

UNITY AND FRAGMENTATION IN INTERNATIONAL LAW

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INTRODUCTORY REPORT ON THE WORLD TRADE ORGANIZATION

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The law and jurisprudence of the WTO stand at the forefront of the debate on unity and fragmentation in international law. This is the case for essentially two reasons.

First, the close-to thirty WTO agreements are of an unprecedented width and depth reaching far beyond traditional trade policies (such as tariffs and quotas). With the passage of time, those agreements now affect virtually all areas of domestic and international regulation (ranging from environmental and human rights protection to cultural diversity, public health, consumer welfare, taxation and intellectual property). As a result, when enacting domestic law or creating international treaties in almost any domain, WTO disciplines can be triggered (*the uniting or centralizing pull of world trade and globalization*).

Second, the WTO treaty is backed-up by a dispute settlement process of an unprecedented compulsory and automatic nature. Combine such strong ‘judiciary’ with the tangential effect of trade rules on almost all layers of regulation, and one logically ends up with WTO disputes that may, in effect, be more related to culture, the environment, territorial delimitation or public health and morality, than trade. Yet, because of the compulsory nature of the WTO dispute process, those trade-related disputes can, and are, being decided within, what seems at first sight, the exclusive domain of the WTO (*the fragmentary or centrifugal pull of world trade and globalization*).

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Treaty-making and dispute settlement at the WTO offer, therefore, a fascinating real-life application of the unity *versus* fragmentation debate.² This report surveys cross-references between the WTO and other branches of international law, first, by WTO treaty-makers (Section I), second by WTO dispute-settlers (Section II). Section III is an *excursus* on the crucial question of when two norms can be said to be in ‘conflict’ with particular reference to WTO jurisprudence. Section IV offers some concluding remarks.

I. CROSS-REFERENCES BY WTO TREATY-MAKERS

From its creation under UN auspices in 1947, the GATT explicitly positioned itself in the wider context of international law. GATT Article XXI security exceptions, for example, explicitly permit trade sanctions “in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security”. GATT Article XV:9, in turn, explicitly allows for “exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund”.

Yet, since the GATT was eventually applied as a left-over or bare skeleton of what was intended to be a much broader and comprehensive International Trade Organization (pursuant to the still-born 1948 Havana Charter), GATT soon withdrew itself to the more humble and isolated role of a tariff-reduction machine, set up and efficiently run by trade-only technocrats operating far away from the political limelight of the UN and the cold war.

Over time, this cozy GATT club gradually transformed, however, into a much more public and contentious WTO, triggered, in particular, by its increasing intervention in domestic regulation (a move that came to the open especially with the infamous *Tuna-Dolphin* cases in the 1990s) and the ever more legalized nature of its dispute process

² For a more complete study of this topic, see JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW, HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003).

(culminating in 1994 with the abandonment of the veto). As a result, world trade rules started to ‘matter’ (i.e. went beyond the dry, technical field of customs duties) and became ‘for real’ (i.e. could be effectively enforced). This catapulted the world trade system from the technical and isolated backwaters of the GATT, to the public and highly-contentious and integrated spotlight of globalization and the WTO.³

Still dominated by trade insiders, most of whom were not well-versed in public international law, the WTO treaty (unlike for example UNCLOS⁴) does *not* explicitly explain its place and interaction with the wider *corpus* of international law. The WTO treaty does *not* include a general conflict clause setting out its relationship with pre-existing international law: It does not explicitly provide that it prevails over pre-existing law, nor does it state that it is without derogation from pre-existing law.⁵ With the exception of treaties establishing a free trade arrangement or customs union (regulated in GATT Article XXIV), the WTO treaty does not include a general conflict clause in respect of future treaties either.⁶

At the same time, multiple, sector-specific cross-references to other domains of international law did find their way in the 1994 WTO treaty. WTO negotiators came up with a wide diversity of methods and processes illustrating the uniting or centralizing pull of world trade. The WTO thus provides a useful laboratory of how treaty-makers can inter-connect different segments of international law. The remainder of this Section sums up seven of such interface methods.

³ See Joost Pauwelyn, *The Transformation of World Trade*, 104 MICHIGAN LAW REVIEW (2005:1, forthcoming)

⁴ See the very elaborate Article 311 of UNCLOS on “Relation to Other Conventions and International Agreements”.

