

## From Territoriality to Functionality?

### Towards a Legal Methodology of Globalization

#### I. Introduction

According to the German sociologist and philosopher Niklas Luhmann, globalization is characterized by a shift from territorial borders to functional boundaries.<sup>1</sup> Important issue areas<sup>2</sup> such as the market, environment, or human rights, have left territorial boundaries behind. Thus, the State has become unable to strike the balance between different values and interests associated with different issue areas. However, on the global scale, no mechanism is in place to substitute for this role of the territorial State.<sup>3</sup> In a 'club model', different functionally defined 'issue areas' could be separated in a way that the different professional 'cells' administering the systems were not connected with each other.<sup>4</sup> With the expansion of the narrow schemes to cover more and more ground, however, their self-sufficiency and lack of contact over both territorial and functional borders are becoming untenable.

Indeed, politics and law lag behind other issue areas in the process of institution building. There exists neither a clear hierarchy between different issue areas, nor a hierarchically

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<sup>1</sup> N. Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main, Suhrkamp Taschenbuch, 1995), pp. 571 et seq.; id., *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, Suhrkamp, 1997), vol. 1, pp. 158-160.

<sup>2</sup> The term 'issue area' is used here as a term for a subject matter which can be regulated by a set of rules which strives to cover the subject matter coherently and comprehensively. The term originates in the attempt of political science scholars to analyse subject matters beyond borders, both in their domestic as in their international aspects. See, e.g., D. W. Leebron, 'Linkages', *AJIL* 96 (2002), p. 5, at 6-10. As to the related term 'regimes', it comprises both formal and informal institutional arrangements which relate to specific issue areas, cf. the now 'classical' definition by S. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in: S. Krasner ed., *International Regimes* (Ithaca/London, Princeton UP, 1983), p. 1, at 2. However, as Leebron does not fail to indicate (*ibid.*, at 9), the term is not clearly defined and lies square to legal terminology. Thus, it is used here with caution.

<sup>3</sup> Similarly Leebron, *supra* note 2, at 8.

<sup>4</sup> See R. Keohane/J. Nye, 'The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy', in: R.B. Porter et al. (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, Brookings, 2001), p. 264, at 265-272.

superior institution which would be capable to coordinate and decide conflicts of values and norms. Whereas the ordinary domestic lawyer will have a place for these decisions in the domestic legal system – in courts or in political institutions acting within a hierarchy established by law – the international sphere lacks such hierarchies and sufficient rules for balancing the values involved. Several more or less institutionalized instances with overlapping competences decide conflicts of interests and values emanating from different issue areas. These instances being, in most cases, associated with one issue area rather than the other – such as the Tribunal of the Law of the Sea or the WTO dispute settlement – there is not a neutral or at least non-partisan body for deciding conflicts of norms. In the words of Leebron: 'We inhabit a world of "multi-multilateralism" – numerous multilateral regimes with sometimes overlapping, indeed sometimes conflicting, mandates.'<sup>5</sup>

This contribution claims that the establishment of new hierarchies such as *ius cogens* or quasi-constitutional conflict of law rules such as Art. 103 of the UN Charter do not alter this prospect in a decisive way. Complexity prevents clear-cut conflict rules. Instead, this contribution argues for a culture of mutual respect and accommodation between different issue areas which will not look for a “hierarchical” solution to value conflicts but will seek to find a practical solution in specific cases. This requires a readiness to dialogue and discourse to find practical ad hoc-solutions for conflicts of interests and values. Thus, one may speak of a move from constitution to discourse<sup>6</sup> – away from formalized hierarchies towards a search for compromise in dialogue.

However, this contribution will also point to the problematic aspects of this development: In the lack of both hierarchies of applicable norms or of implementing institutions that determine the outcome of legal analysis, the international lawyer is much less constrained by norms and processes. This is particularly the case when different normative systems, such as WTO law and the law on the environment, clash with each other. But this unconstrained exercise of power by lawyers raises questions of legitimacy. Why is it the lawyer's task to decide conflicts of values and interests? In the absence of an expression of the will of the community by determinate rules, the lawyer cannot easily point to another source to justify his authority. The reliance on democratic principles and the consent of the governed, which legitimise political decisions in the Western tradition, are of little help in international affairs. The

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<sup>5</sup> Leebron, *supra* note 2, at 17.

<sup>6</sup> I owe this observation to David Kennedy.

"democratic deficit" of international organizations is a commonplace. Rather, the international lawyer must justify his authority by the acceptance of the results of his activity by his audience and addressees, in particular States, and increasingly non-governmental actors. Hence, "compliance" presupposes more than just formal authority – not only formal, but also substantive agreement. International decisions will only be implemented if the results are perceived as based on legal interpretation rather than translation of the lawyers' personal predispositions into claims of authority.

There is another argument which may complicate the task of the international lawyer: Some, if not all nation-States can base their decisions on some "thick" consensus of interests and values between its members.<sup>7</sup> Some claim that in the absence of such a consensus, international law is condemned to irrelevance because divergences of interpretation cannot be bridged by pointing to a pre-established political consensus.<sup>8</sup> Others, among them the present author, have argued that there indeed exists a "thin" consensus on values which might be sufficient to establish a minimum of determinate answers.<sup>9</sup> In any case, the pluralism within the international community is certainly greater than in domestic society, and a consensus on values and norms will be reached only with considerable difficulty. How, then, can the international judge, adjudicator, government official, or NGO activist cope with the 'pluralistic' difficulty? Is the rejection of international law in favour of political debate and struggle, as advocated by some international lawyers close to the "new approaches"-movement, the right answer?<sup>10</sup> In the conclusion to this contribution, the author will attempt to give some preliminary answers to this question.

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<sup>7</sup> On the relationship between a "thick" consensus and domestic community, see M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame/London, University of Notre Dame Press, 1994).

<sup>8</sup> D. Kennedy, 'These about International Law Discourse', 23 *German Yb. IL* (1980), 353, at 376; M. Koskenniemi, *From Apology to Utopia* (Helsinki, Lakimiesliiton Kustannus 1989), p. 48. But see now D. Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden JIL* 9, at 133 (arguing for identity politics); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, Cambridge UP, 2002), 504-509 (advocating a 'culture of formalism').

<sup>9</sup> T. Franck, *Fairness in International Law and Institutions* (Oxford, Clarendon 1995), pp. 3-24; A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (München, Beck, 2001), pp. 250-284; B. Simma/A. Paulus, 'The International Community: Facing the Challenge of Globalization', 9 *EJIL* (1998), 266, at 272; Chr. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours* (1989), p. 55.

<sup>10</sup> For a plea against the rejection of international law and against the subjectivism of alternative approaches see A. Paulus, 'International Law After Postmodernism: Towards Renewal or Decline of International Law?', 14 *Leiden Journal of International Law* (2001), 727-755.

## II. The "Domestic Analogy" and the Community Vision of International Law

In order to analyse the specificity of international law, let us first regard the domestic legal order. Even if one may reject the 'domestic analogy' between law in the domestic and the international realm with regard to the 'thinness' of the international value consensus,<sup>11</sup> the specificity of the international legal order can best be grasped if seen in relation to domestic legal orders which have also shaped conceptions of the international 'legal' sphere.

The territorial State of the 'constitutional' type has established several instances to cope with conflicts of interests and values. In the legal system, there are two hierarchically organized systems trying to generate acceptable solutions: On the one hand, the "Stufenbau der Rechtsordnung", the 'hierarchical structure of the legal system',<sup>12</sup> helps to identify superior substantive values which trump "ordinary" norms and contain the guiding principles of government. This substantive hierarchy, as it were, is doubled by a procedural or institutional one. Ideally, for all conceivable cases, there exists a successive order of instances to decide on the balancing of the recognized norms and values involved. Thus, even if there may be no "right answer" in the material, substantive sense,<sup>13</sup> there will be a "final arbiter" of the legal problem at hand, either a court, or a legislature, or the people, or the executive branch.

When constructing an international community based on the "rule of law", why not reproduce the experience of domestic legal orders in international law? And indeed, there exist numerous attempts to introduce stricter hierarchies in international law and to arrive at an international system modelled after the domestic one. The first candidate for such a reproduction on the institutional side is the "world organization", the United Nations, with its Charter, which attempts to establish a hierarchical structure within the international community in analogy to the domestic State. In substantive international law, *ius cogens* and

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<sup>11</sup> See, e.g., M. Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order', *British Yearbook of International Law* (forthcoming), Manuscript in possession of the author.

<sup>12</sup> A. Merkl, 'Prolegomena zu einer Theorie des rechtlichen Stufenbaues', in: *Gesellschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre. Festschrift Hans Kelsen zum 50. Geburtstag* (Wien, Springer, 1931), 252, at 272-85; see also H. Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (B. Litschewski Paulson/S. Paulson trans., Oxford, Clarendon Press, 1992), 63-65 with n. 48; *id.*, *Pure Theory of Law. Translation from the Second Edition* (M. Knight trans., Berkeley et al., University of California Press 1967), pp. 221-22.

<sup>13</sup> But see R. Dworkin, *Law's Empire* (Cambridge Mass., Harvard UP), 1986, pp. 239 *et seq.*

obligations *erga omnes* are based on the idea of a hierarchy of norms which would place common or even "community" values over the individual and short-term self-interest of States, and which would allow individual States, even in the absence of institutional support, to implement community values.

## **1. The Charter as a constitution of the international community?**

The UN Charter seems to closely reproduce the constitutional State with executive (the Security Council), legislative (the General Assembly) and judicial (the International Court of Justice) branches.<sup>14</sup> The Security Council may act against the consent of member States. Even non-members are addressed by it, and, at the latest after Switzerland's entry this year, the UN has reached true universality of membership. In its Article 103, the Charter claims precedence over any other norm of treaty law. The Statute of the International Court of Justice, which forms an integral part of the Charter (Art. 92 Charter), contains the necessary rules for law-making (Article 38) and its adjudication. Articles 57 and 63 of the Charter regulate the coordination of different issue areas. Some have seen in this structure an incipient constitutionalization of the international community.<sup>15</sup>

However, when looking at the text and, even more so, the reality of the Charter, this analysis turns out to be a half-truth, at best. The Charter itself combines two approaches: A political realist approach, centring on the special responsibility of the great powers with veto power in the Security Council, and an idealist approach, making soft issues such as human rights and self-determination a cornerstone of the values of the new system.<sup>16</sup> As to the 'executive' function of the Security Council, the United Nations possesses a monopoly of the legitimisation of the use of force – except in cases of self-defence – but it does not have real forces at its disposal to control the implementation of this monopoly.<sup>17</sup> In practice, the

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<sup>14</sup> For a comparison between the UN Charter and a State constitution, see B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours* (1994-VI), 217, at 258-283.

