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The Relationship between International Economic Law and Public International Law: The Role of Self-Contained Regimes

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The Relationship between International Economic Law and Public International Law: The Role of Self-Contained Regimes

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Abstract *The development of specialized areas of international investment law and international trade law has increasingly called into question the relationship between these areas and general international law. The concept of a "self-contained regime" has often been invoked as a way of understanding these relationships but on examination this turns out not to be as analytically useful as hoped. In both international investment law and international trade law dispute settlement bodies have sought to explain the intersection between general international law and the specific rules of investment law and trade law. Nonetheless there are questions about the legitimacy of dispute settlement, particularly in the area of investment law, and there are concerns about the way in which the WTO Appellate Body has invoked principles of international law. On the one hand public international law is seen to offer too little in the interpretative process of WTO dispute settlement and on the other hand it is claimed to be able to do too much. The problems that arise are linked to the generic question of the relationship between treaties and general international law to which much greater attention should be given.*

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I. INTRODUCTION

The growth of specialized areas of international law has led to questions about the relationship between particular provisions of a specialized area and other areas of international law, whether contained in treaties or as part of general international law.[1] Principles of public international law have been invoked by the WTO Appellate Body [**"AB"**] and incorporated into its decisions on the interpretation of the WTO agreements. Principles derived from public international law have been incorporated into decisions of investment arbitration tribunals. Although the circumstances of international trade law and international investment law are often quite different, at a certain level they present the same problem. Both are concerned with the interpretation of treaties and thus both raise the question of the legitimacy of referring to public international law principles in their interpretive processes. Can this relationship be explained in terms of the notion of self-contained regimes; and what are the consequences of the incorporation of public international law principles into the interpretation of trade and investment agreements?

Although this article uses the general title of international economic law, it focuses on international trade law and international investment law. These bodies of international economic law, while founded in part on similar organizational principles, vary widely in terms of perception by international lawyers about their place in international law. Aspects of international investment law were always part of customary international law – the law on the minimum standard of treatment of aliens and the law relating to expropriation, which were found in standard textbook treatments of public international law, although not necessarily under the rubric of investment law. International trade law had a somewhat separate existence, being embodied in a multilateral treaty rather than being based on principles of customary international law. It remains appropriate, therefore to deal with them separately.

The article is written against a background in which the major areas that it deals with are in many ways contested. International investment law is under particular scrutiny, both for the broader implications of its economic rationale and consequences, and more specifically for its dispute settlement system.[2] International trade law, often perceived as representing the interests

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1 *See generally*, Donald McRae, "The Contribution of International Trade Law to the Development of International Law" 260 RECUEIL DES COURS 103-237 (1996).

2 Anthea Roberts, "Incremental, Systemic and Paradigmatic Reform ofInvestor-State Arbitration", 112 AJIL 410-432(2018).

of the economically developed states,[3] is under attack in respect of its dispute settlement process.[4] Further, customary international law is being challenged for its identification with and furtherance of the capitalist economic order, which calls into question traditional notions of how customary international law is to be identified and applied.[5] Although this article does not address these issues directly, it does call into question the adequacy of ways of approaching the relationship problem. It also proceeds from the recognition that the issue of the relationship of particular regime areas with general international takes place within a broader debate over the provenance and legitimacy of customary international law, particularly as it applies to and is perceived by post-colonial and other developing countries.

In this article I shall consider *first*, the general nature of self-contained regimes; *second*, the relationship between specific rule regimes and general international law; *third*, the relationship issue in international investment law and the particular interpretive issues that arise; and lastly, the relationship issue in international trade law and the adequacy of the approaches taken by the WTO dispute settlement system. I shall then draw some conclusions.

II. Self-Contained Regimes

What is a self-contained legal regime? The idea of something being self-contained is that it contains within it all parts that are necessary for it to function.[6] The application of the term to the WTO suggests that the rules of the WTO legal regime are adequate in a stand-alone sense and thus rules from the outside are either unnecessary or excluded.

In its commentaries to Article 55 of the Articles on State Responsibility, the International Law Commission [**"ILC"**] refers to "self-contained regimes" as a strong form of *lexspecialis*.[7] In the Fragmentation Study,[8] the Commission

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3 B.S. Chimni, "The World Trade Organization, Democracy and Development: A View from the South", 40 J. of World Trade 5-36(2006).

4 Anwarul Hoda, "Collapsing Trade Order: How the WTO is Under Attack", *Financial Express* (October 26, 2018, 4:01 a.m.) <https://www.financialexpress.com/opinion/collapsing-trade-order-how-the-wto-is-under-attack/1361601/> (accessed December 5, 2018).

5 B.S. Chimni, "Customary International Law: A Third World Perspective", 12 AJIL 1-46 (2018).

6 Self-contained is defined in the Oxford English Dictionary as "independent of external means or relations". *The Oxford English Dictionary*, 2nd edn. (1989).

