

The Overlapping Relationship between Dispute Settlement Mechanisms of the World Trade Organisation and Double Tax Agreements

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Abstract

Keywords:

Conflict, Dispute, Double Tax Agreements (DTAs), Public International Law, World Trade Organisation (WTO).

The rapid expansion of the membership of the World Trade Organisation (WTO) poses a significant challenge to the operation of Double Tax Agreements (DTAs). It has added a layer of complexity to the dispute resolution system of DTAs. Sometimes the signatory States of a DTA can face real complexity as to which forum is competent to settle their dispute. While the WTO determines penalties for non-compliance with its provisions, settlement of disputes under DTAs is often based on political negotiation and comprise and it has a highly political rather than legal-based structure. For this reason, one signatory party, especially the stronger one, may find it more favourable to proceed with the dispute under the DTA framework. International trade rules and the international tax regime also sometimes overlap. For instance, imagine that two parties under a DTA are also WTO Member countries (at the present time 162 countries are members to the WTO). A dispute arises between these two contracting parties regarding a matter which may fall, simultaneously, under the ambit of the relevant DTA, as well as a WTO agreement. This may cause a further dispute as to which mechanism should be applied to resolve the dispute: the DTA's mechanisms or the WTO dispute resolution mechanisms?

What makes finding an appropriate answer for this question a difficult task is the fact that the rules of public international law, such as customary international law, and general principles of law are by default applicable to both the context of the WTO and DTAs equally. This is because both are considered to be international treaties. In addition to this, the WTO rules pertaining to tax matters are generally ambiguous and this may result in unforeseen conflict with the DTAs and international tax policy. This article seeks to shed some light on the possible conflict of jurisdictions and the potential contest between the two dispute resolution mechanisms provided by the DTAs and WTO in the cases where each of these two dispute resolution mechanisms may claim to have cognisance of that particular case.

The Overlapping Relationship between Dispute Settlement Mechanisms of the World Trade Organisation and Double Tax Agreements

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I. Introductory Remarks

The relationship between the dispute settlement mechanisms under the World Trade Organisation (WTO) law and tax treaty law is not clear. Due to the fact that the WTO has jurisdiction in cross-border tax matters, a cross-border related tax dispute may fall within the scope of a Double Tax Agreement (DTA) in force between the two contracting countries as well as WTO law. The possibility of a WTO-tax agreement conflict and the issue of conflicts between WTO and non-WTO rules have received little attention.¹ The following discussions further bring to light the potential conflict of jurisdictions or the contest between the two dispute resolution mechanisms provided by in the DTAs and WTO in cases which each may claim to have cognisance of that particular case. This article seeks to provide a framework on how the conflicting norms of the WTO and DTAs in the area of dispute resolution should interact and which law should take precedence, the law of the treaty or the law of the WTO? As the number of WTO Members is growing to encompass the majority of the countries, this matter deserves to be considered as a major area of concern, in the context of international tax-trade area.

To answer the question raised above the methodology adopted for the present research is based on traditional legal analysis involving different areas of law, including international public law, WTO law and tax law. In order to identify appropriate legal tools for the resolution of conflict of law between the DTAs and WTO law, different sources and agreements of WTO law, such as Agreement on Subsidies and Countervailing Measures (the SCM Agreement), Agreements on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreements), Agreement on Trade-Related Investment Measures (TRIMs Agreement) and so forth have been examined. Furthermore, general principles of

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¹ Jennifer E. Farrell, *The Interface of International Trade Law and Taxation* (IBFD, 1st ed, 2013) 208.

international law, in particular, *lex superior, lex posterior ad lex specialis* have been studied for their possible implications for the resolution of WTO and DTA law conflict.

When appropriate, this article has taken assistance from other useful methods for clarification of the intentions of a treaty such as investigation of the *travaux préparatoires*² and other scholarly works on the matter. The article is structured as follows: Section II provides a general overview on how the jurisdictions of the WTO and DTAs may conflict with one another. Section III considers the applicability of the General Agreement on Trade in Services (GATS) derogation norm on the other WTO agreements, particularly, by investigating the official record of a negotiations leading to the formation of the GATS. Section IV investigates whether or not the principles of public international law are able to resolve the conflict of WTO and DTA laws. Section V summarises the research.