<sup>15</sup> See, e.g., B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Den Haag et al., Kluwer Law International, 1998), pp. 73-115 *et passim*. More circumspect Simma, 'From Bilateralism to Community Interest', *supra*, note 14, p. 217, paras. 22 *et seq.* For a critique of Fassbender's views, see A. Paulus, 'Book Review', 10 *EJIL* (1999), 209.

<sup>16</sup> For a more extensive analysis, see Paulus, *Die internationale Gemeinschaft*, *supra*, note 9, pp. 284-318.

<sup>17</sup> The special agreements between member States and the United Nations foreseen in Article 43 of the Charter for the provision of troops have never materialized, see J. Abr. Frowein/N. Krisch, 'Article 43, MN 9 - 11', in: B. Simma (ed.), *The Charter of the United Nations* (Oxford, Oxford University Press, 2nd edition, 2002).

powerful States do not act as if they were conscious of a monopoly of force by the Council. The current debate over the use of force against Iraq for the non-observance of the inspection regime imposed on it as part of the peace arrangements after the liberation of Kuwait<sup>18</sup> is a case in point: Although the United States and the United Kingdom are trying to receive Council backing for action against Iraq, they have made it clear from the outset that they consider SC authorization as welcome, but not as a necessary condition for taking military action against Iraq's non-compliance with United Nations peace resolutions.<sup>19</sup>

The veto power of the permanent members places them beyond the reach of law constraining unilateral violence, even if they pay, from time to time, lip service to the concept of collective security. In spite of more or less convincing attempts to bring it in line with Charter law,<sup>20</sup> the Kosovo intervention is another example for the unilateral use of force against a State which violates minority rights and, arguably, the right of the Kosovar people to some measure of self-determination.<sup>21</sup> Indeed, even if the present writer were of the opinion that the intervention was lawful, this interpretation would confirm rather than contradict the evaluation of the UN as an incomplete system of collective security.

The law-making rules of the Charter and, in particular, the Statute of the International Court of Justice do not recognize a truly legislative role for the General Assembly. Articles 10-13 confine the legislative functions of the General Assembly to non-binding recommendations<sup>22</sup> – and this limited function seems appropriate with regard to the doubtful representativity of a body in which member States as different as India and Monaco have an equal vote. In spite of being the 'principal judicial organ of the United Nations' (Article 92 of the Charter), the International Court of Justice needs the specific consent of each party to exercise jurisdiction

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<sup>18</sup> See, e.g., SC Resolution 687 (1991); Res. 1154 (1998). For details see M. Bothe, 'Peace-keeping', MN 38-40, in: Simma, *Charter, supra*, note 17; A. Paulus, 'Article 29', MN 38-47, *ibid*.

<sup>19</sup> Note, however, that other UN members except the United Kingdom seem not to share this interpretation.

<sup>20</sup> For an overview and evaluation of the different arguments, see A. Randelzhofer, in: 'Article 2 (4), MN 56', in: Simma, *Charter, supra*, note 17. For a convincing rejection of attempts to legally justify unilateral 'humanitarian intervention', see B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999), 1. However, Simma accepts a moral justification for NATO action.

<sup>21</sup> For the distinction between 'internal' and 'external' self-determination (minority rights vs. secession) see K. Doehring, in: 'Self-Determination, MN 32 - 40', in: Simma, *Charter, supra*, note 17, pp. 56-58. More skeptical D. Thürer, 'Self-Determination', in: R. Bernhardt (ed.), 4 *Encyclopedia of Public International Law* (2000), 370-373. See also the decision of the Supreme Court of Canada, *Secession of Quebec*, 37 *International Legal Materials* (1998), 1340.

<sup>22</sup> Cf. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports (1996), 254-5, para. 70, which binds the normative value of GA resolutions to the conditions of custom according to Article 38 para. 1 lit. (c) of the I.C.J. Statute.

(Article 36 of the I.C.J. Statute) and is thus often confined to an arbitral rather than judicial role. Its competencies as a constitutional check on the Security Council and the General Assembly are limited to Advisory Opinions given at the request of either the Council or the Assembly (Charter Article 96 para. 1). Even in cases where it possesses jurisdiction, it will usually defer to the broad discretion of the Council, which can, in turn, rely on the prevalence of obligations arising under the Charter against all other international agreements (Article 103) – and probably beyond. In the *Lockerbie* case, the Security Council has even intervened in the functioning of the Court by adopting a binding resolution after the oral proceedings on provisional measures in order to prevent the Court from exercising any control over the lawfulness of SC measures.<sup>23</sup> A 'Marbury moment',<sup>24</sup> in which the Court would avail itself of an unequivocal right of judicial review of Security Council decisions, would not only be hampered by problems of enforcement – after all, the only enforcer of I.C.J. judgments would be the Council itself<sup>25</sup> – but also revolutionize the consent-based jurisdiction of the International Court of Justice and would probably meet with resistance by most States.<sup>26</sup>

The provisions on the prevalence of Charter law (Art. 103), universality (Article 2 para. 6), the amendment of the Charter (Article 108, 109) and non-intervention (Article 2 para. 7) may possess constitutional characteristics, but fall short of the standard of domestic constitutions. In particular, Article 103, which provides for the prevalence of the obligations under Charter over their obligations under other international agreements, constitutes a conflict-of-law rule

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<sup>23</sup> Cf. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of April 14, 1992, *I.C.J. Reports* (1992), 3, and SC Res. 748 (1992) of March 31, 1992.

<sup>24</sup> Cf. *Marbury v. Madison*, 5 U.S. 137 (1803), 5 U.S. 137 (Cranch), where the U.S. Supreme Court availed itself of the right of judicial (and constitutional) review of decisions of the executive branch. On the significance of 'constitutional moments' for the development of constitutional law, see B. Ackerman, 2 *We the People: Transformations* (Cambridge Mass./London, Belknap Press, 1998), pp. 409 *et passim*. See also A.-M. Slaughter/W. Burke-White, 'An International Constitutional Moment', 43 *Harvard International Law Journal* (2002), 1, who do not even mention a possible role for the Court. For a comparative analysis of judicial control in the international and domestic legal systems, see J. Alvarez, 'Judging the Security Council', 90 *AJIL* (1996), 1. For the requirement – and rejection – of a constitutional moment for the unification and hierarchization of present-day international law cf. J.P. Trachtman, 'Institutional Linkage: Transcending "Trade and ..."', 96 *AJIL* (2002), 77, at 92.

<sup>25</sup> According to Article 94, para. 2, of the U.N. Charter, the Security Council may, upon the request of one party to a case decided by the Court, decide on measures to give effect to the judgment. In the *Military and Paramilitary Activities in and against Nicaragua* case, *I.C.J. Reports* (1986), 14 – the only instance when Article 94 para. 2 was invoked so far, – a respective resolution failed due to a veto of the United States – which had been a party to the case. See H. Mosler/K. Oellers-Frahm, 'Article 96, MN 13', in: Simma, *Charter, supra*, note 17.

<sup>26</sup> Similarly Trachtman, *supra*, note 24, at 92.

rather than an all-out hierarchization of international law. A 'constitutional' interpretation of this provision runs therefore into some difficulty.<sup>27</sup>

Concerning the integration of different organizations into a single coherent system, Articles 57 and 63 of the Charter endow the United Nations with an oversight function for UN specialized agencies. Some of the most important organizations, such as the World Trade Organization (WTO) founded in 1995, did not even acquire (and did not wish to acquire) the status of a specialized agency.<sup>28</sup> Instead, its relationship with the United Nations is based on an Exchange of letters, in which the WTO Director-General and the UN Secretary-General have reached agreement 'that a flexible framework for cooperation, liable to further review and adaptation in the light of developments and emerging requirements, is the most desirable course of action.'<sup>29</sup> Thereby, the UN has implicitly reneged on its duty to bring the various specialized agencies 'into relationship with the United Nations' by virtue of Articles 57 and 63 of the Charter.<sup>30</sup> But even with regard to specialized agencies in the proper sense of the term, Article 63 para. 2 of the Charter limits the competencies of the UN Economic and Social Council to consultation and recommendation.<sup>31</sup> Thus, the UN lacks real competencies of control in all fields except peace and security. In economic and social matters, the authority of the UN is considerably limited – other institutions such as the World Trade Organization and the Bretton Woods institutions seem far more powerful. Some even claim that the United Nations should develop along the lines of the WTO instead of overseeing it.<sup>32</sup>

But also in security matters, the primacy of the Security Council is subject to challenges by States acting unilaterally. As the Kosovo conflict demonstrates, the representation of the international community by the UN is challenged if and to the extent that the UN proves incapable of securing community values. For instance, when announcing the decision of NATO to attack the Federal Republic of Yugoslavia in spite of the absence of a respective UN Security Council resolution, Secretary-General Solana explained: 'This military action is

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<sup>27</sup> Cf. R. Bernhardt, 'Article 103, MN 6 ff.', in: Simma, *Charter, supra*, note 17; M. Flory, in: J.-P. Cot/A. Pellet, *La Charte des Nations Unies* (Paris, Economica, 2nd edition 1991), pp. 1381-1384, 1388-89.

<sup>28</sup> W. Meng, 'Article 57, MN 4', in: Simma, *Charter, supra*, note 17.

<sup>29</sup> 'Exchange of Letters constituting a global arrangement on cooperation', Sep. 29, 1995, 1889 *UNTS* 590.

<sup>30</sup> On the ambiguous wording of Article 57, see W. Meng, 'Article 57, MN 4-8', in: Simma, *Charter, supra*, note 17.

<sup>31</sup> For more details see W. Meng, 'Article 63, MN 38-39', in: Simma, *Charter, supra*, note 17.

