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CHAPTER 10

INTERNATIONAL ADJUDICATION: A RESPONSE TO PAULUS—COURTS, CUSTOM, TREATIES, REGIMES, AND THE WTO

DONALD H. REGAN^{*}

I. INTRODUCTION

I am pleased to have the opportunity to respond to Andreas Paulus's very interesting contribution, and to elaborate on some of the matters he raises. As will be all too obvious, I am not an expert on general public international law. I undertook this assignment in the hope that I would learn something (as I have), and that I would eventually think of something useful to say (less clear). Happily, the one area of international law where I do have some expertise is the law of the World Trade Organization (WTO). The WTO is often used as an example in discussions of the 'fragmentation' of international law, which is one of the problems Paulus discusses, so I hope some remarks at the end about how the WTO and its Appellate Body

^{*} For helpful discussion of this chapter I thank Samantha Besson, Andreas Paulus, Bruno Simma, and John Tasioulas. All views expressed are my own.

handle problems of conflicting values may be useful. But I shall begin with more general issues.

II. COURTS AND CUSTOM

What are judges doing when they adjudicate cases involving international law? The first way we might hope to answer this question is by denying that there is any special problem about *international* adjudication. Judges deciding international law cases are doing the same thing judges do when they decide cases under domestic law, except that the substantive law is different, and from different sources. Of course, even if we could say this, it would not solve our problem. There is no agreement about just what judges are doing in domestic adjudication. To remind the reader of the obvious, we have never found an uncontroversial solution to two related puzzles or problems about (domestic) adjudication: (1) However much we may have imbibed the lessons of legal realism and its philosophical descendants, we still want it to be the case that there is some sort of law/politics divide. Crudely, we want to believe that legislatures make the law and judges apply it. But of course, the law is often not clear. So the question is, what is the judge doing in the area of opacity? If we want particular cases to be decided by general rules knowable in advance, how can a judge produce a legitimate decision in a particular case where the rules have (or appear to have) run out? (2) Another puzzle, related but distinct, is that we want the law to be both knowable and ideally moral or just (for the circumstances). In practice, these two desiderata are likely to be in tension in many instances. So, assimilating international adjudication to domestic adjudication would not remotely solve the problem of understanding international adjudication. But it would at least mean that we did not have a new problem, and it would give us a large literature ready-made.

Unfortunately for this 'assimilationist' approach, international law and adjudication are different from domestic law and adjudication in significant ways, some of which seem important when we are thinking about the role of the judge. For a start, it is not clear that there is even a single type of 'international adjudication'. We now have a vast range of international tribunals, with remarkably different tasks. For example, a large part of the business of the International Court of Justice (ICJ) consists of identifying and applying general principles of law and customary international law. The Appellate Body of the WTO, in contrast, is mainly concerned to interpret and apply one large and complex treaty. The International Criminal Court (ICC) and the special international criminal tribunals, even though they must inevitably decide some questions of general international law, are primarily concerned with fact-finding.

Paulus notes briefly that international courts differ from domestic courts in having no fully compulsory jurisdiction and no reliable coercive enforcement mechanism, and he suggests that this ‘changes the character’ of international adjudication.¹ But the reality is complex, and I am not sure in any event that the differences here between domestic and international adjudication change the task of the judge. The international criminal tribunals (including the ICC) have fully compulsory jurisdiction over the defendants brought before them, although of course they are dependent on other agencies to produce those defendants. The Appellate Body of the WTO has compulsory jurisdiction over all WTO Members; the only way to avoid the jurisdiction is to withdraw from the treaty. Even the ICJ has what is often referred to as ‘compulsory’ jurisdiction, a general jurisdiction granted conditionally by states in advance of particular disputes under the ICJ Statute article 36.2, although of course no state is required to grant such jurisdiction, and a disgruntled state can always withdraw it prospectively. With regard to enforcement, the criminal tribunals again can expect their judgments to be coercively enforced. That is not true of either the WTO Appellate Body or the ICJ, but compliance with judgments of these bodies has been reasonably high nonetheless,² presumably because of a combination of reputational pressure and the losing party’s commitment to the existence and efficacy of the relevant international system.

Still, it is true that most international courts differ to some degree from domestic courts with regard to the compulsoriness of their jurisdiction and the enforceability of their judgments (or the expectation of compliance). The question is, does this make any difference to what the court is doing when it decides an individual case? So far as I can see, it does not. The central role of a court is to answer questions that are brought to it about the state of the law.³ A court with no compulsory jurisdiction will be asked fewer questions; and a court whose judgments are unenforceable may expect its judgments to have somewhat less effect on the world; but still, there is no obvious reason why the court’s approach to deciding what the law says should be affected. The absence of courts with fully compulsory jurisdiction and fully enforceable judgments may or may not be a problem for the international *system*; but I do not see that the lack of compulsory jurisdiction or enforcement is a problem for the court itself.