II. How Can the Jurisdictions of WTO and DTAs Conflict with one another?

The expansion of the WTO membership posed a significant challenge to the network of DTAs. It has added an additional layer of complexity to the dispute resolution system of DTAs. The signatory States to a DTA can face real complexity as to which forum is eligible for resolving their disputes. While the WTO determines specific penalties for non-compliance with WTO provisions, one signatory party may find it more favourable to proceed the dispute under the DTA framework. It is a violation of WTO law, which may ultimately undermine the consistent application of WTO law as the only international trade organisation. In fact, this possible scenario may seriously harm international businesses. As a result, the impact and use of WTO law when a DTA exists between the two signatory States is an important topic.

In other words, international trade law and tax treaty law may sometimes overlap one another in the area of resolution of cross-border tax disputes. For instance, imagine that the two parties of a DTA are, concurrently, members to the WTO (most countries are members to this organisation). A dispute arises between these two contracting parties regarding a matter which falls, simultaneously, under the ambit of their DTA, as well as a WTO

² The *Travaux Préparatoires* are official documents recording the negotiations, drafting, and discussions during the process of creating a treaty. These documents may be consulted and taken into consideration when interpreting treaties. See: Article 32 of the VCLT.

agreement. This may cause a further dispute as to which mechanism should be followed to resolve the dispute: the DTAs' mechanisms or the WTO dispute resolution mechanisms? What makes this situation even more confusing is that the rules of general international law, such as customary international law and general principles of law, are by default equally applicable to the context of both WTO law and DTAs. As a result, neither of these two mechanisms may be preferred to the other from the perspective of international law. This is due to the fact that both the DTAs and WTO agreements are equally considered as international treaties.

In this vein, a dispute may fall within the scope of a DTA in force between the two contracting States as well as WTO law. The WTO rules pertaining to this matter are ambiguous and this may result in unforeseen conflicts with the DTAs and international tax policy. In addition, the possibility of a WTO-tax agreement conflict and the issue of conflicts between WTO and non-WTO rules have received little attention.³ Generally speaking, one of the most significant and serious problems in international governance is how should different areas and norms of international law interact together.⁴ So, it needs to be addressed that in the events of jurisdictional clashes between WTO and DTAs, how should the conflicts between these laws be resolved.

In the context of international law, there is not any single international parliament, similar to domestic law systems, for legislating consistent binding rules. In addition, there is not any international body, such as an international police force, in charge of sanctioning breaches of international law.⁵ Instead, the international law originates from a variety of sources: (1) conventions and treaties, (2) international custom, in so far as this is evidence of a general practice of behaviour accepted as legally binding, (3) the general principles of law recognised by civilised nations.⁶ With no single international legislator and a multitude of States, international organisations and tribunals making and enforcing the law, the international legal system is prone to a wide variety of conflicts and clashes of its norms and principles.

³ Jennifer E. Farrell, above, n1, Id.

⁴ Joost Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Relates to other Rules of International Law* (1st ed, Cambridge University Press, 2003) preface.

⁵ John McLaren, 'The OECD's 'harmful tax competition' project: Is it international tax law?' (2009) 24 *Australian Tax Forum* 421, 430.

⁶ Jonathan Law, *Oxford Dictionary of Law*, (Oxford University Press, 8th edition, 2015) 333.

In the same vein, the international trade system and the international tax system follow different paths in resolving disputes. This gives rise to the subsequent question: when a conflict arises between a WTO rule and a DTA's provision, which law should prevail over the other? The answer to this question is not clear. Neither the WTO rules, nor tax treaties, adequately define their jurisdiction over tax-related trade matters. In cases which a tax dispute emerges between two or more countries, it is important to clearly determine the applicable principles and the relevant dispute settlement system. Thus, the author seeks to find out how to deal with conflict of laws and the interface of the WTO's rules and DTAs' provisions on the resolution of international tax disputes. Since a cross-border nexus equally exists in both cases, the rules which take precedence in these cases should be identified by recourse to general principles of conflicts of laws. However, prior to this, as a starting point, it is appropriate to look at the WTO agreements to see whether or not there is any implication which ascertains the precedence of WTO over the international agreements which the WTO Member countries may have concluded with other countries.

III. The General Agreement on Trade in Services (GATS): Can Its Derogation Rules Be Extended to All the other WTO Agreements?