<sup>32</sup> E.-U. Petersmann, 'How to Reform the UN System? Constitutionalism, International Law, and International Organizations', 10 *Leiden JIL* (1997), 421.

intended to support the political aims of the international community.<sup>33</sup> However, such individual action threatens the cohesion of the United Nations. NATO's claim did not remain unchallenged. As India's representative in the United Nations explained, '[t]hose who continue to attack the Federal Republic of Yugoslavia profess to do so on behalf of the international community and on pressing humanitarian grounds. ... NATO would have noted that China, Russia and India have all opposed the violence that it has unleashed. The international community can hardly be said to have endorsed their actions when already representatives of half of humanity have said that they do not agree with what they have done.'<sup>34</sup> Concerning the enforcement of the UN armistice resolutions with Iraq and an eventual forcible removal of Saddam Hussein, the United States is putting pressure on the U.N. to authorize or at least acquiesce to unilateral U.S. action<sup>35</sup> rather than the U.N. putting pressure on its member States to enforce its resolutions (and not to exercise unilateral pre-emptive self-defence which unlawful under the Charter<sup>36</sup>). Where such superpower pressure is absent, however, the U.N. is incapable of taking meaningful action, as in the case of the Middle East conflict between Israel and the Palestinians. Thus, the claim of Charter prevalence in security matters may be watertight in theory, but is seldom executed in practice.

All-in-all, this rather cursory analysis shows that an overarching institutional setting of the international community does exist only in very rudimentary forms. With the exception of the ambiguous language of Article 103 of the UN Charter, a judicial hierarchy between institutions regulating different issue areas is absent.<sup>37</sup> The weakness of the institutional structure of the UN thus prevents it from effectively fulfilling a quasi-constitutional mission. Instead of a hierarchy between the UN and other international organizations, we find a horizontal structure of several functional institutions. The decentralized structure of the international community means that it is the States members who are placed in the driving seat, and not a constitutional backed bureaucracy.

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<sup>33</sup> Press Statement by Dr Javier Solana, Secretary General of NATO, March 23, 1999, in: M. Weller (ed.), 1 *International Documents & Analysis* (1999), 495.

<sup>34</sup> Security Council, Fifty-fourth Year, 3989th mtg., March 24, 1999, UN Doc. S/PV 3989 (1999), p. 16; cf. V. Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', 11 *EJIL* (2000), 361, at 376-77.

<sup>35</sup> See [U.S.] President's [George W. Bush's] Remarks at the United Nations General Assembly, Sep. 12, 2002, available at <http://www.whitehouse.gov> (visited Oct. 28, 2002).

<sup>36</sup> See A. Randelzhofer, 'Article 51 MN 39', in: Simma, *Charter*, *supra* note 17, with further references. But see, more recently, the U.S. National Security Strategy, available at <http://www.whitehouse.gov/nsc/nss.html>, visited Oct. 28, 2002, Chapter V.

<sup>37</sup> See Leebron, *supra*, note 2, p. 20.

In the absence of centralized decision-making, the balancing of interests and values cannot be performed in the same way as in the domestic legal system. There is no hierarchy between the World Organisation with its general competence and the functionally limited international organizations such as the World Health Organisation or the International Labour Organization, there exists no body with a 'final' legal competence of interpretation and application of legal norms. Authoritative third party adjudication needs special acceptance by States which is more often than not absent. But where international adjudication exists, as in the case of the dispute settlement system of the World Trade Organization (WTO), it is also functionally fragmented. A 'final arbiter' of disputes involving several issue areas (or the fabric of international law in general) does not exist. The general background rule, auto-interpretation by States, means that international law functions more often than not as an internalised means of self-evaluation rather than as an outside limitation on State discretion. In that regard, H.L.A. Hart's famous analysis that general international law lacks a coherent and complete system of 'secondary' 'rules of recognition, change and adjudication' has not lost its validity.<sup>38</sup> This is, however, not valid for many of the functional institutions which cover a limited issue area only.

## **2. Substantive International Law**

In the absence of a formalized hierarchy of authoritative decision-making, clear and unequivocal norms guiding both political decisionmakers and eventual judges might still help in the search for clear solutions to value and norm clashes. In most of these cases, different institutional settings and different sub-systems of rules and principles will render a decision based on 'ordinary' primary rules difficult, however. Thus, international law is in need of clear and unequivocal rules about the conflict of norms – rules which require the existence of some normative hierarchy between different substantive values. This is exactly what the introduction of *ius cogens* and obligations owed towards the international community (or *erga omnes*) into international law intended to achieve by the establishment of norms of a higher order which would not only trump conflicting norms but which would also allow each member of the international community, regardless of the existence of violations of its rights, to restore the international rule of law.

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<sup>38</sup> H. L.A. Hart, *The Concept of Law* (Oxford, Clarendon Press, 2nd edition 1994), pp. 214, 233 *et seq.*

As is well known, Art. 53 of the Vienna Convention on the Law of Treaties defines a 'peremptory norm of general international law' (*ius cogens*) as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted ...'.<sup>39</sup> In its *Barcelona Traction* judgment, the International Court of Justice opined that 'an essential distinction should be drawn between the *obligations of a State towards the international community as a whole*, and those arising vis-à-vis another State in the field of diplomatic protection.'<sup>40</sup> Even if the precise relationship between obligations towards the international community and *ius cogens* is difficult to determine, there seems to be general agreement that both terms designate an almost identical list of international norms.<sup>41</sup> The reasoning of the Court thus provides a rationale for the establishment of *ius cogens*: When the obligations flowing from *ius cogens*-norms are owed to the international community rather than to States '*ut singuli*', two States alone cannot 'opt out' of their obligations to the international community.

The term 'international community' seems, however, to have lost its clear meaning by the end of the Cold War – until then, this 'community' was conceptualised as consisting of the first, second and third worlds, that is, the capitalist west, the communist east and the developing south.<sup>42</sup> But in the one super-power reality of the contemporary world,<sup>43</sup> the contours of this community have become doubtful. As far as States are concerned, next to the single superpower, there is a Russia which has lost great deal of its influence both in Central Europe and in Asia, there are economic giants but political dwarfs such as the European Union (in particular Germany) and Japan, there are the most populous, but still developing countries China and India, there are States struggling to leave developing status behind, such as South

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<sup>39</sup> UNTS 1155, 331.

<sup>40</sup> *Barcelona Traction, Light and Power Company, Limited*, I.C.J. Reports (1970), 3, at 32, para. 33, my emphasis.

<sup>41</sup> See International Law Commission (ILC), 'Commentary to the Draft Articles on State Responsibility', Chapter III, before Article 40, para. 7, in: J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility* (Cambridge, Cambridge UP, 2002), pp. 244-45. The distinction of the ILC does not entirely correspond to the original separation of the two concepts. See A. de Hoogh, 'The Relationship between Jus Cogens, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective', 41 *Austrian Journal of Public International Law* (1991), 183; Paulus, *Die internationale Gemeinschaft*, *supra*, note 16, at 413-416 *et passim*; Simma, 'From Bilateralism to Community Interest', *supra*, note 14, at 285-301, paras. 45-60.

<sup>42</sup> For a description of the 'Cold War' international community in this vein, see A. Cassese, *International Law in a Divided World* (Oxford, Clarendon Press, 1986), pp. 32-33.

<sup>43</sup> On the role of the United States as sole superpower and its effects on international law see M. Byers/G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge, Cambridge UP, 2003), forthcoming.

Korea or Brazil, and there is a 'fourth world' developing – or rather not developing – which seems to be marred in famine and war. Although organised in the General Assembly of the United Nations, the international community is not endowed with law-making power. How then is the international community able to designate certain norms as *ius cogens*? Whose consent to new norms of *ius cogens* is counted, whose opposition disregarded?

It is not even clear whether this community only consists of States or also of governmental or non-governmental organizations and other non-State entities, let alone individuals.<sup>44</sup> But do altruistic non-governmental organisations really have the legitimacy to make decisions binding on the world community at large, without having been elected or possessing control over territory? And what about terrorist or criminal organisations as part of the community? It seems that the advocates of an enlargement of the relevant community to non-State actors have not quite contemplated the consequences of their position. Nevertheless, non-State actors are of growing relevance in the age of globalisation, from multinational enterprises to altruistic non-governmental organisations such as amnesty international or Greenpeace, to terrorist actors such as Al-Quaeda. Indeed, under Taleban rule, the State of Afghanistan seems to have depended more on Al-Quaeda than *vice versa*.

Thus, it seems that the 'international community as a whole' which is entitled to determine the content of *ius cogens* is still a community of States. Until 1986, this was also the opinion of the International Law Commission.<sup>45</sup> Among those States, it seems, there is no need for the consent of all States, but the great majority of them must have consented or acquiesced to the new status.<sup>46</sup> Thus, *ius cogens* introduces a small element of majority rule into international law, without any clear criteria which majority is required.

Another oddity of *ius cogens* in the Vienna Convention concerns the comparison of 'ordinary' general international law with *ius cogens*. If the progressive view is correct that *ius cogens*

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<sup>44</sup> According to rumors, the ILC Drafting Committee "decided" by the margin of one single vote that the international community does not only consist of States. Cf. the 'official' ILC Commentary to Art. 25, para. 18, in: Crawford *supra*, note 41, pp. 126-27, which avoids rather than treats this issue. Needless to say, such "decisions" are of limited value.

<sup>45</sup> See the ILC commentary to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 2 *ILC Yearbook* (1982) 2, p. 56, Art. 53, note 3.

<sup>46</sup> See the remarks of the Chairman of the Drafting Committee Yasseen, in: *United Nations Conference on the Law of Treaties, Official Records, first session, 26 March – 24 May 1968, Summary Records*, UN Doc. A/CONF.39/11, pp. 471-72, paras. 7, 12.

may be created by the will of the international community even if no pre-existing rule of international law with identical content existed,<sup>47</sup> the question arises whether norms of a quasi-constitutional character can be created without even meeting the requirements for ordinary rules of international law, that is, the existence of positive State consent or at least acquiescence (customary law). A possible solution to this conundrum leads back to the 'pouvoir constituant', the *raison d'être* of international law. The leading English textbook, Oppenheim's *International Law*, considers the international community itself as the final repository of international law: international law has come into existence because States prefer to belong to a system of rules than to live in a rule-less anarchy, and this choice is regarded as the acceptance of the basic values of this legal community.<sup>48</sup> However, it is doubtful whether States will be compelled by such arguments without having given their specific consent to these norms.

In addition, there is an absolute lack of clarity of the legal effects of *ius cogens*. In addition to the nullity of treaties violating *ius cogens*, as provided for in the Vienna Convention on the Law of Treaties, some claim that all unilateral acts of States, including purely domestic ones, are to be considered null and void if in violation of these norms.<sup>49</sup> Others add that the violation of *ius cogens* norms triggers universal jurisdiction for the alleged individual perpetrators.<sup>50</sup> In its draft articles on State responsibility,<sup>51</sup> the *International Law Commission*, has introduced particular consequences for 'serious breaches of obligations under peremptory norms of general international law'.<sup>52</sup> This incremental introduction of *ius cogens* into the fabric of international law raises doubts concerning its effectiveness.