7 International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts", 2001, Supp No. 10, UN Doc A/56/10.

8 International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", UN Doc A/CN.4/L.682 (April 13, 2006).

distinguished between three forms of self-contained regimes; *first*, a set of secondary rules relating to state responsibility that claims primacy over the general rules on state responsibility; *secondly*, "interrelated wholes of primary and secondary rules" or "systems" or "subsystems" of rules regulating a matter independently of international law; and *thirdly*, broad fields of law which are thought to have their own special rules of interpretation and administration. It is in this third category that the Fragmentation report refers to "WTO law".[9]

How useful are these categories of self-contained regimes for understanding international investment law or international trade law and their relationship to other principles of international law? In respect of international trade law, only the first category resonates as a useful description of its relationship to public international law, that is, the WTO has a set of secondary rules relating to state responsibility that claim primacy over the general rules of international law. In other words, when issues of breach and responsibility arise under the WTO, then recourse must be had to the rules and processes of WTO dispute settlement.

However, to think of rules of the WTO as "sub-systems of primary and secondary rules that claim primacy over general international rules" – the second ILC category – does not say much more than that the rules of the WTO are contained in a treaty. Treaties are systems of rules that claim primacy over general rules of international law in respect of the relations of their parties. To assign WTO rules to this category tells us nothing about the relationship of international trade law to general international law.

Equally, the third ILC category does not provide much guidance on the nature of the rules of the WTO or international trade law more generally. Does the WTO embody "a broad field of law that has its own special rules of interpretation and administration"? It is certainly a broad field of law, but would international trade lawyers describe international trade law as having its own special rules of interpretation? The covered agreements are to be interpreted in accordance with the "customary rules of interpretation of public international law"[10]. Such a description looks more like mainstream treaty law and not some separate and special regime. Further, is it meaningful to say that WTO law has its own special rules of administration? The UN, the EU, and other international organizations all have their own rules governing their administration, but does that factor turn all international organizations into self-contained regimes? If it does, then that is simply an

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[9] *Ibid.*

[10] "Understanding on Rules and Procedures Governing the Settlement of Disputes", Art. 3(2), April 15, 1994, 1869 UNTS 401 (1995).

equation of self-contained regimes and international organizations, which does not contribute to our understanding of self-contained regimes or provide a useful way of thinking about them legally.

In short, it does not seem that, outside the area of responsibility, much is gained by thinking of WTO law or international trade law as a self-contained regime with an implication of hierarchy between principles of international trade law and other principles of public international law.

Do the ILC categories of self-contained regimes fare better with international investment law? Does investment law claim to be a set of rules relating to state responsibility that claim primacy over the general rules on state responsibility? In a sense, it does. A bilateral investment treaty – or a trilateral or mega-regional treaty – sets out the conditions of responsibility for states in their treatment of foreign investors, as well as a mechanism for determining breach. The further particular aspect of this responsibility regime is that states have granted their own nationals, who are foreign investors, the right to stand in the place of the state to enforce the terms of a bilateral investment treaty and to obtain a remedy directly. Thus, in relation both to the rules on responsibility and to the right of recourse to non-state entities, this first category of self-contained regimes seems to resonate with international investment law.

The second category of self-contained regimes – "interrelated wholes of primary and secondary rules" or "systems" or "subsystems" of rules regulating a matter independently of international law – could also be a partial description of investment agreements, although the idea of regulating matters independently of international law seems strange in this context. As mentioned earlier, international investment law has been an integral part of the development of international law. The point is that a BIT is a treaty regime to deal with matters that would otherwise be covered by any relevant rules of customary international law. However, that is not to make a statement about investment law; it is to make a statement about any treaty, which by definition provides an arrangement between parties that would otherwise be covered by customary international law.

With regard to the third category of self-contained regimes – broad fields that have their own rules of interpretation and administration – this does not appear to be a helpful way to understand international investment law. This category implies some institutional element, which is not found in any real sense in bilateral investment treaties. As a result, this category does not assist in thinking about the notion of self-contained regimes in the context of international investment law.

The problem with the "self-contained regime" label is that it gives the impression that a self-contained regime provides a different answer to the question about whether a treaty ousts the provisions of general international law or whether they remain compatible and can operate side by side, when compared to what the answer would be if the treaty regime is not "self-contained". This however, cannot be right. Surely, the relationship between a treaty and other treaties or customary international law must be tested on a case by case basis in light of the interpretation of the particular treaty in question and not on the basis of some *a priori* characterization of a particular treaty regime as self-contained.

Moreover, the first sense of self-contained regimes, which is that of secondary rules on state responsibility which claim hierarchy over the general rules on state responsibility, gets closest to a useful way of thinking about the issues facing both international trade law and international investment law. This is because it focuses on the fact that there are specific responsibility rules under the WTO agreements and under investment agreements and dispute settlement mechanisms where issues of the relationship of treaty rules and customary international law arise.

It is clear, then, that the notion of self-contained regimes is not particularly helpful when used simply in descriptive terms – subsets or sub-systems of rules, or as broad fields with their own systems of interpretation – because that description neither gives us any idea of what problems they create or how those problems are to be solved. However, the idea of self-contained regimes is, in a sense, a metaphor for a not very well understood problem – the relationship of specific rules of international law with rules or principles of general international law or, in this context, the relationship of treaties on trade or investment with other treaties or with customary international law.