A close look at the WTO agreements shows that all the WTO agreements simply have referred to the general provisions of dispute resolution mechanism of the WTO for resolving disputes. In particular, Articles XXII and XXIII of the General Agreement on Tariffs and Trade (GATT) 1994, as elaborated and applied by the Dispute Settlement Understanding (DSU) are the main means of resolution of disputes in all these agreements. The following agreements are among the agreements which provide for the submission of cases to the dispute resolution system of the GATT:

- Agreement on the application of Sanitary and Phytosanitary Measures,
- Agreement on Import Licensing Procedures,
- Agreement on Pre-shipment Inspection,
- Agreement on Safeguards
- Agreement on Subsidies and Countervailing Measures (the SCM Agreement),
- Agreements on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreements),

- Agreement on Trade-Related Investment Measures (TRIMs Agreement),
- Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade,
- Agreement on Textiles and Clothing,
- Agreement on Technical Barriers to Trade.⁷

Therefore, in all these agreements, if a dispute occurs and remains unresolved, it should be resolved by recourse to the GATT dispute resolution mechanism. The GATT, itself, is silent as to the possible conflict of its jurisdiction to resolve disputes with jurisdiction of other international treaties such as the DTAs that WTO Member States may have concluded with one another. Thus, it is still not clear how should the possible conflict of law between a WTO agreement and another international treaty be resolved.

However, interestingly, in regard to disputes concerning cross-border trade in services, the General Agreement on Trade in Services (GATS) has addressed this matter clearly.⁸ Exceptionally, the GATS, which exclusively applies to trade in services,⁹ foresees the possibility of conflict between DTAs and WTO rules on trade in services. Article 22(3) of the GATS provides that:

A Member may not invoke Article XVII,¹⁰ either under this Article or Article XXIII,¹¹ with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for

⁷ For instance, Article 8(10) of the Agreement on Textiles and Clothing provides that: "... If, after such further recommendations, the matter remains unresolved, either Member may bring the matter before the Dispute Settlement Body and invoke paragraph 2 of Article XXIII of GATT 1994 and the relevant provisions of the Dispute Settlement Understanding". Similarly, Article 14(1) of the Agreement on Technical Barriers to Trade articulates: "Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding." The other agreements have similar contents in this regard.

⁸ All WTO Members, some 162 economies (as of December 2015), are at the same time Members of the GATS and, to varying degrees, have assumed commitments in individual service sectors.

⁹ GATS comprehensively applies to all services, except for most air transport services, and those supplied in the exercise of government authority. Thus it applies to all modes of service delivery, including the cross-border supply of services and services supplied through the establishment of an office or joint venture overseas.

¹⁰ Article XXIII deals with dispute settlement system and enforcement of panels' reports.

¹¹ Article XXIII provides for National Treatment (NT).

Trade in Services.¹² The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

At this point one may ask whether this Article of the GATS could be considered as a general rule which might be applied in other cases (other than cross-border trade in services) or is it specifically peculiar to cross-border trade disputes related to services. Taking assistance from logical syllogism, one may, reasonably, argue that in other analogous situations, the above-mentioned ruling also applies to the other WTO agreements which lack a clear statement regarding the supremacy of the WTO over the other international agreements or vice versa.

To put it another way, one may reasonably contend that WTO law is generally silent in terms of the possible clash of law between a DTA and a WTO agreement. However, the WTO has, exceptionally, made it clear that when cross-border services are involved, a DTA has a superior status. Thus, whatever the WTO has articulated regarding cross-border trade in services shall, normally, be applicable to the other areas of international trade system. In logic, this form of reasoning is known as logical analogy and might be a valid argument. There are adequate reasons to come to this conclusion. Similar to the GATS, all the other silent agreements are regulated by the same law-maker (WTO Member States). There are no particular characteristics in the GATS which may differentiate it from the other WTO agreements. Thus, as the application of the WTO dispute settlement is prevented by Article 22(3) of the GATS in favour of a DTA, the same treatment is to be adopted regarding the potential clash of a DTA provision with other WTO agreements which lack a clear derogation rule similar to that of the GATS.

