

## **BRIDGING FRAGMENTATION AND UNITY: INTERNATIONAL LAW AS A UNIVERSE OF INTER-CONNECTED ISLANDS**

*Joost Pauwelyn\**

I.	THE EXAMPLE OF THE WTO.....	905
II.	FRAGMENTATION AND UNITY IN LAW-MAKING.....	906
III.	FRAGMENTATION AND UNITY IN LAW-ENFORCEMENT.....	909
	A. <i>Jurisdiction Versus Applicable Law</i> .....	911
	B. <i>Jurisdiction Versus Treaty Interpretation</i> .....	913
IV.	CONCLUSION .....	915

The fragmentation of the international legal system is not new. The consent-based nature of international law inevitably led to the creation of almost as many treaty regimes, composed of different constellations of states, as there are problems to be dealt with. Traditionally, these different regimes operated in virtual isolation from each other. Most importantly, the Bretton Woods institutions (World Bank, IMF, and GATT, now WTO) focused on the world's economic problems, while the UN institutions tackled the world's political problems. Both the IMF and World Bank articles of agreement, for example, explicitly state that political factors cannot be taken into account. Operations are to be based (e.g. loans are to be distributed) solely on economic grounds (and not, for example, with reference to a country's human rights or corruption record).

This separation of spheres was somewhat of a blessing during the Cold War years when economic deliberations, at least between like-minded states, could proceed without political infighting. With the end of the Cold War and the accession of many former communist countries to the Bretton Woods institutions, the separation was no longer self-evident. The increased inter-dependence between states *and* between issue-areas (e.g., trade and environment, human rights and economic development) made the strict separation between different fields of international law all the more artificial.

The emergence of non-state actors in the international arena (be they NGOs, companies, or world public opinion) put additional pressure on government representatives not to deal with problems in isolation. For example, non-state actors have advocated that governments, when

---

\* Associate Professor, Duke University School of Law; Lic. Jur. (Leuven); M.Jur. (Oxon); Ph.D. (Neuchatel); previously with the WTO Secretariat (1996–2002), first, in the legal affairs division, subsequently in the Appellate Body Secretariat.

regulating international trade, should also take account of what has been decided at the UN regarding environmental or human rights protection.

These factors—the end of the Cold War and the rise of global interdependence and international NGOs—exerted important pressure toward a more unitary view of international law. In this sense, there is a relationship between the two phenomena discussed in this symposium: the emergence of non-state actors has contributed considerably to the forces acting *against* the fragmentation of the international legal system.

As a result, what *is* relatively new is the realization that the different fields or branches of international law necessarily overlap and that the resolution of modern problems requires a careful examination of this interaction. It is no longer possible to resolve, for example, trade questions de-linked from the problem of environmental protection or the pursuit of human rights. These interactions require the development of a unitary framework of international law, one where law-making and law-enforcement by different, specialized agents can somehow be harmonized into a coherent set of disciplines (not necessarily universally applicable among *all* states, but at least coherent as they apply in and between two specific countries).

At the same time, fragmentation is not necessarily a bad thing, nor will it disappear anytime soon. Law making and law enforcement by specialized organizations are likely to lead to better law. Regulatory competition may increase efficiency and provide a laboratory for the development of new legal instruments. Moreover, the diversity of states means that not all states have the same interests and hence that not all states will want to, or should, join all treaty-regimes.

What must be avoided, however, is this fragmentation leading to self-contained islands of international law, de-linked from other branches of international law. Put differently, the specialized institutions should continue to make and enforce their specialized law, but in doing so they should also take account of general international law *and* the law made in other institutions (after all, whether the US acts at the WTO or at the UN, it remains one and the same state). If all fora were to follow this approach, fragmentation and unity of international law could go hand in hand and, when it comes to law-enforcement, conflicting rulings could largely be avoided.