III. APPROACHES TO THE TREATMENT OF THE RELATIONSHIP BETWEEN SPECIFIC RULE REGIMES AND GENERAL INTERNATIONAL LAW

In their study of self-contained regimes,[11] Simma and Pulkowski have argued that there are two ways to view international law-a traditional view in terms of hierarchical unity, which gives general international law more authority, or, a more contemporary view in terms of a network of multiple structures and prescriptions in different issue-areas. The ability to look at self-contained

[11] Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law", 17 EJIL 483 (2006).

regimes in this latter way is enhanced by the existence of different dispute settlement mechanisms in each issue area.

In respect of WTO law, and drawing on the work of Pieter Jan Kuijper,[12] Simma and Pulkowski conclude, "With the introduction of 'suspensions of concessions' as a countermeasures equivalent, the WTO system has indeed 'moved decisively in the direction of . . . a self-contained regime'"[13]. It becomes pertinent to ask what such a conclusion tells us about the relationship of the rules of the WTO to other rules of international law. As Simma and Pulkowski point out, there is some debate over whether the rules of the WTO in relation to dispute settlement have replaced the rules of international law relating to state responsibility. The ILC commentaries suggest that Article 23 of the Dispute Settlement Understanding [**"DSU"**] excludes the application of rules of responsibility but others have argued there is no explicit exclusion.[14]

How is this question of the relationship between the rules of international trade law and rules of public international law to be resolved? Certainly, characterization of the WTO as a self-contained regime does not provide an answer. This issue is one of treaty interpretation, which must be dealt with on a case-by-case basis.

Simma and Pulkowski usefully point out[15] that when tribunals of general jurisdiction under international law – the International Court of Justice [the ICJ] – approach the question of the relationship of general international law to other specific forms of international law, they start with the presumption that the general rules apply and then see if those general rules have been modified by specific rules. However, when courts or tribunals of more limited jurisdiction – the WTO AB – approach the same question, their approach is the reverse. They start with the more specific rules and then see the extent to which the general rules still stand applicable.

As a general proposition, this may be correct, although it may depend on how the issue is framed before the court or tribunal. A court of general jurisdiction, such as the ICJ, considers cases brought on the basis of a breach of a rule of international law. The court will likely start by applying relevant rules of international law and then see the extent to which the parties have deviated from those rules of international law by agreement. By contrast, a

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[12] P. Kuyper, "The Law of GATT As A Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?", 25 Neth. YB Int'l L 227 (1994).

[13] Simma and Pulkowski, *supra* note 11 at 523.

[14] Simma and Pulkowski, *supra* note 11 at 520.

[15] Simma and Pulkowski, *supra* note 11 at 488.

case brought in the WTO system starts with an allegation of a violation of some provision of the WTO agreements. The question of general international law can only arise in the context of the interpretation of the relevant agreement.

Simma and Pulkowski generalize this into universalistic and particularistic approaches,[16] which reflect to some extent, differing perceptions of the international legal order. Is it a unitary system into which all rules must be fitted, or is it a federal-type system needing conflict of laws rules to reconcile conflicts between the rules of each sub-system? Of course, the analogy does not work perfectly because even federal systems operate under some form of overriding unitary constitution.

There are certain presumptions or starting points that can be seen as going with each approach. The universalistic approach starts with the presumption that general rules of international law are applicable to all states and thus, there has to be proof that the parties in the matter before a court or tribunal had derogated from a rule of general international law. The particularistic approach sees as the starting presumption that the parties have regulated their relationship by their own particular agreement and there must be proof that general international law still has a role to play.[17]

Regardless of the relevance or utility of presumptions in this area, a treaty is by definition an arrangement governing the relations between the parties to it. To the extent that the parties to the treaty have regulated their relationship in a particular way, general rules of international law applicable to the same subject matter would not apply. However, the real question is whether the treaty has in fact, excluded other rules of international law. This in turn, depends on the interpretation of the treaty; but to say this only complicates the matter because the application of the rules of treaty interpretation is itself often contested and contestable.

The important focus of any enquiry in this area has to be on what courts and tribunals dealing with issues of trade and investment have done in reconciling the relationship of the specific with the general. By considering this, we may be able to build up a picture of how the issue of relationship has been dealt with and avoid any *a priori* categorization of systems of rules as self-contained.

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[16] Simma and Pulkowski, *supra* note 11 at 490.

[17] Simma and Pulkowski reject the value of such presumptions although such presumptions do in fact have an influence on thinking: Simma and Pulkowski, *supra* note 11 at 505-507.

