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The International Law Relation Between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?

Henning Grosse Ruse-Khan

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THE INTERNATIONAL LAW RELATION BETWEEN TRIPS AND SUBSEQUENT TRIPS-PLUS FREE TRADE AGREEMENTS: TOWARDS SAFEGUARDING TRIPS FLEXIBILITIES?

Henning Grosse Ruse-Khan[*]

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* Senior Research Fellow, Max Planck Institute for Intellectual Property and Competition Law (Munich, Germany). E-mail: henning.gr-khan@ip.mpg.de. This Article is a revised version of a paper presented at the conference on "15 Years of TRIPS Implementation: Intellectual Property Protection from a Global Perspective" (University of Georgia School of Law, January 28, 2011). I thank Margaret Chon, Nahoko Ono, Mary Wong and all other participants for their comments. All errors remain mine.

> Flexibilities were included in TRIPS to allow States to take into consideration their economic and development needs. States need to take steps to facilitate the use of TRIPS flexibilities.
>
> United Nations — Human Rights Council[1]

I. INTRODUCTION

Fifteen years after the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) entered into force, international intellectual property (IP) law and policy have moved on.[2] Apart from two multilateral agreements on copyright in the framework of the World Intellectual Property Organisation (WIPO),[3] most new treaties on substantive standards for IP protection are of bilateral, plurilateral, or regional character. Since the mid-nineties, countries interested in higher IP standards have successfully shifted IP negotiations away from WIPO and WTO towards Free Trade Agreements (FTAs).[4] Here, countries which are otherwise reluctant to agree to increases in IP protection are able to negotiate trade-offs, such as obtaining (or avoiding the loss of) preferential access to the markets of their FTA partners such as the U.S., EU, or Japan.[5]

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[1] U.N. HUMAN RIGHTS COUNCIL, *Report of the Special Rapporteaur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, ¶ 96, U.N. Doc. A/HRC/11/12 (Mar. 31, 2009) [hereinafter *Report of the Special Rapporteaur*].

[2] Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments–Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

[3] World Intellectual Property Organization [WIPO] Copyright Treaty, *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, *available at* http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [hereinafter WCT].

[4] On the notion of "regime shifting" in international IP law, see Kal Raustiala, *Commentary: Density and Conflict in International Intellectual Property Law,* 40 U.C. DAVIS L. REV. 1021 (2007); Lawrence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking,* 29 YALE J. INT'L L. 1 (2004); Peter K. Yu, *Intellectual Property at Crossroads: Why History Matters*, 38 LOY. L.A. L. REV. 1 (2004).

[5] Similar to the "single undertaking" in the WTO, issues such as IP, trade in goods and services, investment, and, more recently, even labor and environment, are part of an overarching deal which allows for various quid pro quo trade-offs; see, for example, the subject matter covered in the first comprehensive Economic Partnership Agreement (EPA) which the European Community (EC, now EU) negotiated with the CARIFORUM group of Caribbean countries. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, Oct. 15, 2008, 2008 O.J. (L 289), *available at* http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf [hereinafter EC–CARIFORUM EPA].

The obligations in these FTAs to introduce standards of IP protection beyond those found in the TRIPS Agreement (TRIPS-plus standards) are subject to criticism.[6] One central aspect of this critique is the fact that a lot of the TRIPS-plus standards reduce or eliminate the policy space TRIPS allows for the implementation of its obligations (TRIPS flexibilities).[7] The trend towards TRIPS-plus obligations in FTAs has also led to changes in the perception of TRIPS: initially viewed by developing countries as serving primarily the interests of the IP exporting industries in the developed world, TRIPS is now often praised for the flexibilities it offers.[8] It seems that—after fifteen years and in light of the Anti-Counterfeiting Trade Agreement (ACTA) and other initiatives—TRIPS is not so bad after all.[9] Those demanding stronger IP protection in turn initially celebrated the new international standards TRIPS set, while later calling for new global "gold standards" in areas such as IP enforcement.[10] The TRIPS-plus trend is indicative of the long history of

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[6] *See* U.N. Econ. & Soc. Council, Sub-Comm'n on Promotion & Prot. of Human Rights, *The Impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Rights*, ¶¶ 27–28, U.N. DOC. E/CN.4/Sub.2/2001/13 (June 27, 2001) [hereinafter ECOSOC]; *Report of the Special Rapporteaur*, *supra* note 1, ¶¶ 68–93. *See generally* Peter Drahos, *Expanding Intellectual Property's Empire: The Role of FTAs* (2003), *available at* http://www.grain.org/rights_files/drahos-fta-2003-en.pdf; QUAKER UNITED NATIONS OFFICE, THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH AND THE CONTRADICTORY TREND IN BILATERAL AND REGIONAL FREE TRADE AGREEMENTS (2004), *available at* http://www.quno.org/geneva/pdf/economic/Occasional/TRIPS-Public-Health-FTAs.pdf.

[7] In 2001, the WTO members unanimously recognized the importance of some of these flexibilities in the public health context in the Doha Declaration on TRIPS and Public Health. *See* World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

[8] Fifty-Seventh World Health Assembly, May 17–22, 2004, *Scaling up treatment and care within a coordinated and comprehensive response to HIV/AIDS*, WHA57.14 (May 22, 2004), *available at* http://apps.who.int/gb/ebwha/pdf_files/WHA57/A57_R14-en.pdf; *Report of the Special Rapporteur*, *supra* note 1, ¶¶ 25–55; *see also* Various Interventions by WTO Members in the TRIPS Council Meeting, *Minutes of the Council for TRIPS Meeting, Agenda Item M (Enforcement Trends)*, IP/C/M/63, ¶¶ 252, 264–266, 272, 276, 291, 298, 300, 318, 319 (June 8–9, 2010) which reflect primarily developing countries' concerns that TRIPS-plus standards undermine the "flexibility," "policy space," and "balance" inherent in the TRIPS Agreement.

[9] *See* Joost Pauwelyn, *The Dog that Barked but Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO*, 1(2) J. INT'L DISP. SETTLEMENT 389 (2010). He concludes that

> [t]he TRIPS Agreement inspired both exaggerated hopes in the minds of the IP lobby, and overblown fears in the hearts of NGOs and developing countries. . . . TRIPS, therefore, was not the beginning of a unidirectional strengthening of worldwide IP protection. On the contrary, it turned out to be the beginning of a global wave of IP skepticism.

Id. at 428–29.

[10] In relation to ACTA, the EU Commission explained that the rationale for such a new agreement is to "establish new international norms, helping to create a new global gold standard

international IP protection whose development has primarily been a one-way route towards ever increasing levels of protection.[11] This in turn creates the impression that international treaties on IP protection merely create a "floor"[12] consisting of a minimum level of protection, which must be available in all national laws of the contracting parties, without any apparent limitation as to the further extension of IP protection.[13]

In recent years, however, various institutions, policy makers, and NGOs have highlighted the importance of TRIPS flexibilities—especially in the public health and human rights context—and have called for safeguarding the right of WTO Members to exercise them against TRIPS-plus obligations in FTAs. On the international plane, the World Health Organization emphasized that "Bilateral trade agreements should not seek to incorporate TRIPS-plus protection in ways that may reduce access to medicines in developing countries."[14] Furthermore, the Fifty-Seventh World Health Assembly urges WHO members

> as a matter of priority: . . . (6) to take into account in bilateral trade agreements the flexibilities contained in the Agreement on Trade-related Aspects of Intellectual Property Rights and recognized by the Declaration on the TRIPS Agreement and

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on IPR enforcement." Press Release, European Union Commission, European Commission Seeks Mandate to Negotiate Major New International Anti-Counterfeiting Pact, IP/07/1573 (Oct. 23, 2007).

[11] Once rights have been inscribed into the text of an IP convention, they basically become sacrosanct for now and the future. Revision conferences (with only a few remarkable exceptions, such as the Revision of the Berne Convention 1971, where an Annex addresses the option for developing countries to grant compulsory licenses mainly for translation purposes and the proposed amendment of the TRIPS Agreement in the course of the Doha process; *see* General Council, *Amendment of the TRIPS Agreement*, WT/L/641 (Dec. 8, 2005)) have regularly served the purpose of further strengthening the position of right holders; hardly ever was an effort undertaken to question or curtail incumbent rules. *See* Annette Kur & Henning Grosse Ruse-Khan, *Enough is Enough – The Notion of Binding Ceilings in International Intellectual Property Protection*, MAX PLANCK PAPER SERIES ON INTELL. PROP., COMP. & TAX L., 09-01 (2008), *available at* http://ssrn.com/abstract=1326429.

[12] *See* Antony Taubman, *Rethinking TRIPS: 'Adequate Remuneration' for Non-voluntary Patent Licensing*, 11 J. INT'L ECON. L. 927, 944 (2008); Raustiala, *supra* note 4, at n.20.

[13] On the question whether international IP law does—or should—contain also maximum standards or ceilings, see Kur & Grosse Ruse-Khan, *supra* note 11.

[14] World Health Organization, *Report of the Commission on Intellectual Property Rights, Innovation and Public Health*, Recommendation 4.26 (2006), *available at* http://www.who.int/intellectualproperty/documents/thereport/CIPIHReport23032006.pdf [hereinafter WHO].

Public Health adopted by the WTO Ministerial Conference.[15]

Similarly, the U.N. Special Rapporteur on the right to health, in his 2009 report, demanded:

> Developing countries and LDCs should not introduce TRIPS-plus standards in their national laws. Developed countries should not encourage developing countries and LDCs to enter into TRIPS-plus FTAs and should be mindful of actions which may infringe upon the right to health.[16]

In the TRIPS Council Meeting in June 2010, the delegate of India expressed concerns arising from "the surge of TRIPS plus initiatives in multilateral fora, RTAs and plurilateral initiatives" and emphasized that these initiatives

> are likely to disturb the balance of rights and obligations in the TRIPS Agreement enshrined in, *inter alia*, the Preamble, the objectives and principles in Articles 7 and 8, and have the potential to constrain the flexibilities and policy space provided by the TRIPS Agreement to developing country Members, like India, particularly in areas like public health, transfer of technology, socio-economic development, promotion of innovation and access to knowledge. They also potentially negate decisions taken multilaterally, such as the Doha Declaration on the TRIPS Agreement and Public Health in the WTO and the Development Agenda in WIPO.[17]

Even more important in this context are statements from those countries which so far have been the main parties demanding TRIPS-plus provisions in FTAs. Already in 2007, the EU Parliament stressed "that European IPR policy towards developing countries should not go beyond TRIPs Agreement obligations, but that it should instead encourage the use of TRIPs flexibilities."[18] Furthermore, in the context of the EU–India FTA negotiations, the European Commission, in an effort to reassure, stated that

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[15] Fifty-Seventh World Health Assembly, *supra* note 8.

[16] *Report of the Special Rapporteur*, *supra* note 1, ¶ 108.

[17] Intervention by India, *Minutes of the Council for TRIPS Meeting*, *supra* note 8, ¶ 264.

[18] European Parliament Resolution of 22 May 2007 on Global Europe — External Aspects of Competitiveness, 2006/2292(INI), O.J. (C 102) E/128, ¶ 60.