⁵ The WTO treaty does include, however, sector or treaty specific conflict clauses such as GATT Article XV:9 giving certain preference to the IMF and TRIPS Article 2.2 giving certain preference to certain WIPO conventions.

⁶ This may be surprising, given the vast potential for inter-play between WTO norms and other norms, but is probably explained because of (i) a lack of preoccupation with (and, for many, expertise in) public international law on behalf of the negotiators of the WTO treaty (recall that trade negotiators are often employed by a ministry of trade or the economy, de-linked from that of foreign affairs); and (ii) political dead-lock for those rules of international law WTO negotiators did have in mind (in particular, multilateral environmental agreements).

1. *Institutional Cooperation and Observership*⁷

Pursuant to Article V:1 of the Marrakesh Agreement Establishing the WTO, the WTO General Council “*shall* make appropriate arrangements for effective cooperation with other *intergovernmental* organizations that have responsibilities related to those of the WTO”. Such arrangements – largely procedural in nature -- were subsequently made with the UN, WIPO, World Bank, IMF, International Office of Epizootics and ITU. Pursuant to Article V:1, observer status was granted also to the UNCTAD, FAO, OECD and ITC.

Article V:1 adds that the General Council “*may* make appropriate arrangements for consultation and cooperation with *non-governmental* organizations concerned with matters related to those of the WTO”. In 1996, Guidelines for such arrangements were adopted (yet, so far no arrangements have been made with specific NGOs) and a procedure that allows NGOs to attend WTO Ministerial Conferences as observers was approved.

2. *Elevation of Other Treaties to WTO Obligations*

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) explicitly incorporates a number of WIPO conventions (e.g., the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works). Those WIPO obligations are now also WTO obligations and can be enforced through WTO dispute settlement.

3. *International Standards or Arrangements set up as Safe-Havens under the WTO Treaty*

The WTO Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS), oblige WTO members to “base” their measures on, or

⁷ See WTO Analytical Index, Guide to WTO Law and Practice, First Edition (2003), 69-72.

“use ... as a basis”, certain international standards. If TBT/SPS measures are, respectively, “in accordance with” or “conform to” relevant international standards, such measures benefit from a safe-haven under WTO disciplines (for TBT purposes they are rebuttably presumed not to create “an unnecessary obstacle to international trade”; for SPS purposes, they are presumed consistent with the SPS Agreement and GATT).

The international standards referred to are essentially non-binding guidelines enacted in other international organizations such as the WHO/FAO Codex Alimentarius Commission. Although limited to three so-called sister organizations in the SPS Agreement, the scope of international standards in the TBT Agreement is much broader. As the panel on *EC - Sardines* found, for TBT purposes, “international standards are standards that are developed by international bodies”.⁸ This, of course, begs the question of how to define the terms “standard” and “international body”.

First, the word “standard” is defined in TBT Annex 1.2 as: “Document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is *not mandatory*” (emphasis added). Hence, the fact that, for example, the requirements in the UN Kimberley Scheme on Conflict Diamonds are *not* mandatory could make them “standards” in the TBT sense and, ironically, somewhat more important for TBT purposes than, for example, legally binding human rights treaties since only compliance with international “standards” offers a presumption of TBT conformity.

Second, the word “international body” is defined in TBT Annex 1.4 as: “Body or system whose membership is open to the relevant bodies of at least all Members”. Crucially, such “international body” setting standards could be inter-governmental (such as, arguably, the Kimberley Scheme)⁹ or semi-private (such as ISO) since the “relevant

⁸ WTO Panel Report, *European Communities - Trade Description of Sardines*, WT/DS231/R, para. 7.63 (2002).

⁹ The inter-governmental Kimberley scheme, for example, explicitly states: “participation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of that scheme” (Section VI.8 of the Kimberley scheme). As a result, membership in the Kimberley Process “is open to the relevant bodies of at least all [WTO] Members”. Consequently,

bodies” of WTO members referred to can either be governmental or non-governmental. At the same time, “non-governmental body” is restrictively defined in TBT Annex 1.8 as a “[b]ody other than a central government body or a local government body, including a non-governmental body *which has legal power to enforce a technical regulation*”.