For one institution (say, the WTO) to consider also the law created *by the same states* in *other* institutions (say, in a multilateral environmental agreement, or MEA) flows logically from the principle of *pacta sunt servanda*. For example, when the US agrees to a WTO treaty one day, and the next day it agrees to an MEA, the US acts as one and the same state (even though it does so in different fora). The WTO should

*not* be used as a trade-only safe haven to circumvent MEA obligations that are, in principle, of equally-binding force between WTO members that are also party to the MEA.

Construing the WTO as a self-contained, trade-only regime risks circumvention not only at the *international* level, but also at the *domestic* level, where it would permit powerful domestic pressure groups (read: multinational companies with strong export interests) to circumvent *domestic* legal constraints (say, strict environmental regulations) by insulating their goals and concerns in a trade-only WTO cocoon. Both avenues for circumvention—at the *horizontal*, state-to-state level, when a WTO member circumvents its obligations under non-trade agreements, and at the *vertical* level, such as when a multinational company achieves free trade at the WTO without having to worry about non-trade concerns—go to the heart of the legitimacy and democratic content of international law.

Let me further develop this bridge between fragmentation and unity—connecting the different islands or branches of international law while at the same time respecting the need for specialization and the diversity between states—with reference to the WTO and how WTO law interacts with other branches of international law.

## I. THE EXAMPLE OF THE WTO

The problem of fragmentation, and the need for a unitary view of international law, is particularly acute at the WTO for three reasons: (1) claims of violation under the WTO treaty are subject to the compulsory jurisdiction of WTO panels and the WTO Appellate Body (while claims under most other treaties are not); (2) many international disputes have some trade or economic angle so that the disputes, though not initially or mainly a trade dispute (and hence not subject to compulsory jurisdiction at first blush), end up before the WTO which then must deal with questions of overlap or “trade and . . .” issues; and (3) countries increasingly engage in regional or bilateral free trade deals whose provisions and dispute settlement systems overlap with the multilateral WTO system.

In actual WTO cases, the U.S. has, for example, defended an import ban on shrimp with reference to environmental treaties; the EU tried to justify a ban on hormone-treated beef based on the precautionary principle; Argentina tried to excuse a statistical import tax with reference to a memorandum it had concluded with the IMF; and Argentina objected to a Brazilian complaint before the WTO based on the fact that the same dispute had already been decided by a MERCOSUR panel.

Moreover, in the future, it is not hard to imagine a challenge brought before a WTO panel against trade restrictions imposed or called for by, as examples, a multilateral environmental agreement, the Kimberley Scheme banning trade in conflict diamonds, or the WHO Framework Convention on Tobacco. One could even imagine a WTO case challenging trade sanctions imposed or called for by the International Labor Organization (e.g. against Burma) or pursuant to some human rights convention. In such an event, in which the WTO complainant can invoke a breach of WTO law, the defendant could invoke not just GATT exceptions but also a defense under one of these non-WTO treaties or decisions.

## II. FRAGMENTATION AND UNITY IN LAW-MAKING

At this juncture, it is useful to distinguish the question of overlap or potential for conflict between different fields of international law in the phase of *law-making*, from conflicts occurring in the phase of *law-enforcement*.

Any new rule or treaty of international law is necessarily created within the wider corpus of pre-existing international law, including pre-existing treaties, much like any new contract or statute is necessarily made within the wider context of a domestic legal system. When making new international law, a crucially important bridge to existing law is the corpus of general international law, in particular the “tool-box” of the Vienna Convention on the Law of Treaties and the rules on State Responsibility. This general international law applies to any new treaty *unless* that treaty contracts out of it. If no such contracting-out or *lex specialis* is incorporated in the new treaty, one must fall back on the rules of general international law, be they those on treaty formation, modification, or amendment, or rules on standing, burden of proof, or remedies. In this sense, general international law is a crucially important element of coherence and unity between different treaty regimes. As further explained below, we have witnessed this procedure of fallback on general international law on numerous occasions in WTO dispute settlement.