> negotiations on intellectual property rights (IPR) are taken forward in the spirit of the Doha Declaration on the TRIPS Agreement and Public Health . . . . The Commission has made it very clear that the provisions on IPR, in particular those on patents, must be implemented and interpreted in a way that does not impair the capacity of both parties to promote access to medicines in the developing world.[19]

The EU Commission further emphasised that it has proposed a "clause that will guarantee that no provision of the FTA will prevent India from using the flexibilities contained in the TRIPS Agreement"[20] as well as a "legally binding reference to the Doha Declaration on the TRIPS Agreement and Public Health."[21]

In the U.S., Congress and the Bush administration reached a bipartisan compromise on a "New Trade Policy for America" in 2007, which called for more balance on the position of the U.S. in FTA negotiations regarding issues related to IP, labor standards, and the environment. In response to concerns over U.S. FTAs undermining TRIPS flexibilities, the provisions on data exclusivity, patent extensions, and the linkage between patent protection and drug approval have been relaxed substantially, while the new template for FTAs now also includes specific provisions on public health.[22] The latter provisions state generally that the intellectual property chapter "does not prevent an FTA partner country from taking the necessary measures to protect public health."[23] These changes were then incorporated into the pending FTAs with Colombia, Peru, and Panama.[24]

More recently, the U.S. Trade Representative (USTR) affirmed in the 2010

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[19] Monika Ermert, *EU-India Trade Talks Resume Under Cloud Of Concern For Public Health*, INTELL. PROP. WATCH, Apr. 27, 2010, http://www.ip-watch.org/weblog/2010/04/27/eu-india-trade-talks-resume-under-cloud-of-concern-for-public-health/.

[20] EU Commission, *EU–India FTA Negotiations and Access to Medicines: Questions and Answers*, ¶ 4, http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146191.pdf.

[21] Letter from Karel De Gucht to Médecins Sans Frontières International (May 25, 2010), *available at* http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146192.pdf.

[22] *See* Pedro Roffe & David Vivas-Eugui, *A Shift in Intellectual Property Policy in US FTAs?*, 11(5) BRIDGES MONTHLY 15 (2007), *available at* http://ictsd.org/downloads/bridges/bridges11-5.pdf.

[23] *Brand-Name Drug Industry Alarmed At IPR Precedent Of FTA Template*, INSIDE U.S. TRADE, May 18, 2007, *available at* http://www.cptech.org/ip/health/trade/insideustrade05182007.html.

[24] Roffe & Vivas-Eugui, *supra* note 22. For a detailed analysis of these provisions, see Part IV below. In the negotiations for a Trans-Pacific Partnership Agreement (TPP), however, the USTR reportedly does not feel bound by this bipartisan compromise anymore; *see* Sean Flynn, *USTR Considering Pharmaceutical Pricing Restrictions in TPP; Refuses to Follow May 10th Agreement on IP-Medicines Issues*, IP ENFORCEMENT MAILING LIST, Feb. 8, 2011 (on file with author).

Special 301 Report on the protection of IP assets of U.S. companies abroad that—in accordance with the Doha Declaration on TRIPS and Public Health—"the United States respects a country's right to protect public health and, in particular, to promote access to medicines for all."[25] The report further assures that

> The United States will work to ensure that the provisions of our bilateral and regional trade agreements are consistent with these views and do not impede the taking of measures necessary to protect public health.[26]

In sum, not only international organizations, their representatives, and member states, but also the main state actors on TRIPS-plus FTAs have recently committed themselves to safeguarding TRIPS flexibilities—in particular, those relevant in the public health context.

Given all these statements and assurances, the question arises how FTAs have incorporated these promised policy changes and whether the relevant FTA provisions really translate political commitments and assurances into binding treaty language. This Article aims to examine this question from a public international law perspective. It analyses the relationship between TRIPS flexibility provisions and TRIPS-plus FTAs. By looking at norms in general international law, the TRIPS Agreement, and in TRIPS-plus FTAs which determine this relationship, the main research question is whether and when TRIPS flexibilities can prevail over TRIPS-plus obligations in FTAs. Part II begins by exploring the wider international law context for analysing the relationship between provisions from different treaties. In doing so, it draws on the discourse about unity, norm conflict, and fragmentation in international law. Part III then examines the legal relationship between TRIPS and subsequent FTAs from the perspective of the TRIPS Agreement. In turn, Part IV scrutinises this relationship from the FTAs' viewpoint—in particular, taking into account provisions which may function to safeguard the right to exercise TRIPS flexibilities against TRIPS-plus FTA obligations. Finally, Part V offers some conclusions.

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[25] OFFICE OF U.S. TRADE REPRESENTATIVES, EXEC. OFFICE OF THE PRESIDENT, SPECIAL 301 REPORT 13 (2010). The report further emphasizes that "the United States respects our trading partners' rights to grant compulsory licenses, in a manner consistent with the provisions of the TRIPS Agreement . . . ." *Id.*

[26] *Id.*

II. THE INTERNATIONAL LAW RELATION BETWEEN SUBSEQUENT TREATIES

This Part sets out the international law context for examining the relationship between TRIPS and subsequent FTAs. Given the substantive differences between flexibilities in TRIPS and additional protections mandated under FTAs, the question arises how any potential conflicts between TRIPS and FTA provisions would be resolved under the rules and principles of public international law. As international treaties between states, TRIPS and TRIPS-plus FTAs are born into the existing body of international law.[27] Their relations *inter se* therefore are governed by international law. In this regard, the Report of the International Law Commission (ILC) on the "Fragmentation of International Law" emphasises that, as a legal system, international law is not a random collection of norms. Instead, there are "meaningful relationships" between these different norms in so far as they "act in relation to and should be interpreted against the background of other rules and principles."[28] This also applies to FTAs.

In determining the relationship between two valid and applicable international law norms[29] (for example, a TRIPS flexibility rule and a TRIPS-plus provision in an FTA), the ILC Report distinguishes between two categories of norm relationships:

> *Relationships of interpretation.* This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction.
> *Relationships of conflict.* This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules

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[27] *See generally* Joost Pauwelyn, *The Role of Public International Law in the WTO: How far can we go?*, 95 AM. J. INT'L L. 535, 543–47 (2001).

[28] U.N. Int'l L. Comm'n, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 1, U.N. Doc A/CN.4/L.702 (July 18, 2006) [hereinafter ILC I].

[29] The ILC Report defines "that two norms are *valid* in regard to a situation means that they each cover the facts of which the situation consists. That two norms are *applicable* in a situation means that they have binding force in respect to the legal subjects finding themselves in the relevant situation." *Id.* n.6.

> concerning the resolution of normative conflicts are to be found in the VCLT.[30]

From this distinction, it follows that the relationship between TRIPS provisions and subsequent TRIPS-plus FTA rules can be analysed as one of norm interpretation or one of norm conflict.[31] In the following section, I briefly review the analytical parameters for the two categories of norm relations—to the extent they are relevant for examining the relationship between TRIPS and subsequent FTAs.

A. THE PRINCIPLES OF HARMONIOUS INTERPRETATION AND SYSTEMIC INTEGRATION

For relationships of norm interpretation, the principle of harmonisation or *harmonious interpretation* is primarily relevant. The relationship between two or more distinct rules of international law in general, and between different treaties in particular, is foremost governed by the need for a harmonious interpretation, which operates as a presumption against conflict between the relevant rules.[32] This requires a treaty interpreter to aim for a coherent and mutually consistent interpretation of the different treaty rules, as much as possible to avoid norm conflicts between the two treaties.[33] In the same vein, the principle of *systemic integration*[34] governs the relationship between two distinct treaty norms as a means of treaty interpretation. This principle has been developed based on Article 31(3)(c) or the Vienna convention on the Law of Treaties (VCLT), which calls upon a treaty interpreter to take into account "any relevant rules of

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[30] *Id.* ¶ 2.

[31] As the analysis below shows, these relationships are not mutually exclusive. In particular, the definition of what constitutes a relevant "conflict" between norms has a strong bearing on whether a relationship is perceived and understood as one of conflict or one of interpretation; for further details, see Part II.B below.

[32] The ILC Report, before listing the different conflict resolution tools, states, in reference to the principle of harmonisation: "[I]t is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations."; ILC I, *supra* note 28, ¶ 4. On the notion of coherence, see generally Gabrielle Marceau, *A Call for Coherence in International Law*, 33 J. WORLD TRADE 87 (1999).

[33] As the International Court of Justice stated in the Right of Passage case: "it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it." *See* Right of Passage over Indian Territory, Preliminary Objections (Portugal v. India), 1957 I.C.J. REP. 142 (Apr. 12).

[34] On the notion of systemic integration, see generally Campbell McLachlan, *The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention*, 54 INT'L & COMP. L. Q. 279 (2005).

international law applicable in relations between the parties."[35] Apart from its important role in determining the relationship between a treaty rule and customary international law or general principles of (international) law,[36] systemic integration under Article 31(3)(c) VCLT also requires the interpreter to consider other treaty-based rules so as to arrive at a mutually consistent meaning between two or more distinct treaties. Such other treaty rules are of particular relevance where all parties to the treaty under interpretation are also parties to the other treaty.[37]

Since almost all TRIPS-plus FTAs have been agreed to amongst states which are also Members of the WTO, Article 31(3)(c) VCLT basically covers all relationships between TRIPS and subsequent TRIPS-plus FTAs. It means that, for the interpretation of a TRIPS-plus provision in an FTA concluded amongst WTO Members, any "relevant" rules of TRIPS "shall be taken into account"—because all TRIPS provisions amount to "rules of international law applicable in relations between the parties" in the sense of Article 31(3)(c) VCLT. However, it does not mean that, *vice versa*, for the interpretation of TRIPS provisions, all "relevant" rules of TRIPS-plus FTAs must be borne in mind. Since the FTA rules apply only in relation between the parties to the FTA, they are not "rules of international law applicable in relations between the parties" to the TRIPS Agreement.[38] In sum, both the principle of harmonious interpretation and the principle of systemic integration determine the relationship between TRIPS and subsequent FTAs. They operate primarily as presumptions against conflict and require interpretation of TRIPS and TRIPS-plus treaty provisions as a single set of compatible treaty obligations.

Illustrations of such a role for the principle of harmonious interpretation exist especially in cases where the TRIPS-plus FTA rule is ambiguous or open-textured. For example, both the recently concluded Anti-Counterfeiting Trade

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[35] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Article 31(3)(c) VCLT provides: "There shall be taken into account, together with the context . . . (c) any relevant rules of international law applicable in the relations between the parties." [hereinafter VCLT].

[36] *See* McLachlan, *supra* note 34, at 310–13; ILC I, *supra* note 28, ¶¶ 19–22.

[37] The two other cases where one treaty rule affects the interpretation of another one from a different treaty are where the first treaty rule has passed into or expresses customary international law, or where this rule provides evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term. ILC I, *supra* note 28, ¶ 21.

[38] *See* U.N. Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 447–449, U.N. Doc A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILC II].

Agreement (ACTA)[39] and TRIPS contain overlapping rules on border measures against goods suspected of infringing IP rights.[40] Differences amongst these rules exist, *inter alia*, as to the safeguards for traders and goods owners. While Article 56 TRIPS contains a mandatory requirement that the relevant authorities must have "authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods,"[41] ACTA has no directly equivalent provision. One might, however, consider the general obligation under ACTA Article 6:2 which states: "Procedures adopted, maintained, or applied to implement the provisions of this Chapter shall be fair, equitable, and *shall provide for the rights of all participants subject to procedures to be appropriately protected.*"[42] Hence, the general obligation in ACTA Article 6:2 to protect the rights of all participants to the enforcement procedures can be understood to include the more specific obligation under Article 56 TRIPS to foresee rights holder liability for any injury caused to defendants through the wrongful detention of goods. Furthermore, TRIPS contains in Article 55 mandatory limits on the duration of the initial detention of goods suspected of infringement.[43] Although ACTA does not contain an equivalent rule, the general obligation under Article 6:2 to protect the rights of all participants to the procedures in an appropriate manner again may apply. ACTA Article 6:2, therefore, can serve equally as the basis for a harmonious interpretation that includes the maximum periods of initial detention demanded under Article 55 TRIPS.

The boundaries of this approach are set out in the customary international law principles of treaty interpretation, which are primarily set out in the general rule of Article 31(1) VCLT.[44] If the ordinary meaning and context of the two

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[39] Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, *opened for signature* May 1, 2011, *available at* http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147079.pdf [hereinafter ACTA].