However, this reasoning is a fallacy. Indeed, even though the provisions of the GATT are similar to those of its counterpart, GATS, it does not specify similar provisions as to the possible conflict of GATT-DTA jurisdictions. Therefore, an overview of the *travaux préparatoires* leading to the formulation of this Article of the GATS would make it clear why the GATS differs from other WTO agreements. In addition, it illuminates why, contrary to the most of WTO agreements, the GATS does not refer to the dispute settlement mechanisms of the GATT, as a general principle, for the resolution of cross-border disputes.

¹² Regarding to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only if both parties to such an agreement decide to do so.

In the context of the GATS, the fact is that during negotiations of this agreement, the United States (US) Assistant Treasury Secretary for tax policy conveyed the US objection as to the application of national treatment rules to the tax measures in the GATS draft concerning services. In addition, the US Assistant Treasury Secretary for tax policy noted that the proposed obligation imposed to the US may be in conflict with the existing DTAs which the US has with a variety of States.¹³ In fact, the main uneasiness of US officials during the negotiations of the GATS was that any potential discrimination against foreign services would lead to the compulsory and binding dispute resolution procedures found under the WTO as adopted in DSU. For this reason, the US officials argued that any disagreement over tax measures could be effectively resolved through the Mutual Agreement Procedures (MAPs) mechanism which exists under DTAs.¹⁴

The European countries, however, were particularly concerned that the United States's eleventh-hour position was stemming from its intent to discriminate against foreign service-providers.¹⁵ This fear was rooted in the earlier declaration made by the US in October that year as to the intention of this country to boost taxes on foreign-controlled companies operating in the US since the US was of the opinion that such companies were diminishing its taxes through transfer pricing methods.¹⁶

Initially, the other countries participating in the negotiations did not show much support to the United States stand. Indeed, on 23 November 1993, then GATT Director-General, Peter Sutherland, told the US Assistant Treasury Secretary for tax policy that "the United States is totally isolated in its position. All other 114 nations involved in the talks are against Washington's proposals".¹⁷ If this statement is correct then it means that all the other countries participating in the negotiations allegedly agreed to make tax measures under the GATS subjected to national treatment principle and agreed to apply the DSU on their tax-related disputes.

However, in the end, the US abandoned its extreme position and agreed to the inclusion in the GATS of language bringing tax measures under National Treatment (NT)

¹³ Bob Davis and Julie Wolf, "U.S., EC believe Deal Is in Sight on World Trade-", Wall Sr. J. (1993), A3, quoted in: Zvi Daniel Altman, *Dispute Resolution Under Tax Treaties* (IBFD, 1st ed, 2005) 29.

¹⁴ Robert Green, 'Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes' (1998) *Cornell Law Faculty Publications*, Paper 939, 92-93.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

obligation.¹⁸ Having accepted this risk, the GATS, in return, virtually eliminated the chance of US disagreement by limiting the WTO's jurisdiction over tax measures related to cross-border trade in services. In view of that, Article 22(3) of the GATS articulates that a member may not invoke Article XVII,¹⁹ either under this Article or Article XXIII,²⁰ with respect to a measure of another Member, which falls within the scope of an international agreement between them, relating to the avoidance of double taxation. Accordingly, comparing the texts of the GATS with other WTO agreements is of a little help. The studying *travaux preparatoires* leading to the enactment of the GATS indicated that the derogation rule of the GATS may not be considered to be a general rule. Thus, it is not extendable to other WTO agreements. Returning again to the main question of this study: how shall the possible conflict of jurisdictions between WTO and DTAs be resolved?

IV. How to Resolve the Conflict between WTO and Tax Treaty Laws?

IV.I Hierarchy of the Agreements: WTO or DTA?

The main step to be followed is to determine what type of rules must be applied in order to resolve potential legal clashes between WTO law and treaty law. The WTO agreements, similar to DTAs, are international trade agreements. An uncontroversial role of international agreements is the creation of rights and obligations for the States party to them, as well as for their citizens.²¹ International treaties are, therefore, composed of norms commanding, permitting, or prohibiting State actions or practices. So, WTO agreements and DTAs contain contractual norms which espouse different international values since they are meant to protect certain types of interests.

In addition, the fact that, compared to a DTA, WTO agreements have more contracting members cannot really change the nature of WTO agreements as international agreements. The WTO and DTAs both are binding only on the States that agreed and ratified them. In other words, in spite of being known as “World Trade Organisation”, WTO rules should not be confused with general international law which includes the rules that are binding on all States irrespective of their explicit consent or subject matters. Rules of general international law, such as customary international law and general principles of law, are by

¹⁸ Id, 93.

