
The Definition of 'Norm Conflict' in International Law and Legal Theory

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Abstract

This article argues that the narrow definition of conflict apparently prevailing in international law doctrine and recent WTO rulings is inappropriate in terms of legal theory and in view of the fundamental structures of the international legal order. The problem with this strict definition is that it does not recognize that a permissive norm may conflict with a prescriptive norm. In this perspective, established conflict rules such as the lex posterior and lex specialis principles cannot be applied in order to determine whether a permissive norm (such as a WTO exception or an MEA permission to restrict trade) actually constitutes the lex posterior or the lex specialis which was meant to prevail by the contracting parties. Further problems in recent academic writings and WTO jurisprudence have been caused by an insufficient distinction between norms of conduct and norms establishing competences. This paper therefore shows that an adequate definition has to encompass incompatibilities between prescriptive norms as well as permissive norms and concludes that an appropriate definition should rely on the 'test of violation' first introduced by Kelsen.

1 Introduction

In academic writings on international law, the prevailing view is that a conflict between two norms arises only where a party to two treaties 'cannot simultaneously comply with its obligations under both treaties'.¹ This definition has found its way into WTO panel decisions² and recent academic writings.³ The problem with this strict

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¹ Jenks, 'The Conflict of Law-Making Treaties', 30 *BYIL* (1953) 401, at 426 (emphasis added).

² See *infra* Parts 3, 4 and 5.

³ Cf. Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties', 35 *Journal of World Trade* (2001) 1081, at 1082–1086.

definition is that it does not recognize that a permissive norm may conflict with an obligation or a prohibition. Consequently, established conflict principles such as the *lex posterior* and *lex specialis* maxims cannot be applied in order to determine whether a permissive norm actually constitutes a *lex posterior* or *lex specialis* intended by the contracting parties to be the prevailing norm. In other words, permissions have to give way, even when they are later in time and more specific.

The following analysis will examine the definitions adopted in academic writings on international law and will explore whether an adequate definition can be derived from legal theory and, if so, whether such a definition can be transposed to international law. In international law, arguments similar to those adopted here have been advocated by Pauwelyn,⁴ and in legal theory by Kelsen, Engisch and Wiederin.⁵ The present article expands on the theses presented by Pauwelyn, taking into account legal theory. It also shows that a broad definition should be adopted not only in international law but in any given field of law and elaborates on how it should be formulated. Additionally, this paper tries to trace more precisely the difference between so-called norms of conduct and norms of competence: the apparent failure to do so has caused substantial confusion, for instance, in WTO Appellate Body jurisprudence and academic writings.⁶

2 Adequacy of Jurisprudential Definitions

In view of the variety of definitions of conflict in international law and legal theory that will have to be addressed in the subsequent analysis, a preliminary question arises as to when a definition is to be regarded as 'correct' or 'appropriate'. Although it is arguably unfeasible to establish a uniform theory of definitions, given that definitions are employed for a variety of different purposes in various disciplines and situations,⁷ it is possible, in line with clearly convergent views in legal theory and philosophy,⁸ to rely on the distinction between analytical ('lexical') and synthetic ('stipulative') definitions, and on established principles for giving adequate definitions, as appropriate tools for assessing existing definitions in our context.

An analytical definition examines and explains the actual way a term is used in a given language or context.⁹ Hence, it is an assertion concerned with past or present usage and possesses truth-value.¹⁰ A stipulative definition, by contrast, *establishes* the

⁴ J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law* (2003); cf. *infra* Parts 4 and 5.

⁵ See *infra* Parts 4 and 5.

⁶ Cf. *infra* Part 6.

⁷ O. Weinberger, *Rechtslogik* (2nd edn., 1989) 360 ff.

⁸ On this and the following cf. in particular the classic work of W. Dubislav, *Die Definition* (4th edn., 1981, reprint of the 3rd edition of 1931) which still constitutes the starting point of definition theory; see also the English treatise by R. Robinson, *Definition* (1968); U. Klug, *Juristische Logik* (4th edn., 1982), at 89–109; Weinberger, *supra* note 7, 360 ff.

⁹ Klug, *supra* note 8, at 103; Weinberger, *supra* note 7, 360–361; Rademacher, 'Definition', in E. Braun and H. Rademacher (eds), *Wissenschaftstheoretisches Lexikon* (1978), at 111.

¹⁰ Cf. Dubislav, *supra* note 8, at 131.

meaning of a word; it thus takes the form of a command or proposal on the meaning of a given term.¹¹ Therefore, it cannot be true or false. Although stipulative definitions rest on an arbitrary choice, the author of a stipulative definition does *not* normally enjoy virtually unrestricted discretion, as was held by Pascal.¹² The author is bound in particular by teleological considerations¹³ and may be restricted by the fact that the system or theory within which the definition is meant to operate may already trace out the definition to be adopted;¹⁴ moreover, definitions should not be misleading,¹⁵ which ensues logically from the main aim of definition, namely to increase precision and clarity. These principles can be subsumed under the postulate that stipulative definitions have to be *adequate* to the aim pursued; this means, for purposes of legal doctrine, that they must adequately describe, or fit into, the legal system or doctrine within which they are intended to operate.

These considerations intersect with the 'traditional' requirements for definitions, which have their origin in Aristotle's *Topics* and have been upheld, with minor modifications, until today. According to these requirements, a definition must in particular be commensurate with that which is to be defined (i.e. the *definiens* must be equivalent to the *definiendum*).¹⁶ Hence, and this is crucial for the following analysis, a definition is too narrow if the *definiens* is a sub-class of the *definiendum*; it is too broad if the reverse is true.¹⁷ In the course of this work we shall come back, in particular, to the last rule, to the distinction between stipulative and analytical definitions, and the principle of teleological adequacy of stipulative definitions.

By way of answer to our introductory question, we may submit therefore that an 'appropriate' analytical definition is one which is *correct* or logically *true*, while an 'appropriate' stipulative definition is *teleologically adequate*.

¹¹ Robinson, *supra* note 8, at 19, 21, 59–92.

¹² B. Pascal, *Gedanken über die Religion* (1669–1670, trans. K.A. Blech (1840)), reprinted in: 100 Werke der Philosophie, *Digitale Bibliothek Sonderband* (2000), at 98–100. Pascal held: 'die Definitionen [sind] sehr frei und nie dem Widerspruch unterworfen, denn es ist nichts mehr erlaubt als einer Sache, die man klar bezeichnet hat, einen Namen zu geben, wie man will. Man muß sich bloß in Acht nehmen, daß man die Freiheit, die man hat, Namen bei zu legen, nicht mißbraucht, indem man denselben an zwei verschiedene Sachen giebt' ('definitions can be adopted freely and are never subject to contradiction, since nothing is more permissible than discretionarily to attribute a name to a thing which one has clearly designated. One merely has to take care that one does not abuse the freedom of attributing names by attributing the same name to two different things') (*ibid.*, at 100). On this see also Robinson, *supra* note 8, 72; Dubislav, *supra* note 8, at 21–23.

¹³ Klug, *supra* note 8, 93; Weinberger, *supra* note 7, 360.

¹⁴ Essler, 'Einführung', in Dubislav, *supra* note 8, at 18.

¹⁵ Robinson, *supra* note 8, at 72 ff; Pascal, *supra* note 12, at 100.

¹⁶ Moreover, a definition must not include contradictions nor introduce multiple meanings; it must not directly or indirectly define the subject by itself; it should not be in negative terms where it can be in positive terms; and it must use clear and known terms: cf Aristoteles, *Die Topik*, 6th book (1882/2000), at 126–163 (trans. J.H. von Kirchmann (1882)), reprinted in 100 Werke der Philosophie, *supra* note 12.

¹⁷ Cf. Robinson, *supra* note 8, at 140–148; Weinberger, *supra* note 7, at 368 ff.

3 Background of the Problem

A *The Essential Questions Further Delimited*

Norms have the fundamental functions of obligating, prohibiting and permitting, according to deontic (legal) logic.¹⁸ Beside such norms, which are also referred to as norms of conduct, there is the category of norms of competence. It is disputed in legal theory whether norms of competence can be reduced to norms of conduct;¹⁹ moreover, there is hardly any research on the question whether norms of competence can conflict among each other. Therefore, in the context of the definition of norm conflict, three related problems have to be examined.