[40] *See* TRIPS arts. 51–60, as well as ACTA, *supra* note 39, arts. 13–22. For an overall consistency analysis of these rules, see Henning Grosse Ruse-Khan, *A Trade Agreement Creating Barriers to International Trade? ACTA Border Measures and Goods in Transit*, AM. U. INT'L L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1706567.

[41] TRIPS art. 56.

[42] ACTA, *supra* note 39, art. 6:2 (emphasis added). With this additional duty to ensure "for the rights of all participants subject to procedures to be appropriately protected," ACTA, Article 6:2, is an extended version of TRIPS Article 41:2.

[43] TRIPS art. 55. The general period in Article 55 TRIPS is ten days (with a possible extension of another ten days "in appropriate cases") within which proceedings leading to a decision on the merits of the case have to be initiated or the goods released. *Id.*

[44] VCLT, *supra* note 35, art. 31(1) provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

relevant treaty terms, understood in light of their respective treaty object and purpose, do not allow a mutually consistent understanding of the two terms or provisions, a harmonious treaty interpretation is not possible.[45] This is especially true in cases where a TRIPS-plus FTA contains specific and detailed provisions which differ from the flexibilities that TRIPS foresees. For example, the concrete and well defined provisions in the U.S.–Australia FTA on exhaustion of IP rights and compulsory licensing curtail the respective flexibilities contained in Articles 6 and 31 TRIPS without much room for a harmonious interpretation. Article 17.9.4 of the U.S.–Australia FTA effectively prohibits the adoption of a system of international exhaustion which would allow parallel imports (e.g., of patented drugs) from cheaper markets abroad.[46] Article 17.9.7 then limits the grounds on which compulsory licenses may be granted to situations where the grant of such licences is necessary in order to "remedy a practice determined after judicial or administrative process to be anticompetitive," as well as to "cases of public non-commercial use, or of national emergency, or other circumstances of extreme urgency" if further conditions are satisfied.[47] The U.S.–Australia FTA hence significantly curtails two (if not three)[48] of the TRIPS flexibilities recognized by all WTO members in the Doha Declaration.[49]

Hence, FTA provisions do contain explicit prohibitions of something TRIPS (sometimes equally explicitly) allows. There is no ambiguity in these TRIPS-plus treaty terms open to a harmonious interpretation. This leads to the

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[45] *See* Henning Grosse Ruse-Khan, *A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond*, 13 J. INT'L ECON. L. 139, 162–67; ILC I, *supra* note 28, ¶ 21.

[46] Each Party shall provide that the exclusive right

> of the patent owner to prevent importation of a patented product, or a product that results from a patented process, without the consent of the patent owner *shall not be limited by the sale or distribution of that product outside its territory*, at least where the patentee has placed restrictions on importation by contract or other means.

(emphasis added). United States–Australia Free Trade Agreement, Art. 17.9(4), May 18, 2004, 43 I.L.M. 1248.

[47] *Id.* art. 17.9.7(b)(i)–(iii).

[48] In the compulsory licensing context, one may question whether the discretion under the Doha Declaration, *supra* note 7, ¶ 5(c), to determine autonomously whether a public health crisis amounts to a "national emergency" or "other circumstances of extreme urgency" still exists under the same wording in the U.S.–Australia FTA, *supra* note 46, art. 17.9(7).

[49] In the Doha Declaration, *supra* note 7, ¶ 5, all WTO Members recognized some key public health related flexibilities in TRIPS—such as the right to decide on the domestic system of exhaustion, the freedom to choose the grounds on which compulsory licenses may be granted, and the right to determine autonomously what amounts to a "national emergency" or "other circumstances of extreme urgency" under TRIPS art. 31(b).

question whether such situations can be appropriately addressed as relationships of conflict.

B. DEFINING NORM CONFLICTS

Resolving norm conflicts between international treaties is first of all a matter of defining what constitutes a true "conflict" of norms.[50] In a strict sense, only a direct incompatibility—that is, where complying with one rule necessitates the violation of another—is considered as a conflict.[51] The WTO Appellate Body seems to follow this view,[52] but this is not the only perspective on norm conflicts. A wider understanding takes into account (optional) rights given to states in a treaty and also finds conflicts when one treaty obligation limits or prevents the exercise of a right another treaty provides for.[53]

In the TRIPS context, choosing a narrow or wide understanding of conflict is particularly relevant. A TRIPS-plus rule in an FTA may be in conflict with an optional TRIPS provision as soon as it limits the ability of a WTO Member to exercise a "right" or flexibility TRIPS provides for. If, in such cases, the application of TRIPS flexibilities were to prevail over TRIPS-plus FTA rules, it could make TRIPS flexibilities inviolable and untouchable. They would appear almost as inalienable rights of WTO Members which cannot be taken away whenever conflict resolution tools apply in favour of TRIPS. Some support for such a position comes from paragraph 4 of Doha Declaration on TRIPS and Public Health where WTO Members "*reaffirm the right of WTO Members to use*, to the full, the *provisions* in the TRIPS Agreement, *which provide flexibility*," in that case for the purpose of public health protection.[54]

Still, such a far-reaching effect seems to contradict the overall notion of *optional* flexibilities in TRIPS; a WTO Member may choose to implement them (i.e., to exercise its right), but may equally choose not to do so. One must keep in mind that it is primarily the state's own domestic IP law which provides for the additional protection, not some external rule imposed upon a country

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[50] Instructive on this topic in general is JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW (2003).

[51] *Id.* at 166–67 (citing Wilfred Jenks, *Conflict of Law-Making Treaties*, [1953] British Yearbook Int'l L. 401, 426, 451).

[52] See the Panel Report, *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico*, ¶ 65, WT/DS60/R (Nov. 5, 1998), where the Appellate Body defined conflicts as "a situation where adherence to the one provision will lead to the violation of the other provision."

[53] Pauwelyn, *supra* note 27, at 551; for an overview on various different approaches to "conflicts" or "inconsistencies," see ILC II, *supra* note 38, ¶¶ 21–26; and PAUWELYN, *supra* note 50, at 167–74.

[54] *See* Doha Declaration, *supra* note 7, ¶ 4 (emphasis added).

wishing to exercise a TRIPS flexibility. If a WTO Member decides to waive its right to use a certain flexibility which it has under TRIPS, this is in fact a way of exercising its right and part of the flexibility TRIPS provides. Applying a wide notion of norm conflict so as to prevent a WTO Member from doing so may be thought of as turning the optional rule into a mandatory one.[55]

In the context of TRIPS-FTA relationships, this argument speaks in favour of adopting a narrow definition of norm conflict. Hence, only cases where compliance with one rule necessitates the violation of another would be considered as a conflict in the technical sense, making it necessary to decide which norm shall be given preference in application. This narrow definition of conflict would not eradicate all conflict potential between TRIPS and TRIPS-plus FTAs—as long as it is based on the operation of mandatory TRIPS limits (ceilings) to additional IP protection and a corresponding obligation for such additional IP protection in an FTA.

This narrow definition nevertheless would exclude *a priori* the most common and relevant cases—those where a TRIPS flexibility is undermined by a TRIPS-plus FTA rule—from any further discussion about conflict resolution tools and their application to the TRIPS-FTA relationship. Another counter-argument is that one must not equate the existence of a conflict with its resolution. in our context, the assumption that a TRIPS flexibility is in conflict with a TRIPS-plus rule which undermines the former's operation does not necessarily presume that this "conflict" must be resolved in favour of the TRIPS flexibility. Similar considerations have led the drafters of the ILC Report to adopt a wide notion of conflict which covers any "situation where two rules or principles suggest different ways of dealing with a problem."[56] While the important arguments above counsel a narrow conflict approach, different, equally valid views exist. A definite decision here is not necessary if one keeps in mind the two different options when analysing the existing conflict resolution tools. For the purpose of a thorough analysis of the fate of TRIPS flexibilities, the next section continues by assessing the relevant conflict norms in international law.

C. CONFLICT RULES IN INTERNATIONAL LAW

The resolution of a conflict between different treaty-based rules is primarily dependent on the applicable conflict resolution rules, which may derive from either of the two (or more) treaties or from general international law.[57] Before

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[55] For further details, see Part III, below.

[56] *See* ILC II, *supra* note 38, ¶ 25.

[57] *See* Pauwelyn, *supra* note 27, at 544–45.

this Article moves to an analysis of conflict rules in TRIPS and in TRIPS-plus FTAs, this section examines the application of general international law conflict norms to the relationship between TRIPS and TRIPS-plus FTAs. These norms, however, are relevant only to the extent that no specific conflict rules in either of the treaties—in our case TRIPS or TRIPS-plus FTAs—apply.

The ILC Report identifies legal maxims such as *lex specialis* (regarding relations between general and more specific rules), *lex posterior* (on relations between prior and subsequent rules), or *lex superior* (concerning relations between rules at different hierarchical levels) and their expressions in international law as primary conflict resolution tools. For the purpose of examining the relation between TRIPS and subsequent TRIPS-plus FTAs, the notions of *lex posterior* and *lex specialis*, and the general international law rules associated with them, are of primary relevance.[58] In international law, these conflict resolution tools are, *inter alia*, expressed in general principles of law (*lex specialis*) and in Article 41 and 30 VCLT (*lex posterior*).

With regard to TRIPS rules and subsequent TRIPS-plus IP provisions in FTAs, the *lex posterior* conflict rule demands primary attention since "the *lex posterior* principle is at its strongest in regard to conflicting or overlapping provisions that are part of treaties that are institutionally linked or otherwise intended to advance similar objectives (i.e., form part of the same regime)."[59] The expression of this principle in Article 41 VCLT concerns the question whether a multilateral treaty allows for some of its contracting parties to conclude subsequent agreements *inter se*, whereas Article 30 VCLT deals with priority in application between all types of subsequent treaties on the same subject matter. Thus, of all subsequent treaties on the same subject matter, Article 41 VCLT concerns only those situations where some of the contracting parties to a multilateral treaty modify their treaty relations amongst each other (*inter se*). For these *inter se* agreements, Article 41 VCLT addresses the "preliminary question" whether the prior multilateral treaty allows the conclusion of a bi- or plurilateral treaty. It provides:

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[58] Since the relation between TRIPS and subsequent TRIPS-plus FTAs does not concern preemptory rules of international law *ius cogens* (*see* VCLT, *supra* note 35, art. 53) or U.N. Charter provisions (which prevail over other international law rules, U.N. Charter art. 103), notions of *lex superior* are of limited relevance here.

[59] ILC I, *supra* note 28, ¶ 26. The ILC Report further notes that, in case of conflicts or overlaps between treaties in *different* regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them.

> 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>   (a) the possibility of such a modification is provided for by the treaty; or
>   (b) the modification in question is not prohibited by the treaty and:
>   (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>   (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
> 2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

In relation to the WTO/TRIPS Agreement, post-1995 FTAs with provisions on IP protection beyond TRIPS standards are such *inter se* agreements because they generally are concluded by some Members of the WTO to modify the TRIPS obligations amongst themselves—mainly by adopting stronger standards. This would make the FTA's applicability (in relation to TRIPS)[60] subject to the requirements of VCLT Article 41. TRIPS does not contain an explicit allowance or prohibition of *inter se* modifications.[61] Thus, under the two alternatives of Article 41:1(b) VCLT, TRIPS-plus FTAs

> (1) may not affect the enjoyment of TRIPS rights or obligations by other (non-FTA) WTO Members;

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[60] The ILC fragmentation report suggests that inconsistencies with the conditions set out by art. 41 VCLT does not necessarily lead to *invalidity* of the relevant *inter se* treaty norm, but that it should depend on an interpretation of the original treaty as to what consequences should follow. *See* ILC II, *supra* note 38, ¶ 319. In relation to the original multilateral treaty, one might generally assume mere *inapplicability* (instead of invalidity) of the relevant *inter se* treaty norm.