IV. The Relationship Issue in International Investment Law

Investment tribunals have embraced the idea that investment treaties are governed by the Vienna Convention on the Law of Treaties ["**VCLT**"], and have sought to apply the interpretation rules of Articles 31-33 to them. In the context of investment treaties, this was inevitable. Unlike the GATT, investment treaties have incorporated principles that have been well-known in customary international law and thus, the only way to interpret those treaty provisions was to go back and look at customary international law. The idea that investment agreements had somehow ousted rules of customary international law *simpliciter* could simply have no traction in international investment law. There is the related debate, particularly in the context of NAFTA Article 1105, on the extent to which fair and equitable treatment is an embodiment of the customary international law standard, whether it is an evolutionary development of that standard, or whether it is a self-standing standard in respect of which the customary international law standard was of historical but not interpretative interest.[18]

However, what is more important is the extent to which investment tribunals have looked at principles of customary international law, which do not find an analog in the treaty being interpreted. Two important examples of this are the treatment of the international law doctrines of countermeasures and necessity as defenses to breaches of investment treaties. In the case of countermeasures, all three tribunals[19] (as mentioned below) while considering the doctrine, started from the assumption that in principle, the defense of countermeasures could be brought in a case under NAFTA Chapter 11.[20] There was no suggestion that NAFTA Chapter 11 was *lexspecialis* from which general international law was excluded. The difficult question related to the specific nature of investment arbitration; could a state party to an investment agreement invoke a defense against a claim by an investor that it might have had if the claim had been brought by the investor's state?

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[18] *See generally* Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Brill. 2013).

[19] *Corn Products International Inc.* v. *United Mexican States*, ICSID Case No. ARB (AF)/04/01, Decision on Responsibility (International Centre for Settlement of Investment Disputes Additional Facility) (2008); *Cargill Inc.* v. *United Mexican States*, ICSID Case No. ARB (AF)/05/2, Award (International Centre for Settlement of Investment Disputes Additional Facility) (2009); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas Inc.* v. *United Mexican States,* ICSID Case No. ARB (AF)/04/5, Award (International Centre for Settlement of Investment Disputes Additional Facility) (2007).

[20] Donald McRae, "Countermeasures and Investment Arbitration", in *Building International Investment Law: the First 50 Years of ICSID* 495 [Meg Kinnear et al. (eds.), Kluwer Law International, 2015] 495.

In each case the tribunal worked on the assumption that the defense of countermeasures was in principle applicable and then decided the case on the basis of the international law rules relating to countermeasures, not on the basis that international law had somehow been excluded. The *Corn Products* and *Cargill* cases[21] took the view that countermeasures were not applicable because the law of countermeasures could not be applied against a third party who had not committed the breach against which the countermeasures were directed. The *Archer Daniels* case[22] concluded that the criterion of proportionality, which had to be present in order to justify a claim to invoke countermeasures, had not been established. The point is that invocation of principles of international law was a natural part of the interpretative process in assessing the obligations of a state under a BIT.

Similarly, investment tribunals have treated claims to the defense of necessity as applicable in principle, to disputes under investment agreements and applied them in accordance with their terms.[23] They have not excluded them on the ground that the treaty does not make provision for them, although some BIT's do contemplate such defenses such as the US-Argentina BIT that was in issue in the *CMS* case.[24]

In short, investment tribunals have had no difficulty in treating general international law as applicable to the interpretation and application of investment treaties. That is not to say that there are no problems with the way in which investment tribunals apply international law. Just as the interpretation of GATT was initially in the hands of those who were not lawyers – although they were often well versed in trade law and policy and thoroughly conversant with the provisions of GATT – the early investment disputes were often decided by commercial arbitrators – experienced in contract interpretation but not necessarily in treaty interpretation.

One can see this in some of the earlier cases on MFN where what was in effect a modified exhaustion of remedies clause was not identified as such

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[21] *Corn Products International Inc.* v. *United Mexican States*, ICSID Case No. ARB (AF)/04/01, Decision on Responsibility (International Centre for Settlement of Investment Disputes Additional Facility) (2008); *Cargill Incorporated* v. *United Mexican States*, ICSID Case No. ARB (AF)/05/2, Award (International Centre for Settlement of Investment Disputes Additional Facility) (2009).

[22] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas Inc.* v. *United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (International Centre for Settlement of Investment Disputes Additional Facility) (2007).

[23] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas Inc.* v. *United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (International Centre for Settlement of Investment Disputes Additional Facility) (2007).

[24] *CMS Gas Transmission Co.* v. *Republic of Argentina*, ICSID Case No. ARB/01/8 (International Centre for Settlement of Investment Disputes) (2005).

but seen as a rather pointless restraint on the ability of investors to pursue their claims.[25] Further, one can see frustration with the way international law is being treated in the dissenting opinion of Georges Abi-Saab in *Abaclat v. Argentina*,[26] as well as in the dissenting opinion of Laurence Boisson de Chazournes, in *Garanti Kos*,[27] where the majority used an MFN clause not to provide a benefit to a party but to find consent to a form of arbitration that had not been agreed to in the BIT being interpreted. In both instances the concerns expressed were about the way international law was being interpreted and applied in investment arbitration cases with the result that the rights of investors were being enhanced.