First, there is the question as to which constellations of incompatible norms should be comprised by the notion of 'norm conflict'. The consequences of the answers given are far-reaching: as noted, if one excludes given constellations from the definition of conflict, the established conflict principles of *lex posterior* etc. do not come into play. This is clearly problematic if one considers such conflict rules as devices for reducing the discretion of the judge who is faced with incompatible norms and has to decide which to apply. More precisely, the question is that of whether, in particular, the definition of norm conflict should cover incompatibilities between obligations and prohibitions only, as is apparently the preponderant view in the field of international law;²⁰ or whether it should also extend to incompatible obligations, prohibitions and *permissions*; or whether a 'unilateral' incompatibility between two obligations should also be recognized as constituting conflict. An example of the last constellation would be a situation in which one norm requires a person to pay an indemnity of \$200, while another norm stipulates the sum of \$100. Compliance with the second obligation may violate the first (stricter) obligation, but not vice versa. This first issue of which constellations of incompatible norms should be covered by the definition of conflict of norms thus in fact consists of the three interrelated questions just sketched out. This issue is disputed in legal theory, international law doctrine and international jurisprudence.²¹

¹⁸ These functions will be dealt with in detail, from the perspective of deontic logic, *infra* in Part V.; cf. also e.g., K. F. Röhl, *Allgemeine Rechtslehre. Ein Lehrbuch* (1994), at 192–196; according to Kelsen, derogation is also a specific function of norms. Cf. the English article by Kelsen, 'Derogation', in H. Klecatsky, R. Marcic, and H. Schambeck (eds), *Die Wiener Rechtstheoretische Schule* (1968), ii, at 1429; the article was originally published in R. A. Newman (ed.), *Essays in Jurisprudence in Honor of Roscoe Pound* (1962), at 339–361.

¹⁹ It has repeatedly been held in legal theory that norms of competence can be reduced to norms of conduct. According to this view, norms of competence make it obligatory for the person subjected to a competence to act according to the norms of conduct (i.e. prohibitions, obligations, and permissions) which have been created by the holder of the competence. Cf. H. Kelsen, *Allgemeine Theorie der Normen* (1979), at 210; Röhl, *supra* note 18, at 237. For a critique of such views cf. Wiederin, 'Was ist und welche Konsequenzen hat ein Normkonflikt?', 21 *Rechtstheorie* (1990) 311, at 325–327; R. Alexy, *Theorie der Grundrechte* (2nd edn., 1994), at 216–218; this issue is addressed further *infra* in Part VI.

²⁰ Cf. *infra* Part 4.

²¹ Relevant writings will be analysed *infra* in Parts 4 and 5; for an overview of judicial decisions in international law cf. Pauwelyn, *supra* note 4, at 200 ff, 440 ff; Bartels, 'Comments on William Davey' in S. Griller (ed.), *The WTO After Cancun* (working title, forthcoming 2006).

Secondly, there is the problem whether one can find a *criterion* for making a norm conflict recognizable as such in an objective and reliable manner. Thus, for example, a *logical contradiction* between two assertions is *formally* recognizable when the assertions cannot both be true. The examples typically given are assertions of the sort that 'God exists' and 'God does not exist'. The same is true in formal axiomatic systems, if it can be shown that two assertions are both valid according to the system which then proves inconsistent and unfit for use.²² However, this criterion is not transposable to norm conflicts, the opposite view having been discarded by the 1960s at the latest: thus, as pointed out by Kelsen in his last works (who as one of the most pronounced writers on the issue had changed his mind by then), a norm conflict 'is not a logical contradiction and cannot even be compared to a logical contradiction', as it is perfectly possible for two conflicting norms to occur within one and the same legal system.²³ Moreover, the legal system does not become unfit for use if two of its norms conflict, as was sometimes held by authors wrongly equating the legal order to a logical system.²⁴ Hence, if the truth-criterion cannot be transposed from logical contradictions to norm conflicts in the sense of a simple 'litmus test', it is necessary to ascertain whether it is possible to find an appropriate criterion as regards norm conflicts.

Third, there is the aforementioned problem whether a norm granting competences (also referred to, for instance, as powers) can conflict with another such norm. In WTO rulings and academic writings, this issue has not so far been sufficiently distinguished from the foregoing issues.²⁵

B Two Practical Examples Taken from WTO Jurisprudence

A good illustration of the problems ensuing from a strict definition of conflict is furnished by two WTO panel reports. In the first panel report, *Indonesia – Automobiles*, a claim was brought against Indonesia *inter alia* under the national treatment provision of the GATT, Article III. When Indonesia invoked, as a defence, its special developing country rights under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), i.e., a *permission* to provisionally maintain certain subsidies, the panel referred to the strict definition of conflict found in international law:²⁶

²² Cf. Perelman, 'Les antinomies en droit. Essai de synthèse', in C. Perelman (ed.), *Les Antinomies en droit* (1965), at 393, 398.

²³ Kelsen, *supra* note 18, at 1439.

²⁴ Cf. e.g., Foriers, 'Les antinomies en droit', in Perelman (ed.), *supra* note 22, at 22–23, who held that a conflict of norms constitutes a 'situation anormale dans un système où le principe de non-contradiction est essentiel et où la cohérence logique est une exigence fondamentale' ('abnormal situation in a system in which the principle of non-contradiction is essential and in which logical coherence constitutes a fundamental requirement') (at 22); such conflict '[met] en péril la cohérence logique du système tout entier' ('endangers the logical coherence of the system as a whole') (at 23). In a similar sense, but with further qualifications, Huberlant, 'Antinomies et recours aux principes généraux', in *ibid.*, at 204, 212, speaks of a 'cohérence excluant la contradiction' ('coherence which excludes contradiction').

²⁵ Cf. *infra* Part 6.

²⁶ The panel referred to the writings of Jenks and Karl. These and other relevant writings on international law will be analysed *infra* in Parts 4 and 5.

In international law for a conflict to exist between two treaties, . . . [their] 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*.²⁷

Hence, the panel recognized only that conflict exists in a situation of mutually exclusive obligations, thus excluding the possibility of conflicts between express permissions and duties. The practical consequence in this case was that the panel did not even examine whether the permissive norm invoked by Indonesia was the *lex specialis* which should have prevailed. In other words, it was the very definition of conflict which influenced the outcome of this dispute in that the panel declined to address Indonesia's developing country rights under the SCM Agreement, which pursuant to an explicit conflict clause in Annex 1A of the WTO Agreement²⁸ would have prevailed to the extent of conflict.²⁹

A second case in point is the 1999 panel report on *Turkey – Textiles*. In this case, India challenged quantitative restrictions imposed by Turkey on Indian textiles and clothing upon the formation of the customs union between Turkey and the EC. In defence, Turkey argued that these quantitative restrictions did not violate relevant provisions of the GATT and the WTO Agreement on Textiles and Clothing,³⁰ submitting that they were justified by GATT rules on regional trade agreements (Article XXIV of the GATT), which, in its view, constitute a *lex specialis* for the rights and obligations of WTO Members at the time of formation of a customs union.³¹ In addressing this defence, the *Turkey – Textiles* panel, too, referred to Jenks' strict definition of conflict, holding that '[t]here is no conflict if the *obligations* of one instrument are *stricter* than, but not incompatible with, those of another, or it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another'.³² While this definition denies the very existence of conflict in such instances, the panel nonetheless went on to examine 'whether Article XXIV *authorizes* measures' which the GATT and the Agreement on Textiles and Clothing 'otherwise *prohibit*'.³³ After a lengthy analysis of Article XXIV of the GATT, it concluded that this provision does not permit a departure from relevant obligations contained in the GATT and the Agreement on Textiles and Clothing.³⁴ It is evident that the stance taken by the panel is paradoxical: had it really complied with the definition

²⁷ WTO Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS59/R, WT/DS64/R, adopted on 23 July 1998, at note 649 (emphasis added).

²⁸ Cf the General Interpretative Note to Annex 1A of the WTO Agreement, stipulating that specific Agreements like the SCM Agreement take precedence over the GATT.

²⁹ This is rightly pointed out by Pauwelyn, *supra* note 4, at 193–194.

³⁰ The pertinent provisions were Arts XI and XIII of the GATT and Art. 2.4 of the Agreement on Textiles and Clothing. Art. XI prohibits quantitative restrictions; Art. XIII requires non-discriminatory administration of quotas; Art. 2.4 prohibits new restrictions on trade in textiles.

³¹ *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/R, adopted on 31 May 1999, at para. 9.88.

³² *Ibid.*, at para. 9.92 (emphasis added).

³³ *Ibid.*, at para. 9.95 (emphasis added).

³⁴ Cf. *ibid.*, at paras 9.97–9.192, in particular at paras 9.188–9.189.

of conflict that it set forth, then there would have been no need to inquire into whether there exists an authorization colliding with obligations under the GATT.