[61] TRIPS art. 71:2, concerns "Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO" and therefore does not concern *inter se* Agreements such as TRIPS-plus FTAs accepted only by some WTO Members.

(2) nor may they affect the effective execution of TRIPS' object and purpose.[62]

Based on the territoriality of IP rights, TRIPS-plus provisions in FTAs generally affect the domestic IP regimes of the FTA contracting parties only. Equally, TRIPS rights and obligations relate to domestic implementation only, so that *inter se* modifications can hardly affect other WTO Members.[63] The remaining question is whether any TRIPS-plus standard derogates from a TRIPS rule in a way that is incompatible with the TRIPS objectives expressed in Articles 7 and 8.[64] Given the very general terms used in the balancing objectives and public interest principles of TRIPS, this standard seems difficult to apply. Does it mean that VCLT Article 41:1(b)(ii) invalidates any TRIPS-plus standard that derogates from a TRIPS provision which is part of the balance expressed in Article 7 or allows effect to be given to the public interests addressed in Article 8? Since the effects of *inter se* modifications in the form of additional IP protection are generally confined to the national IP regimes of the modifying parties, this type of *inter se* derogation from TRIPS flexibilities as such cannot be viewed as incompatible with the "effective execution of the object and purpose of the treaty as a whole."[65] Instead, an *effect on other WTO Members* and their ability to implement the TRIPS objectives should be required for a finding of incompatibility. As argued in relation to the first option under Article 41:1(b) VCLT, such cases of negative impact on a WTO Member which is not a contracting party to the FTA will be very rare and exceptional.

Finally, under Article 41:2 VCLT, "the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."[66] Unless the FTA negotiating parties have discharged their notification duty with respect to all other WTO

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[62] VCLT, *supra* note 35, art. 41:1. On the application of Article 41 VCLT in relation to TRIPS and FTAs in general, see Andrew Mitchell & Tania Voon, *Patents and Public Health in the WTO, FTAs and Beyond: Tension and Conflict in International Law*, 43 J. WORLD TRADE 571 (2009).

[63] Unless, of course, in the rather unlikely case that the FTA would set standards below those of TRIPS. For a discussion on how TRIPS-plus rules on seizing goods in transit may affect the exercise of TRIPS flexibilities by other WTO Members, see Grosse Ruse-Khan, *supra* note 40, at 51–58.

[64] *See* Doha Declaration, *supra* note 7, ¶ 5(a), on the role of arts. 7 and 8 as object and purpose of TRIPS.

[65] VCLT, *supra* note 35, art. 41:1.

[66] *Id.* art. 41:1(b).

Members,[67] they are acting in violation of Article 41:2 VCLT. However, it seems doubtful that any inconsistency with this provision will have any (practical) effect. In sum, cases where TRIPS-plus FTAs may be inapplicable due to inconsistencies with Article 41 VCLT will be extremely rare.

VCLT Article 30, on the other hand, concerns the application of successive treaties on the same subject matter.[68] In its relevant paragraphs 2–4, Article 30 VCLT provides:

> 2. 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.
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.
> 4. When the parties to the later treaty do not include all the parties to the earlier one that:
> (a) as between States parties to both treaties the same rule applies as in paragraph 3;
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

VCLT Article 30:2 contains an exception from the general *lex posterior derogat legi priori* principle embodied in VCLT Articles 30:3 and 4. Article 30:2 applies to provisions which indicate the intention of the negotiating parties that, instead of the later, the earlier treaty shall prevail. Classic examples in the international IP context are Article 2:2 TRIPS or Article 1:2 of the WIPO Copyright Treaty, each of which states that its provisions shall not "derogate from existing obligations" under various preexisting multilateral IP treaties, such as the Berne Convention on the Protection of Literary and Artistic Works.[69] As will be

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[67] See the WTO notification mechanism regarding Regional Trade Agreements under art. XXIV GATT or art. V GATS at WTO Regional Trade Agreements Information System, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

[68] On the operation of art. 30 VCLT as a conflict norm, see ILC II, *supra* note 38, ¶ 251.

[69] *See, e.g.*, TRIPS art. 2:2 ("Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne

examined in more detail below, TRIPS-plus FTAs contain several variations on these types of conflict clauses. In the absence of such a clause, the general rule in Article 30:3 VCLT resolves conflicts between provisions deriving from subsequent treaties on the same subject matter in favour of the later treaty provision. Thus any subsequent TRIPS-plus FTA provision would prevail in its application over a TRIPS rule to the extent that these provisions are in conflict. However, this applies only for those contracting parties which are bound by both the earlier and the later treaty—in our case, only to those WTO Members which are equally bound by the subsequent FTA.[70] For WTO Members which are not bound by the potentially conflicting TRIPS-plus FTA rule, Article 30:4(b) VCLT makes clear that, regarding their relation to the FTA parties, TRIPS prevails. In essence, this is an expression of the general principle embodied in VCLT Article 34 that "a treaty does not create either obligations or rights for a third State without its consent."[71]

Finally, the notion of *lex specialis derogat legi generali* may function as a relevant conflict resolution tool between TRIPS and TRIPS-plus provisions in FTAs. As a general principle of (international) law, it suggests that, whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific since it often takes better account of the particular context addressed or creates a more equitable result.[72] Of course, the *lex specialis* principle only applies between those states which are bound by both norms—in this case the two international IP treaties. A classic example of application of *lex specialis* between provisions of distinct international IP treaties are those WIPO Copyright Treaty rules which clarify the application of certain more general rules of the Berne Convention in the digital network environment.[73] In relation to TRIPS and TRIPS-plus FTAs, one could assume that the often specific and very detailed provisions—for example, on the protection of test

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Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.").

[70] *See* VCLT, *supra* note 35, art. 30:4(a).

[71] *Id.* art. 34.

[72] ILC I, *supra* note 28, ¶ 5.

[73] An agreed statement concerning Article 1(4) WCT for example states:

> The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

WCT, *supra* note 3, Agreed Statement concerning Art. 1(4). Further, Articles 4 and 5 (and their respective Agreed Statements) clarify the application of the notion of "literary works" under Article 2 of the Berne Convention to software and databases.

data or geographical indications[74]—are *lex specialis* to the more general rules contained in TRIPS. In at least one instance, an FTA explicitly considers its IP provisions as specifying TRIPS.[75]

Such a result would nevertheless not necessarily entail that the TRIPS rule is set aside between the FTA partners. Being the more general rule, it "will remain valid and applicable and will, in accordance with the principle of harmonization . . ., continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter."[76] The ILC report further notes that, in scenarios where the special law might frustrate the purpose of the general law, where third party beneficiaries are negatively affected by the special law, and where the balance of rights and obligations established in the general law would be negatively affected by the special law, the general law prevails.[77] Especially the last situation may provide a relevant exception to the operation of the *lex specialis* rule in cases of TRIPS-plus FTA provisions which tilt the balance of rights and obligations mentioned in the TRIPS objectives in Article 7 too heavily in favour of rights holders. The scope of application of the *lex specialis* maxim hence depends on the individual TRIPS rule and its TRIPS-plus counterpart.

In sum, the general international law conflict rules do not offer conclusive solutions, especially for the relationship between TRIPS flexibility rules and TRIPS-plus FTA provisions which undermine their application. This follows from a narrow definition of conflict which would exclude *a priori* all tensions between an optional TRIPS right and a subsequent TRIPS-plus obligation which takes this right away in a FTA. Also, if one adopts—along the lines of the ILC report—a wider understanding of conflict, the general conflict resolution tools do not provide clear answers to the most pressing issues on the fate of TRIPS flexibilities. The next section therefore looks in detail at the specific "conflict resolution" clauses in TRIPS and TRIPS-plus FTAs.

III. CONFLICT NORMS IN THE TRIPS AGREEMENT

In addition to the conflict rules in general international law, the treaties

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[74] *See, e.g.*, EC–CARIFORUM EPA, *supra* note 5, art. 145; Dominican Republic–Central America–United States Free Trade Agreement [DR–CAFTA FTA], Aug. 5, 2004, 43 I.L.M. 514.

[75] *See* EU–Colombia–Peru Free Trade Agreement, Art. 196, Mar. 24, 2011 ("The provisions of this Title shall *complement and specify* the rights and obligations of the Parties under the TRIPS Agreement . . . ." (emphasis added)).

[76] ILC I, *supra* note 28, ¶ 9.

[77] *Id.* ¶ 10.

whose rules potentially clash also may contain relevant conflict rules. Such rules generally are *lex specialis* to those of general international law discussed above.[78] To the extent such conflict clauses exist in either TRIPS or subsequent FTAs, they determine the relationship between these treaties. In international IP law, Article 2:2 TRIPS is an example of a provision which establishes that certain preexisting multilateral IP treaties prevail over TRIPS in the sense that provisions in TRIPS Parts I–IV shall not be understood to derogate from obligations in these pre-existing treaties.[79] While this is a fairly clear-cut rule governing the relation between TRIPS and the most important pre-TRIPS multilateral treaties on substantive IP protection, it does not address in any way the relation between TRIPS and subsequent FTAs with provisions providing additional IP protection.

The main concept in international IP law which governs the relation amongst different agreements addressing the same subject matter is that of "minimum standards."[80] In principle, subsequent treaties can establish additional protection for IP, but may not curtail the protection provided for in earlier treaties. This leads to the often-criticised spiral of ever-increasing levels of IP protection.[81] In the second sentence of Article 1:1, TRIPS addresses this issue of additional protection beyond its own standards. It authorizes members to grant more extensive protection than TRIPS requires, with the qualification that such protection "*does not contravene* the provisions of the Agreement."[82] In the context addressed here, the primary importance of this qualification lies in its capacity to establish a *condition on the ability to introduce more extensive IP protection*; TRIPS-plus protection must not contravene TRIPS.[83]

The first question which arises is whether this TRIPS provision can be understood as a conflict rule between TRIPS and subsequent TRIPS-plus FTAs. Since Article 1:1 TRIPS directly applies to the ability to implement more extensive protection in *domestic* law only, findings of contravention would not

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[78] *See* Pauwelyn, *supra* note 27, at 544–45.

[79] In this regard, Article 2:2 TRIPS is a conflict clause on the priority of application of subsequent treaties in the sense of Article 30:2 VCLT; *see* Part II.C above.

[80] *See* Part I above.

[81] *See* Kur & Grosse Ruse–Khan, *supra* note 11, at 8–14.

[82] TRIPS art. 1:1. In full, the second sentence of Article 1:1 states: "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement."

[83] For an analysis of this qualification and its implications for the principle of minimum standards, see Henning Grosse Ruse–Khan, *Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection*, 1 J. TRADE, L. & DEV. 56 (2009), *available at* http://ssrn.com/abstract=1457416.

amount to inconsistency with the TRIPS-plus FTA rule as such. Indirectly, however, Article 1:1 TRIPS also affects the international plane. While countries may agree to TRIPS-contravening TRIPS-plus provisions in FTAs without directly violating the wording of Article 1:1 TRIPS, any subsequent domestic implementation of IP protection which "contravenes" TRIPS provisions would be inconsistent with TRIPS. In light of this linkage, the notion of *pacta sunt servanda*[84] should prevent States from agreeing to international obligations whose implementation would conflict with other treaty obligations—in this case Article 1:1 TRIPS. The WTO Director General, Pascal Lamy, also acknowledged the relevance of Article 1:1 TRIPS for the relationship between TRIPS and TRIPS-plus FTAs when he referred to this provision to address the legality of ACTA from a WTO/TRIPS perspective.[85] In addition, several developing countries referred to the TRIPS notion of "non-contravention" in the TRIPS Council Meeting on June 8–9, 2010.[86] On the relation between TRIPS and TRIPS-plus FTAs, such as ACTA, the Indian Delegate stated:

> TRIPS plus measures cannot be justified on the basis of Art 1:1 since the same provision also states that more extensive protection may only be granted "provided that such protection does not contravene the provisions of this Agreement." In addition to laying certain minimum standards, TRIPS Agreement also provides "ceilings", some of which are mandatory and clearly specified in the TRIPS Agreement.[87]

The Chinese delegate equally stressed that, while generally TRIPS establishes "only minimum standards of IP protection," it also constrains the ability of WTO Members to foresee more extensive protection—*inter alia*, by requiring

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[84] *See* VCLT, *supra* note 35, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

[85] In a response to Members of the European Parliament which demanded a WTO enquiry into ACTA, the WTO Director General Pascal Lamy responded by referring to the second sentence of Article 1:1 TRIPS in order to describe the relation between ACTA and the WTO/TRIPS Agreement. While Lamy did rely primarily on the general ability of WTO members to introduce additional IP protection, he also noted the qualification that this is subject to such protection not "contravening" TRIPS provisions. Letter from Pascal Lamy, Director General, World Trade Organization, to European Union Parliament Members (May 4, 2010), *available at* http://keionline.org/sites/default/files/WTO-Lamy_Answer-to-MEP-letter.pdf.