V. The Relationship Issue in International Trade Law

References to public international law are widespread in WTO jurisprudence. In his *Digest of WTO Jurisprudence on Public International Law Concepts and Principles*[28] Graham Cook identifies over 200 cases in which such references have been made. However, this was not automatic. The AB went out of its way to make the relevance of public international law clear with its famous dictum that WTO agreements were not to be interpreted in clinical isolation from public international law.[29]

The statement is quite revealing about the way in which international trade law was perceived at the time. If such a statement had been made about human rights law, say by the European Court of Human Rights ["**ECHR**"], or about the law of the sea by International Tribunal for the Law of the Sea ["**ITLOS**"], it would have been regarded as nonsensical – human rights law and the law of the sea are international law, so how could one even conceive of them being interpreted in "clinical isolation" from public international law?

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[25] *See*, for example, *Plama Consortium Ltd.* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (International Centre for Settlement of Investment Disputes) (2005).

[26] *Abaclat* v. *Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Georges Abi-Saab (International Centre for Settlement of Investment Disputes) (2011).

[27] *Garanti Koza LLP* v. *Turkmenistan*, ICSID Case No. ARB/11/20, Dissenting Opinion of Laurence Boisson de Chazournes (International Centre for Settlement of Investment Disputes) (2013).

[28] Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge: Cambridge University Press, 2015).

[29] Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WTO Doc WT/DS8/AB/R (adopted November 1, 1996).

Yet the AB was at the time making a statement that was taken very seriously because of the past attitudes of the "clients" of international trade law – the representatives of governments to the GATT – who did not see what they were dealing with as international law. Public international law scholars, with some important exceptions, for their part did not treat international trade law as public international law.[30]

So, what was in fact nonsensical was an important statement and its frequent invocation is an indication of that importance –it was an indication to WTO officials and delegations that they were now to see their work in a different context, and an assurance to public international lawyers that what was happening under the new WTO dispute settlement process and in WTO law more generally was nothing more than mainstream public international law.

"Clinical isolation from public international law" is an engaging metaphor, but what did it really mean? It could have meant nothing more than what is said in Article 3.2 of the DSU, that the WTO agreements are to be interpreted in accordance with the customary principles of interpretation of public international law. Even so, it has to be understood as being much more than that. It was an affirmation that the WTO agreements were international agreements just like any other treaties and the international law consequences that applied to treaties would apply to them. This, of course, provides no guidance on how the treaties are to be interpreted or what their actual relationship to other rules of international law would be.

Unlike principles of international investment law, which were often grounded in public international law, and were thus, naturally relevant to the interpretation of those principles, the provisions of GATT and the WTO were not so obviously related to principles of public international law. And even where they were, there was no ready reference to public international law jurisprudence. GATT and WTO interpretations of MFN did not invoke interpretation of the MFN principle in the decision of the Court of Arbitration in the *Ambatielos* claim[31] as investment tribunals have done.

Nonetheless, public international law principles have been invoked as a normal part of the interpretive process of international trade law. This was the significance of the "clinical isolation" comment where the AB was asserting its intention to invoke principles of public international law in the

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[30] McRae *supra* note 1 at 111-119.

[31] *Ambatielos Case* (*Greece* v. *United Kingdom*), Judgment, 1953 ICJ 1 (May 19).

interpretation and application of the WTO agreements and, *Shrimp/Turtle*[32] is a straightforward application of that position. It is significant, too, that the AB did not try to justify its recourse to rules of international law by reference to Article 31(3)(c) of the VCLT. It simply asserted that the term "exhaustible natural resources" must be read "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment." It then went on to look at "modern international conventions and declarations".[33] In short, the AB acted like any other international court or tribunal, reasoning by analogy.

The same sort of approach is found in *US-Line Pipe*[34] and *US-Cotton Yarns*,[35] where the notion of proportionality derived from the Articles on State Responsibility was applied to the Safeguards Agreement requirement to conclude that measures may be applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."[36]

Indeed, the area of countermeasures is one where arbitrators under Article 22.6 of the DSU considering the permissible level of suspension of benefits, panels and the AB, have freely looked at the ILC Articles on State Responsibility to assist in the interpretation of relevant provisions of the WTO agreements. In *Brazil-Aircraft*[37] the Arbitrator said:

> "*While the parties have referred to dictionary definitions for the term 'countermeasures' we find it more appropriate to refer to its meaning in general international law and to the work of the ILC on state responsibility which addresses the notion of countermeasures*."

The Arbitrator rejected the argument of Canada that the Articles were not relevant because they were not relevant rules of international law within the meaning of Article 31(3)(c), saying, "we use the Draft Articles as evidence of an agreed meaning of certain terms in general international law". In short, referring to provisions of international law by analogy was a normal part of the interpretative process and did not require Article 31(3)(c) sanction.

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[32] Appellate Body Report, United States–Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc WT/DS58/AB/R (adopted November 6, 1998) (*US – Shrimp*).

[33] *US – Shrimp,* at ¶¶ 129-130.

[34] Appellate Body Report, United States–Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WTO Doc WT/DS202/AB/R (adopted March 8, 2002) (*US – Line Pipe*).

[35] Appellate Body Report, United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WTO Doc WT/DS192/AB/R (adopted November 5, 2001).

