CHAPTER 4

Invocation of Extrinsic Rules of Conventional Law

4.1 Introduction

The previous chapter looked at invocations of customary international law and general principles. In this chapter, I turn to consider instances where a regime has relied on rules and principles that could be attributed to other regimes and that are binding law only for the parties to those instruments.1

Extrinsic rules in the form of other conventional law may be referred to as something to be directly applied, or as a guide to interpretation of intrinsic provisions. This chapter concentrates on conditions in which and reasons why extrinsic norms are invoked as directly applicable, whereas guidance for interpretation is dealt with in the next chapter. Direct application of extrinsic norms seems more closely connected with a proper conflict of norms (or regime rationalities), whereas the issues relating to interpretation raise other kinds of questions, such as the role of consent as a legitimating factor for the reference to international legal norms.2

The incompatibility between an extrinsic and an intrinsic norm may provide a basis for mounting a challenge to the latter, which is argued invalid because of that incompatibility, or as an argument justifying derogation from an intrinsic rule, thus providing a defence or excuse to mitigate the offense. In the event of conflict, extrinsic rules may also provide the conflict rules to decide whether the extrinsic norms or intrinsic regime rules are to prevail.3

Extrinsic norms may also come into play because they have counterparts in intrinsic norms that are identical or similar. This is more commonly the case when extrinsic norms are invoked as relevant to interpretation of such corresponding intrinsic norms, but the distinction between the two is not always clear cut. Extrinsic norms may be implemented into a regime body of law because institutions of the regime have acceded to them under their own

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1 Due to the pacta tertiis principle; see e.g., Joost Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?” American Journal of International Law 95, (2001): 535–578, 544.
2 Cf. Chapter 6 and see further in Chapter 7.
powers and the transposition of the commitment can create a new rule, which can interact with the international rule from which it was derived. Rules may also be created in the regime, which mirror the commitments made by regime members. This duplication of extrinsic norms results in ‘mirror-image’ provisions representing obligations that are ‘multi-sourced’.4

In this chapter, I will try to illustrate how extrinsic norms are used, focusing on cases that in some way or other highlights the collision, not just of norms, but of stakes.

But before going into the more detailed examination, I will provide an overview over how the various legal disciplines selected in this study cut into each other. This is necessary in order to explain why there is an imbalance in the reported cases. Some interfaces between subject-matters are more intense than others, entailing that there is no absolute commensurability between the different interactions identified in this book.

There are for example many examples of invocation of WTO law before the EU courts, whereas the invocation of EU law in support of action under review in the WTO legal system is less frequent. The most frequently cited extrinsic instruments in the WTO legal order are those that concern environmental law, as these can provide legitimacy for action that may otherwise be challenged as protectionist.

Trade regimes are generally likely to intersect with a wide range of issues as economic activities are liable to be affected by many varieties of regulation.5 Economic growth can be connected to problems such as global warming and climate change, pollution of air or water, deforestation, or loss of biological diversity.6 Economic integration has environmental repercussions, as ecological systems are inherently transboundary and environmental problems such as pollution easily move across borders.7 Environmental degradation often results

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5 Gabrielle Marceau, “Fragmentation in International Law: The Relationship between WTO Law and General International Law: A Few Comments from a WTO Perspective,” Finnish Yearbook of International Law 17, (2006): 5–20, 19. The connection between the multilateral trading system and trade measures for environmental purposes pursuant to MEAs, including the relationship between the respective dispute settlement mechanisms in these fields, is clear from the fact that in its first report, the Committee on Trade and Environment (CTE) treated these two agenda items together.
7 Ibid. This study examines five case studies on chemical-intensive agriculture, deforestation, global warming, acid rain and overfishing, in order to illustrate the linkages between trade and environment.