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<sup>47</sup> B. Simma, 'From Bilateralism to Community Interest', *supra*, note 14, at 291-93, para. 52-53; C. Tomuschat, 'Obligations Arising For States with or against their Will', 241 *Recueil des Cours* (1993 IV), 307.

<sup>48</sup> Cf. R. Jennings/A. Watts (eds.), *Oppenheim's International Law* (Harlow, Longman, 9th ed. 1992), p. 12, who argue that States derive their rights from the community and not *vice versa*. But cf. the famous *Lotus* case, PCIJ, Series A, No 10, p. 18. Jennings and Watts expressly distance themselves from *Lotus*, see *ibid.*, p. 12 n. 21. For the acceptance of the existing body of international law as a sort of 'entry fee' to membership status in the international community, see T. Franck, *The Power of Legitimacy Among Nations* (New York/Oxford, Oxford UP, 1990), pp. 185-87, 193.

<sup>49</sup> See, e.g., the proposal of the Special Rapporteur of the International Law Commission on unilateral acts of States, V. Rodríguez Cedeño, 'Fifth report on unilateral acts of States', Apr. 17, 2002, UN Doc. A/CN.4/525/Add.1, p. 10, para. 119, Article 5 (f).

<sup>50</sup> See, in particular, ICTY, *Furundžija*, 38 *ILM* (1999), at 349-50, para. 155, 156.

<sup>51</sup> See Crawford, *supra*, note 41.

<sup>52</sup> Chapter III, Art. 40, 42, *ibid.*, p. 68.

Thus, the best what can be said about *ius cogens* is that it is still developing. No clear content of the concept can be discerned, even if there seems to be some agreement on the content of this category, comprising the prohibition of aggression – but not its exact scope – , the prohibition of genocide, crimes against humanity, and war crimes (not necessarily extending to the obligations of prevention or universal jurisdiction), some fundamental human rights such as the prohibition of slavery, and maybe a general duty not to severely and intentionally pollute the environment.<sup>53</sup> Nevertheless, instances of the application of the concept are rare. Thus, *ius cogens* will certainly nullify a treaty between secret services of several countries to maltreat or torture prisoners – such as the 'Operation Condor' in South America in the 1970s. It might also help to decide questions of the primacy of multilateral obligations, such as the prohibition on the use of force, over bi- or even multilateral military alliances and troop deployment treaties. In any event, *ius cogens* does not dispose of most 'ordinary' value conflicts, e.g. between the promotion of free trade and the protection of the environment.<sup>54</sup>

Thus, the 'domestic analogy' between international and domestic law seems not to lead very far. International law lacks both centralized organizations and a developed constitutional structure which would preserve the unity of the law and its uniform application by States. Any international decision on the hierarchy of values is open to contestation. Indeed, international adjudicatory bodies may well feel obliged to return a question to the political sphere. However, such an outcome leaves the parties where they had been before resorting to judicial means of settlement: with the need to negotiate a political solution which they were unable or unwilling to find in the first place. If a 'constitutional' solution of value conflicts appears impossible, the alternative might consist in the resort to a discursive analysis which pays due regard to all the values involved. How can the lawyer help to decide clashes of interests and values if the law does not give a clear answer or at least an indication of the solution? And what does the obvious element of arbitrariness or discretion mean for the authority of the international lawyer's judgment? That is the question to which we now turn.

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<sup>53</sup> For a list of candidates, see Paulus, *supra*, note 9, at 356, with further references.

<sup>54</sup> See Report of the Study Group on Fragmentation of International Law, Aug. 1, 2002, UN Doc. A/CN.4/L.628, p. 4, para. 15: 'There was also agreement that drawing analogies to the domestic legal system may not always be appropriate. It was thought that such analogies introduced a concept of hierarchy that is not present on the international legal plane, and should not be superimposed. It was suggested that there is no well-developed and authoritative hierarchy of values in international law. In addition, there is no hierarchy of systems represented by a final body to resolve conflicts.'

### III. The Unequal Institutionalisation of International Society and Its Consequences for International Law

As it turns out, the success remains doubtful of all attempts of the unification of international law under the auspices of its 'constitutionalisation', both in terms of its institutional structures as in terms of substantive law. However, it can hardly be doubted that we have witnessed a remarkable progress in the establishment of international institutions in the course of 'globalisation'. It is not so much the United Nations, but rather more limited, functional organisations and institutions that have carried the day, such as, for instance, the World Trade Organization or the International Criminal Court. These institutions have only a limited scope but they are much more institutionalised than 'ordinary' international organisations. For lawyers, the most exciting, sometimes also the most troubling aspect consists in their elaborate dispute settlement mechanisms of a judicial or para-judicial character.

By dealing with a clearly limited issue area, these institutions may develop a highly sophisticated jurisprudence. However, specialized judicial bodies have difficulty in balancing the values embodied in their Statute with the values embodied in other institutions. This creates the danger of overreaching and of a biased approach to questions of clashes between different values and issue areas. Ultimately, the unity of international law seems at stake. The International Law Commission has thus recently initiated a study on the '[f]ragmentation of international law: difficulties arising from the diversification and expansion of international law'.<sup>55</sup>

Why does the 'diversification and expansion' of international law create problems? Should it not rather be subject to joy and celebration?<sup>56</sup> However, being not connected to a significant hierachisation and constitutionalisation of international laws and institutions, the expansion of international law to diverse areas also leads to a lack of cohesion of international legal rules and concepts. That might be a problem only an international lawyer would worry about. However, the ensuing risks are considerable: In particular, the different issue areas of

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<sup>55</sup> Summary of the Commission's work at its fifty-fourth session (Extracts from Chapter II of the Report of the International Law Commission - forthcoming), available at <http://www.un.org/law/ilc/sessions/54/54sess.htm> (visited Sep. 19, 2002), see *infra*, note 74, and accompanying text.

<sup>56</sup> Cf. Report of the Study Group on Fragmentation of International Law, Aug. 1, 2002, UN Doc. A/CN.4/L.628, p. 3, para. 7: 'For example, fragmentation can be seen as a sign of the vitality of international law.'

international law are unequally institutionalised: That is, some areas, in particular the law of trade and the law of the sea, have the benefit of highly organized and effective dispute settlement systems. Others, such as human rights or the protection of the environment, do not know a binding dispute settlement system and can only be implemented by decisions of individual State institutions or bargaining between States (and maybe other relevant actors). To speak with Thomas Franck,<sup>57</sup> the 'compliance pull' of trade law will be far greater, the rules being far more specific (and thus more determinate), the 'pedigree' being tested more severely, and the 'coherence' and 'adherence' of the trade law system being preserved by quasi-judicial institutions. In this vein, one might thus conclude that trade law is 'more' law than environmental law.

Such a finding has definitive consequences. The main area in which these consequences have materialized so far is the 'trade and ...' problematic: If a trade body decides conflicts between free trade and environmental protection or free trade and social rights, the guess is that trade will prevail. This is, however, probably a hierarchy of values which not every observer will share. The existence of institutional means for dispute settlement in one case and their absence in the other does not imply such a hierarchy of values. The argument that all agreements concerned are made by States does not solve the problem of priority either, because each treaty is as binding as the other. The classical later in time-rule<sup>58</sup> does not solve the problem in its entirety: By its purely formal nature, it disregards the substantive value questions which were usually neither intended to be solved at the time of the conclusion of the later agreement nor even contemplated. But how to solve that conflict? Are trade lawyers entitled to defer to general international law instead of GATT or GATS? Or do they need to stick to the values of their system, regardless of the repercussions both in reality and in the fabric of general international law?

The attitude a panellist or Appellate Body Member will adopt will, in turn, also influence the way the person fulfils the task of balancing between the laws of different issue areas. Two general approaches can be discerned. One opinion, only recently strongly advocated by Ulrich

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<sup>57</sup> Cf. T. Franck, *The Power of Legitimacy Among Nations* (New York/Oxford, Oxford UP 1990), p. 49 *et passim*.

<sup>58</sup> See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 *UNTS*, p. 331, Article 30.

Petersmann,<sup>59</sup> views the juridification of WTO dispute settlement as the best chance ever to develop binding adjudication on international legal issues. Accordingly, the WTO panellists and Appellate Body members should adopt a broad view of their task and not shy away from adjudicating issues of civil and social rights, health regulations or of the protection of the environment. In this view, a too narrow approach would prevent the dispute settlement body from dealing with all the legal norms involved and would not arrive at a comprehensive solution to the problem before it. Making that point even more sticking, one might imagine the WTO as an incipient world court with real power over international economic and social actors and issues.

However, there exists also strong opposition to that view, not the least because it shifts the balance between trade institutions and other bodies and refers non-trade issues to a trade body.<sup>60</sup> The WTO dispute settlement was not developed to serve as a world court substitute. It was supposed to centre on trade issues, and should preserve free trade among its member States, nothing more, but nothing less either. If human rights, social issues or the environment are finally adjudicated by a body of trade lawyers and practitioners, those issues might be submerged under the primordial considerations of trade. On top of this, the trade lawyer has no special competence to deal with these issues. Thus, there exists a considerable danger of 'trade bias'.<sup>61</sup> In particular regarding individual and social rights, the exclusivity of the traditional human rights bodies<sup>62</sup> serves a useful purpose (even if the lack of a single, comprehensive, and coherent international system for the protection of human rights remains a desideratum): Specialized human rights bodies will protect human rights better than a generalized body which has to weigh all sorts of considerations of which human rights can only be one among others or a trade body with a built-in penchant towards free trade. Thus, the governments of the Group of Fifteen, which is comprised of 17 WTO members, issued a

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<sup>59</sup> See E.-U. Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 *EJIL* (2002), 621.

<sup>60</sup> For a strong critique of Petersmann, see P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 *EJIL* (2002), 815; R. Howse, 'Human Rights in the WTO: Whose Rights, What Humanity?', 13 *EJIL* (2002), 651; id., 'From Politics to Technocracy – and Back 'Again: The Fate of the Multilateral Trade Regime', 96 *AJIL* (2002), 94, at 105. For an economic argument against a fusion of trade and other policy issues, see K. Bagwell/P.C. Mavroidis/R.W. Staiger, 'It's a Question of Market Access', 96 *AJIL* (2002), 56, at 74-5 *et passim*.

<sup>61</sup> See Leebron, *supra*, note 2, at 22; J. Trachtman, 'Institutional Linkage', 96 *AJIL* (2002), 77, at 78.