In addition, any treaty, new or old, interacts with other treaties, at least in relations between countries that are parties to both. Although treaties may be ratified by the same states, they are often negotiated and drafted by different people or constituencies within those states (e.g., trade ministry *versus* the foreign affairs department; health ministry *versus* ministry of agriculture). In the event of tension between treaties, there is, first of all, a presumption *against* conflict. Put differently, when

a treaty leaves room for interpretation, an attempt must be made to read it in a way harmonious with other treaties (at least those treaties reflecting the common intentions of the parties to the first treaty). This is called for explicitly in Article 31.3(c) of the Vienna Convention on the Law of Treaties: when interpreting a treaty, one must take account of “any relevant rules of international law applicable in the relations between the parties.”

In some cases, however, the tension between treaties cannot be “interpreted away” and a genuine conflict arises. In my book on *Conflict of Norms in Public International Law*,<sup>1</sup> I identified the following as the most important problems in this respect:

1. *When are two norms of international law, as they apply between two states, in conflict with each other?* In my view, conflict arises not only when faced with two mutually exclusive obligations. Conflict may also arise between an obligation to do X under one norm (say, to liberalize trade) and an explicit right not to do X under another (say, permission to ban a particular import under an environmental treaty).

2. *Some conflicts of norms lead to the end of one of the two norms:* i.e., because of the conflict, one of the two norms is invalid, terminated, or ‘illegal’. I call this type of conflict *inherent normative conflict*. A norm in conflict with *jus cogens*, for example, is void under Articles 53 and 64 of the Vienna Convention. One treaty, without stating so explicitly, may terminate another (Art. 59 Vienna Convention). In addition, an *inter se* agreement between a limited number of, for example, WTO members, may be explicitly prohibited or otherwise illegal under a pre-existing and broader multilateral agreement (*in casu*, the WTO treaty), especially if the *inter se* agreement “affects the enjoyment by the other parties of their rights under the treaty or the performance of their obligations” as described in Articles 34 and 41 of the Vienna Convention. In other words, an *inter se* agreement is illegal if it affects the rights or obligations of WTO members *not* party to the *inter se* agreement.

Whether, for example, an environmental treaty between some (but not all) WTO members is ‘legal’ under the WTO treaty will, therefore, depend on whether the trade restrictions permitted or imposed under the environmental treaty necessarily affect *all WTO members* (including those *not* party to the environmental treaty) or only those WTO members that agreed to the environmental treaty. The answer to this question depends, in turn, on the *nature* of WTO obligations: are they of the collective/integral/*erga omnes partes*-type, or essentially a bundle of bilateral relationships, making it possible to alter one bilateral relation-

---

1. JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 5 *passim* (2003).

ship between two WTO members without affecting other WTO members? In my view, most, if not all, WTO obligations remain of the bilateral type.<sup>2</sup> As a result, other, non-WTO treaties, even if they are concluded only between some WTO members, may reinstate specific trade restrictions, as long as these restrictions do not affect the rights of other WTO members.

3. *Other conflicts of norms leave both norms intact, but priority rules must be used to decide which norm applies in a particular situation.* One and the same set of facts may trigger the application of two conflicting norms. If these two norms are both valid and legal, the question is one of priority: which norm prevails? I term this type of conflict, *conflict in the applicable law*.

No inherent hierarchy exists of the *sources* of international law (e.g., treaties do not necessarily prevail over custom or vice versa). To resolve the conflict, therefore, recourse must be had to (1) explicit conflict rules in either treaty (e.g., NAFTA Art. 104 stating that certain environmental agreements prevail over NAFTA); and, in the absence of such explicit rules, (2) conflict rules of general international law, the most important being the *lex posterior* principle in Art. 30 of the Vienna Convention. *Lex specialis* as a general conflict rule was not explicitly incorporated in the Vienna Convention. Still, in my view, it must be resorted to in case the *lex posterior* principle is not or cannot be invoked. *Lex posterior*, or the rule that a later treaty prevails over an earlier one, is based on the domestic law idea that the more recent expression of ‘legislative intent’ controls. In international law, this idea does not always work. It may be difficult to put one single time-label on a particular treaty (re-negotiation and subsequent accession by certain states may complicate matters). Moreover, when it comes to multilateral treaties that set up a regulatory framework or system which continuously evolves and is continuously (re)confirmed, adapted, expanded and interpreted, it is difficult to freeze such a treaty at the moment when it was originally created and to label it simply as an expression of state consent limited to, say, 15 April 1994 in the case of the WTO agreement. Rather, I suggest calling this type of treaty “continuing” or “living” treaties” because it is most often impossible or purely fictitious to say that they are later or earlier in time compared to another treaty. Since the *lex posterior* principle cannot be applied (there are no ‘successive treaties’ to begin with), I suggest to resort in those cases to the principle of *lex specialis*. In many instances, the more general WTO rule (say, the general prohibition on import quotas) then must give way to, for example, a more specific obligation or right to