¹⁹ Article XXIII deals with dispute settlement system and enforcement of panels' reports.

²⁰ Article XXIII provides for National Treatment (NT).

²¹ See Art. 26 of the Vienna Convention on the Law of Treaties, 23 May 1969, (entered into force on 27 January 1980) [VCLT].

default applicable to both the context of the WTO and DTAs. Seen this way, the conflict is not between general international law and a treaty, but it is rather a conflict between two sets of different treaties within the international law.²² International agreements are instruments by means of which States commit themselves to binding obligations under international law towards one another.²³ Due to the contractual nature of international agreements, they are horizontal tools that do not have any priority among them.

Thus, how should one of the contractual instruments be prioritised over the other one? In other words, if the two international agreements cannot be reconciled, still, some sort of hierarchical prioritisation of norms would be required to finally resolve the conflict. In the context of international law, when international agreements conflict, a norm representing a higher-level value within the given context is to be preferred over that representing a lower-level value.²⁴ The textbook case of this conflict is when trade values contradict human rights.²⁵ If they happen to be in an irreconcilable conflict, a determination of hierarchy between these conflicting values would be necessary. This would result in preferring one interest over the other. For example, in *Soering v. the United Kingdom [Soering]*, the European Court of Human Rights (ECtHR) stated that the obligation of United Kingdom (UK) under the European Convention on Human Rights (ECHR) would prevail over the violation of the extradition treaty between the UK and the US.²⁶

A value-oriented reading of international law may not always be able to judicially resolve conflicts of norms in the current decentralised international legal system. In the context of the current study, this approach does not facilitate a better understanding of normative conflicts. In other words, here, in the context of this discussion, where the ultimate objectives of the conflicting treaties (WTO agreements and DTAs) are similar and parallel (trade liberalisation), a value-based paradigm of treaty conflicts is of a little help. This approach does not provide a valid legal basis to determine the higher-level value in the context of conflict of international trade law and tax treaty law. In addition, the construction of international law suggests that the development of international law and the international

²² Article 2(1)(a) of the VCLT defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

²³ See Article 2(1)(a) of the VCLT.

²⁴ Ahmad Ali Ghouri, ‘Determining Hierarchy Between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?’ (2012) *Asian Journal of International Law* 1, 2.

²⁵ *Id.*

²⁶ *Id.*

legal system are not based on any collective values. This would make it difficult to take assistance from a value-oriented approach to the international law norms.

In addition, even in one single international treaty, conducting a value-based ordering of norms (the determination of hierarchy of values of the norms) may be potentially beset with confrontation and difficulties. Faced with a single treaty which has possibly conflicting objectives, one may not, undisputedly, identify the ultimate object of that treaty. For instance, while the GATT contains various provisions for protecting the multilateral trading system and trade liberalisation, Article XX of this lists a variety of environmental measures as exceptions to its provisions.

IV.II The Application of Principles of International Public Law

In a tax dispute case, where both the DTA's provisions and WTO rules on the resolution of dispute are valid and in force, with similar objectives and values, which one should be applicable? In simple words, the question to be addressed here is which of the two treaties should be given priority according to public international? A conflict between the contents of treaties is basically considered to be conflict of norms.²⁷ In other words, all treaties are normative expressions of rights and obligations that States undertake and promise to honour with respect to other party States and their citizens.²⁸ What happens when norms incorporated in one treaty conflict with those in another treaty? As Hans Kelsen posits, the conflict of norms presupposes that both norms are binding and in force.²⁹ Kelsen contends that conflict of norms takes place where, in following or applying one norm, the other norm is necessarily or possibly violated.³⁰

A conflict of norms, thus, can only occur when both WTO norms and a DTA provision are, simultaneously, in force between the two contracting States. From this perspective, on the one hand, a DTA clearly creates rights and duties for the contracting States to resolve their disputes through the MAP process. The provisions of DTAs in this matter are enforceable under international law. On the other hand, if the two contracting countries are also WTO Member countries, then the WTO s, similarly, create rights and

²⁷ Jan B. Mus, 'Conflicts between Treaties in International Law' (1998) 45 *Netherlands International Law Review* 208, 209.