[36] *US – Line Pipe*, ¶ 245.

[37] Decision by the Arbitrator, *Brazil—Export Financing Programme for Aircraft*, WTO Doc WT/DS46/ARB at para 3.44 (Recourse to Arbitration by Brazil under Art. 22.6 of the DSU and Art. 4. 11 of the SCM Agreement – Decision by the Arbitrator) (August 28, 2000).

Nonetheless, ambivalence about the application of principles of public international law resurfaces from time to time. The panel in *US-Antidumping and Countervailing Duties (China)*[38] took an almost GATT-type approach to the question of the relevance of the ILC Article on State Responsibility to the interpretation of "public body" in Article 1.1(a)(1) of the *SCM Agreement*. It invoked the notion of *lexspecialis* and argued that the provisions on attribution in the SCM Agreement had replaced the rules of customary international law and left no place for the ILC Articles. It also took the view that the Articles were not "relevant rules of international law applicable between the parties" within the meaning of Article 31(3)(c) of the VCLT.

The AB disagreed.[39] While clearly the ILC Articles could not override the provisions of the SCM agreement, they could be taken into account in ascertaining the meaning of the relevant provisions of the SCM Agreement. They were, in the AB's view relevant rules of international law within the meaning of VCLT Article 31(3)(c). But what is interesting is that the AB did not say that reference to the State Responsibility Articles was permissible without seeking justification under Article 31(3)(c).

Thus, there appear to be two tracks running in WTO dispute settlement with respect to the invocation of rules or principles of public international law. The first is to treat public international law as potentially relevant to the interpretation and application of provisions of the covered agreements if they have something useful to say and might assist in interpretation. This is essentially the *Shrimp* approach, evidenced also in the Arbitrator's decision in *Brazil-Aircraft*. The second approach is that rules of public international law can be referred to and taken into account as long as they are relevant rules of international law within the meaning of Article 31(3)(c) of the VCLT. The approach of the AB in *US-Antidumping and Countervailing Duties (China)* suggests this.

The difference between these two approaches is important, because if one proceeds on the basis of Article 31(3)(c), questions of relevance come to the fore, and the question whether the rules are binding between the parties is apposite. However, if the approach is that all rules of public international law are potentially relevant to interpretation, then those constraints disappear. That is why in the *Shrimp* case the AB could rely on the Law of the Sea Convention, the Convention on Biological Diversity and the

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[38] Panel Report, United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WTO Doc WT/DS379/R (October 22, 2010).

[39] Appellate Body Report, United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China WTO Doc WT/DS379/AB/R (adopted March 25, 2011).

Resolution on Assistance to Developing Countries under the Convention on the Conservation of Migratory Species of Wild Animals,[40] without asking the question whether these instruments were binding on the parties.

The role of the VCLT deserves particular attention in this context. It has been cited and applied frequently in panel and AB reports and rather than invoking the VCLT as boilerplate, as the ICJ has often done in the past and investment tribunals frequently do, the AB takes the VCLT seriously. It has parsed Article 31(1) and (2) carefully and sought to give meaning on the basis of ordinary meaning in context, and less frequently in light of the object and purpose of the treaty.[41]

What then are the consequences of the frequent resort in the WTO interpretive process to principles of public international law? The VCLT is not a constitutional document. It sets out a set of rules to guide in the interpretive process and it has achieved widespread uniformity in the fact of invocation, although not necessarily in the way it has been applied. However, granting the VCLT too great a status can result in some doubtful decision-making.

This arguably occurred in *Clove Cigarettes*[42] which involved the interpretation of Article 2.12 of the Technical Barriers to Trade Agreement ["**TBT**"], the requirement that there be a "reasonable interval" between the publication of technical regulations affecting trade in goods and their entry into force.[43] The AB was faced with a decision of the Ministerial Conference of the WTO on the meaning of a "reasonable interval".[44] It treated the Ministerial Decision as a subsequent agreement of the parties on the interpretation of that particular provision and gave effect to it.

In doing so the AB provided a careful analysis of the circumstances under which a subsequent agreement could be considered – it must be entered into subsequently to the treaty being interpreted, it must constitute an agreement, and it must relate to the interpretation or application of the provision in question. All of this seems clear and a useful example of the how subsequent agreements between the parties can be used in the interpretation of treaties.

However, Article IX(2) of the WTO Agreement gives "exclusive authority" to the Ministerial Conference and the General Council to adopt

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40 *US – Shrimp*, ¶¶ 127-134, 161-176.

41 *See generally* Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP, 2009).

42 Appellate Body Report, United States—Measures Affecting the Production and Sale of Clove Cigarettes WTO Doc WT/DS406/AB/R (Adopted April 24, 2012) (*US – Clove Cigarettes*).

43 *US – Clove Cigarettes*, ¶¶ 237-297.