---

2. See Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 5 EUR. J. INT'L L. 907 (2003).

impose a ban on a particular product pursuant to an environmental agreement.

In exceptional situations of conflict, none of the above rules may offer a way out. In that case, I would not rule out a *non liquet*, i.e., a ruling not so much that there is *no* law, but that there is *too much* law and that it cannot be resolved which of the conflicting norms applies.

4. *One particular type of conflict is especially problematic*, namely a conflict between two treaties where only one of the two countries is bound by both, the other country being a party only to one of the treaties. I call this conflict of the “AB/AC” type: country A promising one thing to country B; but thereafter or elsewhere promising the same thing or a contradictory thing to country C. In old examples, A would cede a particular territory first to B, then to C, resulting in conflicting claims in the hands of B and C. More recent cases are embodied in the following example: A promising to B at the WTO not to restrict trade, after which A agrees with C that all trade in, for example, CFKs or conflict diamonds, *including those from third parties (in casu, country B)*, must be banned. This may lead to conflict from the perspective of country A: should it comply with its obligations vis-à-vis B not to restrict trade, or should it comply with its obligations vis-à-vis C to restrict trade? Making a choice necessarily violates the rights of either B or C.

International law offers no conflict rules for this type of conflict, not even priority rules. However, the rules on state responsibility continue to apply: if A decides to restrict trade and thereby violates the WTO rights of B, country B can claim at least compensation or retaliation rights at the WTO (certainly against country A, and arguably also against country C, if country C is also a WTO member). However, if A thereafter decides to withdraw the trade restriction on B, it will violate its obligations vis-à-vis country C under the environmental/conflict diamonds treaty. In the end, this impasse can only be resolved by re-negotiating either or both treaties, for example, or by country B joining the environmental agreement (perhaps in exchange for greater market access to countries A and C).

### III. FRAGMENTATION AND UNITY IN LAW-ENFORCEMENT

In principle, there should be no difference between how norms interact in the abstract and how they interact, or how conflict ought to be resolved, before a particular adjudicator. Nonetheless, while most would agree with the evaluation in the section above on law-making, when it comes to practical law-enforcement, many object to, for example, WTO panels taking account also of non-WTO law. In my view, this reticence is

based on a widespread confusion between three concepts or processes that any court or tribunal engages in. The scope of the legal rules that each of these three processes covers varies considerably. To confuse one process with the other may, therefore, lead to unjustified restrictions on the extent to which, for example, a WTO panel can consider non-WTO law. The three concepts or processes I have in mind, as applied to WTO dispute settlement, are:

- 1) The *jurisdiction* of WTO panels: the WTO panels are limited to claims of violation of WTO agreements only.
- 2) The law that WTO panels can refer to when *interpreting* WTO provisions: in the process of *treaty interpretation*, WTO panels may be called upon to refer to non-WTO rules of international law pursuant to Articles 31 and 32 of the Vienna Convention, in particular, Article 31.3(c) referring to “any relevant rules of international law applicable in the relations between the parties.” In my view, the non-WTO rules that may thereby be referred to in the process of interpreting WTO terms is limited to those non-WTO rules reflecting the common intentions of all WTO members.
- 3) The law that WTO panels may *apply* when examining and deciding on the validity of the WTO claims before them: although the jurisdiction of WTO panels is limited to WTO claims, in my view, all international law binding on both parties to a dispute may, in principle, be part of the *applicable law* before a WTO panel. Non-WTO law is part of this applicable law, and may, in particular, provide a defense against violation of WTO law (for example, an environmental agreement binding between the disputing parties may, depending on the relevant conflict rules, excuse a violation of GATT, independently of GATT Article XX). While non-WTO law to be referred to when interpreting WTO terms ought to be limited to law that reflects the common intentions of all WTO members, in my view, the applicable law in a particular dispute may also include law binding only between the two disputing parties (it need not be binding on all WTO members).

The best way to explain the difference between jurisdiction, treaty interpretation, and applicable law is to give some examples.

### A. Jurisdiction Versus Applicable Law

The difference between jurisdiction and applicable law is well known and accepted in other international courts and tribunals,<sup>3</sup> though often neglected at the WTO. Making an analogy to the limited jurisdiction of the International Court of Justice (ICJ), the *Lockerbie cases* decided by the ICJ constitute a perfect illustration. There, the ICJ had *jurisdiction* to consider Libyan claims only under the Montreal Convention. However, this did not stop it from also examining other international law, in particular UN Security Council Resolution 748 invoked in defense by the United Kingdom and the United States, as part of the *applicable law*.<sup>4</sup>

Non-WTO law invoked as part of the applicable law before a WTO panel may, therefore, constitute a self-standing defense *on the merits* (e.g., the Kimberley Scheme on conflict diamonds constituting a defense against a claim of violation of GATT, at least between WTO members party to the Kimberley scheme). In that case, a WTO and a non-WTO rule of international law may both apply to the case at hand. If they conflict, the conflict rules elaborated above must be applied. The result is that either the non-WTO rule is invalid/illegal (*inherent normative conflict*) or that it is valid and legal and a *conflict in the applicable law* arises. Based on the priority rules explained earlier, either the WTO rule or the non-WTO rule should then prevail. If the WTO rule prevails and it is violated, the panel must then find a violation of WTO law. If the non-WTO rule prevails and it justifies a WTO violation, the panel must reject the claim of violation of WTO law.

---

3. As most recently noted by the Arbitral Tribunal in the *Mox Plant* dispute (under Annex VII of UNCLOS): “The Tribunal agrees . . . that there is a cardinal distinction between the scope of its jurisdiction . . . on the one hand, and the law to be applied by the Tribunal . . . on the other hand.” *MOX Plant (Ireland v. United Kingdom)* (Perm. Ct. Arb. 2003) (Order No. 3, June 24, 2003, at para. 19), at <http://www.pca-cpa.org/PDF/MOX%20Order%20no3.pdf>. Compare the investor-state dispute settlement mechanism under Chapter 11 of NAFTA: Arts. 1116–17 of NAFTA, entitled “Claim by an Investor of a Party . . .,” limits the *jurisdiction* of NAFTA arbitration tribunals to *claims of violation* of Section A of NAFTA Chapter 11 and NAFTA Arts. 1503(2) and 1502(3)(a); in contrast, Art. 1131 of NAFTA, entitled “Governing Law,” sets out the broader scope of the *applicable law* to be considered in examining the validity of those enumerated NAFTA claims (“A Tribunal established under this Section shall decide the issues in dispute in accordance with *this [entire] Agreement and applicable rules of international law*”) (emphasis added). North Atlantic Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 (1993). Compare also Art. 288 (jurisdiction) to Art. 293 (applicable law) of UNCLOS. United Nations Convention of the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

4. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. U.S.*), 1992 I.C.J. 114 (Provisional Measures of Apr. 14, para. 42).