Along the same lines, the WTO Subsidies Agreement provides that an export credit practice shall not be considered as a prohibited export subsidy if it is in conformity with the interest rate provisions of “an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members)”.¹⁰ Though not explicitly referred to, the “undertaking” in mind is the *OECD Arrangement on Guidelines for Officially Supported Export Credits*, also referred to as “OECD Arrangement”.

4. *Other International Law Referred to in WTO Waivers*

The WTO occasionally waives certain obligations of its members (pursuant to Article IX:3 of the Marrakesh Agreement). In doing so, it may condition the waiver to action required by, or consistent with, other international treaties.

The 1994 (GATT) waiver granted to the EC for its import regime of bananas, for example, applied only “to the extent necessary” to do what was “required” by the relevant provisions of the EC-ACP Lome Convention.¹¹ Equally, the 2003 waiver in respect of trade restrictions on so-called conflict diamonds is limited to measures “necessary to prohibit the export [and import] of rough diamonds to [and from] non-

Kimberley requirements could well qualify as "international standards" triggering a presumption of TBT conformity.

¹⁰ Second paragraph of item (k) in Annex I to the Subsidies Agreement.

¹¹ GATT Document L/7604/WT/L/186, 9 December 1994.

Participants in the Kimberley Process Certification Scheme consistent with the Kimberley Process Certification Scheme”.¹²

5. *The WTO Committee on Trade and the Environment*

Although since long a subject of debate and negotiations, so far GATT/WTO treaty-makers have failed to include an explicit rule on how GATT/WTO rules relate to multilateral environmental agreements (MEAs). Yet, with the task of doing so, and as a procedural method of coordination between trade and environment, the drafters of the WTO treaty did adopt a *Declaration on Trade and Environment* whose main content was the creation of a WTO Committee on Trade and the Environment (CTE).¹³

The topic of interaction between WTO and MEA provisions was also put on the agenda of the Doha Development Round. The Doha Declaration itself calls for negotiations on “the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)”. However, those negotiations were explicitly “limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question”.¹⁴

6. *WTO Declarations on Trade and ...*

A *Declaration on the Relationship of the WTO with the IMF*¹⁵ (part of the WTO 1994 Final Act) states, in essence, that GATT 1994 and other Annex 1A agreements prevail

¹² WTO Document G/C/W/432/Rev.1, 24 February 2003. See Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for ‘Conflict Diamonds’*, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW (2003) 1177.

¹³ WTO Secretariat, *Legal Texts*, 469.

¹⁴ Doha Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 31(i).

¹⁵ WTO Secretariat, *Legal Texts*, 447.

over IMF rules unless otherwise provided for in these WTO agreements (as, for example, in GATT Article XV).¹⁶

Importantly, the 1996 *Singapore Declaration* deals with the relation between WTO rules and international labour standards. Instead of incorporating, or providing a safe-haven for, any of these standards in the WTO, members agreed to “renew our commitment to the observance of internationally recognized core labour standards”, but added that “[t]he International Labour Organization (ILO) is the competent body to set and deal with these standards”. In the Declaration, WTO members also “reject the use of labour standards for protectionist purposes” and “note that the WTO and ILO Secretariats will continue their existing collaboration”.

Professor Ernst-Ulrich Petersmann has advocated the adoption of a similar declaration in respect of ‘International Trade and Human Rights’ in which WTO members would “recognize the universal human rights obligations of all WTO Members, and acknowledge the ‘human rights dimensions’ of a rules-based world trading system”. At the same time, the declaration would affirm that the legal protection of human rights occur “through the competent UN human rights bodies and national institutions”.¹⁷

¹⁶ *Ibid.*: “unless otherwise provided for in the [WTO] Final Act, the relationship of the WTO with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the WTO Agreement, will be based on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund”.

¹⁷ Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in L. BURGI, T. COTTIER AND J. PAUWELYN (EDS.), HUMAN RIGHTS AND INTERNATIONAL TRADE (forthcoming, OUP 2005).

7. *The Confirmation of 'Customary Rules of Interpretation of Public International Law'*

Perhaps the most influential -- but at the time of its creation, least conspicuous and debated -- reference to public international law in the WTO treaty can be found in the largely procedural WTO dispute settlement understanding (DSU). Article 3.2 of the DSU provides in relevant part that WTO covered agreements must be clarified “in accordance with customary rules of interpretation of public international law” (in effect, Articles 31 and 32 of the Vienna Convention on the Law of Treaties).