²⁸ Ghouri, above, n 24, 2.

²⁹ Hans Kelsen, 'Derogation', quoted in Jan B. Mus, above, n 27, 210.

³⁰ Id.

duties of referring to the WTO dispute settlement body for resolving cross-border disputes. At this point, legal clashes may occur. In addition, both norms must be applicable in a certain situation for the conflict to take place.³¹ Hence, when one party seeks to apply or observe one of the mechanisms of the resolution of disputes (either the WTO dispute settlement mechanism or the MAP mechanism), one norm will infringe upon another one and, consequently, another dispute is born: conflict of norms.

To resolve the conflict of norms, some treaties clearly offer derogation norms. For instance, Article 103 of the North American Free Trade (NAFTA), explicitly states that in the event of conflict between provisions of the GATT treaty and NAFTA treaty, NAFTA should prevail. In the same vein, Article 103 of the Charter of the United Nations (UN) provides that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international , their obligations under the present Charter shall prevail”.³² However, not the OECD/UN Model Tax Conventions, nor the WTO rules offer a derogation norm as such concerning a possible conflict between WTO and a DTA.³³

Herbert Hart pointed out that the essence of the norms is that they prescribe or forbid certain behaviours. The addressees of those norms “are required to do or abstain from certain actions, whether they wish to or not.”³⁴ These binding norms are known as “primary norms”.³⁵ When the two conflicting primary norms turn out to be actually applicable to a certain case, and the conflicting treaties both lack a conflict clause to resolve the existing conflict, there are certain rules of customary international law available which might resolve the conflict.³⁶

In the absence of comprehensive rules on the resolution of conflict of laws rules in the WTO texts and tax treaties, one must resort to the guidance under general public

³¹ Id.

³² See the Charter of the UN, available from: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>, Last accessed 12 December 2015.

³³ However the Commentary to Article 25 of the UN Model Tax Convention suggests the interaction between the mutual agreement procedure and the dispute resolution mechanism of the GATS. See: Department of Economic & Social Affairs, United Nations Model Double Taxation Convention between Developed and Developing Countries, (UN 2011), 412.

³⁴ Herbert Hart, ‘The Concept of Law’, quoted in Robert Summers, ‘Professor H. L. A. Hart’s Concept of Law’ (1963) *Duke Law Journal* 629, 634. Electronic copy is also available from: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1879&context=dlj>, Last accessed 10 December 2015.

³⁵ Mus, above n 27, 210.

³⁶ Id.

international law. The principles of *lex superior*,³⁷ *lex posterior*³⁸ and *lex specialis*³⁹ are, traditionally, used to determine the most relevant law and, consequently, resolve the clash between conflicting laws. International law scholars stress that there is no hierarchy of the three main principles of collision (*lex superior, lex posterior ad lex specialis*).⁴⁰ These principles will be introduced here and it will be discussed whether or not they might be applied in the context of this discussion.

IV.II.I The Application of *Lex Superior* Rule

This legal maxim denotes that a law which is higher in the hierarchy repeals the lower law. According to the foregoing discussions, the principle of *lex superior* cannot be applied in the context of conflict of a tax treaty law and WTO law, as they have equal international law status. In the context of DTAs, a hierarchical comparison cannot be made between the rights and obligations created by a treaty and the rights and obligations created by WTO law. In other words, this principle “requires a common system within which a hierarchy of norms can be established”.⁴¹ International trade and tax treaties do not belong to one single system of law. Thus, one cannot safely arrive to the conclusion that whether the position of a WTO or a tax treaty for resolving a cross-border dispute is higher than the position of the other.

IV.II.II The Application of *Lex Posterior* Rule

The chronology of adoption or accession of international s has a decisive role in ascertaining the applicable law. According to the *lex posterior* rule, which is codified in Article 30 of the Vienna Convention on the Law of Treaties (VCLT), if two conflicting treaties which are signed or accessed to by the disputing States, simultaneously, deal with the same subject matter and are concluded by the same parties, the later treaty shall prevail. However, in the context of this discussion, *lex posterior* principle does not make sense. In case of conflict or overlap between treaties in different regimes, the question of which of them is later in time would not

³⁷ *Lex superior derogat legi inferiori*: a law higher in the hierarchy repeals the lower one. See: Raul Narits, Interpretation of Law in the Estonian Legal System, available from: <http://www.juridicainternational.eu/?id=12429>, last accessed: 10 December 2015.