Less dramatically, non-WTO law is also commonly applied to fill largely procedural *gaps* in the WTO agreement. The WTO agreement is silent on questions such as burden of proof, standing, representation before panels, the retroactive application of treaties, and error in treaty formation. As a result, panels have applied the rules of *general international law* addressing those questions, essentially custom or general principles of law binding on all states.<sup>5</sup>

Finally, non-WTO law to be *applied* by WTO panels can also undermine the *jurisdiction* of a WTO panel when, for example, the non-WTO law reserves exclusive jurisdiction to another court or tribunal to deal with the dispute at hand, or provides that once a dispute has been decided under a regional trade deal, it cannot be brought a second time to the WTO. Both NAFTA and MERCOSUR set out provisions along those lines. If a WTO member were, nonetheless, to bring the same dispute a second time to the WTO, in my view a WTO panel should apply the relevant NAFTA/MERCOSUR provision and decide that, based on the agreement between the parties, it does not have jurisdiction (technically speaking the WTO rule on jurisdiction ought then give way to the NAFTA/MERCOSUR rule on jurisdiction on the ground that the latter is later in time or more specific than the former).

A similar tension between E.C. courts and an arbitral tribunal under UNCLOS materialized more recently in the *Mox Plant* case (*Ireland v. United Kingdom*). In that dispute, Ireland submitted claims of violation under UNCLOS concerning discharges into the Irish sea of radioactive waste by a new processing plant (the so-called Mox Plant) built by the United Kingdom close to the Irish border. In an Order on Provisional Measures dated December 3, 2001, the International Tribunal on the Law of the Sea (ITLOS) found that it had *prima facie* jurisdiction under Article 288.1 of UNCLOS.<sup>6</sup> Subsequently, an Arbitral Tribunal was constituted under Annex VII of UNCLOS to decide the merits of the case. The Tribunal decided, in contrast to the finding of ITLOS, to suspend its proceedings by order on June 24, 2003. It did so mainly in response to arguments by the United Kingdom that the dispute fell within the exclusive jurisdiction of E.C. courts pursuant to Article 292 of the E.C. Treaty. The Arbitral Tribunal was of the view that the question of whether and what aspects of the UNCLOS dispute fall under the exclusive jurisdic-

---

5. For an overview of relevant case law, see James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 INT'L. & COMP. L. Q. 248 (2001). See also Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L. L. 535, 563 (2001); Meinhard Hilf, *Power, Rules and Principles—Which Orientation for WTO/GATT Law?*, 4 J. INT'L. ECON. L. 111 (2001).

6. MOX Plant (*Ireland v. United Kingdom*) (Int'l. Trib. for the L. of the Sea 2001) (Order of 3 December 2001), at <http://www.itlos.org> (Case No. 10).

tion and competence of the European Communities is a question “to be decided within the institutions of the European Communities, and particularly by the European Court of Justice.”<sup>7</sup> Hence, the Arbitral Tribunal considered it inappropriate to continue its proceedings “in the absence of a resolution of the problems referred to” within the context of the E.C.<sup>8</sup> Interestingly, the order did so “bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States,” noting that “a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties.”<sup>9</sup>

This order to suspend UNCLOS proceedings based on provisions in another agreement (here, the E.C. Treaty) is in line with the approach that this author would suggest for WTO panels. WTO panels, as well, ought to take cognizance of other agreements in which the disputing parties may have stripped the WTO of jurisdiction to deal with particular cases.

### B. Jurisdiction Versus Treaty Interpretation

Notwithstanding the limited *jurisdiction* of WTO panels (WTO claims only), it has become standard practice for WTO panels and the Appellate Body to use non-WTO law when *interpreting* the meaning of terms in the WTO agreement. Such interpretation can, for example, lead to broader GATT exceptions, as in *US-Shrimp*, where the Appellate Body interpreted the words “exhaustible natural resources” in GATT Article XX(g) with reference to certain environmental treaties.<sup>10</sup> It may also narrow the scope of GATT rules or exceptions, as shown in the *Oil Platforms*, where a treaty provision similar to GATT Article XXI(b)(iii)

---

7. See *MOX Plant supra* note 3, at 8, para. 26. The European Commission actually initiated infringement procedures under the E.C. Treaty against Ireland claiming that Ireland’s initiation of the *Mox Plant* case under UNCLOS (as well as the OSPAR Convention) violates Ireland’s obligations under the EC Treaty. *Ireland Threatened over Sellafield Row*, THE INDEPENDENT, June 29, 2003, at 1.