To my knowledge, the WTO treaty is the only international legal instrument that saw the need to explicitly confirm those rules. It perfectly illustrates the extent to which the earlier GATT had alienated itself from the broader *corpus* of international law. In all other treaty-negotiating fora it would come across as completely superfluous to confirm these Vienna Convention rules, as those rules (to the extent they reflect custom) automatically apply to any treaty anyhow. Yet, in the WTO context, to many trade negotiators and WTO insiders, this confirmation of public international law rules was a true revelation.¹⁸ Even to this date, some WTO experts maintain that had DSU Article 3.2 not been included, those Vienna Convention rules would not have applied.¹⁹

For present purposes, the most important effect of this DSU reference to Articles 31 and 32 of the Vienna Convention is contained in Article 31.3(c), directing WTO panels and the Appellate Body to take account not only of the treaty itself (*in casu*, the WTO treaty), but also of “any relevant rules of international law applicable in the relations between the parties”.

¹⁸ One WTO panel explained the need for DSU Article 3.2 as follows: “The language of 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law” (*Korea—Measures Affecting Government Procurement*, WTO Doc. WT/DS163/R, para. 7.96 (June 19, 2000)).

¹⁹ See Joel Trachtman, Panel Remarks on *The Jurisdiction of the WTO*, Proceedings of the 98th Annual Meeting of the American Society of International Law, 2004, 135, at 139-140.

It is to the role of these WTO dispute-settlers, and their impact on the fragmentation and/or unity of WTO law and other international law that I next turn.

II. CROSS-REFERENCES BY WTO DISPUTE-SETTLERS

In its very first report, the WTO Appellate Body confirmed that the direction in DSU Article 3.2 to clarify WTO covered agreements “in accordance with customary rules of interpretation of public international law” – discussed in the previous section -- “reflects a measure of recognition that the *General Agreement* [GATT] is not to be read in clinical isolation from public international law”.²⁰ This statement constituted but the opening salvo of a long series of panel and Appellate Body rulings welcoming back the ‘lost son’ of GATT/WTO law into the big family of public international law.

As this brief report cannot attempt to include all cross-references to international law in what is now over 10 years of WTO dispute settlement, what follows is an illustrative overview of the types of cross-references that WTO dispute-settlers have engaged in.

1. *The Crucial difference between ‘jurisdiction’, ‘interpretation’ and ‘application’*

In previous work, I set out a classification based on the different ways or processes through which WTO panels can and have referred to international law. In this respect, it is crucial to distinguish the following three processes:

Jurisdiction to examine claims of violation: WTO panels can only examine government measures for their consistency with so-called ‘WTO covered agreements’ (DSU Art. 1.1). They cannot examine claims of violation of, for example, human rights or environmental treaties nor of customary international law.

²⁰ *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, at 17 (Mar. 20, 1996).

A recent Appellate Body report did, however, find that the general principle of good faith can give rise to an additional finding of violation, thereby rejecting a US argument that there was no basis in the WTO agreement to conclude that a WTO Member had not acted in good faith.²¹

Treaty interpretation with reference to other international law: WTO treaty terms can, and have been, interpreted with reference to

- (i) other international agreements such as in *US – Shrimp*, where the Appellate Body interpreted the words “exhaustible natural resources” in GATT Article XX(g) with reference to certain environmental treaties²² or in *EC – GSP* where the words “development, financial and trade needs” of developing countries, which the Appellate Body found *can* justify differential treatment between developing countries, were interpreted with reference to “broad-based recognition of a particular need, set out ... in multilateral instruments adopted by international organizations”²³;
- (ii) general principles of (international) law such as good faith, due process or *abus de droit* (as in *EC – Hormones*, *US – Shrimp* and *US – FSC*²⁴); and
- (iii) general customary international law such as “the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered”.²⁵

²¹ Appellate Body Report on *US – Byrd*, paras. 297-8 (“[c]learly ... there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith”, adding, however, that “[n]othing ... in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion”).

²² Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*US – Shrimp*”), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras. 128-132.

²³ Appellate Body Report on *EC – Conditions for the Granting of Preferences to Developing Countries*, WT/DS246/AB/R, April 20, 2004, paras. 162-4.

²⁴ As discussed in Pauwelyn, *supra* note 2, at 268-272.