³⁸ *Lex posterior derogat legi priori*: a later law repeals a prior one, See Narits, Id.

³⁹ *Lex specialis derogat legi generali*: a special law repeals a general law, See Narits, Id.

⁴⁰ Catherine Barnard, Okeoghene Odudu (edits.), *Cambridge Yearbook of European Legal Studies*, Volume 11 (Hart Publishing, 1st ed, 2009) 36.

⁴¹ Ralf Michaels & Joost Pauwelyn, ‘Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law’ (2012) 22 *Duke Journal of Comparative & International Law* 349, 356.

necessarily express any presumption of priority between them.⁴² In addition, *lex posterior* principle cannot be automatically applied to a case where the parties to the subsequent treaty, say DTA, are not identical to the parties of the earlier treaty, say WTO which has several other parties. In such cases, as provided in article 30 (4) VCLT, the State that is party to two incompatible treaties, a DTA and WTO, is bound *vis-à-vis* both of its treaty parties separately. In case it cannot fulfil its obligations under both treaties, article 60 VCLT regarding the termination or suspension of the operation of a treaty as a consequence of its breach may become applicable. Therefore, the question which of the incompatible treaties should be implemented and the breach of which should attract State responsibility may not be answered by this general rule.⁴³

IV.II.III The Application of *Lex Specialis* Rule

The *Lex specialis* rule is a recognised principle of customary international law.⁴⁴ The maxim *lex specialis* is a generally accepted technique of interpretation and conflict resolution in 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. The name comes from the full statement of a legal maxim in Latin: *lex specialis derogat legi generali*. The *lex specialis* in legal theory and practice, is a doctrine relating to the interpretation of laws and articulates that where two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*).

First, rules on the specific matters under dispute should be identified. Any exception, exemption or specific conflict clause will trump the general rules. In the author's view, it seems quite plausible to argue that when two WTO Member countries enter into a DTA, they are in fact, intended to form a more specific compared to the general WTO rules. In the context of jurisdiction to resolve disputes, this principle envelops the idea that tax provisions of a DTA, as a more specific and unique pact, derogates from those general provisions of the WTO and therefore, are *lex specialis*.

⁴² UN, 'Conclusions of the work of the Study Group on the Fragmentation of International Law', (UN Report, 2006) Para. 26, Electronic copy is available from: legal.un.org/ilc/texts/instruments/word_files/english/.../1_9_2006.doc, Last accessed: 12 December 2015.

⁴³ Id. Para. 25.

⁴⁴ Barnard and Odudu, above, n 40, 36.

But the important question regarding the application of *lex specialis* is whether this principle of resolving conflicts of “law” is applicable to resolving conflicts of “treaties”. The answer to this question is positive. Conclusions of the work of “the UN Study Group on the Fragmentation of International Law; Difficulties arising from the Diversification and Expansion of International Law”,⁴⁵ provides that the maxim *lex specialis* may be applicable in several contexts, for instance:

... between provisions within a single treaty, between provisions within two or more treaties, between a treaty and a non-treaty standard, as well as between two non-treaty standards.⁴⁶ The source of the norm (whether treaty, custom or general principle of law) is not decisive for the determination of the more specific standard.⁴⁷ However, in practice treaties often act as *lex specialis* by reference to the relevant customary law and general principles.⁴⁸

Accordingly, the maxim *lex specialis* prioritises the application of DTAs when they overlap with the WTO’s dispute resolution rules in tax matters.

There are, however, problems with this approach. The precise definition of *lex specialis* maxim is not clear.⁴⁹ Different institutions applying the general rule may trigger its varying interpretations. *Lex specialis* is considered to be a conflict-resolution technique for when two valid and applicable legal provisions provide incompatible directions for the same facts.⁵⁰ In this situation, the International Law Commission (ILC) Report suggests that the “special” provision, that is, the rule with a more precisely “delimited scope of

⁴⁵ UN, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law’, above, n 42, Id.