Yet the point of this article is not to criticize this apparent inconsistency, but rather to stress the problematic consequences of the definition unambiguously adopted by the *Indonesia – Automobiles* panel and referred to by the *Turkey – Textiles* panel. Thus, whereas the *Indonesia – Automobiles* panel denied the existence of a conflict of norms where a permission and a prescription collide, the *Turkey – Textiles* panel additionally indicated a denial of the possibility of a unilateral conflict between obligations in the similar situation in which complying with a less stringent obligation results in breaching a stricter one, as in the example given above.³⁵ This definition unavoidably favours the strictest obligation among a given set of 'parallel' obligations.

Regarding WTO jurisprudence, where the problem of conflicts of norms has surfaced repeatedly, it must be mentioned that a wider definition of conflict has been adopted by the panel report in *Bananas III*; however, the formulation chosen there arguably is not fully adequate.³⁶ Moreover, as indicated, decisions of the Appellate Body appear to have been misread as supporting broader definitions of conflict, whereas they actually concerned the special problem of norms of competence.³⁷

4 (Conflicting) Conflict Definitions in International Law Doctrine

A *The Prevailing Narrow Definition of Conflict*

The 'classic' narrow definition of conflict which still appears to prevail in public international law was arguably first advocated by Wilfred Jenks in his treatise on conflict of law-making treaties in 1953. According to Jenks, one has to distinguish conflicts *stricto sensu* from mere divergences: 'A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot *simultaneously comply* with its *obligations* under *both* treaties.'³⁸

Jenks does not recognize other divergences as conflicts, even if they 'defeat the object of one or both of the divergent instruments'. Jenks makes it expressly clear that he is aware of the fact that '[s]uch a divergence may, for instance, prevent a party to both of the divergent instruments from taking advantage of certain provisions of one of them'. He also admits that such a divergence may 'from a practical point of view be *as serious as a conflict*; it may render inapplicable provisions designed to give one of the divergent instruments a measure of flexibility of operation which was thought necessary to its practicability'.³⁹ Nonetheless, Jenks explicitly upholds his strict definition,

³⁵ Cf. the example of an addressee facing a norm requiring her to pay \$100 and another norm requiring her to pay \$200 in a given case, *supra* Part 3.A.

³⁶ Cf. *infra* Part 5.B.

³⁷ Cf. *infra* Part 6.

³⁸ Jenks, *supra* note 1, at 426 (emphasis added).

³⁹ *Ibid.*, at 426 (emphasis added).

according to which there is no conflict ‘when one instrument eliminates *exceptions* provided for in another instrument’, even if one of the agreements ‘loses much or most of its practical importance’.⁴⁰

As noted, this classic narrow definition of conflict in public international law has had a marked influence on recent WTO jurisprudence, where express reference is made to Jenks’ definition.⁴¹ A strict definition was apparently also advocated by Karl in the *Encyclopedia of Public International Law*,⁴² although he adopts the wider definition of the legal theorist Engisch in his main treatise on the subject.⁴³ Several other authors, among them Czaplinski and Danilenko⁴⁴ and most recently Wolfrum and Matz,⁴⁵ have also opted for narrow definitions of conflict; yet it is not always clear whether in doing so these authors are aware of the particular problem of conflicts between permissive norms on the one side and prescriptive or prohibitive norms on the other. Moreover, the proposed definitions are often open to different interpretations. Thus Klein, Wilting and Kelsen have been understood as giving strict definitions, excluding any incompatibility of permissions and prescriptive norms.⁴⁶ In relation to Kelsen, this interpretation appears problematic, as this author adopted a wide definition in his *General Theory of Norms* and other works. Thus he expressly stated ‘. . . that one cannot deny that a permission and a prescription mutually exclude each other’.⁴⁷ The same

⁴⁰ *Ibid.*, at 426–427 (emphasis added).

⁴¹ Cf. WTO Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WTO Doc. WT/DS54/R, WT/DS59/R, WT/DS64/R, adopted on 23 July 1998, at note 649; WTO Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/R, adopted on 19 Nov. 1999, at para 9.92. Both reports have been described *supra* in Part 3.B.

⁴² Karl, ‘Conflicts between Treaties’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1984), vii, at 467, 468 ([t]echnically speaking, there is a conflict between treaties when two or more treaty instruments contain obligations which cannot be complied with simultaneously).

⁴³ W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (1983), at 61 ff. On Engisch’s definition cf. *infra* Part 5.

⁴⁴ According to Czaplinski and Danilenko, ‘Conflicts of Norms in International Law’, 21 *NYIL* (1990) 3, at 12–13, [o]ne can speak of the conflict of treaties when one of the treaties *obliges* party A to take action X, while another stipulates that A should take action Y, and X is incompatible with Y’. Pauwelyn, *supra* note 4, at 168–169, however, reads this definition as a wide one.

⁴⁵ R. Wolfrum and N. Matz, *Conflicts in International Environmental Law* (2003), at 4, apparently opt for a broader definition of conflict than Jenks; however, this is obviously not done so as to include divergences between permissions and obligations, but to include ‘conceptual conflicts between different approaches or programmes’, ‘conflicting objectives’, and ‘political conflicts’ in the conflict terminology. This impression is reinforced in the sections in which these authors deal with ‘conflicting *obligations*’ and ‘conflicts in the implementation phase’ (*ibid.*, at 10–11).

⁴⁶ This is the reading of Pauwelyn, *supra* note 4, at 167.

⁴⁷ ‘Wenn man “Gebieten” und “Erlauben” als zwei verschiedene normative Funktionen gelten lassen muss, kann man nicht leugnen, daß sich Erlaubt-Sein und Geboten-Sein gegenseitig ausschließen’ (‘If one has to recognize that ‘prescribing’ and ‘permitting’ constitute two different normative functions, one cannot deny that a permission and a prescription mutually exclude each other’); cf. Kelsen, *supra* note 19, at 79.

As regards Kelsen’s definition of conflict cf. his essay on derogation (*supra* note 18, at 1438), where he held that ‘[a] conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated’; Kelsen adopted a similar definition in his *General Theory of Norms* (*supra* note 19, at 99). On Kelsen’s definition of conflict see also the detailed discussion *infra* Part 5.

may hold true for Klein⁴⁸ and Wilting, the latter of whom builds upon Kelsen's definition.⁴⁹

Most recently, Jenks' narrow definition and corresponding WTO practice have been explicitly defended by Marceau, who submits that a conflict may be defined narrowly or broadly⁵⁰ 'depending on one's conception of the international legal order'.⁵¹ One central argument for Marceau's supporting of Jenks' definition is the coherence of the international legal order which her definition is meant to promote.⁵² Marceau even admits that this strict definition 'will often favour the most stringent obligations'.⁵³ It follows logically from Marceau's standpoint that '[i]n the area of *trade and environment*, where MEAs may authorize (and not oblige) the use of trade restrictions otherwise prohibited by GATT, we would not be faced with a conflict *stricto sensu*'.⁵⁴

The problematic consequence of this view is that conflict principles such as the *lex posterior* principle cannot come into play to resolve such an incompatibility even if an MEA is clearly later in time. Marceau explains her stance with the somewhat ambiguous reasoning that 'since the main objective of interpretation rules is to identify the intention of the parties, it is suggested that "conflicts" should be interpreted narrowly, in order to keep as much as possible of the agreement of the parties'. To take into account explicit permissions provided in another treaty, one should, in her view, refer to the *lex specialis* principle.⁵⁵

An analogy with the strict definitions submitted by writers on international law can be found in the jurisprudence and academic literature on domestic law in some countries, as well as in legal theory.⁵⁶

B Critical Assessment of the Narrow Definition of Conflicts

This section briefly presents some of the main arguments that can be put forward against the narrow definition of conflicts in this subsection. Additional reasons will ensue from the discussion of the broader definition offered in Part 5. Thus, both sections have to be seen in conjunction.

⁴⁸ In explaining his definition, Klein writes: '[p]raktisch bedeutsam sind nur diejenigen Vertragskonkurrenzen, in denen sich die Vertragsbestimmungen, insbesondere die Vertragsverpflichtungen, in zwei oder mehreren völkerrechtlichen Verträgen formal unauflösbar widersprechen' ('only those constellations of parallel treaties are practically relevant in which the provisions, in particular the obligations, of two or more international treaties formally contradict each other in a manner which cannot be resolved'); Klein, 'Vertragskonkurrenz', in K. Strupp (ed.), *Wörterbuch des Völkerrechts* (2nd edn., 1962), iii, at 555.

⁴⁹ W. H. Wilting, *Vertragskonkurrenz im Völkerrecht* (1994), at 2–12.

⁵⁰ Marceau, *supra* note 3, at 1083 ff.

⁵¹ *Ibid.*, at 1082–1083.

⁵² 'If one believes that international commitments should be understood in the light of *some coherent* international order, one favours *narrow definitions* of conflict. . .': *ibid.*, at 1082.

⁵³ *Ibid.*, at 1085.

⁵⁴ *Ibid.*, at 1086.