²⁵ Appellate Body Report on *US – Cotton Yarn*, para. 120.

The Appellate Body has confirmed, on several occasions, that such interpretative material can only be referred to in case it reflects the *common intention* of all WTO members.²⁶ In other words, the other international law must be binding on all WTO members (as is the case for general custom, general principles and some treaties) or, at least, reflect their common intention (as may be the case, in particular, of certain provisions in broadly supported multilateral agreements referred to by the Appellate Body, almost the way it refers to the *Oxford English Dictionary*, to find out, for example, whether “exhaustible natural resources” should be read to include living species or to decide whether something is part of the “development, financial and trade needs” of developing countries).

Confirming that the WTO operates as part of a living ‘system’ of international law, the Appellate Body, in a crucial finding, also opted for a so-called ‘evolutionary’ approach to interpreting the WTO treaty. In *Shrimp – Turtle* it found as follows:

The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment ... From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary".¹⁰⁹ It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.²⁷

Crucially, however, interpretation with reference to other international law cannot lead to an interpretation *contra legem* and can, hence, not overrule the unambiguous wording of a WTO provision.

²⁶ See, most recently, the Appellate Body Report on *US – Gambling*, circulated on 7 April, 2005, para. 159 (“Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members ...”, emphasis in the original).

²⁷ Appellate Body Report on *US – Shrimp*, paras. 129-130.

Application of other international law: In addition to treaty interpretation, other international law is commonly referred to also to fill largely procedural gaps in the WTO agreement. The WTO agreement is, for example, silent on questions such as burden of proof, standing, due process, good faith, representation before panels, the retroactive application of treaties or error in treaty formation. As a result, reference has been made to rules of *general international law* addressing those questions, essentially custom or general principles of law binding on all states.²⁸

In addition, panels may be asked to apply WTO provisions in the light of some other treaty, not to provide interpretative material, but essentially to dis-apply the WTO provision.²⁹ Such reference may be invoked to undermine the *jurisdiction* of a WTO panel (based, for example, on a NAFTA or MERCOSUR rule which may state that the parties had agreed not to submit the dispute to the WTO, an issue that remains contentious³⁰).

The reference may also be made to dis-apply a WTO provision on the *merits*. One could think, for example, of an MEA or human rights treaty where two WTO members agree to impose a trade restriction, but one of them subsequently challenges the trade restriction before a WTO panel. Can the other party then invoke the non-WTO treaty as a defense before the WTO panel? In my view, the answer must be yes, as long as both parties agreed to this other treaty and it does not affect the rights of third parties. In the event there is a genuine conflict between the WTO obligation and the other norm, a conflict

²⁸ For an overview of relevant case law: J. Cameron and K. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 ICLQ (2001) 248-298 and Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AJIL (2001) 535, at 563. See also Meinhard Hilf, *Power, Rules and Principles – Which Orientation for WTO/GATT Law?* JIEL (2001), 111-130. For an increasingly isolated critique see John McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 Va. J. Int'l. 229 (2003).

²⁹ For a detailed examination of the question whether a WTO panel can reject a claim of WTO violation based independently on a non-WTO rule of international law, see Joost Pauwelyn, *How to Win a WTO Dispute Based on Non-WTO Law? Questions of Jurisdiction and Merits*, 37 Journal of World Trade (2003) 997.

³⁰ See Panel Report on *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted on 19 May 2003 (not appealed), para. 7.38 (where Argentina unsuccessfully relied on MERCOSUR to undermine the jurisdiction of a WTO panel) and the currently pending dispute on *Mexico - Tax Measures on Soft Drinks and Other Beverages* (WT/DS308) (where Mexico argues that the dispute is pending before NAFTA and hence should not be decided by the WTO).

clause in either treaty or general conflict rules (e.g., *lex posterior* and *lex specialis*) must then decide which of the two norms prevails. If the WTO norm prevails, the panel can find a violation; if the other norm prevails, the panel must simply conclude that the WTO provision cannot here be applied and, therefore, is not violated.

Crucially, whilst reference material in treaty *interpretation* must reflect the common intention of all WTO members, in my view (and this is an issue not yet decided by the Appellate Body), the *application* of other international law as between the disputing parties before a WTO panel does not require that this other law is binding on, or reflects the common intention of, all WTO members; it suffices that the two disputing parties are bound by it.

