Chapter 6. The Nagoya Protocol and WTO Law

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In the past two decades, the relationship between the Convention on Biological Diversity (CBD) and multilateral trade obligations administered by the World Trade Organisation (WTO) has no doubt been one of the most well-known case studies within the ‘trade-and-environment’ debate. Commentators have especially focused on the potential conflict with the WTO agreements arising from restrictions on trade in genetically modified organisms as well as from the CBD provisions on access to genetic resources and sharing of benefits resulting from their utilisation (ABS). Following the adoption of the Nagoya Protocol, both issues are now regulated under protocols to the CBD. As the purpose of these protocols is to operationalise the programmatic and frequently vague provisions of the CBD, it is foreseeable that, as already occurred with the Cartagena Protocol, the adoption

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and implementation of the Nagoya Protocol will generate a new wave of enhanced policy and scholarly discussions on its compatibility with the world trade system. For the same reasons, it is unsurprising that trade-and-environment quarrels were prominent in the negotiating process leading to the Nagoya Protocol and that the latter’s final text contains several provisions embodying compromise solutions in this area.⁴

In the present chapter, I take the view that those compromises translate into an agreement that leaves the issue of the relationship between the international biodiversity regime on ABS and WTO obligations largely unresolved and ambiguous. This does not mean that instances of actual conflict with WTO disciplines may never surface in the future. The measures enacted by the Parties for implementing the Nagoya Protocol will indeed be crucial for evaluating the latter’s potential to pave the way for laws and practices that are prima facie inconsistent with WTO rules. Therefore, when illustrating the interferences of the Nagoya Protocol with WTO obligations, I will conveniently use a broad notion of conflict of norms, i.e., one referred to situations where the Parties’ implementation of one instrument may lead to a breach of the other. More orthodoxy, these should be identified as ‘tensions’ among competing regimes, rather than ‘norm conflicts’ stricto sensu, i.e., those arising from mutually-exclusive obligations set forth in the agreements themselves. However, the alternative between deviations from WTO disciplines that are imposed by an international agreement itself and those that are merely allowed by the latter is critical from the WTO perspective. In the case of a WTO dispute involving the second hypothesis, the international agreement would at best only be relevant for interpretative purposes, while the disputed national measures would most likely be found in breach of WTO law.⁵

After a preliminary consideration of the scope of the Nagoya Protocol and the nature of its obligations (section I), this chapter will present an overview of the main substantive trade issues arising from the Protocol. Essentially, these concern the relationship between the Protocol’s ABS regime and WTO agreements on trade in goods (section II.1) and that between the Protocol and WTO obligations in the field of intellectual property rights (IPRs) (section II.2). The next part of the chapter will revisit the systemic issue of the

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⁵ See further section I.