<sup>62</sup> E.g., the U.N. Human Rights Committee, the Commission on Human Rights, or regional systems such as the Inter-American and European Human Rights systems.

statement demanding the exclusion of 'non-trade issues such as labour standards and environmental conditionalities' from the WTO agenda.<sup>63</sup>

Of course, the problem of a split between general international law and specific areas does normally not appear in such a clear-cut fashion. Most international instruments, such as the United Nations Convention on the Law of the Sea [UNCLOS],<sup>64</sup> the Statute of the International Criminal Court,<sup>65</sup> or, to a certain extent, GATT<sup>66</sup>, contain their own rules which determine their relationship with general international law. As we have seen, the question of whether the WTO Dispute Settlement Bodies may rely on general international law is hotly disputed.<sup>67</sup> Some of these disputes may be solved by reference to general rules of treaty interpretation, as incorporated by Article 3 para. 2 of the Dispute Settlement Understanding.<sup>68</sup>

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<sup>63</sup> Eleventh Summit of the Group of Fifteen, Jakarta, 25-31 May 2001, available at <http://www.dfa-deplu.go.id/world/multilateral/g15/summit.htm> (visited Sep. 30, 2002), para. 17, also cited by S. Charnovitz, 'Triangulating the World Trade Organization', 96 *AJIL* (2002) 28.

<sup>64</sup> United Nations Convention on the Law of the Sea, Apr. 30, 1982, *entry into force* Nov. 16, 1994, 1833 *UNTS* 3 [hereinafter UNCLOS], Art. 311 – which omits, however, customary international law.

<sup>65</sup> Article 21 of the Rome Statute of the International Criminal Court, Jul 17, 1998, *entry into force* Jul. 1, 2002, UN Doc. A/CONF.183/9\*, reads, *inter alia*: 'The Court shall apply: (a) In the first place, this Statute, elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, ..., ...'. Note that the hierarchy employed here gives precedence to the rules of the Court, not to general international law. See A. Pellet, 'Applicable Law', in: A. Cassese/P. Gaeta/J. Jones, *The Rome Statute of the International Criminal Court* (Oxford, Oxford UP 2002), p. 1051, at 1067-1084; M. McAuliffe deGuzman, 'Article 21', in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, Nomos, 1999), paras. 1-7, 9-14; B. Simma/A. Paulus, 'Le rôle relatif des différentes sources du droit international (dont les principes généraux de droit)', in: H. Ascensio/E. Decaux/A. Pellet (eds.), *Droit international pénal* (Paris, Pedone, 2000), pp. 56-57.

<sup>66</sup> See also Articles 3.2 and 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 2, 1869 *UNTS* 401, partly cited *infra*, note 68. See also Article 20 of the General Agreement on Tariffs and Trade (GATT 1994), Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1a, 1867 *UNTS*, pp. 4, 190, 33 *ILM* (1994), p. 1154 (amending and novating the General Agreement on Tariffs and Trade (GATT 1947), Oct. 30, 1947, 55 *UNTS*, p. 187, amended 278 *UNTS*, p. 168; 572 *UNTS*, p. 320), which deals with exceptions to the obligations under the GATT for the sake of (unilateral) domestic measures for the protection of other values than trade.

<sup>67</sup> See, on the one hand, J. Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go', 95 *AJIL* (2001), 535, at 541-550; on the other J.P. Trachtman, 'Institutional Linkage: Transcending 'Trade and ...'', 96 *AJIL* (2002), 77, p. 88, n. 28. Pauwelyn's assertion that Articles 3.2 and 7.1 DSU do not exclude the application of general international law is doubtful. As they empower the DSB to apply the relevant provisions in the 'covered agreements' only, this seems to exclude other rules (except the general rules of interpretation referred to in Art. 3.2 DSU, see *infra*, note 68). Trachtman's argument that the authority of the panels is limited to the WTO agreements (only) does not solve the problem how far these agreements are meant to defer to other rules of international law. Article 3.2 does not rule out the exercise of judicial restraint and deference to other regimes, especially in areas of overlap, see, e.g., H. L. Schoemann/S. Ohlhoff, "'Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence', 93 *AJIL* (1999), 424, at 424-5, note 2.

<sup>68</sup> The relevant phrase of Article 3 para. 2 DSU reads: 'The Members recognize that [the WTO dispute settlement system] serves ... to clarify the existing provisions of [the WTO] agreements in accordance with customary rules of interpretation of public international law.'

Thus, the later-in-time rule (cf. Article 30 of the Vienna Convention on the Law of Treaties<sup>69</sup>) or the rules regarding the relevance of subsequent practice of the parties (Article 31 para. 3 lit. (b) VCT)<sup>70</sup> and those regarding the importance of 'any relevant rule of international law applicable in the relations between the parties' (Article 31 para. 3 lit. (c) VCT) may solve many apparent conflicts of norms.<sup>71</sup> Others are avoided by express recognition of the superiority of another treaty. For example, the GATT recognizes in Article XXI (c) the priority of obligations under the UN Charter for the maintenance of international peace and security under Charter Article 103.<sup>72</sup> In the absence of similar provisions concerning conflicts involving other normative systems, however, these rules will not always suffice to avoid clashes between different legal orders. Due to the lack of a clear hierarchy within general international law, the claim of the general applicability of general international law within specific systems – and thus the rejection of so-called 'self-contained régimes' independent of the background norms of general international law<sup>73</sup> – does not help much.

Clashes of values and specialized legal system have an institutional component, too: Whereas, in some cases, a specialized body is called upon to deal with other areas of law, in others, two bodies of different systems deal with identical problems, with the apparent danger of opposing conclusions. This is not the place for a comprehensive study.<sup>74</sup> In the following, we will instead look at two examples in which the clash of legal systems has played a central role: The *Shrimp/Turtle* case, which dealt with a conflict between trade and animal protection, and the *Swordfish* case, which involved two different dispute settlement bodies, the WTO DSB and the Tribunal for the Law of the Sea.

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<sup>69</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 *UNTS*, p. 331, Article 31 para. 3 lit. c. Article 31 is considered as an expression of customary law on the matter, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports (1994), 21, para. 41.

<sup>70</sup> Article 31 para. 2 lit (c) was apparently overlooked by the GATT 1947 Panel in the *Tuna/Dolphin* case, see *United States – Restrictions on Imports of Tuna*, GATT Doc. DS29/R (June 16, 1994), reprinted in 33 *ILM* (1994), 839 (unadopted), para. 5.19. However, this apparent mistake did not influence the Panel decision.

<sup>71</sup> For a detailed analysis, see Pauwelyn, *supra* note 67, at 545-47, 572-76.

<sup>72</sup> For a detailed analysis, see Schloemann/Ohlhoff, *supra* note 67.

<sup>73</sup> See, generally, B. Simma, 'Self-Contained Regimes', 16 *Netherlands Yearbook of International Law* (1985), 111; specifically relating to GATT and the WTO, see P.J. Kuijper, 'The Law of GATT as a Special Field of International Law', *Netherlands Yearbook of International Law* (1994), 227; Pauwelyn, *supra*, note 67.

<sup>74</sup> See Report of the ILC Study Group on Fragmentation, *supra* note 56, at 5, para. 21; Summary of the Commission's work at its fifty-fourth session (Extracts from Chapter II of the Report of the International Law Commission - forthcoming), available at <http://www.un.org/law/ilc/sessions/54/54sess.htm> (visited Sep. 19, 2002); and the previous study by G. Hafner, 'Risks Ensuing From Fragmentation of International Law', in: International Law Commission, Report on the work of its fifty-second session, General Assembly, Official Records, Fifty-fifth Session, Suppl. No. 10 (A/55/10), 321-330.

## **1. Value Clash and Unequal Institutionalisation: The Example of the Shrimp/Turtle Case**

The supervision of the prohibition on non-tariff barriers to trade belongs to the basic tasks of the World Trade Organization (WTO) under the 1947/1994 General Agreement on Tariffs and Trade (GATT).<sup>75</sup> GATT prohibits, *inter alia*, discrimination between domestic and foreign products (Arts. III, XIII). However, these measures do not necessarily serve the protection of domestic industries but also unquestionable political goals such as social rights, health, or environment measures. The task of the WTO requires a delicate judgment concerning the purposes and effects of non-tariff measures which are acceptable only if they serve purposes permitted under the GATT and thus remain in the political discretion of each contracting State.

Since the establishment of the WTO in 1994, the GATT benefits from binding dispute settlement contained in the Dispute Settlement Understanding (DSU).<sup>76</sup> The most prominent example for value clashes in the jurisprudence of the WTO Dispute Settlement Body (DSB) is the *Shrimp/Turtle*-decision<sup>77</sup>, in which the DSB had to strike a balance between free trade and animal protection. The United State had unilaterally imposed an import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles.<sup>78</sup> Only States requiring trawl vessels to use Turtle Excluder Devices (TED) or tow-time restrictions and adopting enforcement measures similar to the requirements of the U.S. regulations should be spared.

On the one hand, free trade required admitting fish caught in any of the WTO member States with no environmental conditions attached, on the other hand, protection of animal life demanded that fish caught in violation of environmental and animal protection standards should be sanctioned rather than supported, for instance by barriers to free trade. The U.S.

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<sup>75</sup> Marrakesh Agreement establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS, pp. 4, 154.

<sup>76</sup> See *supra*, note 66.

<sup>77</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, Report of the Appellate Body, Oct.12, 1998, WTO Doc. WT/DS58/AB/R reproduced in: 38 *ILM* (1999), 121.

<sup>78</sup> Section 609 of Public Law 101-162, 16 United States Code (U.S.C.) § 1537, see *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, Report of the Appellate Body, Oct.12, 1998, WTO Doc. WT/DS58/AB/R reproduced in: 38 *ILM* (1999), 121, at 123-24, paras. 1-3.

measures unquestionably violated free trade rules, namely Article XI:1 of GATT 1947/1994, which prohibits the institution of import prohibitions or restrictions on goods other than duties. The other interest involved, animal protection, was only marginally present in the GATT, namely in Article XX, which reads:

'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries ... or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

(b) necessary to protect human, animal or plant life or health; ...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.'

First, Article XX contains a limited catalogue of interests or values which justify restrictions to trade, among them animal life and the conservation of exhaustible natural resources. Second, it requires a balancing act: Those measures are only admissible if the restrictions of trade are necessary to the pursuit of the recognised goal. The chapeau of Article XX requires an additional balancing between the necessity of the measure as such and the requirement of non-discrimination and its trade-restricting effects. As the Appellate Body put it in *United States – Gasoline*,

'[i]n order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the

opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.<sup>79</sup>

Thus, the exception to free trade is narrowly circumscribed so that trade will usually carry the day. If otherwise, the trade regime would suffer from the invention of countless exceptions by States willing to impede free trade to their individual advantage. Thus, it is not surprising that both the original panel and the Appellate Body decided, as a result, in favour of trade and against the particular measure concerned which was meant to protect animal life.