[86] *See* Int'l Center for Trade & Sustainable Dev., *Animated TRIPS Council Meeting Tackles Public Health, ACTA, Biodiversity*, BRIDGES WKLY. TRADE NEWS DIGEST, June 16, 2010, *available at* http://ictsd.org/i/news/bridgesweekly/78201/ [hereinafter ICTSD].

[87] Intervention by India, *Minutes of the Council for TRIPS Meeting*, *supra* note 8, ¶ 265.

that "such protection shall not contravene the provisions of TRIPS."[88] These views were shared by delegates from Peru, South Africa, Egypt, Bolivia, Ecuador, and from other developing countries.[89] In sum, there are convincing arguments in favour of understanding the second sentence of Article 1:1 TRIPS as the relevant conflict rule concerning any international obligation demanding additional IP protection.

This leads to the question of when an FTA rule obliging implementation of TRIPS-plus standards which inhibit or prevent the exercise of flexibilities in TRIPS "contravenes" the respective TRIPS flexibility provision. Therefore, one needs to assess which form of additional IP protection has the potential to "contravene" TRIPS.[90] Without completely excluding other arguments for findings of contravention,[91] instances where this qualification of Article 1:1 TRIPS applies are most likely to be found in cases where one can point to conflicts with a *mandatory* TRIPS provision instead of an *optional* one. Can a TRIPS-plus rule "contravene" optional TRIPS flexibilities—for example, by mandating levels of IP protection whose implementation inhibits or curtails a WTO Member's ability to rely on a flexibility foreseen by TRIPS? As argued in Part II.B above,[92] this is not the case. Any other result contradicts the overall notion of optional flexibilities in TRIPS: a WTO member may choose to implement them in its domestic IP laws (i.e., to exercise its right), but may equally choose not to do so. If a WTO member thus decides to waive its right to use a certain flexibility which it has under TRIPS, this is equally a way of exercising its right and part of the flexibility TRIPS provides. Applying the notion of "contravening" in Article 1:1 TRIPS so as to prevent a WTO Member from doing so in effect turns the optional rule into a mandatory one.[93]

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[88] Intervention by China, *id.* ¶ 252.

[89] ICTSD, *supra* note 86.

[90] For a more detailed analysis of this term, see Grosse Ruse-Khan, *supra* note 83, at 67–73.

[91] See in particular the idea expressed in ICTSD & UNCTAD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT: AN AUTHORITATIVE AND PRACTICAL GUIDE TO THE TRIPS AGREEMENT 24 (2005) that pressure to accept TRIPS-plus standards in FTA negotiations might contravene the object and purpose of the WTO Agreement and TRIPS to provide a secure framework for the conduct of international trade relations. On the question of whether political pressure to adopt TRIPS-plus is relevant in the context of Article 1:1, see below.

[92] The discussion in Part II.B deals with the similar question of what constitutes a relevant "conflict" of norms in the TRIPS—FTA context, while this Part looks at the notion of "contravening" as a *conflict resolution tool.*

[93] In the discussion on the most appropriate understanding of norm conflict in Part II.B above, strategic arguments in favor of a wide definition of conflict may call for a different result in order not to exclude *a priori* the relation between TRIPS flexibilities and TRIPS-plus FTA rules from further conflict analysis. In the end, however, when assessing which provisions actually prevail in this relationship, the arguments in favor of a wide definition of "conflict" have no bearing on the

These findings remain valid even when the domestic TRIPS-plus rule results from an FTA imposing TRIPS-plus obligations. While most (developing) countries agree to such obligations only in order to obtain preferential market access concessions in areas of their interests, they also consent formally to the IP obligations which are often *conditio sine qua non* for the preferential treatment they strive for. This assessment does not ignore the political bargaining and use of economic might by dominant trade powers and the consequence that countries are often "bullied" into signing TRIPS-plus FTAs.[94] It seems very difficult, however, to rely on the notions of norm conflict in international law to interfere in this process or to safeguard the "free will" (or perceived best interests) of developing WTO Members in order to uphold TRIPS flexibilities.[95] In this regard, the phrase in the second sentence of Article 1:1 TRIPS, which states that WTO Members "may, *but* shall *not be obliged to*" introduce additional IP protection beyond TRIPS, also is arguably of limited help.[96] While it may serve as a tool against unilateral pressure to adopt TRIPS-plus IP protection, pressure tactics in bilateral negotiations will be unlikely to suffice if, in the end, there is a formal *agreement* signed between the parties. Given that these FTAs are the result of reciprocal concessions, however "unfair" and uneven they may be, international law (unfortunately) does not have the appropriate tools to undo the uneven political and economic positions in the negotiation of international treaties.

The "non-contravention" qualification in the second sentence of Article 1:1 TRIPS hence cannot function to safeguard TRIPS flexibilities for WTO Members who decide not to exercise them. Since a TRIPS-plus rule in national law thus does not contravene an (optional) TRIPS flexibility norm, the conflict resolution rule in Article 1:1 TRIPS does not prevent, but allows obligations in TRIPS-plus FTAs to curtail a WTO Member's ability to exercise these

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appropriate understanding of the TRIPS notion of "contravene" in Article 1:1, 2nd sentence of TRIPS. They therefore cannot affect the analysis in this section.

[94] *See* Drahos, *supra* note 6; PEDRO ROFFE, BILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE CHILE-USA FREE TRADE AGREEMENT (2004), *available at* http://www.quno.org/geneva/pdf/economic/Issues/Bilateral-Agreements-and-TRIPS-plus-English.pdf; Susan K. Sell, *Industry Strategies for Intellectual Property and Trade: The Quest for TRIPs and Post-TRIPs Strategies*, 10 CARDOZO J. INT'L & COMP. L. 79 (2002).

[95] By analogy to notions in private law to protect the weaker party (consumers, employees, tenants), one could instead think about extending the (international) law of treaties to address such issues. In the end, however, in the absence of a central authority in international relations between countries, international law is not the all-powerful tool to prevent political pressure and the exercise of economic might.

[96] TRIPS art. 1:1 (emphasis added). For a comprehensive discussion on this issue, see NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF PATENT RIGHTS 107–13 (3d ed. 2010).

flexibilities. Only where a TRIPS-plus rule conflicts with binding limits or "ceilings" to additional protection in TRIPS does it "contravene" TRIPS provisions so that, under Article 1:1 TRIPS, the TRIPS maximum standard prevails in application.[97] In sum, from the perspective of TRIPS, TRIPS-plus FTAs may certainly triumph over TRIPS flexibilities.

IV. CONFLICT NORMS IN TRIPS-PLUS FTAS

The final body of rules in which to look for a relevant conflict norm is the general and IP-specific provisions in FTAs. On the one hand, TRIPS-plus FTAs often contain provisions which undermine or limit the ability of the contracting WTO Members to use the policy space provided by TRIPS. On the other, especially the newer generation of U.S. and EU FTAs contain clauses which may function to safeguard some of the TRIPS flexibilities. Again, the question arises whether these provisions—understood as conflict clauses—lead TRIPS flexibilities to prevail over TRIPS-plus FTA provisions to the extent they are in conflict. In the relation between the FTA parties, these conflict clauses are *lex specialis* to the general rule in Article 1:1 TRIPS. If their application does safeguard TRIPS flexibilities, this result in turn arguably prevails over the one flowing from the application of the more general TRIPS conflict norm.[98] In the following section, these FTA provisions are divided into several groups based on how they define the relation to TRIPS or specific TRIPS flexibilities.

A. AFFIRMING WTO/TRIPS (RIGHTS AND) OBLIGATIONS

The first and most traditional group of conflict clauses generally affirm the parties' intentions to act consistent with WTO obligations in general or with those deriving from TRIPS in particular. In most instances, this affirmation also extends to "rights" granted under the WTO/TRIPS Agreements.

A prominent example where the conflict rule refers to WTO/TRIPS *obligations* only is Article 1 ACTA which states: "Nothing in this Agreement shall derogate from any international obligation of a Party with respect to any other Party under existing agreements to which both Parties are party, including the TRIPS Agreement."[99] First and foremost, ACTA hence would have to be interpreted in a manner consistent with TRIPS. If that is not possible, the

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[97] Grosse Ruse-Khan, *supra* note 83, at 73.

[98] On the operation of the *lex specialis* principle to determine priority in application of the more specific rule (and its limitations), see Part III.C.

[99] ACTA, *supra* note 39, art. 1.

ACTA draft expresses the intention of the negotiating parties not to derogate from any WTO/TRIPS obligations. Interestingly, the final ACTA text uses only the term "obligations"—not "rights and obligations" as earlier versions of ACTA did.[100] This indicates that—from its own perspective—ACTA prevails over *optional* TRIPS flexibilities. The same result applies to other conflict clauses which only refer to obligations owed under TRIPS.[101]

However, in all U.S. FTAs examined for this research, the conflict clause concerns both *rights and* obligations under WTO / TRIPS. The contracting parties usually include a general provision where they assert "existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which both Parties are party, including the WTO Agreement."[102] In addition, in an IP-specific rule in some FTAs the "parties affirm their rights and obligations with respect to each other under the TRIPS Agreement."[103] Similarly, some clauses used in EU FTAs refer to both "rights and obligations between the Parties under the TRIPS Agreement."[104] Also, most Japanese

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[100] Based on the July ACTA text, Article 1 "Relation To Other Agreements" stated that "nothing in this Agreement shall derogate from [N.Z./Sing./EU: any existing rights and] any obligation of a party with respect to any other Party under existing agreements, including the WTO Agreement of Trade-Related Aspects of Intellectual Property Rights." ACTA–July 1, 2010 Consolidated Text: Informal Predecisional/Deliberative Draft, Art. 1.1, *available at* http://sites.google.com/site/iipenforcement/acta (follow "Consolidated ACTA Text, July 1, 2010" hyperlink). In the ACTA draft leaked after the Washington D.C. round of negotiations in the end of August 2010, however, Article 1.1 had again been changed to refer only to "obligations." ACTA–August 25, 2010 Consolidated Text: Informal Predecisional/Deliberative Draft, Art. 1.1, *available at* http://sites.google.com/site/iipenforcement/acta (follow "Full Leaked Text Dated August 25, 2010" hyperlink), Art.1:1, at p. 3; Grosse Ruse–Khan, *supra* note 40, at 63–65.

[101] *See, e.g.*, EU–CARIFORUM EPA, *supra* note 5, art. 139.1; EU–Chile Association Agreement Art. 170.1(a)(i), Nov. 18, 2002, 2002 O.J. (L 352) 3 (expressing intention of the contracting parties to "[e]nsure adequate and effective implementation of the obligations arising from . . . TRIPS").