8. See *MOX Plant, supra* note 3, at 9, para. 38.

9. *Id.*

10. WTO Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R, DSR 1998:VII 2755, ¶ 128–132 (1998) [hereinafter *US—Shrimp*]. On the process of interpreting the WTO treaty with reference to non-WTO law, see Gabrielle Marceau, *A Call for Coherence in International Law—Praises for the Prohibition Against ‘Clinical Isolation’ in WTO Dispute Settlement*, J. WORLD TRADE 87 *passim*, Oct. 1999. See also PAUWELYN, *supra* note 1, at 244–74 (discussing treaty interpretation as a conflict-avoidance tool).

on essential security interests was interpreted restrictively with reference to rules of general international law prohibiting the use of force.<sup>11</sup>

In *Oil Platforms*, the interaction was between Article XX:1(d) of the Iran-US Treaty of Amity of 1955 (permitting “measures necessary to protect essential security interests of a party”) and general international law rules prohibiting the use of force, in particular rules regarding self-defense. The International Court of Justice (ICJ) only had jurisdiction to examine claims under the Treaty of Amity. Yet, when deciding on those claims, i.e., when interpreting the Treaty of Amity, the ICJ did refer to general international law rules on the use of force. The questions were, more specifically, whether US attacks on Iranian oil platforms could be justified as “measures necessary to protect essential security interests” of the United States, in line with Article XX:1(d), and whether, in the examination of this first question, general international law rules on the use of force played a role. The ICJ decided to interpret Article XX:1(d) with reference to rules on the use of force (invoking Article 31.3(c) of the Vienna Convention on the Law of Treaties in support), found that the US attacks were not justified under those rules as acts of self-defense, and, on that basis, concluded that the US attacks could not be seen as “necessary to protect essential security interests” of the United States. In the end, however, this lack of justification under Article XX:1(d) did not play a role since the ICJ later decided that the US attacks did not breach the 1955 Treaty of Amity in the first place (hence there was no need to justify US conduct under Article XX:1(d) to begin with).

Based on the above distinctions, the role of non-WTO law before a WTO panel can be summarized as follows:

---

11. *Oil Platforms* (Islamic Republic of Iran v. United States of America), 2003 I.C.J. 90 (November 6), at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_ijudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106.PDF).

	WTO Covered Agreements	Other WTO Law	General International Law and Norms Binding on All WTO Members or Reflecting their "Common Intentions"	Norms Binding on both Disputing Parties	Norms Binding on only one of the Disputing Parties
JURISDICTION (to examine claims under these rules)	Yes	No	No	No	No
APPLICABLE LAW (to be applied in the examination of WTO claims)	Yes	Yes	Yes	Yes	No
Reference material for INTERPRETATION of WTO Covered Agreements	Yes	Yes	Yes	No	No
Valid DEFENCE against a WTO claim	Yes	Yes	Yes	Yes	No
CLAIMS ENFORCED under these rules if they prevail as the applicable law	Yes	No	No	No	No

#### IV. CONCLUSION

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 prism of general international law.

Both in the abstract and before a particular adjudicator, current international law provides ways to marry the different branches of international law. Especially before a particular court or tribunal, it is important to include *all* international law binding 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 would come to different conclusions based on the same law. This can never be avoided completely and, much like the phenomenon of fragmentation, 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 or expert advice or one tribunal taking account of the rulings and precedents of others. This is already happening at the WTO (for example: WTO panels requesting advice from the WHO or WIPO, the Appellate Body referring to ICJ judgments, etc.).

The theory explored here for the WTO can be transposed to other regimes of international law. Thinking of international law in this way, as a universe of inter-connected islands, should go a long way toward bridging the conflicting realities of both fragmentation and unity in modern international law.