2. *The Special case of customary international law*

One particular reference to other international law may cause additional concerns, namely the application by WTO panels of rules of general international *customary* law. While other, non-WTO *treaties* agreed upon by the disputing parties are the product of deliberative and explicit state consent, international *custom* derives from “a general practice accepted as law”.³¹ As a result, when it comes to defining and interpreting custom, WTO panels have less explicit guidance and may feel inhibited, in particular, to decide on whether WTO treaty provisions have been altered by an allegedly supervening custom. In *EC – Hormones*, for example, the Appellate Body was extremely hesitant when addressing the EC claim that the precautionary principle as a rule of customary law ought to supplement the provisions of the SPS Agreement.³² This trepidation is justified and WTO panels ought, indeed, be extremely careful and on solid grounds before concluding that a new rule of custom has emerged.

³¹ Article 38.1(b) of the Statute of the International Court of Justice.

³² Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* (“*EC – Hormones*”), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, at para. 123: “The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question”. For a critique, see Pauwelyn, *supra* note 2, 481-2.

At the same time, the risk of new custom overruling prior WTO provisions is extremely limited. Although it is generally accepted that no inherent hierarchy exists between treaties and custom³³, in practice, it is rare for custom to, first of all, *emerge* notwithstanding the continuing existence of a contradictory treaty norm. It is not as if custom can be established over night. Custom requires a general and consistent practice of states, *including* the (at least) tacit consent of those who concluded the pre-existing treaty (persistent objectors cannot be bound by it). Moreover, even if new custom does emerge in the face of a treaty dealing with the same subject matter, given the often vague and general nature of custom, a genuine conflict between custom and treaty is exceptional. In most cases it will be possible to interpret the treaty in line with the new custom. Finally, in those cases where a genuine conflict does arise, the treaty is most likely to prevail as *lex specialis* based on its often more specific and explicit expression of state will.³⁴

In sum, the fear expressed by some authors³⁵ that for WTO panels to apply custom risks high-jacking the contractual, consent-based nature of the WTO is unwarranted: WTO members can only be held to custom if the strict rules for its emergence are met (states who explicitly and consistently objected to the custom cannot be bound by it). Moreover, even if custom was explicitly or tacitly consented to, it is unlikely to prevail over the WTO treaty.

³³ See, for example, NANCY KONTOU, *THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW* (1994) and the references in Pauwelyn, *supra* note 2, 94-97. *Contra*: John McGinnis, *supra* note 28 arguing that “[g]lobal multilateral agreements should dominate customary international law because they rest on a more certain consensus and have fewer agency costs” (p. 42) and even “skeptical that [the] substantive aspects [of custom that is part of *jus cogens*] should have priority over global multilateral treaties” (note 137).

³⁴ For a full discussion, see Pauwelyn, *supra* note 2, 131-143.

³⁵ See, in particular, John McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law*, *supra* footnote 28, discussed also *supra* footnotes **Error! Bookmark not defined.** and 33.

3. *Judicial cooperation with other international organizations and courts or tribunals*

WTO panels and the Appellate Body have on several occasions referred to ICJ and PCIJ (even ECJ) judgments, in particular, to enlighten themselves on questions of general international law such as burden of proof, good faith or the role of domestic law before international tribunals. Unlike UN specialized agencies, the WTO cannot, however, ask formal advisory opinions from the ICJ. Yet, WTO panels have on several occasions requested information from other international organizations, especially from the IMF (on questions of balance of payments), WHO/FAO Codex Alimentarius Commission (to find out about the meaning of some of its international standards incorporated through the SPS and TBT agreements) and WIPO (seeking information on the preparatory works of certain WIPO conventions incorporated in the TRIPS Agreement).

WTO panels have broad authority under DSU Art. 13 to seek the opinion or expert advice from any source. Nothing limits this power so as to exclude legal questions. The *amicus curiae* procedures before certain cases at the Appellate Body, for example, were explicitly limited to legal questions (as the Appellate Body can, in principle, only examine legal, not factual, elements of the panel report). Although WTO panels must be presumed to know the law (*jura novit curia*), other institutions may be more knowledgeable than they are on certain specialized legal matters under non-WTO treaties (e.g., WIPO or the secretariat of an MEA) or general international law (e.g., the ICJ). Although international organizations could deal with such WTO requests, other international courts or tribunals would require an explicit grant of jurisdiction to reply to such WTO demands (as noted earlier, the ICJ can only issue advisory opinions to UN specialized agencies).