[102] United States–Singapore Free Trade Agreement Art. 1.1(2), May 6, 2003, 42 I.L.M. 1026; U.S.–Australia FTA, *supra* note 46, art. 1.1(2); United States–Bahrain Free Trade Agreement Art. 1.2(1), Sept. 14, 2004, 44 I.L.M. 544; United States–Morocco Free Trade Agreement Art. 1.2(1), June 15, 2004, 44 I.L.M. 544; United States–Oman Free Trade Agreement Art. 1.2(1), Jan. 19, 2006; United States–Jordan Free Trade Agreement Art. 1.2, Oct. 24, 2000, 41 I.L.M. 63; DR–CAFTA, *supra* note 74, art. 1.3(1); United States–Panama Trade Promotion Agreement Art.1.3(1), June 28, 2007; United States–Chile Free Trade Agreement Art. 1.3, June 6, 2003, 42 I.L.M. 1026; United States–Colombia Trade Promotion Agreement Art. 1.2, Nov. 22, 2006; United States–Korea Free Trade Agreement Art. 1.2(1), June 30, 2007; United States–Peru Trade Promotion Agreement Art. 1.2(1), Apr. 12, 2006.

[103] *See, e.g.*, U.S.–Australia FTA, *supra* note 46, art. 17.1(3); DR–CAFTA, *supra* note 74, art. 15.1(7); U.S.–Chile FTA, *supra* note 102, arts. 17.1(5), 1.3, ch. 17 (IP) pmbl. ("nothing shall derogate from"); U.S.–Colombia TPA, *supra* note 102, art. 16.1(6); U.S.–Korea FTA, *supra* note 102, art. 18.1(2).

[104] *See, e.g.*, EU–Colombia–Peru FTA, *supra* note 75, art. 186(1).

FTAs contain such a clause—however, often with the addition that "[i]n the event of any inconsistency between this Agreement and the WTO Agreement, the WTO Agreement shall prevail to the extent of the inconsistency."[105] Again, the question arises whether such explicit conflict clauses, as well as the further inclusion of treaty rights under WTO/TRIPS Agreements, can function to safeguard TRIPS flexibilities as far as their operation is undermined by TRIPS-plus FTA provisions.

For the following reasons, however, this seems unlikely. First, the contracting parties may understand the term "rights and obligations" with respect to each other as describing a (treaty) obligation in international law from a dual perspective where the obligation of one party is a right of another party.[106] Then the term would still apply only to *obligations* in international (treaty) law and not as a safeguard for TRIPS flexibilities as optional treaty rights. Second, even if one considers that the term "rights" applies to TRIPS flexibilities, it is limited to rights which the FTA parties owe to another. If these countries decide to waive rights (by not exercising certain TRIPS flexibilities), then any TRIPS-plus FTA provision which undermines the use of such a flexibility would arguably not derogate from a treaty right affirmed in these conflict clauses. This argument also applies to the explicit conflict clauses in most Japanese FTAs which give preference to the WTO Agreement to the extent of any inconsistency with the FTA; inconsistency with TRIPS (as an agreement annexed to the WTO Agreement) does not exist where the contracting parties agree not to exercise a right under TRIPS. Finally, as far as FTAs contain specific TRIPS-plus rules whose interpretation necessarily leads to an outcome that undermines the exercise of TRIPS flexibilities, the operation of the conflict rules described above cannot lead to a result which renders the specific TRIPS-plus provision inutile or ineffective.[107] It thus remains rather

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[105] *See, e.g.*, Japan–Indonesia Economic Partnership Agreement Art. 12, Aug. 20, 2007; Japan–Thailand Economic Partnership Agreement Art. 11, Apr. 3, 2007; Japan–Philippines Economic Partnership Agreement Art. 11, Sept. 9, 2006; Japan–Malaysia Economic Partnership Agreement Art. 11, Dec. 13, 2005; Japan–Vietnam Economic Partnership Agreement Art. 9, Dec. 12, 2008.

[106] For example, the obligation not to introduce a system of international exhaustion in the domestic law of one contracting party can be viewed as a right of the other contracting party to demand that no such system of exhaustion is provided in domestic law.

[107] This follows from the application of the principle of good faith in treaty interpretation (as embodied in VCLT, *supra* note 35, art. 31(1)) which is *inter alia* an expression of the principle of *pacta sunt servanda* (*id.* art. 26) that in turn embodies the principle of effectiveness. *See* [1996] 2 Y.B. Int'l L. Comm'n 219, U.N. Doc. A/CN.4/SERA/1966/Add.1, *and* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 119–20 (2d ed. 1984). Notions of good faith and of giving effect to each provision of the treaty prohibit an interpretation of one treaty provision which renders another treaty provision ineffective or inutile. *See also* Appellate Body

doubtful that the FTA clauses simply affirming "rights and obligations" can operate to prevent specific TRIPS-plus rules in FTAs from undermining TRIPS flexibilities. Only where TRIPS-plus provisions are open-textured or ambiguous in their impact on TRIPS can such conflict clauses demand an interpretation which safeguards TRIPS flexibilities.[108] In sum, these traditional FTA conflict clauses cannot be applied to uphold an optional provision in TRIPS which the IP Chapter provisions of that very same FTA override.

B. REFERENCES TO THE DOHA DECLARATION

Another type of provision that appears in the more recent U.S. and EU FTAs contains various types of references to the Doha Declaration on TRIPS and Public Health.[109] Since the Doha Declaration in paragraph 5 lists some of the most important flexibilities that TRIPS contains in relation to public health matters in particular,[110] such provisions could function to uphold these flexibilities over TRIPS-plus provisions in FTAs.

The first category of "Doha-references" are of a general nature. The FTA contracting parties "recogni[se] the principles set out in,"[111] "affirm their commitment to,"[112] or "recognise the importance of"[113] the Doha Declaration. In the same vein, in the ACTA preamble, the negotiating parties agree to ACTA while: "*Recognizing* the principles set out in the Doha Declaration on the TRIPS Agreement and Public Health, adopted on November 14, 2001, by the WTO at the Fourth WTO Ministerial Conference, held in Doha, Qatar."[114] The principles expressed in the Doha Declaration concern, *inter alia*, a public health-

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Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121 WT/DS58/AB/R (Nov. 6, 1998).

[108] This result, however, already follows from the principle of harmonious interpretation as discussed in Part II *supra*. The same is true for the more specific EU–Colombia–Peru FTA, *supra* note 75, art. 196(2), which further provides "[t]he provisions of this Title shall complement and specify the rights and obligations of the Parties under the TRIPS Agreement and other multilateral agreements related to intellectual property to which the Parties are party, and therefore, *no provision of this Title will contradict or be detrimental to the provisions of such multilateral agreements*." (emphasis added). Apart from expressing the principle of *lex specialis*, the provision calls—to the extent possible—for a harmonious interpretation which takes TRIPS flexibilities into account.

[109] Doha Declaration, *supra* note 7.

[110] *See* Part I above.

[111] U.S.–Chile FTA, *supra* note 102, pmbl. to ch. 17.

[112] U.S.–Colombia TPA, *supra* note 102, art. 16.13.1; U.S.–Peru TPA, *supra* note 102, art. 16.13:1; U.S.–Korea FTA, *supra* note 102, art. 18.11.1.

[113] EC–CARIFORUM EPA, *supra* note 5, art. 147(b).

[114] ACTA, *supra* note 39, pmbl.

supportive interpretation and implementation of TRIPS.[115] In making this connection, WTO Members reaffirmed "the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose."[116] Hence, such general references to the Doha Declaration in FTAs can function primarily as a tool which demands an *interpretation and implementation* of FTA provisions that does not undermine the flexibilities listed in the Doha Declaration. Similar to the WTO/TRIPS consistency clauses discussed above, this may work well in cases of open-textured and ambiguous TRIPS-plus obligations in FTAs.[117] However, it will not be particularly helpful in the vast number of cases where specific and concise TRIPS-plus provisions in FTAs curtail or inhibit the reliance on TRIPS flexibilities.[118]

A more promising clause is Article 197:2 of the EU–Colombia–Peru FTA which states:

> The Parties recognize the importance of the [Doha Declaration] and especially the Doha Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 by the Ministerial Conference and its subsequent developments. In this sense, *in interpreting and implementing the rights and obligations under this Title, the Parties shall ensure consistency with this Declaration.*[119]

Again, it emphasizes interpretation and implementation of the FTA as the primary field of operation for "recognising" the importance of the Doha Declaration for the FTA. However, beyond the general Doha-references discussed above, the parties are under a binding legal obligation to "ensure consistency" with the Doha Declaration. How can this be aligned with specific TRIPS-plus FTA obligations in case they undermine the use of any of the flexibilities listed in the Doha Declaration? An example of such a contradiction is Article 231 of the EU–Peru–Colombia FTA, which demands a minimum of

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[115] Doha Declaration, *supra* note 7, ¶ 4 (stating that TRIPS "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all").

[116] *Id.*

[117] For an example of such an interpretation (there in relation to the term "exceptional circumstances" in Article 18 ACTA), see Grosse Ruse–Khan, *supra* note 40, at 37–41.

[118] As argued in Part 1, general conflict clauses in FTAs, including these general references to the Doha Declaration, cannot lead to a result which renders the specific TRIPS-plus FTA provisions inutile or ineffective.

[119] EU–Colombia–Peru FTA, *supra* note 75, art. 197(2) (emphasis added); *see also* Draft EU–India FTA Text, art. 13.2(2), *available at* http://cis-india.org/advocacy/ipr/upload/india-eu-fta-ipr-july-2010/at_download/file.

five years of test data exclusivity for pharmaceutical products.[120] This TRIPS-plus rule can prevent Peru or Colombia from effectively exercising the compulsory licensing flexibilities set out in the Doha Declaration. Such flexibilities—allowing states to determine freely the grounds for compulsory licenses—are *de facto* useless when, based on test data exclusivity, no generic production can take place to improve affordable access to medicines. To resolve this conflict, the Doha-reference in Article 197:2 should be understood to allow a wider understanding of the "[e]xceptions for reasons of public interest, situations of national emergency or extreme urgency, when it is necessary to allow access to those data to third parties" foreseen in Article 231:4.[121] To live up to the obligation to "ensure consistency" with the Doha Declaration, these exceptions must allow a real and effective use of all the TRIPS flexibilities mentioned in the Doha Declaration.[122] In sum, the added value of Doha-references—such as Article 197:2 of the EU–Colombia–Peru FTA—is that they are more concrete and specific in indicating *how* the Doha Declaration is relevant for the FTA. They are hence more effective in safeguarding TRIPS flexibilities because they have a greater impact on the appropriate understanding of TRIPS-plus FTA provisions. Since even a concise and detailed TRIPS-plus provision in an FTA will seldom explicitly prohibit reliance on any of the four TRIPS flexibilities mentioned in the Doha Declaration, FTA provisions may not undermine those flexibilities.

Yet another category of Doha-references in FTAs appear particularly promising at first sight. They allow that "a Party may take measures to protect public health in accordance with . . . the Declaration on the TRIPS Agreement and Public Health."[123] However, this is "[n]otwithstanding subparagraphs (a), (b), and (c)" of the relevant TRIPS-plus FTA rule, which in essence oblige the FTA contracting parties to introduce a "reasonable period" of test data exclusivity. That normally is to be understood as five years.[124] Hence the right to rely on TRIPS flexibilities which flows from these Doha-references is subject to the obligation not to interfere with the specific obligation to introduce test data exclusivity. Since the contextual placement of the Doha reference in the

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120 EU–Colombia–Peru FTA, *supra* note 75, art. 231(2).

121 *Id.*

122 In the context of the EU–India FTA, the EU Commission confirms this result by assuring that "[d]ata exclusivity will not hamper the effective use of a compulsory licence. . . . More specifically, in case of conflict between data exclusivity rules and compulsory licensing, the latter would override the former." *See* EU Comm'n, *supra* note 20, ¶ 4.