⁵⁵ *Ibid.*, at 1086.

⁵⁶ Cf. e.g., Wiederin, *supra* note 19, at 323; Wiederin himself favours a wider definition, however; similarly, Griller, 'Der Schutz der Grundrechte vor Verletzungen durch Private', 114 *Juristische Blätter* (1992) 205, at 209 and note 21.

Several objections have been voiced against the strict definition advocated by Jenks, such as the fact that states may intend to detract from their existing obligations by establishing permissions.⁵⁷ A further problem is that this definition appears not to correspond to the prevailing opinion in legal theory and in domestic legal systems.⁵⁸ Furthermore, if one views conflict rules such as the *lex posterior* and *lex specialis* principles as devices for approximating the probable intentions of the contracting parties on the basis of *objective* factors (time and specialty),⁵⁹ it seems problematic to exclude incompatibilities between permissions and obligations, between permissions and prohibitions, as well as unilateral incompatibilities between divergent obligations (i.e., which are not *mutually* exclusive⁶⁰), from the scope of these conflict principles altogether. This, however, is the effect of excluding such divergences from the notion of conflict in the first place. Consequently, these types of incompatibilities are ‘defined away’ and a less stringent obligation or a permission, which constitutes the *lex specialis* or the *lex posterior*, cannot prevail.⁶¹ Finally, introducing such a strict definition runs counter to the basic principle that norms have to be interpreted in a way which does not reduce them to inutility.

Beside these reasons, it is possible to put forward even more fundamental arguments. The main objection against the narrow definition advocated by Jenks and others is given by Jenks himself when he states, as was already quoted above, that incompatibilities between permissions and obligations, incompatibilities between permissions and prohibitions, and unilateral incompatibilities between obligations which are not mutually exclusive, may ‘from a practical point of view be *as serious as a conflict*; [as they] may render inapplicable provisions designed to give one of the divergent instruments a measure of flexibility of operation which was thought necessary to its practicability’.⁶² In terms of the theory of definition discussed above, the *definiens* offered therefore appears *inadequately narrow*: it excludes incompatibilities that appear analogous to the mutual incompatibility between obligations and prohibitions which Jenks is willing to recognize as conflicts.

This becomes even clearer if one recalls that we are not here faced with an analytical definition, but with a *stipulative* definition: as was pointed out above, a stipulative definition has to be adequate to the aims, or the *telos*, pursued with the adoption of that definition. The *telos* of norms is to regulate behaviour. Thus, if a given conduct is at the same time permitted and prohibited, or subject to

⁵⁷ Pauwelyn, *supra* note 4, at 174.

⁵⁸ Cf. e.g., Kelsen, *supra* note 19, at 79, and the following text.

⁵⁹ Cf. Bobbio, ‘Des critères pour résoudre les antinomies’, in Perelman (ed.), *supra* note 22, at 237, 241, and 244; for a discussion of the wide variety of views held in this regard in international law, domestic law, and legal theory, cf. Vranes, ‘Lex Superior, Lex Specialis, Lex Posterior—Zur Rechtsnatur der “Konfliktlösungsregeln”’, 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005) 391.

⁶⁰ Cf. the abovementioned example of a norm requiring a person to pay an indemnity of \$200 and another norm requiring her to pay only \$100. An example in international law would be norms imposing differing periods of intellectual property protection, cf. *infra* Part 5.B.2.

⁶¹ Cf. Pauwelyn, *supra* note 4, at 171 and *passim*.

⁶² *Ibid.* (emphasis added).

unilaterally incompatible obligations, it is not unequivocally but *contradictorily* regulated from the viewpoint of the addressee of these norms. In other words: if attaining this *telos* is impaired by a permission incompatible with a prohibition, or by a permission inconsistent with an obligation, one should recognize these norms as being *in conflict*.

It will only briefly be noted that the reasoning of the second writer, Marceau, having recently emphatically argued in favour of a narrow definition appears partly unfounded and partly contradictory as well. First, as regards the underlying reason of Marceau's argumentation⁶³ – that one should promote the coherence of the international legal order – it is not only dubious why one should, but also how one could, create more coherence by mechanically defining away an evident problem. Marceau's second argument – 'since the main objective of interpretation rules is to identify the intention of the parties, "conflicts" should be interpreted narrowly, in order to keep as much as possible of the agreement of the parties' – is also difficult to sustain: it seems impossible to see why arbitrarily subordinating explicit permissions, or less stringent obligations, to other obligations automatically, or at least typically, better conforms to the presumptive intention of the parties. Marceau's third argument – i.e. that '[t]o take into account explicit 'rights' provided in another treaty, one should refer to the *lex specialis* principle of interpretation' – appears contradictory. The *lex specialis* principle, at least as employed by Marceau in her reasoning,⁶⁴ constitutes a maxim for resolving *conflict*. Hence, she implicitly, though involuntarily, recognizes that there is a conflict, since she wants to give priority to a 'right . . . inconsistent with a subsequent treaty provision drafted in general terms'.⁶⁵ There would be further contradictions, if one tried, on the basis of this argumentation, to determine in a concrete case to what extent the *lex generalis* has to be carved out to make room for the *lex specialis*, since this operation depends upon determining the *extent of conflict* between the *lex specialis* and the *lex generalis*. Finally, Marceau holds that one should use the approach of effective interpretation instead of 'extending' the notion of conflict. To refute this argument, it suffices to point to writers who have rightly emphasized that effective interpretation is a two-edged device:⁶⁶ using this principle, one would first have to give reasons explaining which of two conflicting norms should be interpreted narrowly and which extensively. Hence, the suitability of the principle of effective interpretation as a sufficient device for avoiding conflict is doubtful.

⁶³ Cf. *supra* in the preceding section.

⁶⁴ "The *lex specialis* principle of interpretation favours the application of a more specific provision over a general one. Therefore, it may appear from the intention of the parties and in application of the *lex specialis* principle, that a State may exercise an express and more specific right provided for in an earlier or later treaty, albeit inconsistent with a subsequent treaty provision drafted in general terms': Marceau, *supra* note 3, at 1086).

⁶⁵ *Ibid.*, at 1086.

⁶⁶ Pauwelyn, *supra* note 4, at 250–251.

C Authors Advocating a Broader Definition

Unlike writers in legal theory, among whom a broader definition of conflict seems to have prevailed,⁶⁷ comparatively few authors have explicitly opted for a wider definition of conflicts in public international law. Engisch's wide definition⁶⁸ is adopted, in international law, by Karl.⁶⁹ Further, a broad definition is also advanced by Klein, according to whom there is a conflict, if 'two treaty provisions, *in particular treaty obligations*, in two or more international treaties cannot be resolved.'⁷⁰ And recently, Falke expressly approved Klein's definition and that of the *Bananas III* panel, which opted for a broader definition of conflict.⁷¹ However, just as in the case of several writers apparently favouring a narrow definition of conflict,⁷² the definitions given by other authors writing on public international law are often not entirely clear as regards the issue of divergences between permissions and obligations. This is due to the fact that it is not always evident whether the authors providing a broader definition were actually aware of this issue. One may by way of example refer to Aufricht, whose definition is apt to encompass divergences between permissions and obligations,⁷³ and who has been read as providing a wide definition,⁷⁴ but who does not actually deal with this issue in his work. The same can be said, for instance, of Salmon.⁷⁵

Recently, Pauwelyn, having criticized the 'classic' narrow definition of conflict, has opted for a broader definition. He defines conflict of norms 'as a situation

⁶⁷ Cf. e.g., the definition given by Engisch in 1935, according to whom there is a conflict:

'1) if conduct of a given type is at the same time prohibited and *permitted*, or prohibited and prescribed, or prescribed and not prescribed in a given legal order. Or if incompatible ways of conduct are prescribed at the same time. . . 2) if a concrete conduct appears at the same time to be prohibited and *permitted* etc in a given legal order.' Cf. K. Engisch, *Die Einheit der Rechtsordnung* (1935), at 46 (translation by the author); in the same sense see K. Engisch, *Einführung in das juristische Denken* (7th edn., 1977), at 162. On this cf. also the discussion on conflict definitions in legal theory *infra* in Part V.

⁶⁸ Cf. *supra* note 67.

⁶⁹ Karl, *supra* note 43, at 61.

⁷⁰ Klein, *supra* note 48, referred to '*Vertragskonkurrenzen, in denen sich die Vertragsbestimmungen, insbesondere die Vertragsverpflichtungen, in zwei oder mehreren völkerrechtlichen Verträgen formal unauflösbar widersprechen*' (emphasis added).