But the outcome of the dispute settlement procedure shall not be the focus of this article. Rather, what is of particular interest here is the methodology by which the Appellate Body reached its decision. And it is this methodology, I claim, that may be more apt to solve clashes of values and interests than looking for hierarchical relationships. In interpreting Article XX, the WTO Appellate Body (AB) did not limit itself to the wording of the GATT in light of the purpose of the treaty and its drafting history. To the contrary, from the very beginning of its analysis, the AB took other values into account as they were understood by both authoritative and (only) persuasive, soft law interpretations. According to the preamble of the WTO Agreement, the parties to the agreement recognize that trade 'should be conducted with a view to', *inter alia*, 'expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment'. Article 3 DSU, paragraph 2, describes one of the tasks of the WTO dispute settlement system as the clarification of 'the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.' As already mentioned, these rules are contained in Article 31 of the Vienna Convention on the Law of Treaties, which provides, in turn, for the taking into account, in the interpretation of treaties, of 'any relevant rules of international law applicable in the relations between the parties.'<sup>80</sup> Thus, the GATT

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<sup>79</sup> *United States – Gasoline*, adopted May 20, 1996, WTO doc. WT/DS2AB/R, p. 22; see also *US Import Prohibition on Shrimp*, *supra*, note 79, p. 152, para. 118. The Panel had disregarded this two-tiered approach.

<sup>80</sup> See *supra*, note 69, also for the relationship of the Vienna Convention to general international law.

1994 is to be interpreted in the light of general international law applicable at the time of the dispute. In the words of the AB:

'The words of Article XX (g) ... 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.'<sup>81</sup>

In order to find out whether living resources such as fish could be 'natural resources' in the sense of Article XX (g), the AB also took account of the UN Convention on the Law of the Sea<sup>82</sup> and the Convention on Biological Diversity<sup>83</sup>, although some parties to the dispute had not subscribed to them.<sup>84</sup> Thus, the AB came to the conclusion that fish is also an exhaustible natural resource. This part of the decision is of particular interest because it seems that the AB was more concerned with the Conventions than with its own case law which had reached the same conclusion.<sup>85</sup> The AB pointed out that the incriminated U.S. measure was related to the conservation of an exhaustible natural resource, and was made effective with similar restrictions on domestic production or consumption.<sup>86</sup> In recent jurisprudence, the DSB has emphasized that the necessity requirements of Article XX – the quite loose term of a measure 'in relation to' in Article XX (g) is a case in point – are subject to considerable discretion of

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<sup>81</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, *supra*, note 78, para. 129.

<sup>82</sup> See *supra*, note 64.

<sup>83</sup> Convention on Biological Diversity, Jun. 5, 1992, *entry into force* Dec. 29, 1993, 1760 *UNTS*, p. 79, reproduced in: 31 *ILM* (1992), 818.

<sup>84</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 78, para. 130.

<sup>85</sup> See *ibid.*, para. 131, referring to two GATT 1947 panel reports which were adopted by the CONTRACTING PARTIES, *United States - Gasoline*, May 20, 1996, WT/DS52/AB/R, p. 23; *Japan – Taxes on Alcoholic Beverages*, Nov. 1, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12; *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Feb. 25, 1997, WT/DS24/AB/R, p. 16.

<sup>86</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 78, paras. 142, 145.

the country concerned, especially if important values such as human life are at stake.<sup>87</sup> Article XX (g) being *lex specialis*, the AB had not to deal with Article XX (b).<sup>88</sup>

The *Chapeau* (introduction) to Article XX contains three tests: (1) arbitrary or (2) unjustifiable discrimination between countries where the same conditions prevail, and (3) disguised restrictions on international trade. The AB describes the task of the application of the *Chapeau* as 'essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception ... and the rights of the other Members ... so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations'<sup>89</sup>. In the case at hand, the balancing concerned, on the one hand, the legitimate purpose of the United States to protect animal life at sea, and the right of shrimp importers to free trade with the U.S. Here, the AB found that the U.S. requirements were too rigid and inflexible, because they demanded the adoption of largely identical measures like the U.S.<sup>90</sup> In addition, the formal certification of the identity of the measures, and not the substantive identity or the effect of the measures, were considered decisive. Any negotiated solution which would recognize similar regulatory schemes was not contemplated.<sup>91</sup> For the requirement of negotiation before the unilateral imposition of trade restrictions, the AB again cited the law on the environment, in particular referring to Principle 11 of the Rio Declaration on Environment and Development<sup>92</sup> and the Agenda 21, but also, again, the Convention on Biological Diversity.<sup>93</sup> Finally, the AB stated that the U.S. had engaged in an arbitrary fashion only in negotiations with some countries, but not with others, and did not have a fair procedure of certification.<sup>94</sup> Therefore, the AB held the U.S. in breach of the GATT 1994 because of its discriminatory application of Article XX, not because of the general unjustifiability of restrictions of trade for animal protection. In the end, the case

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<sup>87</sup> *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, Doc. WT/DS161, 169/AB/R, Dec. 11, 2000, paras. 161-64; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, Mar. 12, 2001, 40 *ILM* (2001), 1193, paras. 167-168, 178; cf. R. Howse, *supra* note 60, at 657.

<sup>88</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 78, para. 146.

<sup>89</sup> *Ibid.*, paras. 159-60.

<sup>90</sup> *Ibid.*, para. 164.

<sup>91</sup> *Ibid.*, paras. 164-66.

<sup>92</sup> Rio Declaration on Environment and Development, Jun. 14, 1992, 31 *ILM* (1992), 874.

<sup>93</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, *supra*, note 78, para. 168.

<sup>94</sup> *Ibid.*, paras. 169-176.

constituted the first example of the DSB considering the lawfulness of unilateral extraterritorial measures for the protection of universal values other than trade.

Accordingly, the U.S. revised its guidelines and provided for 'certification' of a shrimp exporting country when the country adopts 'comparably effective' measures to protect sea turtles as the U.S.<sup>95</sup> In addition to the Inter-American Convention for the Protection and Conservation of Sea Turtles<sup>96</sup> adopted, but not in force when *Shrimp/Turtle* was originally decided, the U.S. had negotiated a Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia.<sup>97</sup> The adoption of a legally binding document had apparently failed due to opposition of East-Asian States.<sup>98</sup> Thus, the Appellate Body now agreed to the Panel's finding that the U.S. law on the protection of sea turtles was 'now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination'.<sup>99</sup> In addition, both AB and Panel agreed that the U.S. could demand the adoption of a turtle protection programme 'comparable in effectiveness' with its own measures, but not, as previously, 'essentially the same' programme.<sup>100</sup> Thus, the new guidelines were flexible enough to be justified under Article XX (g) GATT 1994.<sup>101</sup>

## **2. The Problem of Overlapping Jurisdiction**

However, the problem gets even more tricky if other decision-making bodies with a limited jurisdiction are involved. The *Swordfish* Case has raised, for the first time, the spectre of two

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<sup>95</sup> See United States Department of State, Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 *Federal Register* (Jul. 8, 1999), p. 36946; WTO Appellate Body, *United States- Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, 41 *ILM* (2002), 150, at 151 para. 8. For a brief assessment, see L. de la Fayette, 'Case Report: United States- Import Prohibition of Certain Shrimp and Shrimp Products (compliance)', 96 *AJIL* (2002), 685.

<sup>96</sup> Inter-American Convention for the Protection and Conservation of Sea Turtles, *opened for signature* Dec. 1, 1996, *entered into force* May 2001, S. Treaty Doc. No. 105-48, 1996 WL 33141597 (Treaty). See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, *supra*, note 78, paras. 167-172. The Appellate Body considered the differential treatment of American and other States *ibid.* discriminatory.

<sup>97</sup> July 14, 2000, entry in to force Sep. 1, 2001, available at the Website of the Convention on Migratory Species, <http://www.unep-wcmc.org/cms> (visited Nov. 4, 2002).

<sup>98</sup> *Shrimp, Recourse to Article 21.5*, *supra*, note 95, at 173, para. 132 n. 93.

<sup>99</sup> *Shrimp, Recourse to Article 21.5*, *supra* note 95, at 173, para. 134.

<sup>100</sup> *Shrimp, Recourse to Article 21.5*, *supra* note 95, at 175, paras. 141-144.

<sup>101</sup> *Shrimp, Recourse to Article 21.5*, *supra* note 95, at 177, para. 153.

instances of international dispute settlement institutions confronting each other in the same case.<sup>102</sup> The case concerned Chilean measures against alleged over-fishing of swordfish in the High Seas by European Community fishers. Chile prohibited the landing of boats carrying swordfish in its ports. Both Chile and the European Communities are members of the WTO and parties to the United Nations Convention on the Law of the Sea (UNCLOS).<sup>103</sup>

From the standpoint of the European Communities, the Chilean measures violated both the freedom of transit pursuant to Article V paras. 1 – 3 GATT 1994 and the tariffs-only provision of Article XI para. 1 GATT prohibiting non-tariff barriers to trade.<sup>104</sup> Concerning Article XX GATT, the EU could argue that Chile had, at a minimum, violated the duty of cooperation enunciated by the *Shrimp/Turtle* AB decision<sup>105</sup>. The EU first requested formal consultations the establishment of a DSB panel pursuant to Articles 4 and 6 DSU.<sup>106</sup>

The EU also relied on the right to fish on the high seas under Article 116 UNCLOS. Due to the detailed provisions of UNCLOS concerning the duty of States to adopt measures for the conservation of the living resources of the high seas as provided for by Articles 64 and 117 UNCLOS, Chile could expect more favourable treatment there. Thus, Chile requested arbitration pursuant to Article 287 para. 3 UNCLOS. Later on, the parties agreed on the referral of the case to a chamber of the International Tribunal for the Law of the Sea.<sup>107</sup>

In the end, however, both parties understood that two – maybe conflicting – dispute settlement decisions would not be helpful to fulfil the very purpose of both the DSU and the UNCLOS rules – dispute settlement, not continuation of the dispute by judicial means. Thus,

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<sup>102</sup> Of course, different international courts or tribunals already had encountered differences of opinion about the meaning of international norms, see, e.g., the discussion of attribution of conduct of mercenaries to States between the I.C.J., *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports (1986), p. 14, paras. 191, 228 [‘Effective Control’ required]; and the International Criminal Tribunal for the Former Yugoslavia (ICTY), see *Prosecutor v. Tadić*, July 15, 1999, IT-94-1-A, available at <http://www.un.org/icty>, visited Oct. 31, 2002, paras. 88 ff. [‘overall control’ sufficient]. But they were not confronted with the identical case in two different fora of binding dispute settlement.