As with other expert advice, the WTO panel would not be bound by the legal information thus provided, but would be naturally inclined to give deference to it. For a panel to request the opinion of other courts or tribunals, or to suspend its work whilst the parties

go back to another international law system³⁶ (e.g. NAFTA, MERCOSUR, the ICJ or ITLOS, all of which have had overlapping disputes with the WTO system), may be borderline between, on the one hand, transferring jurisdiction to another body without the agreement of the parties (something that a panel cannot do) and, on the other hand, seeking the advice from an epistemically superior institution (something that ought to enhance the legitimacy of the WTO process).

Crucially, an important additional argument in favor of WTO panels entering into a dialogue with other international organizations and tribunals is that it would enhance the co-ordination between different branches of international law and decrease the risk of conflicting judgments being issued by different tribunals.

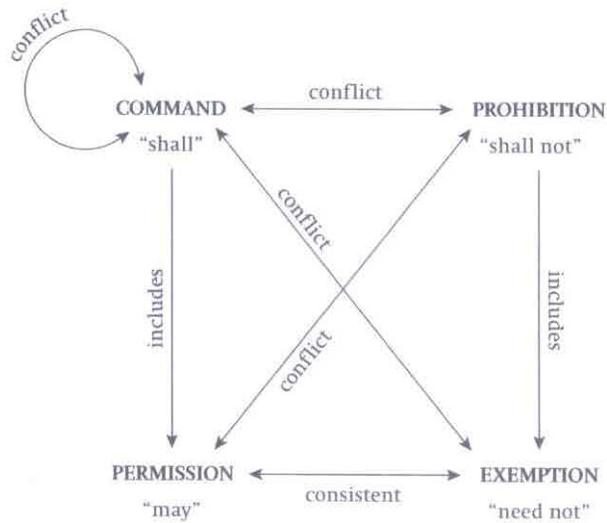
III. THE DEFINITION OF 'CONFLICT' OF NORMS IN WTO CASE LAW

A crucial, yet often ignored, question in any debate on fragmentation of international law is the very definition of 'conflict': When are two norms of international law, as they apply between two states, in conflict with each other? In my view, conflict does not only arise when faced with two mutually exclusive *obligations* (be they a command or prohibition). Also an *obligation* to do X under one norm (say, to liberalize trade) and an explicit *right* to do -X under another (say, a permission to ban a particular import under an environmental treaty), can constitute conflict.³⁷ The figure below illustrates what are, in my view, the four possible situations of conflict:

³⁶ As recently happened in the *Mox Plant case* (Ireland v. United Kingdom), Order No. 3 of 24 June 2003, at <http://www.pca-cpa.org/PDF/MOX%20Order%20no3.pdf>.

³⁷ See Pauwelyn, *supra* note 2, 164-200.

The four situations of conflict



As the WTO consists of close to thirty agreements negotiated at different times and, most often, by different people, WTO rules may sometimes contradict each other. To know, for example, when a conflict clause between different agreements is triggered it is, then, essential to define when two norms can be said to ‘conflict’. Such definition, in turn, sheds light on when two *different* branches of international law can be said to conflict (say, a WTO provision as against an MEA or human rights provision).

The first WTO panel confronted with the notion of conflict defined it to include the following two situations: “(i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits”.³⁸ The second panel which addressed the notion of conflict (*Indonesia – Autos*) adopted a totally different position. In the panel’s opinion,

³⁸ Panel report on *EC – Bananas*, para. 7.159.