⁷¹ Cf. the WTO panel report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (*Bananas III*), adopted on 25 Sept. 1997, para. 7.159 and note 728; see also Falke, 'Vertragskonkurrenz und Vertragskonflikt im Recht der WTO: Erste Erfahrungen der Rechtsprechung 1995–1999', 3 *Zeitschrift für Europarechtliche Studien* (2000) 307, at 328.

⁷² Cf. the first subsection of Part 4.

⁷³ 'A conflict between an earlier and a later treaty arises if both deal with the same subject matter and if at least one State is party to both treaties': Aufricht, 'Supersession of Treaties in International Law', 37 *Cornell Law Quarterly* (1952) 655.

⁷⁴ Cf. Pauwelyn, *supra* note 4, at 167–168; Bartels, *supra* note 21.

⁷⁵ J.-A. Salmon defines conflict (*antinomie*) as '*l'existence, dans un système juridique déterminé, de règles de droit incompatibles; de telle sorte que l'interprète ne peut appliquer les deux règles en même temps, qu'il doit choisir*' ('the existence of incompatible legal rules in a given legal system; which has the consequence that the interpreter cannot apply both rules at the same time, that he has to make a choice'): Salmon, 'Les antinomies en droit international public', in Perelman (ed.), *supra* note 22, at 285.

where one norm breaches, has led to or may lead to breach of, another norm', making clear in the accompanying argumentation, though not in the definition itself, that this definition is meant to cover incompatibilities between permissive norms and obligations.⁷⁶ As Pauwelyn's definition shows some affinity to Kelsen's definition, it will be discussed in more detail in the next section together with Kelsen's approach.

D *Interim Conclusions*

By way of conclusion, it is submitted that a broader definition of conflict has arguably not yet unequivocally asserted itself in the jurisprudence and writings in the field of international law. This is also reflected in particular in the WTO panel reports referred to above.⁷⁷ In view of this finding, further reasons for a broader definition of conflict in public international law, building also on legal theory, will be discussed in the next section.

5 An 'Adequate' Definition of Conflict in Legal Theory and Public International Law

A *Conflict Types According to Legal Theory and their Application to International Law*

1 *Norms of Conduct and their Inter-relations*

As regards conflicts between norms in international law, we are concerned with rights held by one state *vis-à-vis* another state (or group of states).⁷⁸ A crucial factor in this context is that the term 'right' is used with a series of different meanings such as claim, competence, permission, liberty and privilege, which may be employed to refer to different legal functions.⁷⁹ To be in a position to analyse the set of possible legal relations between 'rights', it is indispensable therefore to briefly recall some fundamentals of the theory of norms and the basic structure of norms.

It was already pointed out by Bentham in his *Of Laws in General* that the multitude of legal provisions and complex legal concepts (such as 'competence', 'property', etc) can be reduced to sets of norms of conduct, which he referred to as complete norms,

⁷⁶ Pauwelyn, *supra* note 4, at 176 ff (quotation at 199).

⁷⁷ Cf. *supra* Part 3.B. Moreover, two WTO Appellate Body rulings have erroneously been read as supporting a wide definition of conflict, whereas they actually concerned the special constellation of norms of competences. Cf. *infra* Part 6.

⁷⁸ As will be shown below, to speak of a right of state A *vis-à-vis* state B is logically equivalent to speaking of the converse obligation of state B *vis-à-vis* state A. It does not therefore prejudice the issue of an adequate definition of conflict, if one speaks of the rights of a given state instead of its obligations.

⁷⁹ On this cf. the classic study by Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale LJ* (1913) 16 and 26 *Yale LJ* (1917) 710.

namely prohibition, obligation and permission.⁸⁰ In this regard, legal logic (customarily referred to as deontic logic)⁸¹ and Bentham's imperative theory of law are congruent. A norm of conduct consists of two parts, that is to say the so-called deontic operator, which expresses an obligation, prohibition or permission, and a descriptive proposition⁸² which can be any conduct, be it an act or an omission. An example is the norm: it is incumbent (deontic operator) on *a* to adopt conduct C (descriptive proposition). Expressed in more traditional terminology:

a is obligated to do C.

a is prohibited from doing C.

a is permitted to do C.

All of these 'basic units' of legal thinking are *interdefinable* through mere negations. Thus, if the prohibition of a given conduct is negated, this same conduct is permitted, and *vice versa*. In other words, the prohibition of a given conduct constitutes the contradictory opposite of the permission of this conduct ('non-prohibition', positive permission). The same is true for the permission to forbear from adopting a given conduct and the obligation to adopt this conduct: negating this obligation yields a permission of contradictory content ('non-command', negative permission), and *vice versa*. Hence, there are two types of permissions, the first consisting in the absence, or negation, of a prohibition, the second in the absence of an obligation. Prohibition and obligation are also logically interdefinable through negation, if the conduct which is regulated (the descriptive proposition) is negated.^{83,84}

⁸⁰ Cf. J. Bentham, *Of Laws in General* (ed. H.L.A. Hart, 1970), at 93–109 and 153–183; Bentham pointed out that there is no complete law which is not imperative or 'deimperative'. Incomplete norms, in contradistinction, are fragments of complete norms: thus, legal definitions, exceptions, norms referring to other norms or setting out legal fictions are merely parts of the antecedents (the if-clause) of complete norms: a complete norm is equivalent to the complete expression of the legislator's will in respect of a given conduct. It therefore varies, in extent and complexity, from a simple command to a multitude of legal provisions.

A right (in the sense of a claim) on the other hand is constituted by a series of commands (obligations and prohibitions) addressed to a class of persons other than the holder of the right. Hence, a legal institution like property is constituted by a compound of norms which can be resolved into prohibitions on interferences directed against everyone except the holder of the right. For a concise overview of Bentham's thinking, the imperative theory and its overlap with modern legal logic cf. H.L.A. Hart, 'Bentham's "Of Laws in General"', 2 *Rechtstheorie* (1971) 55.

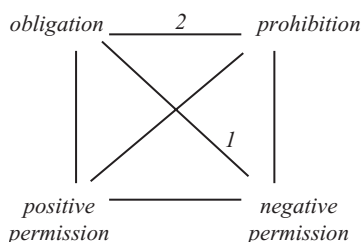
⁸¹ On this cf. e.g. Weinberger, *supra* note 7, at 228 ff; Lenk, 'Konträrbeziehungen und Operatorenbeziehungen im deontologischen Sechseck', in H. Lenk (ed.), *Normenlogik. Grundprobleme der deontischen Logik* (1974), at 198; Alexy, *supra* note 19, at 182–194; K. Adomeit, *Normlogik—Methodenlehre—Rechtspolitik* (1986), at 26–29 and 82–86.

⁸² The descriptive proposition is also referred to as *Satzradikal*; cf. Weinberger, *supra* note 7, at 228–229; Griller, *supra* note 56, at 209 and note 21. It is called 'modal indifferentes Substrat' by Kelsen, *supra* note 19, at 45–46.

⁸³ Let us assume the conduct in question is 'to stay in Vienna'. A given norm may prohibit a person from 'staying in Vienna'. The negation of this conduct is 'not staying in Vienna'. If that person is prohibited from 'not staying in Vienna', the person is actually under an obligation 'to stay in Vienna'. Thus, negating the descriptive part of a prohibitive norm yields the contrary obligation and *vice versa*.

⁸⁴ Cf. e.g., Lenk, *supra* note 81, at 199; Weinberger, *supra* note 7, at 231 ff; Alexy, *supra* note 19, at 182–184; Griller, *supra* note 55, at 209.

The possible set of inter-relations can be illustrated by using the so-called deontic square, which in fact relies on the logic square known since Greek antiquity,⁸⁵ and which was arguably first used in deontic logic by Bentham:⁸⁶



The relation between the obligation to adopt a given conduct C and the permission not to adopt this conduct (designated as 1 in the graph) is commonly referred to as a *contradictory conflict* in legal theory, since negating the obligation to do C yields a permission not to do C, i.e. its contradictory opposite, and *vice versa*. The same is true for the relation between a prohibition to do C and a permission to do C: negating either modality yields the contradictory opposite, as was just explained.

The relation between obligation and prohibition (designated as 2 in the square) is termed *contrary conflict*, since both norms cannot be applied at the same time. There is no conflict between a permission to adopt a given conduct and a permission to adopt the opposite conduct: the conjunction of positive and negation permission (permission to do something and to refrain from doing the same thing) can be defined as liberty in the legal sense.⁸⁷

As noted, unlike in public international law, the two situations, when a permission conflicts with either an obligation or a prohibition (i.e. contradictory conflicts), are recognized as conflicts by the prevailing opinion in legal theory.⁸⁸ The main assertions expressed in the deontic square coincide with Engisch's definition of conflict, according to which there is a conflict 'if a given behaviour appears in abstracto or in concreto as prescribed and not prescribed, or as prohibited and not prohibited, or even as prescribed and prohibited.'^{89,90} The first two alternatives refer to what we have called contradictory conflicts, the third to what we have designated here as contrary conflicts.