44 *US – Clove Cigarettes*, ¶¶ 241-275.

interpretations of the WTO Agreement and the MTAs, and it provides a procedure for this to be done – there must be a recommendation from the relevant Council and the interpretation must be adopted by a three-fourths majority.[45]

The AB concluded in *Clove Cigarettes* that the Ministerial Decision had not been taken on the basis of a recommendation of the relevant Council and thus could not be regarded as an interpretation by the Ministerial Conference within the meaning of Article IX(2).[46] Nonetheless the AB went on to apply the interpretation on the basis that the Ministerial Decision was a subsequent agreement within the meaning of Article 31(3)(a).[47] In short, the requirements of Article IX(2) were by-passed by means of a subsequent agreement – or to put it another way, Article 31(3)(a) of the VCLT trumped Article IX(2) of the WTO Agreement.

It is not clear whether the AB fully appreciated the conflict between the provisions it was applying. It noted that it had authority to apply the principle embodied in Article 31(3)(a) and said that the interpretation rule under Article IX(2) of the WTO Agreement and the subsequent agreement principle of VCLT Article 31(3)(a) "serve different functions and have different legal effects under WTO law".[48] The former allows WTO organs to adopt binding legal interpretations while the latter is an interpretive tool to determine the meaning of a treaty provision.

This seems unobjectionable, but how was Article 31(3)(a) applied? The AB seems to have taken the view that if the Ministerial Decision constituted a subsequent agreement, then it was valid and effective. But this seems to ignore what Article 31(3)(a) actually provides. Subsequent agreements are not definitive for the purpose of treaty interpretation. Article 31(3)(a) provides that a subsequent agreement "shall be taken into account together with the context". In other words, it is a consideration whose weight is to depend upon the other elements of Article 31, including the context. The context for the interpretation of Article 2.12 of the TBT Agreement must surely include the WTO Agreement itself.

Further, a relevant factor in determining the weight to be given to the Ministerial Decision as an interpretation of Article 2.12 of the TBT Agreement was that it did not comply with the requirements of Article IX(2) for providing authoritative interpretations of the WTO Agreements. Its weight as a

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[45] Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 14, 33 ILM 1143 (WTO Agreement).
[46] *US – Clove Cigarettes*, ¶¶ 254-255.
[47] *US – Clove Cigarettes*, ¶¶ 262-269.
[48] *US – Clove Cigarettes*, ¶ 257.

subsequent agreement must therefore have been seriously impaired. But the AB ignored this by treating interpretation under Article IX(2) of the WTO Agreement and interpretation through subsequent agreements as if they were separate and autonomous rules, relying on what it had said in *Bananas* that interpretation under Article IX(2) was similar to subsequent agreements under Article 31(3)(a).[49] The AB said that even if they were similar, they could not be the same, and this seemed to reinforce its view that Article IX(2) interpretation was separate from Article 31(3)(a).

But, what are the implications of claiming that Article 31(3)(a) is separate and autonomous from Article IX(2) of the WTO Agreement? One provision is found in the constituent instrument of the WTO, the other is a principle of interpretation that is only to be taken into account in the interpretative process. The latter cannot trump the former. However, that is what has been done in *Clove Cigarettes*. An interpretation that did not meet the requirements of Article IX(2) had in effect exactly the same result as an interpretation that did meet those requirements. Under the approach of the AB, the Ministerial Conference can ignore legality, disregard the requirements of Article IX(2), and have its decision still treated in effect as binding.

Thus, a principle of public international law was invoked to negate the effect of a treaty requirement in the WTO Agreement. That this is not meant to occur is implicit in Article 5 of the Vienna Convention on Treaties between States and International Organizations,[50] which provides that the rules on treaty interpretation take effect subject to the rules of the organization.[51] That was not done in the *Clove Cigarettes* case. The AB in effect reversed what Article 5 says and made the Article IX(2) rule – effectively a constitutional provision – take second place to the treaty interpretation rule of Article 31(3)(a). In short, *Cloves* is an example of an overreaching and misleading use of public international law in the interpretation of the WTO agreements.

Another example of the invocation of public international law, which raises fundamental questions about the relationship between the WTO agreements and public international law, is found in *Peru-Agricultural Products*.[52] The central issue in that case, although arising in the context of a WTO dispute, was not an issue that is peculiar to the relationship of the WTO agreements to principles of public international law. It is a more

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[49] *US – Clove Cigarettes*, ¶¶ 249, 259, 265.

[50] Convention on the Law of Treaties between States and International Organizations or between International Organizations, 25 ILM 543 (March 21, 1986).

[51] *Ibid*.

[52] Appellate Body Report, Peru—Additional Duty on Imports of Certain Agricultural Products, WTO Doc WT/DS457/AB/R (adopted July 31, 2015).

general issue of international law; how conflicts between the provisions of a treaty regime and arrangements between some of the parties to that regime that are inconsistent with the provisions of the regime are to be resolved.