123 *See* U.S.–Colombia TPA, *supra* note 102, art. 16.10:2(e); U.S.–Peru TPA, *supra* note 102, art. 16.10:2(e); U.S.–Korea FTA, *supra* note 102, art. 18.g:3.

124 *See* U.S.–Colombia TPA, *supra* note 102, art. 16.10:2(b); U.S.–Peru TPA, *supra* note 102, art. 16.10:2(b); U.S.–Korea FTA, *supra* note 102, art. 18.g:2.

last subparagraph of the test data provision indicates that it only applies to this provision, one may question what independent value it can have after all. One could interpret the "notwithstanding test" in a way that any measure taken cannot affect the protection for test data at all. A more liberal reading, however, would allow taking any measure in accordance with the Doha Declaration (e.g., a compulsory license based on Article 31 TRIPS) as long it is within the interpretative boundaries of the provision on test data. Here, a wider understanding of "reasonable period" and "normally" could allow compulsory licenses for a patented drug as an exceptional, public health–motivated situation which does not interfere with the "reasonable" test data exclusivity period. Again, appropriate solutions depend heavily on an implementation and interpretation which adopts creative ways to give effect to the Doha-references.

Finally, some of the recent FTAs contain language which is similar or identical to parts of the Doha Declaration. For example, a section in the "Understanding Regarding Certain Public Health Measures" in several recent U.S. FTAs states:

> The *obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health* by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS, tuberculosis, malaria, and other epidemics as well as circumstances of extreme urgency or national emergency. *Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and, in particular, to promote access to medicines for all.*[125]

In a similar manner, Article 139:2 of the EC–CARIFORUM EPA assures that "nothing in this Agreement shall be construed as to impair the capacity of the Parties and the Signatory CARIFORUM States to promote access to medicines."[126] A detailed analysis of the implications of these provisions is well beyond the scope of this Article.[127] Compared to the Doha-references, they

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[125] U.S.–Colombia TPA, *supra* note 102, art. 16.13:2; U.S.–Peru TPA, *supra* note 102, art. 16.13:2; U.S.–Korea FTA, *supra* note 102, art. 18.13:2 (emphasis added) which are, in the emphasized parts, almost identical to para. 4 of the Doha Declaration, *supra* note 7.

[126] EU–CARIFORUM EPA, *supra* note 5, art. 139(2), which also has the same core meaning as para. 4 of the Doha Declaration.

[127] For a more detailed analysis of the EU–CARIFORUM EPA, article 139:2, see Henning Grosse Ruse–Khan, *The Concept of Sustainable Development in International IP Law — New Approaches*

reiterate important principles of the Doha Declaration and transplant them into the FTA context instead of indirectly referring to them or to the flexibilities mentioned in the Declaration. While this may be less effective for safeguarding these flexibilities against TRIPS-plus FTA provisions, the Doha-language transplanted here can have an even further-reaching impact on the FTA obligations. It may entail a right of the contracting parties to adopt public health or nutrition protecting measures—even if these measures are inconsistent with individual IP obligations in the FTA. Or, it may mean that such individual obligations must be *interpreted and implemented* in a way that allows domestic measures to protect public health and nutrition. Given the reference to interpretation and implementation as the means for ensuring the right to protect public health in the U.S. FTA quote above, the latter option appears preferable. Also, for the EU EPA provision, its title ("Nature and Scope of Obligations")[128] speaks to an interpretative function for that provision. The nature and scope of individual IP obligations in the EPA must be such that they allow the protection of public health and nutrition and must not impair access to medicines.[129]

In sum, the various types of Doha-references in FTAs can go a certain way to safeguarding TRIPS flexibilities. The extent to which they can perform such a safeguarding function depends on the type of reference at hand. In general, the main feature of the Doha Declaration that allows the creation of policy space within TRIPS—mainly *by interpretation and implementation*[130]—equally affects the role Doha-references can play in TRIPS-plus FTAs. They function primarily as a tool which demands an interpretation and implementation of FTA provisions that does not undermine the flexibilities listed in the Doha Declaration. Doha references thus guide the notion of "harmonious interpretation" towards an understanding which recognises TRIPS flexibilities. The more specific the TRIPS-plus obligations in FTAs are, however, the fewer the options are for such an interpretative approach. On the other hand, the more specifically and demandingly a clause refers to the Doha Declaration, the more effective it is in safeguarding TRIPS flexibilities.

Beyond its role as a potential safeguard for TRIPS flexibilities, another important effect of the Doha-references is that they establish a (legal) relationship between the Doha Declaration and the FTA IP provisions. Depending on the type of Doha reference, this is instrumental in clarifying the

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from EU Economic Partnership Agreements?, MAX PLANCK PAPER SERIES ON INTELL. PROP., COMP. & TAX L. 10-04, 22–24, *available at* http://ssrn.com/abstract=1542486.

[128] EU–CARIFORUM EPA, *supra* note 5, art. 139(2).

[129] Grosse Ruse–Khan, *supra* note 127, at 23.

[130] Doha Declaration, *supra* note 7, ¶ 4.

legal status of the Doha Declaration as an interpretative instrument, as well as a source of law in its own right.[131] Again, the more concretely and specifically an FTA refers to the Doha Declaration, the greater will be its relevance for the interpretation of the FTA IP provisions. Furthermore, those FTAs which transplant parts of the Doha Declaration into the FTA treaty text "internalise" and integrate the Doha Declaration, allowing it to become part of treaty law. The Doha Declaration hence is upgraded from a mere source of external guidance (relevant for interpretation)[132] to being a part of the treaty provisions. As part of treaty law, it is part of the treaty's rights and obligations and can therefore have a greater and more direct impact on IP obligations in FTAs.[133]

C. REFERENCES TO (SPECIFIC) TRIPS FLEXIBILITIES

The third and final category of rules examined here are those which refer to specific TRIPS provisions that offer policy space or to TRIPS flexibilities in general. A good example of the latter category is Article 197:1 of the EU–Peru–Colombia FTA which states:

> Having regard for the provisions of this Title, *each Party may*, in formulating or amending its laws and regulations, *make use of the exceptions and flexibilities permitted by the multilateral intellectual property agreements*; particularly when adopting measures necessary to protect public health and nutrition, and to guarantee access to medicines.[134]

The text highlighted in italics gives the impression that Article 197:1 allows the FTA parties to rely on exceptions and flexibilities permitted by any multilateral IP treaty—including TRIPS. Although the provision contains

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[131] On the debate about the legal status of the Doha Declaration, see Frederick Abbot, *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO*, 5 J. INT'L ECON. L. 469, 491–92 (2002); Henning Grosse Ruse–Khan, *Proportionality and Balancing within the Objectives of Intellectual Property Protection*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS 161, 184 (P. Torremanns ed., 2008). *See generally* Steve Charnovitz, *The Legal Status of the Doha Declaration*, 5 J. INT'L ECON. L. 207 (2002).

[132] In the context of TRIPS, the Doha Declaration should be understood as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" in the sense of Article 31:3(a) VCLT which hence "shall be taken into account, together with the context" in the process of TRIPS interpretation. Grosse Ruse–Khan, *supra* note 131, at 184.

[133] Thanks to Margaret Chon for emphasising this point.

[134] EU–Columbia–Peru FTA, *supra* note 75 (emphasis added).

several ambiguities (what constitutes an "exception"—and, more importantly, what is a "flexibility"?), this fact arguably works in favor of the FTA party invoking this provision. The absence of any definition of the term "flexibilities" allows each party significant discretion to rely on almost any provision in an international IP agreement which offers more policy space than the FTA provisions. Against this background, the *chapeau* clause "[h]aving regard for the provisions of this Title" functions to limit the policy space in relying on anything understood as a "flexibility" in international IP law. Making use of TRIPS flexibilities hence cannot override TRIPS-plus clauses in the FTA. This means that, where FTA provisions contain detailed and concrete obligations to protect IP rights, they prevail over the permission to rely on exceptions and flexibilities to the extent of a conflict. However, it also means that, where those obligations are ambiguous or of general nature, they must be interpreted in light of the right to rely on (TRIPS) flexibilities.[135] Wherever possible, provisions like Article 197:1 thus allow an interpretation and implementation of the FTA obligations that aligns with the existing exceptions and flexibilities in multilateral IP treaties.

A similar approach is taken in Article 17.4:10(c) of the U.S.–Australia FTA, which allows the contracting parties to rely on exceptions and limitations under TRIPS and other international IP treaties.[136] It provides: "unless otherwise specifically provided in this Chapter, nothing in this Article shall be construed as reducing or extending the scope of applicability of the limitations and exceptions permitted under the agreements referred to in Articles 17.1.2 and 17.1.4 and the TRIPS Agreement."[137] The impact of this provision is, however, more limited. First, it applies only to copyright protection obligations in Article 17.4 of the FTA. Second, it refers to exceptions and limitations only—not to the broader notion of flexibilities. Article 17.4:10(c) hence merely allows states to rely on copyright exceptions and limitations contained in, *inter alia*, the Berne Convention and TRIPS—and only to the extent that the FTA IP chapter does not specifically provide otherwise. Since the latter is the case particularly for exceptions to the protection of technological protection measures and digital rights management information,[138] its practical importance is rather limited.

Another example is Article 15 of the Draft EU–India FTA stating that "[e]ach Party in its laws and regulations shall provide for protection of

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[135] See also the arguments concerning the EU–Columbia–Peru FTA, made in Part III above, which are to the same effect as those made in relation to the Doha-reference in Article 197:2 of the same EU–Colombia–Peru FTA.

[136] U.S.–Australia FTA, *supra* note 46, art. 17.4:10(c).

[137] *Id.*

[138] *Id.* art. 17.4(7)(e), (f), (8)(b).

undisclosed information *in accordance with and subject to the flexibilities in the TRIPS agreement.*"[139] Again, the field of operation for this clause is limited because it applies only to the protection of undisclosed information. The obligation to provide for this form of IP protection, however, is made subject to the right to rely on TRIPS flexibilities.[140] It means that, for example, the protection of test data submitted for the purpose of obtaining marketing approval for pharmaceutical products cannot interfere with the public health–related flexibilities of TRIPS—such as the right to grant compulsory licenses. In order to give effect to this clause, it should be further understood that patent-related flexibilities in TRIPS impose limits to the protection of undisclosed information and that the latter cannot make the former meaningless.[141] The EU Commission has confirmed such an interpretation in a Question and Answer paper on the EU–India FTA to allay fears and concerns expressed by civil society groups over the impact that FTA might have on access to medicines in India and other developing countries which rely on India for affordable medicines. The paper states:

> Data exclusivity will not hamper the effective use of a compulsory licence. The EU has proposed a clause that will guarantee that no provision of the FTA will prevent India from using the flexibilities contained in the TRIPS Agreement. More specifically, in case of conflict between data exclusivity rules and compulsory licensing, the latter would override the former.[142]

ACTA offers another, different example of clauses referring to TRIPS flexibilities. Its Article 2:3 (nature and scope of obligations) states: "The objectives and principles set forth in Part I of the TRIPS Agreement, in particular in Articles 7 and 8, shall apply, *mutatis mutandis*, to this Agreement."[143] While the reference to Articles 7 and 8 TRIPS is a reference to specific TRIPS provisions, those are primarily relevant for a public interest based interpretation and implementation of other TRIPS provisions.[144] Since the objectives and

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[139] *See* EU–India FTA Draft, *supra* note 119, art. 15.

[140] A more narrow reading of this provision would merely refer to the flexibilities inherent in the TRIPS provision on protecting undisclosed information (Article 39), in particular the discretion to define what amounts to "unfair commercial use" under Article 39:3 TRIPS.

[141] This follows from the principle of effectiveness (*effet utile*) as embodied in the notion of "good faith" in Article 31:1 VCLT; *see also supra* note 107 and accompanying references.