A much more important difference between international courts and domestic courts is the ‘sources of law’ that they rely on. For domestic courts, the sources of law are constitutions, statutes or codes, administrative regulations, and in some systems, judicial precedent (and also in some systems international law, but this

¹ Paulus, A., ‘International Adjudication’, Chapter 9 in this volume, 208.

² With regard to the ICJ, see generally Schulte, C., *Compliance with Decisions of the International Court of Justice* (Oxford: Oxford University Press, 2004).

³ I ignore the fact-finding role, not because it is unimportant, but because it is *relatively* unproblematic philosophically.

will be relevant to at most a small number of domestic cases). These domestic sources of law are for the most part easily identified. Of course these sources still require interpretation, and there is room for enormous controversy about interpretation, both at the level of hermeneutics and of exegesis. But still, it is usually reasonably clear what the texts are that need to be interpreted and applied. That is not true in general for international adjudication. The Statute of the ICJ lists as sources of law: international conventions (general or particular), 'international custom, as evidence of a general practice accepted as law', and 'the general principles of law recognized by civilised nations'.⁴ International conventions, including treaties, are easily identifiable. (Treaties raise other problems, which I shall discuss in section III.) But the other sources are not easily identified; identifying the source may be the hardest part of the adjudicative project.

Taken at face value, the definition of what is known as 'customary international law' seems to require a broad empirical investigation into the behaviour of nations and the attitudes behind that behaviour. The ICJ is widely thought to have revised the conception of custom in the *Nicaragua* case, so that even a putative norm that is frequently violated may count as 'custom' if violators consistently offer some justification for their violation.⁵ This reduces the importance of uniform practice and elevates the importance of *opinio juris*, but it does not eliminate the need for extensive empirical investigation. Nor does it eliminate the possibility for spirited disagreement about whether some supposed custom exists. Some scholars want to move beyond *Nicaragua* and base customary law on the pronouncements of international assemblies, and congresses, and the like—significantly de-emphasizing questions about the practice or rhetorical behaviour of individual states.⁶ On this view, it is the role of the court (assisted, of course, by scholars) to say when a norm that is announced or adumbrated in a variety of often largely hortatory documents has crystallized into international law. At this point, the courts are being asked to play a role that hardly seems like 'adjudication' at all. But if the demand on judges at this extreme end of the spectrum of views about custom seems clearly unacceptable (at least to me), the same *sort* of demand is already being made even at the other end of the spectrum, under the most traditional view of custom. Even here, the judge plays a role in identifying the law to be applied that is quite different from the judge's usual role in domestic systems. Familiarity with this scheme has bred acceptance—familiarity and necessity. In the international system, where there is no general legislature, we must recognize customary law if there is to be any

⁴ Statute of the ICJ, article 38. Also, as 'subsidiary means', non-binding precedent and 'the teachings of the most highly qualified publicists'. For a much fuller discussion of the sources of international law, see Samantha Besson, 'Theorizing the Sources of International Law', Chapter 7 in this volume, 163.

⁵ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (ICJ Reports 1986), 14 (see esp. paras. 186, 202).

⁶ e.g. Charney, J., 'Universal International Law', *American Journal of International Law*, 87 (1993), 529, 543–50.

universally applicable (i.e., non-treaty-based) positive law at all. But familiar or not, the role of the international court in identifying and applying customary law in a controversial case is very different from the role of a domestic court.

In the central section of his paper, Paulus discusses three approaches to international adjudication; the ‘functionalist’ approach, the ‘liberal’ approach, and the ‘post-modern’ approach. The discussion of the functionalist approach focuses on the problem of ‘fragmentation’ of international law; this problem arises largely from the multiplication of treaties, and we will take it up in section III. But in the discussions of both the ‘post-modern’ approach and the ‘liberal’ approach, Paulus is grappling with the same problems that bedevil our understanding of domestic adjudication, except that in the international sphere the problems are magnified by the absence of a legislature or a true world community. The post-modern view of international adjudication is a response to the puzzle about what judges are doing, or should do, when they decide a case where the *lex lata* is unclear, a puzzle that we have encountered in the domestic sphere. But as we have seen, in the international sphere the absence of a legislature means the judge must first identify the law before applying it. Hence a ‘political’ contribution by the judge seems even more inevitable in the international sphere, and the magnitude of the political contribution greater. Similarly, calls for ‘liberal’ international law, coupled with Paulus’s warning that international law must not simply exclude non-liberal regimes lest it ‘endanger the peace-making role of international adjudication’,⁷ reflect the tension between wanting the law to be ideally moral or just, on the one hand, and wanting it to be knowable and effective on the other—again, a problem we have encountered in the domestic sphere. This problem is magnified in the international context because there is no international polity with common values except in the thinnest sense. To be sure, even in the national context, any appeal to community values inevitably overrides some conflicting views on the disputed question, but even so, most functioning states represent societies with a much greater commonality of fundamental values than we can find over the world as a whole.