Of course it is appealing to accept the constellations of contradictory conflicts as 'conflicts of norms', due to the fact that simply negating a positive permission transforms

⁸⁵ Cf. Lenk, *supra* note 81, at 198.

⁸⁶ Cf. Bentham, *supra* note 80, at 93–109; see also Adomeit, *supra* note 81, at 26–29 and 82–86.

⁸⁷ It is sometimes also called *permission bilatérale* or *Indifferenz*. Cf. e.g. Lenk, *supra* note 81, at 198; Weinberger, *supra* note 7, at 232 and 236; Alexy, *supra* note 19, at 185.

⁸⁸ Cf. Wiederin, *supra* note 19, at 322 and note 38; Griller, *supra* note 56, at 209.

⁸⁹ Engisch, *supra* note 67, at 162.: 'Ein Verhalten [erscheint] in abstracto oder in concreto zugleich als geboten und nicht geboten oder als verboten und nicht verboten oder gar als geboten und verboten'.

⁹⁰ However, Engisch's definition does not make explicit the decisive criterion for determining exactly when there is a conflict between two given norms, regardless of whether they are prescriptions or permissions. This issue of the appropriate criterion will be addressed in the following subsection.

it into its opposite, which *ex definitione* is the corresponding prohibition, and merely negating a negative permission yields the opposite obligation. However, we are not faced with an *analytical* definition here, in the sense of a definition that can be deduced from legal texts, and which would therefore be binding. Hence, one may indeed argue that there is discretion to adopt a different (stipulative) definition, for instance, a narrower definition excluding the type of contradictory conflict.

Nevertheless, while it is correct that we are here concerned with a stipulative definition, such a definition has to be justified as being as adequate to the ends pursued as possible. After all, it is a notion *introduced* more or less arbitrarily (i.e. in academic writings) in order to describe the legal system. Regarding this justification, it has to be recalled that we have pointed out above that the *telos* of norms is to regulate behaviour. It follows that if a given conduct is at the same time permitted and prohibited, it is not unequivocally but *contradictorily* regulated from the viewpoint of the addressee of these norms. The same is true for a permission of a given conduct and a norm prescribing the opposite conduct; and for the prohibition of a given conduct and an obligation to adopt this conduct. In other words: *if attaining this telos is impaired by a permission incompatible with an obligation or prohibition, or by an obligation incompatible with a prohibition, one should recognize these norms as conflicting.*

This reason holds true for both legal theory and given legal fields such as international law. As noted, it has to be seen in conjunction with the additional reasons advanced against the narrow conflict definitions predominating in international law, which were set out in Section 4.

2 Treaty Norms as Norms Establishing ‘Relational’ Rights

Rights established, for example, by treaties are rights of a state *a* against another state (or group of states) *b* that *b* adopt a conduct defined in the treaty. This ‘relational’ or ‘relativized’ aspect⁹¹ may cause problems in understanding the inter-relations, outlined in the preceding section, between rights, permissions, obligations and prohibitions, and thus the definition of a conflict of norms. However, it is relatively easy to show that what has been said on these inter-relations and conflicts of norms holds true even if one makes this additional layer of complexity explicit.

It is appropriate, in this context, to refer to the classic analysis of Hohfeld.⁹² Hohfeld distinguished eight ‘strictly fundamental legal relations’, and categorized them as jural opposites and jural correlatives:

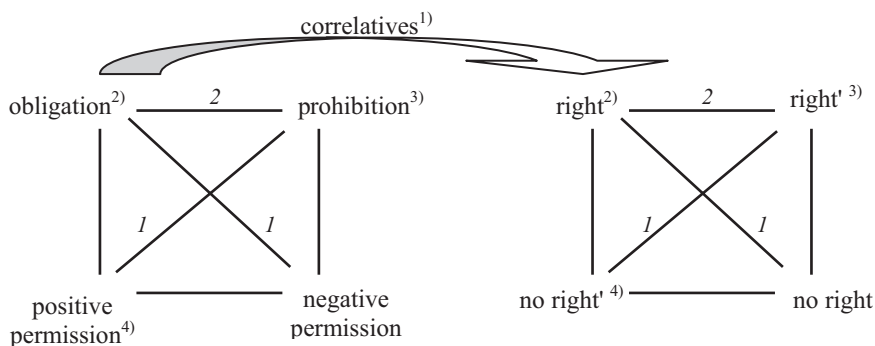
(1) Jural Opposites:	right	privilege	power	immunity
	no-right	duty	disability	liability
(2) Jural Correlatives:	right	privilege	power	immunity
	duty	no-right	liability	disability

⁹¹ Cf. Alexy, *supra* note 19, at 185–186, who speaks of ‘relational obligations’ (*‘relatione Verpflichtungen’*).

⁹² Hohfeld, *supra* note 79.

The following will first focus on the left side of this table. This scheme demonstrates that a right of *a* against *b* that *b* adopt a given conduct *C* is the *correlative* (and logical equivalent) of the duty of *b* toward *a* to adopt conduct *C* (for instance, to pay a debt). The same is true for privileges and 'no-rights' in Hohfeld's terminology: if *b* has no right against *a* that *a* adopt conduct *C*, *a* has the privilege *vis à vis b* not to adopt conduct *C*. It is important, in this context, to look at the allegedly conflicting norms from the perspective of *one* state. Moreover, it is essential to recognize that 'right' does not mean 'permission' here. A (positive) permission – i.e. to adopt a certain conduct – was defined as the opposite of a prohibition to adopt that conduct in the preceding section. A (negative) permission – i.e. not to do something – was defined as the logical opposite of an obligation (duty) to do that same thing. As just explained, a 'right', however, is not the opposite, but the correlative of an obligation: a right in this sense can also be referred to as a claim.

On this basis, Hohfeld's scheme, and his insight concerning the correlative relation between rights and duties, can be used to extend the deontic square.⁹³ This yields the following double scheme, in which both squares are deontic squares. The relations between the individual positions of both squares are converse (logically equivalent) ones, which Hohfeld called correlative relations:



¹⁾ All positions in the respective corners are correlatives (obligation vs right etc). For instance:

²⁾ The obligation of state *a vis à vis* state *b* to do *C* is the correlative of the right held by state *b* that *a* adopt conduct *C*.

³⁾ A prohibition imposed by *b* on *a* to do *C* constitutes the correlative of the right held by *b* that *a* refrains from doing *C*.

⁴⁾ A positive permission to do *C*, which is held by *a* in its relation to *b*, has its correlative in the legal position of *b* that *b* has no right that *a* adopt conduct *C* etc.

This graph shows that the insights gained from the deontic square are also applicable to rights and obligations if analysed as 'relativized' rights between two states (or groups of states): the contradictory conflict (designated as *I* in the diagram) between

⁹³ On this cf. also Alexy, *supra* note 19, at 185–194 with further references.

obligation and permission (obligation of *a vis à vis b* to do C vs permission of *a vis à vis b* not to do C) in the left square has its logical correlative in the inconsistency between the *b*'s right and *b*'s 'no-right' in the right square. In other words, if one accepts *a*'s situation as constituting a conflict, one must logically accept the converse situation as giving rise to that same conflict (right vs no-right of *b*).

This also holds true for the contradictory conflict between a positive permission and a prohibition, which translates into the equivalent inconsistency between 'no right' and 'right' in the right square. The same is true of contrary conflicts between a prohibition and an obligation, designated as 2 in the left square, and the correlative inconsistency between a given right and an irreconcilable right, also marked as 2, in the right square.

This may be illustrated by a concrete example taken from the much debated *trade and environment* context:

- (1) Let us assume that state *a* is under a WTO-imposed obligation not to restrict imports of state *b*'s goods (left top corner in the left square).
- (2) Thus, there is a correlative right of state *b* toward state *a* that *a* is not to restrict imports of *b*'s goods (left top corner in the right square).
- (3) Let us assume that a multilateral environmental agreement concluded, *inter alia*, by *a* and *b* provides that *a* is *not obligated* to allow imports from *b*, if *b* does not comply with the MEA, and let us assume that this condition is fulfilled. Then there is no obligation of *a* toward *b* not to restrict imports of *b*'s goods. This is *ex definitione* equivalent to a corresponding *permission* of *a* to restrict imports of *b*'s goods (bottom right corner in the left square).
- (4) It follows that *b* has no converse ('corresponding') right *vis à vis a* (bottom right corner in the right square).