“under public international law a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter”.³⁹

In its first ruling on the matter, the Appellate Body on *Guatemala – Cement* seemed to confirm this narrow view of conflict, which it defined as “a situation where adherence to the one provision will lead to a violation of the other provision” (although the term “adherence” could arguably include adherence to an obligation or a right). In *EC – GSP*, however, the Appellate Body expanded the notion of conflict so as to include a GATT provision *prohibiting* discrimination (GATT Art. I) and a provision in the so-called Enabling Clause (a decision under GATT) that *permits* – but does not mandate – trade preferences to developing countries which discriminate against developed countries.⁴⁰ Subsequently, however, a panel (under appeal at the time of writing) reverted to the previous, narrow definition of conflict.⁴¹

In sum, the last word is not yet said on how to define ‘conflict’, not even within the WTO. To avoid that obligations systematically prevail over rights, it is crucial that a wide definition of conflict is adopted. Widely defining conflict does, however, say nothing on how to *resolve* conflict, the next question that must be decided by conflict clauses or general principles such as *lex posterior*. However, to find conflict only when two obligations cannot be complied with simultaneously is, in effect, collapsing the two steps (of *defining* and *resolving* conflict) as it, by definition, always gives preference to obligations over rights.

IV. CONCLUDING REMARKS

³⁹ Panel report on *Indonesia – Autos*, para. 14.49. In a footnote, the panel remarked that “the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations ... which cannot be complied with simultaneously”, footnote 649.

⁴⁰ Appellate Body Report on *EC – GSP*, paras. 100-103.

⁴¹ Panel Report on *EC – Sugar*: “The WTO jurisprudence has maintained the general principle that there is a conflict only when two provisions are mutually exclusive, that is when only one provision ‘applies’ because it is not possible for a single measure to be consistent with both provisions”. Strangely enough, in a footnote the panel did, however, acknowledge that “[r]ecently in *EC – Tariffs Preferences*, para. 88, the Appellate Body seems to have expanded the concept of conflicts to include situations where a provision gives a right while another one gives an obligation”.

Because it is largely consent-based, international law is fragmented. A wide range of different treaty regimes and courts and tribunals exist. This is not necessarily a bad thing. Crucially, however, these different islands of international law must be inter-connected and considered in unison through the spectrum of the 'system' of international law, in particular, the 'toolbox' of general international law on treaties and state responsibility.

As illustrated by the WTO example, both in the abstract and before a particular adjudicator, the current international legal system provides a variety of ways to marry the different branches of international law. Treaty-makers can, for example, set up schemes for institutional cooperation between the different branches and cross-refer or even incorporate other treaties or rules of general international law. Before a particular court or tribunal, it is important to include *all* international law binding as between the parties as part of the *applicable law*, even if the *jurisdiction* of the adjudicator is limited to a given treaty (say, WTO covered agreements). If all courts and tribunals follow this approach, it would mean that, although they may have *jurisdiction* to examine different claims, in so doing they would apply *the same law*. Hence, in theory, no conflict should arise.

At the same time, it remains possible that two different judges come to different conclusions based on the same law. This can never be avoided completely and, much like the phenomenon of fragmentation itself, may even have positive side effects: Through competition the best interpretation is likely to surface. The risks of conflicting rulings *on the same law* can, moreover, be mitigated considerably through judicial cooperation, be it in the form of preliminary rulings, advisory opinions, requests for information, expert advice or one tribunal taking account of the rulings and precedents of others.

The theory explored here for the WTO can be transposed to other regimes of international law. It requires a higher degree of tolerance and cooperation between treaty-makers and dispute-settlers than what we have witnessed to date. This, in turn, necessitates day-to-

day, practical linkages and coordination in the minutia of international affairs. Equally, if not more, important for the theory proposed in this report is the broader battle to maintain the notion of a ‘system’ of international law. Indeed, the ultimate disagreement between WTO commentators on whether other international law can be applied by WTO panels boils down to this: While I regard the WTO as *necessarily* operating as part of a broader ‘system’ of international law, my critics (mainly from the U.S.) open the door to other law only if the WTO treaty *explicitly says so*. Put differently, they regard the different branches of international law as separated compartments or ‘coalitions of the willing’, connected only if, and to the extent that, these compartments explicitly incorporate ‘foreign’ elements. My position, in contrast, sees the WTO as born and operating in a ‘system’ of international law. Hence, as confirmed by countless international decisions, there is no need to explicitly confirm other international law in a new treaty.⁴² The rule is, rather, that unless other law was contracted out from in the new treaty, this other law continues to apply. As a result, to the extent that the WTO treaty did not contract out of other international law, this other law remains relevant.⁴³

⁴² See Pauwelyn, *supra* note 2, 205.

⁴³ As confirmed in the Panel Report on *Korea – Government Procurement*, para. 7.96 and the Appellate Body Report on *US – Hot Rolled Steel*, para. 120.