⁴⁶ For application of *lex specialis* to provisions within a single agreement, see *Beagle Channel Arbitration (Argentina v. Chile)* ILR vol. 52 (1979) p. 141, paras. 36, 38 and 39; Case C-96/00, *Rudolf Gabriel*, Judgment of 11 July 2002, ECR (2002) I-06367, pp. 6398-6399, paras. 35-36 and p. 6404, para. 59; *Brannigan and McBride v. the United Kingdom*, Judgment of 28 May 1993, ECHR Series A (1993) No. 258, p. 57, para. 76; *De Jong, Baljet and van den Brink v. the Netherlands*, Judgment of 22 May 1984, ECHR Series A (1984) No. 77, p. 27, para. 60; *Murray v. the United Kingdom*, Judgment of 28 October 1994, ECHR Series A (1994) No. 300, p. 37, para. 98 and *Nikolova v. Bulgaria*, Judgment of 25 March 1999, ECHR 1999-II, p. 25, para. 69. For application of *lex specialis* between different treaties, see *Mavrommatis Palestine Concessions case, P.C.I.J. Series A, No. 2 (1924)* p. 31. For application of this principle between a treaty and non-treaty standards see, *INA Corporation v. Government of the Islamic Republic of Iran*, Iran-US C.T.R. vol. 8, 1985-I, p. 378. For application between particular and general custom, see *Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Merits) I.C.J. Reports 1960*, 44.

⁴⁷ In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) I.C.J. Reports 1986* 137, para. 274, the Court said: “In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim.”

⁴⁸ UN, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law’, above, n 42, Id.

⁴⁹ Ghouri, above, n 24, 18.

⁵⁰ Id. 19.

application”, is to be prioritised.⁵¹ It concedes the difficulty of determining the “delimited scope of application” of a rule, and acknowledges the indeterminate nature of the “substantive coverage” of a provision and its legal subjects.

In short, neither of the normative means of conflict of law resolution, which exist under public international law, may indisputably resolve the issue and provide efficient legal solutions to resolve the conflict between WTO and DTA laws. For this reason, disputing States sometimes have to fall back on unprincipled political determination of these conflicts. It is, thus, inevitable for the disputing States to enter into costly and lengthy non-legalistic negotiations to resolve their disputes. This would prolong the process of resolution of the main dispute which is already a lengthy and slow process. Thus, to avoid situation like these, serious coordination between the WTO and tax conventions is needed. In particular, since DTAs are, mainly, based on either, the OECD Model Tax Convention or the UN Model Tax Convention, it is important for policy-makers from the WTO, OECD and UN to endeavour to prevent these scenarios. Yet, the question of how should this coordination be accomplished, would be an interesting topic for a future paper.

V. Conclusions and Thoughts for the Future

Due to the expansion of the WTO membership it is likely that a dispute falls within the scope of a DTA in force between the two contracting States as well as WTO law. DTA will generally have comprehensive cross-border tax coverage. Similarly, the WTO also covers cross-border tax-type provisions in its several s. Therefore, it is important to determine whether the WTO or the DTA has the required jurisdiction in cases where a tax-related dispute occurs.

Apart from, Article 22(3) of the GATS treaty which clearly provides for a derogation rule and gives priority to DTAs, the other WTO s are silent as to the possibility of conflict of laws between a DTA and a WTO provision. The studying *travaux preparatoires* leading to the enactment of the GATS suggested that the derogation rule of the GATS may not be considered to be a general rule and may not be extended to all the other WTO s. The three main principles of collision, namely, *lex superior*, *lex posterior ad lex specialis* also may not

⁵¹ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission (ILC), finalized by Martti KOSKENNIEMI, UN Doc.A/CN.4/L.682 (2006), at 35, para. 57 [ILC’s Report on Fragmentation].

totally eliminate the problem. The principle of *lex superior* may not be applied as there is no hierarchy between these two sets of international rules, namely DTAs and WTO s. In addition, *lex posterior* principle cannot be applied in these cases, as the parties to a tax treaty are not exactly identical to the parties of a WTO . The application of *lex specialis* can also be controversial in these cases. This is because, the precise definition of *lex specialis* maxim is not clear and different institutions applying this general rule may have a different interpretation from it.

It follows from the foregoing analysis that, to effectively resolve the conflict of WTO and tax treaty laws, it is necessary that policy-makers from the WTO, OECD and UN to cooperate and collaborate with each other to eliminate these challenges. It would be interesting to see how they may accomplish these objectives in the future. But that is a topic for a future paper.