Crucially, this is one of the situations in which Jenks, Marceau and WTO panels *deny* the existence of a conflict of norms. However, as just shown, a conflict between an MEA permission and a WTO obligation corresponds to a contradictory conflict from the viewpoint of state *a* in the terminology of deontic logic, marked as 1. It follows that the reasons given in the preceding sections against a narrow definition of conflict (excluding this type of incompatibility from the notion of conflict) apply, by implication, to this concrete example as well. Moreover, as all positions in the respective corners of both squares are converse (logically equivalent), it ensues that these reasons hold true in case of relational rights between two or more states in general.

B The Appropriate Definition: Wide Definition Focusing on Breach of Norms

We must now turn to the second question stated by way of introduction. The preceding sections weighed arguments for and against narrow and wider definitions of norm conflict. It was concluded that a wide definition (including incompatibilities between permissions and obligations, permissions and prohibitions, and between obligations and prohibitions) is to be preferred for a range of reasons. Thus, it has

been made clear *what* is to be included in the definition. However, it has not yet been determined *how* to formulate the definition appropriately. This will be our task in this section. Therefore, the question now becomes: Which criterion, or criteria, constitutes an appropriate definition of conflict?

1 Potential Criteria

At first sight, several criteria for defining conflict appear possible. In this section the so-called *test of joint compliance* will be discussed, since it is the test most commonly employed in legal theory. WTO panels have arguably employed this test as well.⁹⁴

Before addressing this approach it is appropriate to briefly mention two other criteria that are conceivable, but which suffer from evident shortcomings. First, one might try to translate two norms into declarative statements to determine whether their conjunction results in a *logical* contradiction.⁹⁵ However, a statement that, in a given legal system, there exist two norms with contradictory legal *consequences* (p and non-p) is a *true* statement. Thus, this test does not employ an appropriate criterion⁹⁶ in the sense that it would yield a logical (and thus easily recognizable) contradiction between statements each time there is a conflict between the underlying norms. A modified second test would compare statements that correspond to the content of two norms (for instance, 'it is obligatory to do C' and 'it is obligatory to do non-C') in order to determine whether there is a contradiction. However, if the content of two norms is incompatible not logically, but merely empirically, then this test will not yield unequivocal results.⁹⁷

On the other hand, the test of *joint compliance*, which prevails in legal theory, asks whether it is *possible* for the addressee of two norms to comply with the second norm, *after* having complied with the first one. However, this test appears unsuitable in several constellations as well. It is useful to take the hypothetical example of two divergent provisions on copyright protection:⁹⁸ let us assume that a given norm prescribes a

⁹⁴ Cf. the panel report, *Bananas III*, *supra* note 71, at para 7.159: the panel referred to 'clashes between obligations . . . [which] are mutually exclusive in the sense that a Member cannot *comply with both obligations at the same time*'; on this problem cf. the following text.

⁹⁵ Such a test is arguably proposed by R. Walter, *Über den Widerspruch von Rechtsvorschriften* (1955), at 61: '[e]ine Antinomie müsste . . . dann vorliegen, wenn über zwei (gleichzeitig erlassene) anordnende Sätze der Rechtsautorität zwei rechtswissenschaftliche Urteile gefällt werden müssten, die einander widersprechen' ('there would be a conflict if the interpreter had to conclude that two rules that had been simultaneously enacted by a legal authority contradict each other'). Such a test is vehemently criticized by Kelsen in his later thinking: cf. Kelsen, *supra* note 19; see also Wiederin, *supra* note 19, at 312–318.

⁹⁶ On this see in particular *ibid.*, at 313 (with further references provided in note 9), who rightly states that, in view of this shortcoming, the standard argument given in legal theory in support of the existence of a conflict (i.e. that if one not did not recognize a conflict in such instances, one could not describe the legal system without contradiction) is logically untenable. This argument can also be found in Foriers, *supra* note 36, at 38.

⁹⁷ Wiederin refers to the example of one norm prescribing that at a given time the addressee has to be in Salzburg, and another norm requiring that the same person one hour later be in Vienna. The conjunction (being both in Salzburg and Vienna within an hour) may or may not be true, depending on further circumstances, which shows that this criterion is evidently unsuitable for an unequivocal definition: see *ibid.*, at 315. Cf. also Kelsen, *supra* note 19, at 166–179.

⁹⁸ This example is taken from Pauwelyn, *supra* note 4, at 180–181.

minimum term of copyright protection of 40 years, whereas another norm prescribes a minimum duration of 50 years. Here there appears to be a conflict;⁹⁹ and we may once more refer to the reasons against the classic narrow definition of conflict set out above, according to which there is no conflict in such cases. After 40 years, according to the criterion of joint compliance, it is still *possible* to protect copyrights for ten more years and thereby to comply with the second norm. Hence, the test of joint compliance would not designate this situation as one involving conflict. Yet one could argue that after 40 years, i.e. after compliance with the first norm, there is a – at least implicit, if not, depending on the circumstances of a concrete treaty, explicit – *permission* not to protect copyrights. This would correspond to a contradictory conflict in the above scheme and should be recognized as a conflict of norms for the reasons given in the preceding analysis.

Incidentally, this example also shows that there is no reason to extend the deontic square, as is intimated in Pauwelyn's study,¹⁰⁰ so as to cover this constellation which was referred to in the introduction to this article as a unilateral incompatibility between two divergent obligations: i.e. a situation in which compliance with one obligation may breach the other. In this example, if there is an implicit or explicit permission not to protect copyrights after 40 years, there actually exists a conflict between a (conditional) permission and a contradictory obligation. In the alternative, two given obligations may turn out to be irreconcilable, because the first obligation requires the opposite of what the other obligation requires: hence, the first norm actually *prohibits* what the other requires. In other words, there exist only two types of conflicts between norms of conduct: contradictory conflicts (with the sub-types of conflicts between permission and obligation, and between permission and prohibition) and contrary conflicts (between obligation and prohibition).

2 *The Appropriate Criterion: Kelsen's Focus on Breach of Norms*

The fourth method, which has been neglected in academic writings, focuses on breach. This method, which avoids the problems of the approaches just discussed, was arguably introduced by Kelsen,¹⁰¹ according to whom '[a] conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly *violated*'. Kelsen further categorized conflicts as bilateral and unilateral, potential and necessary, and total and partial conflicts. According to Kelsen, a conflict

is bilateral if in obeying or applying each of the two norms, the other one is (possibly or necessarily) violated. The conflict is unilateral if obedience to or application of only one of the two norms violates the other one. The conflict is a total one if one norm prescribes a certain behaviour which the other forbids (prescribes the omission of the behaviour). The conflict is a partial one if the content of one norm is only partially different from the other one.¹⁰²

⁹⁹ Cf. also Wiederin, *supra* note 19, at 315–316, who uses a similar example.

¹⁰⁰ Pauwelyn, *supra* note 4, at 179.

¹⁰¹ Cf. Kelsen, *supra* note 18. See also Kelsen, *supra* note 19, at 99. The same approach is advocated by Wiederin, *supra* note 19, at 318–325; most recently, Pauwelyn, *supra* note 4, at 175–176 has focused on breach of norms as well.

¹⁰² Kelsen, *supra* note 18, at 1438; Kelsen, *supra* note 19, at 99–100.

It is appropriate to illustrate the practical application of this definition and its subdivisions using an example analogous to that employed before. In line with Kelsen's definition of conflict of norms, the decisive question is whether compliance with, or the application of, one norm necessarily or potentially *violates* the other. This test is to be applied *twice* in each case of a conflict of norms, i.e. from the side of each norm:

Norm 1: Restrictions of imports from country *a* are prohibited.

Norm 2: Import bans on goods from country *a* are permitted if there is no sufficient environmental protection in country *a*.

In complying with norm 1, the state which is the addressee of these norms does not violate norm 2, since that state cannot 'breach' the permission granted to itself. Complying with norm 2 violates norm 1 *if* use is made of the permission set out in norm 2. Thus the conflict is unilateral and only potential: it can be avoided by refraining from asserting the explicit permission.¹⁰³

For the sake of clarity, it must be pointed out additionally that one has to distinguish the perspective of the addressee of these norms from that of a tribunal: if a tribunal fails to recognize this situation as constituting conflict, it does *not* infringe the permission set out in norm 2, as the tribunal is not the addressee of this norm. However, by not recognizing this situation as involving conflict, the tribunal would violate a *third* norm of which it is the addressee, namely the (implicit) obligation to apply valid law.¹⁰⁴ Only by accepting that there is a unilateral conflict between norm 1 and norm 2 in the foregoing example is it possible to let principles of conflict resolution such as the *lex posterior* and *lex specialis* principles come into play in order to determine whether the prohibition or the permission were meant to prevail.

Hence, in order to make it clear that permissive norms are included, the definition of norm conflict should read:¹⁰⁵

There is a conflict between two norms, *one of which may be permissive*, if in obeying or applying one norm, the other one is necessarily or possibly violated.