The essential facts in *Peru-Agricultural Products* were that Peru and Guatemala had signed a free trade agreement under which Guatemala had agreed that Peru could maintain its agricultural "price range system" notwithstanding that the system was WTO inconsistent. Subsequently, Guatemala had challenged the "price range system" before the WTO. If the Free Trade Agreement ["**FTA**"] had entered into force, Peru would potentially have had an Article XXIV defence.[53] But, since Peru had not ratified the FTA that defence was not available. But Peru argued that its obligation under the Agreement on Agriculture not to maintain a price range system had, in respect of Guatemala, to be read in the light of the agreement with Guatemala permitting it to maintain a price range system. The arrangement with Guatemala, according to Peru, was a "relevant rule of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the VCLT.

The AB decided the case on the basis that the draft FTA was not a relevant rule of international law –a doubtful proposition as it could be argued, as Peru did, that on this point the FTA did reflect a common understanding of the parties on which they had in fact acted. In deciding so, the AB avoided dealing with the fundamental issue at stake in this case whether two parties to a multilateral treaty can modify their relationship *inter se* under that treaty.

Article 41 of the VCLT provides that if a treaty permits some of the parties to a multilateral treaty to modify their relationship under that treaty *inter se* then they can do so. If the treaty is silent on the matter then whether such a modification is permissible depends on whether the modification in fact affects the enjoyment by other parties of their rights under the treaty, or relates "to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".

Applying Article 41 to these facts, the WTO agreements do not prohibit modification by individuals or by parties carving out a bilateral or regional arrangement. They permit it in particular ways. That is what Article XXIV

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[53] General Agreement on Tariffs and Trade, October 30, 1947, 58 UNTS 187, (entered into force 1 January 1948). Art. XXIV(5) provides in part:

...the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area ...

provides for, as do waivers that can be granted by the WTO membership.[54] But the WTO Agreements make no specific provision for the type of carve-out argued for in the *Peru* case – a modification by two parties without going through either the Article XXIV or the waiver route. By the same token, there is no provision in the WTO agreements directly prohibiting such carve outs, and if the matter were to be measured in terms of VCLT Article 41 the question would be whether the bilateral arrangement between Guatemala and Peru affects the enjoyment of other parties to the treaty or relates "to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".

Here there is a problem arising out of the nature of the WTO agreements, and the MFN principle. When Guatemala enters into an agreement with Peru exempting Peru from the application of Article 4.2 of the Agreement on Agriculture, it is providing Peru with a benefit that it is not providing to other WTO Members. GATT Article XXIV permits this in the context of a customs union or a FTA, but otherwise MFN applies. In short, to permit such an agreement to override the terms of a WTO agreement would be, to use the language of Article 41, "incompatible with the effective execution of the object and purpose" of the WTO agreements.

In a sense, the approach of Peru is reflective of the universalistic approach mentioned earlier in the discussion of self-contained regimes – general international law applies to all states and it is only derogated from in their treaties if they make it clear that they are derogating from general international law – a presumption, if you like, in favour of the applicability of rules of general international law. And while one can sympathize with a desire to introduce more flexibility into a treaty where flexibility through amendment is virtually impossible, it cannot be done at the expense of undermining broader obligations at the foundation of the treaty.

VI. Conclusions

Several conclusions can be proposed in light of the above analysis about the way in which principles of public international law are being applied in trade and investment dispute settlement processes.

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[54] Art. IX(3) of the WTO Agreement. WTO Agreement, *supra* note 45, provides:
"*In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph.*"

First, the notion of self-contained regimes is not analytically useful in considering how conflicts between treaties and other treaties or other principles of international law are to be resolved, any more than it is useful to characterize the law of the sea, human rights law or environmental law as self-contained regimes. The notion of a self-contained regime simply suggests too much. There is an international law process applicable across a range of issue areas with common sources of law and with various institutional mechanisms for dealing with disputes and applying, distinguishing and developing that body of law. Whether rules of general application apply in particular issue areas depends on a contextual analysis of each area.

Second, the issue of conflict between treaties and general international law is an undeveloped area, which is becoming increasingly important with the expansion in the content of different areas of international law, and the development of courts and tribunals that have jurisdiction to make rulings on these conflicts. It is particularly acute in the area of international trade law because of lingering assumptions about the nature of international trade law and its relationship to public international law. On the one hand, public international law is seen to offer too little in the interpretative process of WTO dispute settlement and on the other hand it is claimed to be able to do too much.

Third, in the area of international investment law there are less concerns about investment law not being viewed as public international law, but more concerns about the interpretative methodology applied by investment tribunals and their application of international law, not to mention the very legitimacy of those tribunals themselves.

Fourth, it can be concluded that international law, whether general international law or treaty law, cannot override the provisions of a treaty unless provided for expressly or by implication in that treaty. That simply flows from the principle of consent. This was the basis of the error in *Clove Cigarettes* where the AB effectively amended the terms of the WTO Agreement, by use of a technique of treaty interpretation – a secondary rule of interpretation being allowed to supplant a primary rule of obligation. This was also the error behind the argument of Peru, that its obligation under the Agreement of Agriculture – a primary rule of obligation – could be overridden not directly by a conflicting rule, but indirectly through the application of a secondary rule of interpretation.

Lastly, in areas where questions of legitimacy are currently being raised the role of international courts and tribunals as motors for the application and the development of international law has to be scrutinized carefully.