[142] *See* EU Comm'n, *supra* note 20, ¶ 4.

[143] ACTA, *supra* note 39, art. 2:3.

[144] *See* Doha Declaration, *supra* note 7, ¶ 5(a) (emphasizing the role of Articles 7 and 8 TRIPS for treaty interpretation: "In applying the customary rules of interpretation of public international

principles embodied in Articles 7 and 8 TRIPS apply horizontally to all TRIPS obligations, their application via reference in ACTA equally affects the understanding of all ACTA provisions.[145] The fact that Article 2 ACTA defines the "nature and scope of obligations"[146] in ACTA further underlines this. The nature and scope of ACTA obligations is, *inter alia*, determined by an interpretation and implementation based on the principles and objectives embodied in Articles 7 and 8 TRIPS. In sum, the reference to Articles 7 and 8 TRIPS within ACTA can have important consequences for those ACTA parties willing to implement ACTA based on the balancing objectives and public interest principles embodied in those TRIPS provisions. Their main effect will again be on open–textured and ambiguous provisions in ACTA—while it is less likely to have an impact on most of the concise and detailed TRIPS-plus provisions.[147]

While these more general references to exceptions and flexibilities stem primarily from the newer generation of EU FTAs, some U.S. FTAs also contain references to specific TRIPS flexibilities. In relation to the scope of patentable subject matter, the U.S.–CAFTA DR, U.S.–Colombia FTA, and U.S.–Peru TPA all contain the following clause:

> Nothing in this Chapter shall be construed to prevent a Party from excluding inventions from patentability as set out in Articles 27.2 and 27.3 of the TRIPS Agreement. Notwithstanding the foregoing, any Party that does not provide patent protection for plants by the date of entry into force of this Agreement shall undertake all reasonable efforts to make such patent protection available. Any Party that provides patent protection for plants or

law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles."); *see also* Grosse Ruse–Khan, *supra* note 131, at 181–83. *See generally* Peter K. Yu, *The Objectives and Principles of the TRIPs Agreement*, 46 HOUSTON L. REV. 979 (2009).

[145] Since the ACTA Preamble refers to the Doha Declaration, one can safely conclude that the role paragraph 5(a) of the Doha Declaration foresees for Articles 7 and 8 TRIPS also applies for ACTA. For a detailed analysis, see Grosse Ruse–Khan, *supra* note 40, at 37–41.

[146] Article 2 ACTA has as its title: "Nature and Scope of Obligations."

[147] For a more detailed analysis on the impact of Article 2:3 ACTA on the interpretation of ACTA and its role in achieving coherence between TRIPS and ACTA, see Grosse Ruse–Khan, *supra* note 40, at 37–41, 56–58.

> animals on or after the date of entry into force of this Agreement shall maintain such protection.[148]

The first sentence clarifies that the IP FTA obligations shall not be understood in a way that affects the flexibilities in Articles 27:2–3 TRIPS to exclude certain inventions from patentability. The right to exercise these flexibilities hence prevails over any TRIPS-plus provisions which might suggest otherwise. Where such provisions exist, they would have to be interpreted in a manner which allows reliance on Articles 27:2–3 TRIPS. The language used in the first sentence thus appears to be an effective way to safeguard (specific) TRIPS flexibilities. However, sentences 2 and 3 qualify the right to rely on Articles 27:2–3 TRIPS. Regarding the patentability of plants, the contracting parties must "undertake all reasonable efforts" to foresee such protection in their national laws. Legally, this does not seem to affect the safeguard in the first sentence in a meaningful way. FTA parties should be able to decide autonomously what "reasonable efforts" they undertake, and they could arguably use internal opposition as an excuse for not (yet) providing patents for plants. The more decisive qualification is contained in the third sentence, whereby any FTA party that already foresees patents for plants or animals must maintain this level of protection. This "freezes" domestic TRIPS-plus laws and does not allow FTA parties to rely on the flexibilities in Articles 27:2–3 TRIPS to change their law. Such "freeze-clauses" thus prevent countries from exercising existing flexibilities to adapt their IP system to the changing economic, technological, and societal context.

Further examples of FTA clauses upholding specific TRIPS flexibilities can be found in basically all investment chapters of U.S. FTAs.[149] They relate primarily to prohibitions of expropriation and technology transfer requirements and define the relation of those general investment protection standards to specific exceptions and limitations allowed under TRIPS.[150] Identical

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[148] *See* DR–CAFTA, *supra* note 74, art. 15.9; U.S.–Colombia TPA, *supra* note 102, art. 16.9(2); U.S.–Peru (TPA), *supra* note 102, art. 16.9(2).

[149] *See* U.S.–Morocco FTA, *supra* note 102, arts. 10.6:5, 10.8:3(b)(i); U.S.–Oman FTA, *supra* note 102, arts. 10.6:5, 10.8:3(b)(i); U.S.–Australia FTA, *supra* note 46, arts. 11.5:7, 11.g:3(b)(i); U.S.–Singapore FTA, *supra* note 102, arts. 15.6:5, 15.8:3(b)(i); CAFTA–DR, *supra* note 74, arts. 10.7:5, 10.9:3(b)(i); U.S.–Panama TPA, *supra* note 102, arts. 10.7:5, 10.g:3(b)(i); U.S.–Chile TPA, *supra* note 102, arts. 10.g:5, 10.5:3(b)(i); U.S.–Colombia TPA, *supra* note 102, arts. 10.7:5, 10.9:3(b)(i); U.S.–Peru TPA, *supra* note 102, arts. 10.7:5, 10.g:3(b)(i); U.S.–Korea FTA, *supra* note 102, arts. 11.6:5, 11.8:3(b)(i); *see also* Japan – Chile Economic Partnership Agreement, March 27, 2007, art. 82.5.

[150] The standard provision on expropriation states that it "*does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement*, or to the

provisions exist in the 2004 U.S. Model for a Bilateral Investment Treaty (BIT) and in recent U.S. BITs.[151] These clauses can ensure that investment standards—especially relating to (indirect) expropriation—do not interfere with the exercise of TRIPS flexibilities.[152]

In sum, references to TRIPS flexibilities are often "subject to" TRIPS-plus FTA obligations which limit their application and hence their ability to safeguard the flexibilities declared applicable. In cases of *general* references, their main role is to ensure—to the extent possible—coherence between TRIPS-plus FTA obligations and the right to use TRIPS flexibilities. Their effectiveness as a TRIPS flexibility safeguard is significantly enhanced where TRIPS-plus obligations are made "subject to" the right to use TRIPS flexibilities. Instead of limiting the operation of the reference-clause by the TRIPS-plus obligations in the FTA, such obligations then are limited by TRIPS flexibilities. *Specific* references in turn are more likely to allow the referenced flexibility to prevail over TRIPS-plus FTA obligations. Most effective are clauses referring to specific TRIPS flexibilities in such a way that "nothing in the FTA IP provisions shall be construed to prevent" an FTA party from relying on a specific TRIPS provision. Another, more general implication of these specific

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revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Seventeen (Intellectual Property Rights)" (emphasis added). *See, e.g.*, DR–CAFTA FTA, *supra* note 74, art. 10.7(5). The prohibition against imposing certain technology or other proprietary knowledge transfer conditions usually does not apply "when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, and to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement." *See* U.S.–Singapore FTA, *supra* note 102, art. 15.8(3)(b)(i).

[151] *See* U.S. Model Bilateral Investment Treaty [BIT] (2004), *available at* http://www.bilaterals.org/IMG/doc/2004_update_US_model_BIT.doc [hereinafter BIT]. Accordingly, the standards on expropriation do "not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement." Under recent BITs, this type of safeguard clause extends further to cover not only compulsory licenses, but also "the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement." United States–Uruguay Bilateral Investment Treaty Art. 6(5), Nov. 4, 2005, 44 I.L.M. 268; United States–Rwanda Bilateral Investment Treaty Art. 6(5), Feb. 19, 2008.

[152] But these clauses allow investors to raise the issue of TRIPS consistency in investor-state arbitration. Distinct to the WTO dispute settlement system, private parties therefore can challenge the compliance of domestic laws with the TRIPS Agreement in front of international (quasi)judicial bodies. This implies a significant departure from the WTO/TRIPS system which in turn challenges the substantive coherence established by these consistency clauses in the first place; for a detailed discussion, see Henning Grosse Ruse–Khan, *Protecting Intellectual Property Under BITS, FTAs and TRIPS: Conflicting Regimes or Mutual Coherence?, in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (K. Miles & C. Brown eds. forthcoming 2011), *available at* http://ssrn.com/abstract=1757724.

references is that they can operate to integrate the referred-to flexibility into the FTA. Similar to the references to the Doha Declaration, the TRIPS flexibility then becomes part of the treaty's rights and obligations and can therefore have a greater and more direct impact on IP obligations in FTAs.

V. CONCLUSIONS

This Article has attempted to answer the question whether, based on the international law concepts which define the relationships between different treaty rules, TRIPS flexibilities prevail over TRIPS-plus obligations in FTAs. The political assurances and commitments made by those demanding FTAs sound promising in this regard. However, they do not live up to the legal reality in cases where FTA provisions contain (explicit) *limitations* to something TRIPS (sometimes equally explicitly) allows. In these instances, neither the principle of harmonious interpretation nor most conflict rules in general international law, TRIPS, or in TRIPS-plus FTAs operate in a way which would uphold an optional flexibility over a subsequent obligation that limits its application. This confirms the continued relevance of the minimum standards approach in international IP law. As a rule, the ever increasing standards of protection on the regional and bilateral level erode the optional policy space on the multilateral level.

In some instances, however, conflict clauses in TRIPS-plus FTAs do function as a safeguard for TRIPS flexibilities—even over concrete and precise FTA obligations that would otherwise undermine these flexibilities. For example, certain types of Doha-references demand an interpretation and implementation of FTA provisions that does not undermine the flexibilities listed in the Doha Declaration. In a nutshell, the more specifically and demandingly a clause refers to the Doha Declaration, the more effective it is in safeguarding the TRIPS flexibilities mentioned therein. Also, clauses referring generally to TRIPS flexibilities and exceptions can have such a safeguarding effect—especially where certain TRIPS-plus obligations are made "subject to" the right to use TRIPS flexibilities. Other effective tools are clauses referring to specific TRIPS flexibilities in a way that "nothing in the FTA IP provisions shall be construed to prevent" an FTA party from relying on a specific TRIPS provision.

A different picture emerges where TRIPS-plus FTA obligations are ambiguous, open-textured, or otherwise allow for an interpretation and implementation which sufficiently takes TRIPS flexibilities into account. Here, most conflict clauses in FTAs operate as sufficient safeguards—from those merely affirming WTO/TRIPS rights and obligations, via Doha-references, to

provisions which refer to TRIPS flexibilities and exceptions to IP protection. As the default rule, the concepts of harmonious interpretation and systemic integration in general international law would lead to the same result. The limits to this interpretative approach are set out in the VCLT principles of treaty interpretation. If the ordinary meaning and context of the TRIPS-plus rule, understood in light of the relevant treaty object and purpose, does not allow alignment with the right to exercise TRIPS flexibilities, a harmonious interpretation is not possible.

Overall, the emerging set of conflict rules in TRIPS-plus FTAs is most promising in opening doors and pathways towards creative interpretation and implementation of FTA obligations on IP protection. They often *can* be used to achieve policy space similar or equivalent to that offered by TRIPS flexibilities. But, this requires the willingness and ability of interested FTA parties to do so. And, maybe more importantly, it depends on the absence of pressure and bullying by those who have traditionally demanded TRIPS-plus FTAs against such creative interpretation and implementation. However, on a more conceptual level, some of the conflict rules analysed here can operate as tools of normative integration—making the Doha Declaration or certain TRIPS flexibilities part of the balance of FTA rights and obligations. In this sense, the term integration—or assimilation—rules may be more appropriate.