6 Post-Script: Norm Conflicts between Norms of Competence?

So far we have dealt with norms of conduct, i.e. conflicting prohibitions, obligations and permissions. There remains the – at first glance slightly more intricate – problem of norms granting competences that appear inconsistent among each other. As noted, this issue has given rise to considerable problems in WTO jurisprudence and international law more generally. It seems useful therefore to refer to an actual

¹⁰³ See also Wiederin, *supra* note 19, at 324, who holds that conflicts between prescriptions and permissions are always *unilateral* avoidable conflicts.

¹⁰⁴ On this see again *ibid.*, at 326.

¹⁰⁵ Besides the focus on breach, this definition is co-extensive with the above-mentioned definition of Engisch's seminal 1935 treatise and Engisch, *supra* note 67, at 162: '[e]in Verhalten [erscheint] in abstracto oder in concreto zugleich als geboten und nicht geboten oder als verboten und nicht verboten oder gar als geboten und verboten' ('a given behaviour appears in *abstracto* or in *concreto* as prescribed and not prescribed, or as prohibited and not prohibited, or even as prescribed and prohibited').

example taken from WTO case law, namely that of the often discussed¹⁰⁶ 1998 decision *Guatemala – Cement*, in which the Appellate Body had to address the relationship between Article 6.2 of the WTO Dispute Settlement Understanding (DSU) and the special procedural provisions contained in Article 17 of the WTO Antidumping Agreement. According to Article 6.2 of the DSU, a WTO Member is entitled to request the establishment of a panel subject to the conditions that the request be made in writing, that it identify the specific measures at issue and provide a brief summary of the legal basis of the complaint. Article 17.5 of the Antidumping Agreement, however, sets forth partially different conditions for the request for the establishment of a panel.¹⁰⁷

In dealing with these two provisions, the Appellate Body held that there is a conflict between two norms, if ‘adherence to the one provision will lead to a *violation* of the other provision.’¹⁰⁸ Moreover, it found that a conflict occurs ‘only in the specific circumstance where a *provision* of the DSU and a special or additional *provision* of another covered agreement are *mutually inconsistent*’.¹⁰⁹ It placed these statements against the background of Article 1 DSU,¹¹⁰ which it interpreted as providing that ‘it is only where the provisions of the DSU and the specific or additional rules and procedures *cannot* be read as *complementing* each other that the special or additional provisions are *prevail*.’¹¹¹ In the case at issue, the Appellate Body concluded that there is ‘no inconsistency’ between these two provisions.¹¹² The Appellate Body’s definition in this case has generally been read as a strict definition – i.e., a definition excluding the possibility that a *permission* and an incompatible obligation or prohibition constitute a ‘conflict of norms’ – not only by commentators,¹¹³ but also by subsequent panel practice¹¹⁴ which referred to it to justify narrow definitions of conflict.

It is submitted, however, that these inferences miss an essential point: Article 6.2 of the DSU and Article 17.5 of the Antidumping Agreement do not constitute norms of

¹⁰⁶ Cf. e.g., Marceau, *supra* note 3, at 1085; Montaguti and Lugard, ‘The GATT 1994 and Other Annex 1A Agreements: Four Different Relationships?’, 3 *J Int’l Econ L* (2000) 473, at 475–476, 481, 483; Pauwelyn, *supra* note 4, at 194–197; W. Weiss and C. Herrmann, *Welthandelsrecht* (2003), at 149, marginal note 352.

¹⁰⁷ According to Art. 17(5) of the Antidumping Agreement, ‘[t]he DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon: (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member’.

¹⁰⁸ Appellate Body report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WTO Doc. WT/DS60/AB/R, adopted on 5 Nov. 1998, at para. 65.

¹⁰⁹ *Ibid.*, at para. 66 (emphasis added).

¹¹⁰ According to Art. 1(2) of the DSU, the special or additional rules of the Antidumping Agreement prevail ‘[t]o the extent that there is a difference’.

¹¹¹ *Ibid.*, at para. 66; similar statements can be found, e.g., in para. 75.

¹¹² *Ibid.*, at para. 66; see also at para. 75.

¹¹³ Cf. Montaguti and Lugard, *supra* note 106, at 476; Marceau, *supra* note 3, at 1085; Weiß and Herrmann, *supra* note 112, at 149, marginal note 352; but see the more nuanced view of Bartels, *supra* note 21, pointing out that this passage of the ruling should not be taken at face value.

¹¹⁴ Cf. the 1999 panel report *Turkey—Textiles*, *supra* note 40, at para. 9.93.

conduct (permissions, prohibitions or obligations), but have to be regarded as *norms of competence*. By norm of competence is meant a norm which enables the state or person holding the competence to *transform* the legal situation of persons/states subjected to this power: in the exercise of this competence, new norms of conduct (prohibitions, obligations and permissions) as well as subordinate norms of competence can be brought into existence. This is the reason why competences have to be distinguished from 'mere' permissions.¹¹⁵ In our example, Article 6.2 of the DSU and Article 17.5 of the Antidumping Agreement grant the power to request the establishment of a panel, albeit under divergent preconditions. By using this competence, the complaining Member creates a new legal situation from which new rights and obligations (procedural obligations of the defendant, etc) arise.¹¹⁶

As the exercise of both competences may entail different consequences, the question arises whether norms of competence can 'conflict'. This question, which relates to the more fundamental issue of whether competences can be reduced to 'mere' obligations, permissions or prohibitions,¹¹⁷ is disputed in legal theory, as was indicated already.¹¹⁸ What is crucial, however, is the fact that exercising competences may create incompatible prohibitions, obligations and permissions. This is well illustrated by a further WTO Appellate Body decision, the 1999 *Brazil – Aircraft* ruling,¹¹⁹ which had to address provisions contained in the DSU and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), which grant powers to WTO panels to determine the time-frame within which the losing party has to implement a WTO dispute settlement decision. As these provisions differ,¹²⁰ their exercise by a panel can give rise to an obligation (prompt compliance with a WTO ruling) incumbent on the defendant which is in potential conflict with a permission (the permission of not complying for a longer period of time). Thus, there clearly is a potential conflict on the 'level' of concrete prohibitions, obligations and permissions, irrespective of whether one holds that there cannot be a conflict on the 'level' of competences¹²¹ or whether one takes the opposite view, since competences may give rise to conflicting norms of conduct.

¹¹⁵ Competences are not only bestowed on the state, but can also be held by private persons. A typical example is the competence to conclude treaties or to institute court proceedings by bringing a claim. Treaties, in turn, can establish new competences, to be exercised by the contracting parties. Cf. e.g., Röhl, *supra* note 18, at 238; see also Alexy, *supra* note 19, at 211 ff.

¹¹⁶ For the view that a 'right' to bring a claim before a court constitutes a competence (to be exercised by a private person or a state, as the case may be) see e.g., Alexy, *supra* note 19, at 210.

¹¹⁷ Cf. Kelsen, *supra* note 19, at 210; Alexy, *supra* note 19, at 216–217 with further references; Wiederin, *supra* note 19, at 325.

¹¹⁸ Cf. *supra* Part 3 A.

¹¹⁹ Appellate Body report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted on 20 Aug. 1999, at para. 191.

¹²⁰ Art. 4(7) of the SCM Agreement provides that 'the panel shall recommend that the subsidizing Member withdraw the subsidy *without delay*. In this regard, the panel shall specify . . . the time period within which the measure must be withdrawn'. On the other hand, Art. 21 of the DSU read together with Art. 4(12) of the SCM Agreement stipulates that WTO Members shall be granted *up to seven and one half months* for compliance with a WTO ruling.

¹²¹ This is the position taken by Wiederin, *supra* note 19, at 327.

In view of the fact that one has to distinguish these two levels, however, the aforementioned stances in panel practice and academic writing seem problematic to the extent that they attempt to infer from these two rulings whether or not the Appellate Body has actually opted for a wide or narrow definition of conflict of norms.

7 Conclusions

The preceding analysis has shown that the narrow definition of conflict arguably prevailing in international law is legally inappropriate and leads to contradictions. By contrast, this article has argued that an adequate definition of conflict of norms (i) has to be a *wide* one that includes incompatibilities between permissions and obligations, permissions and prohibitions, and obligations and prohibitions; and (ii) has to rely on the ‘test of violation’, since the criterion of ‘joint compliance’, which is regularly employed in legal theory and domestic law and which has also been used in WTO panel practice, does not produce unequivocal results.

In conclusion, the definition of conflict of norms in legal theory, in any given legal fields and in international law should read: *There is a conflict between norms, one of which may be permissive, if in obeying or applying one norm, the other norm is necessarily or potentially violated.*