<sup>103</sup> *Supra*, note 64.

<sup>104</sup> *Chile – Measures affecting the transit and importation of swordfish – Request for Consultations by the European Communities*, Apr. 26, 2000, WTO Doc. WT/DS193/1; *Request for the Establishment of a Panel by the European Communities*, Nov. 7, 2000, WTO Doc. WT/DS193/2, available at <http://www.wto.org>.

<sup>105</sup> *Supra*, note 91 and accompanying text.

<sup>106</sup> See the requests *supra*, note 104.

<sup>107</sup> International Tribunal for the Law of the Sea, *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*, Constitution of Chamber, Dec. 20, 2000, Order 2000/3, Case No. 7, available at <http://www.itlos.org>, reproduced in 40 *ILM* (2001), 474.

they suspended both proceedings and agreed on negotiations on a framework for the conservation and management of swordfish in the South-East Pacific.<sup>108</sup> The case demonstrates that, in cases of a threatening clash of different jurisdictions at the international level, State parties must find a solution themselves rather than risking a lengthy dispute settlement process which leads to no practical result. Thus, jurisdictional overlap will sometimes not lead to more, but to less judicial third-party settlement.

On the other hand, one may imagine that the WTO and ITLOS would have been able to avoid such a conflict. The AB could have used the duties of cooperation contained in Articles 64 and 117 UNCLOS to underline its *Shrimp/Turtle*-jurisprudence on the cooperation required under Article XX g) GATT. It could also have referred to the recent Fishery Agreement<sup>109</sup>. It requires, in Arts. 7 and 23, an agreement of both fishing and coastal States for conservation measures, but also prescribes detailed standards and interim measures of protection through the Tribunal. Thus, there exists no real conflict between GATT and UNCLOS. The ITLOS, on the other hand, could have looked to the GATT for guidance how to fill the lack of concreteness in the provisions of UNCLOS, the fishery agreement being not in force between the parties.<sup>110</sup> Be that as it may, both institutions would have needed to look to the other for guidance. One might even consider some sort of informal coordination between the bodies.

### **3. World Trade and Other Values – Integration or Opposition?**

The *Shrimp/Turtle* case did of course not solve all 'trade and ...'-problems. The decision could be based, for instance, on the express language of the GATT allowing for environmental exceptions. What would a panel do if a valid concern was not mentioned in Article XX and Article XXI? As the AB pointed out: 'The words of Article XX (g) ... were actually crafted

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<sup>108</sup> See EU and Chile reach an amicable settlement to end /WTO/ITLOS swordfish dispute, Doc. IP/01/116, 25 Jan. 2001, available at [http://europa.eu.int/comm/trade/index\\_en.htm](http://europa.eu.int/comm/trade/index_en.htm) (visited Oct. 3, 2002); J. Neumann, 'Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen: Die Problematik paralleler Streitbeilegungsverfahren am Beispiel des Schwertfisch-Falls', 61 *ZaöRV* (2001), 529; M. Orellana, 'The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea', *ASIL Insight*, Feb. 2001, available at <http://www.asil.org/insights/insigh60.htm> (visited Nov. 4, 2002).

<sup>109</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, UNTS No. 37924, 34 *ILM* (1995), 1569, *opened for signature* 4 August 1995, in force Dec. 11, 2001, but neither for the European Community nor for Chile, which has not even signed.

<sup>110</sup> For an extensive treatment, see Neumann, *supra*, note 107.

more than 50 years ago.<sup>111</sup> This is of course also valid of the whole treaty. Thus, we find a provision on prison labour, but not on labour rights, on public morals and the protection of human life, but not on human rights and freedoms, on the UN Charter and the protection of essential security interests, but not on humanitarian intervention, etc. No wonder, then, that the current debate centres on these issues. But there seems to be no clear cut 'solution', as the weighing of circumstances will be different in each case.

How would a decisionmaker decide without the benefit of explicit language in the treaty? Which criteria could he or she apply? Consider, for example, trade unions asking for the respect of the rights of their brethren, but in reality fearing for the jobs in their own country? Are not most trade restrictions related to a public purpose which can be justified on these grounds? In each of these cases, the lawyers serving on the AB will be hard pressed to decide those questions in favour of trade. After all, the protection of free trade is their expertise. The temptation is strong to regard most justifications of trade restrictions as a cynical circumvention of international rules for individual interests.<sup>112</sup> Jagdish Bhagwati fears the 'threat posed to the trading system by lobbies (in the North, of course) seeking to impose their own "trade-unrelated" agendas on the GATT (and later the WTO) by simply adding the words "trade-related" before whatever these agendas were.'<sup>113</sup> Bhagwati thus reminds us of the so-called trade-related aspects of intellectual property integrated into the WTO by the TRIPs Agreements.<sup>114</sup> "By putting TRIPS into the WTO, in essence we legitimated the use of the WTO to extract royalty payments." Bhagwati continues: "[T]he poor countries [which] have no lobbies anywhere like the sumptuous ones such as the Sierra Club and the AFL-CIO [the U.S. trade union umbrella organization, A.P.] now find themselves at the receiving end of a growing list of lobbying demands that the northern politicians are ready to concede, cynically realizing that the bone thrown to these lobbies in their own political space is actually a bone down the gullets of the poor countries."<sup>115</sup> Thus, nowadays, third world countries seem

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<sup>111</sup> See *supra*, note 81 and accompanying text.

<sup>112</sup> For a description of the development of the 'insider network' ideology on free trade, see R. Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime', 96 *AJIL* (2002), 94.

<sup>113</sup> J. Bhagwati, 'Afterword: The Question of Linkage', 96 *AJIL* (2002), 126, at 127.

<sup>114</sup> Bhagwati, *ibid.*, referring to the Agreement on Trade-Related Aspects of Intellectual Rights [hereinafter TRIPS], in: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1 C, 1869 *UNTS* 299.

<sup>115</sup> *Ibid.*, pp. 127-8. See also the Third World Intellectuals and NGOs' Statement Against Linkage (Nov. 15, 1999) (TWIN-SAL), available at <http://cuts.org/twin-sal.htm> (visited Nov. 4, 2002), signed by Bhagwati.

often to be the true champions of a purist trade agenda. And indeed, most States or lobbies will find one concern or the other which justifies trade restriction on 'higher' grounds.

In the absence of a political consensus among WTO members, is the DSB entitled go beyond the narrow confines of the WTO agreements towards other areas of law? It is not possible to give a simple answer to this question. In each case, the solution will be different. However, what makes the *Shrimp/Turtle*-decision a laudable exercise is the attempt of the AB not to disregard the question by pretending that the WTO would exist in a legal vacuum, but to include other international instruments, even if not yet formally in force, to rely on an international consensus allowing for exceptions to free trade by domestic regulation. There is no doubt that such decisions between different legitimate concerns by weighing all circumstances, including the resort to legal and quasi-legal norms and broad principles, will empower the judge or panellist to justify almost any result. And yet, the AB did not act without legal guidance. It did not have to substitute its own political convictions for those expressed by the international community, but it integrated them into its own system.

There is, however, also a danger involved in this strategy. The controversy between Philip Alston and Ernst-Ulrich Petersmann on the inclusion of human rights in the WTO Dispute Settlement<sup>116</sup> is a case in point. Could the transformation of the WTO dispute settlement system from a trade body to a body of general international law destroy the specificity of human rights law? Alston speaks of the danger of a 'merger & acquisition' of human rights by trade law. He particularly takes issue with the apparent conflation of economic freedoms with human rights in the proper sense of the term.<sup>117</sup> Indeed, Petersmann largely equates economic rights, in particular property rights, but also the market freedoms of the EC treaty, with human rights.<sup>118</sup> On the other hand, he is clearly not ignorant of the problematique involved:

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<sup>116</sup> See *supra*, note 59 and accompanying text.

<sup>117</sup> P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 *EJIL* (2002), 815, at 823-828.

<sup>118</sup> Petersmann, *supra*, note 59, at 636-7, 644 *et passim*; even more clearly *id.*, 'The WTO Constitution and Human Rights', *Journal of International Economic Law* (2000), 19, at 23; see also *id.*, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg/CH, University Press, 1991), pp. 402-403 (arguing for an individual right to free trade). Cf. Howse, *supra*, note 60, at 651: '[T]here are few who would disagree with Petersmann that the full realization of human rights is incompatible with ruthless suppression of market freedoms. Yet ... the markets and trade are entwined with some of the most horrific human rights abuses, and on a massive scale.' Against an individual right to free trade, see S. Peers, 'Fundamental Right or Political Whim? WTO Law and the European Court of Justice', in: G. de Burca/J. Scott, eds., *The EU and the WTO* (Oxford/Portland, Hart, 2001), p. 111, at 129.

'Given the widespread bias among human rights lawyers *vis-à-vis* economics and WTO law, and the agnostic attitude of many trade specialists *vis-à-vis* human rights, it is an important task of academics to promote more dialogue and better understanding among these different communities of trade specialists and human rights advocates so as to render both human rights law and WTO law more effective in reducing worldwide poverty and health and human rights problems.<sup>119</sup>

Nevertheless, the question arises whether Petersmann does not overload a trade dispute settlement procedure with other concerns. Being charged not only with promoting economic exchange, but also with the reduction of worldwide poverty, with health and human rights problems, the promise of free trade seems to be taken too far – let alone the question of whether these 'rights' conform to the current state of human rights law.<sup>120</sup> In the words of Robert Howse, in the hierarchy of rights that Petermann is proposing, '[s]ocial and other positive human rights may only be pursued by governments to the extent to which they can be shown as "necessary" limits on market freedoms. But why not the reverse? Why not subject *free trade rules* to strict scrutiny under a necessity test, where these rules make it more difficult for governments to engage in interventionist policies to protect *social rights*?<sup>121</sup> Indeed, Petersmann criticizes traditional human rights doctrine for its blindness towards the liberating potential of free markets and sound competition laws.<sup>122</sup> But the extension of the WTO to the core of the political discourse puts the legitimacy of the project of free trade at risk.<sup>123</sup> In the words of Robert Howse:

[I]f free trade is recast in terms of "rights," it must obviously be integrated or balanced somehow with other human rights, explicitly entrenched in international legal instruments . . . . Yet since these other

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<sup>119</sup> Petersmann, *supra*, note 59, at 643.

<sup>120</sup> Cf. Alston, *supra*, note 60.

<sup>121</sup> Howse, *supra*, note 60, at 655.

<sup>122</sup> Petersmann, *ibid.*, at 639.

<sup>123</sup> This is the core of Alston's criticism, *supra* note 60. See also R. Howse/K. Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far', in: R.B. Porter et al. (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, Brookings, 2001), p. 227, at 235-239.

rights are not substantively focused on trade, it is very unclear why the trading system itself or, more specifically, its juridical organs have the legitimacy to strike the balance (as opposed to the UN organs primarily seized of human rights questions), or indeed why it should not in the first instance be struck by democratic decision making within each polity.<sup>124</sup>

And yet, there is some truth to Petersmann's insistence that human rights and social concerns are often (ab)used as disguise for the pursuit of individual interests, and that trade restrictions will only rarely be an effective tool for reaching policy goals.<sup>125</sup> In addition, as Jagdish Bhagwati has remarked, unilateral trade restrictions for environmental or labour or human rights reasons are only an option, as a rule, to rich and powerful countries, not to small and weak ones.<sup>126</sup>

Nevertheless, a better regard to conflicting policy goals might lead to a stricter check on the effects of trade-related measures for other human rights and values, such as development or the environment.<sup>127</sup> The present author agrees with Petersmann when he calls for a better taking into account of human rights law, including social rights, in the interpretation of Article XX GATT.<sup>128</sup> However, such an approach would require a much more bold approach by the Dispute Settlement Body concerning the (re)interpretation of narrowly crafted exceptions.<sup>129</sup> The question remains of whether a body of trade experts and international lawyers constitutes the appropriate forum for such decisions rather than national regulators and parliaments, and whether and how they could face some sort of democratic or public

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<sup>124</sup> R. Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime', 96 *AJIL* (2002), 94, at 105.

<sup>125</sup> Petersmann, *supra*, note 59, at 645: '[T]rade restrictions are only rarely an efficient instrument for correcting "market failures" and supplying "public goods" *et passim*.

<sup>126</sup> Bhagwati, *supra*, note 113, p. 133.

<sup>127</sup> Howse, *supra*, note 123, pp. 245-46; Howse/Nicolaïdis, *supra* note 123, at 228.

<sup>128</sup> Petersmann, *supra*, note 59, at 646 *et passim*.

<sup>129</sup> Cf. Petersmann's suggestion that the relationship between human rights and the 'public morals' exception in Article XX lit. a GATT 1994/47 should be clarified, *ibid*. Indeed, Article XX could serve the purpose of a much broader integration of human rights into the Article XX exceptions. On the same line S. Charnovitz, 'The Moral Exception in Trade Policy', 38 *Virginia J. Int'l. L.* (1998), 689.

control.<sup>130</sup> Thus, the DSB will continue to have to avoid the danger of abuse of trade issues for political advantage, in particular when extraterritorial enforcement is in question.<sup>131</sup> Nevertheless, confronting this issue requires a weighing of a host of circumstances and values expressed in legal values, with no simple and one-fits-all solution in sight.

#### **IV. Conclusion: From Constitution to Discourse?**

The analysis of the value clashes in the case of the WTO ended with the conclusion that, for better or for worse, trade lawyers needed to look to other functional systems in order to delineate their system from them. But are lawyers the right persons to decide those issues? Should they not be left to the 'international legislator', namely (ideally elected) governments?<sup>132</sup> However, this 'hands off'-approach would lead to the conclusion that, for the time being, trade would prevail until the next trade round – which may take years. The parties in such a case can often not wait for the results of political processes such as the decade-long WTO policy rounds. They need a decision on their problem, here and now. This approach would also imply a shift from domestic to international, from democratic to inter-State decision-making, because all these decisions would be taken out of the domestic political process. Thus, waiting for the next treaty amendment might often amount to less democracy and flexibility. At times, however, legal problems of this kind may be 'solved' by sending the parties to the dispute back to the negotiating table. The insistence of the AB in *Shrimp/Turtle* on the priority of negotiations to the unilateral imposition of sanctions demonstrates how a legal body may defer to political decisions without renouncing the claim to full compliance with the law. In cases involving difficult value problems which are not pre-ordained in WTO

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<sup>130</sup> Petersmann, *supra*, note 59, at 646; Howse, *supra*, note 60, at 658 (who remains skeptical). Even WTO practitioners do not understand their role that broadly, see, e.g., D.P. Steger, 'Afterword: The "Trade and ..." Conundrum – A Commentary', 96 *AJIL* (2002), 135, at 140.

<sup>131</sup> The extraterritoriality of the U.S. measures to protect dolphins apparently was the main reason for one of the original GATT panel to reject the U.S. measures, see *United States – Restrictions on Imports of Tuna*, *supra* note 70, paras. 5.24-5.27, 5.37-5.39. For a suggestion to deal with this issue by applying the effects doctrine, see Bagwell/Mavroidis/Staiger, *supra* note 60, at 75-6. However, given the indeterminacy of this doctrine, this approach to extraterritorial rules does not much more than demanding a weighing of all circumstances in cases of extraterritorial application of domestic laws.

<sup>132</sup> The first *Tuna/Dolphin* panel in the GATT 1947 argued for a referral of the matter to a political decision, see *United States – Restrictions on Imports of Tuna*, 16 Aug. 1991, reprinted in 30 *ILM* (1991), 1594 (unadopted), paras. 6.3 – 6.4; see also *United States – Restrictions on Imports of Tuna*, Jun. 1994, *supra* note 70, para. 5.43. In that sense also Bhagwati, *supra* note 113, at 134; Steger, *supra*, note 130, at 140, 144.

law or other international rules, a renvoi to the parties, with some guidance on the legal principles and issues involved, may thus be the best avenue to take.<sup>133</sup>

Adjudicating bodies such as WTO dispute settlement must forego the temptation to preserve the prime value of their system as against others. Thus, they need to forego the attempt of hierarchization (trade trumps environment) to the benefit of delicate balancing acts paying due regard to other issue areas (such as the protection of the environment and animal life in *Shrimp Turtle*). It is the task of international lawyers to further develop a methodology which allows for the respect for the values of other issue areas within institutional settings such as WTO dispute settlement. Thus, the advent of pluralist functionalism may indeed imply a shift from constitutional solutions relying on hierarchical decisionmaking by superior bodies to mutual accommodation of different functional systems, from constitution to discourse.

This development also involves the danger of 'strong law', such as WTO law, getting the upper hand over 'weak law' not equipped with a strong implementing mechanism, such as labour law or human rights law. Thus, for upholding the acceptance of their jurisprudence and decisions, strong implementing mechanisms must strive to accommodate the concerns of "weak" norms and interests. The most suitable legal methodology for approaching typical problems of functionalisation thus consists in accommodating and balancing clashing values and interests and paying due regard to the decisions of other judicial and quasi-judicial mechanisms, rather than in establishing hierarchical relationships between issue areas. The *Shrimps/Turtle* case is an example in point – both for the quest to strike that balance as for the failure to accommodate all actors involved.

However, this approach also gives an ever larger margin of appreciation to lawyers. The lawyer ends up in a political role: The result of the application of abstract principles to the concrete circumstances of a specific case is not predetermined by legal rules. As one WTO practitioner has observed: '[T]he problems of scope and linkage are essentially political in nature. Therefore, the solutions will also be political.'<sup>134</sup> But does the political (and therefore

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<sup>133</sup> Cf. the *Beef Hormone* case, *European Communities – Measures Concerning Meat and Meat Products* (Hormones), Feb. 13, 1998, WT/DS48/AB/R. Howse and Nicolaïdes consider this case as a model for the future decision (or non-decision) of questions deemed too political, Howse/Nicolaïdes, *supra*, note 123, at 245. Cf. also the *Gabčíkovo-Nagymaros (Hungary v. Slovakia)* decision of the I.C.J., I.C.J. Reports (1997), p. 7, which has, however, not yet lead to a successful settlement.

<sup>134</sup> Steger, *supra*, note 130, p. 135. Similarly Trachtman, *supra*, note 24, at 77.

arbitrary) nature of the lawyer's choices delegitimize the lawyer or transform him into a political actor? Where do we find the specificity of judicial as opposed to purely political settlement? One answer to this concern can be found in both the procedure and the criteria used in a "legal" decision. The specificity of a legal decision on value clashes is the orientation towards values and principles, not political expediency or exchange of benefits. Here we find the argument for the use of the traditional means of treaty interpretation which might help to preserve the unity of international law in diversity: '[T]he very decision to follow these general interpretive rules of public international law enhances the legitimacy of the dispute settlement organs in adjudicating competing values, because these norms are common to international law generally, including to regimes that give priority to very different values, and are not specific to a regime that has traditionally privileged a single value, that of free trade.'<sup>135</sup> The lawyer is not entitled to find an unprincipled, political "tit-for-tat" solution. He needs to refer to established rules and principles to reason his decision. Neither needs he to hide the ultimate value judgment, which will always be subject to doubt and contestation. Still, the very nature of decision-making will remain different.

The political nature of legal choices also means that the results of such legal balancing of values, norms and interests is open and subject to "political" critique. In the absence of unequivocal, clear rules for the decision of value conflicts or independent enforcement authority, international decisions ultimately depend – far stronger than political ones – on the social acceptance of the outcomes by the political community at large. Such acceptance will only be reached if the lawyer strives to take all relevant legal pronouncements of values into account. Thus, in the end, only by remaining within the professional realm the international lawyer will fulfil his mandate. Only the professional attitude of the lawyer as an intermediary between socially accepted values translated into legal norms, and an often confusing and confused reality, can fill the legitimacy void in the international realm. This requires both legal professionalism and judicial modesty.<sup>136</sup>

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<sup>135</sup> Howse, *supra*, note 124, at 110.

<sup>136</sup> Cf. the debate between O. Korhonen, 'International Lawyer: Towards Conceptualization of the Changing World and Practice', in: J. Drolshammer, M. Pfeifer, *The Internationalization of the Practice of Law* (The Hague et al., Kluwer Law International, 2001), p. 373, and the present writer, 'The International Lawyer between Globalization and Postmodernity', *ibid.*, p. 385. See also Paulus, 'International Law After Postmodernism', *supra*, note 10, pp. 737, 755.