With regard to both the post-modern and liberal views, Paulus’s conclusion seems to be that there is some truth in them, but we cannot take either approach to the extreme.

Proper international adjudication . . . will take account of the move towards individual rights and duties in the international sphere, but will not forget that Western individualism cannot be imposed on others; [also] it will be mindful of the relevance of political circumstances when it applies legal prescriptions, but knows that it derives its authority from the relevant legal sources emanating, for better or worse, from states.⁸

In sum, judges should just muddle through. They should also do it transparently. In appropriate cases, ‘judges should openly admit to the indeterminacy of the sources and the clash of the underlying principles and clearly distinguish between the

⁷ Paulus, A., this volume, 217.

⁸ *Ibid.* 223–4.

constraints of law and the reasons for their adoption of a particular solution and their preference for one principle over another.⁹ The hope is that if judges are open in this way about when they are going beyond the *lex lata* and about their reasons for the choices they make when they do, then they can facilitate ‘the very international public discourse that can build and elaborate areas of international consensus, beyond doctrinal formalism and postmodern particularism’ and can ‘not only shape the role of international law within the international community, but will itself become part of the community building’.¹⁰

Taken as advice to judges, this is rather amorphous. (And the judges may not feel in need of advice.) Perhaps the real usefulness of Paulus’s prescriptions is as a reminder to us observers to be tolerant of judicial pronouncements that may not meet our standards for scholarly argument. But amorphous or not, if I thought I could do better than Paulus has done at describing what judges should be doing with these two problems, I would be writing a different paper. There is just one respect in which Paulus’s prescriptions may be unrealistic, and may actually be in tension with one of his most interesting points elsewhere in the chapter. Paulus calls for judges to be clear about when they are going beyond the *lex lata*, but judges may not always know just when they are going beyond the *lex lata* (unless we think the *lex lata* ends where even the slightest possibility for controversy begins, a definition which is surely too strict). Paulus suggests (and I agree) that a virtue of having multiple opinions supporting a judgment of the ICJ on different grounds is that this multiplicity can reveal an ‘overlapping consensus’, in which different legal views with different value premises converge on a common result.¹¹ But in at least some such cases of overlapping consensus, each concurring judge will think she is simply announcing the *lex lata*, whereas the whole constellation of opinions may persuade the observer that about that, they are all wrong.

III. TREATIES AND REGIMES

The third approach Paulus discusses is ‘functionalism’, which he describes as ‘embrac[ing] the fragmentation of international law, because more specialized systems, such as trade law or international criminal law, can establish stronger mechanisms of adjudication’. Surely the advantage is not just stronger adjudication, but more precise and specialized rules—which is what makes the stronger adjudication acceptable. But whatever the advantages of specialized regimes, Paulus discusses two possible disadvantages. He worries that specialized regimes may be committed to the promotion of a single regime value (trade, the environment, punishment for war criminals, protection of human rights, whatever) to the exclusion of other values;

⁹ Paulus, A., this volume, 221.

¹⁰ Ibid. 224.

¹¹ Ibid. 219–20.

and he worries that even if the regime recognizes the need to reconcile the principal regime value with other values, the regime's courts will be biased in favour of the regime value (for example, construing narrowly exceptions in favour of the other values).¹² Paulus focuses on regimes that are created by states through the treaty mechanism, so issues about fragmentation are closely bound up with issues about treaty interpretation, which brings us back to the other main source of international law.

I am not persuaded that the problems Paulus discusses give much cause for concern at present. Paulus himself mentions more examples where regime courts have acknowledged and accommodated values other than the putative regime value than examples where they have not. The International Law Commission (ILC) Report on Fragmentation also concludes that 'the emergence of special treaty-regimes . . . has not seriously undermined legal security, predictability or the equality of legal subjects'.¹³ Although the authors of the Report say 'the emergence of conflicting rules and overlapping legal regimes will undoubtedly create problems of coordination at the international level', and 'no homogeneous, hierarchical meta-system is realistically available to do away with such problems', they seem to be distinctly not alarmed. Specifically, they think techniques for reasoning about treaty conflicts that are already embodied in the Vienna Convention on the Law of Treaties go a long way towards dealing with inter-regime conflict. Although I agree with the ILC in not being alarmed, I shall explain why I reject some of their arguments about just how conflict of regime values is to be dealt with.

The first of Paulus's worries is that a specialized regime may commit itself to the promotion of a single value and ignore all others. As a matter of fact, I am unaware of any regime that operates this way; and so long as we focus on regimes created by states, there is every reason to expect regimes *not* to operate this way, since states, after all, have multiple interests and values. For example, the WTO explicitly recognizes the importance of the environment and various other non-trade values in the 'General Exceptions' articles of the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), and elsewhere. (More on this in section IV.) Similarly, no international criminal court could rationally pursue conviction of criminals to the total exclusion of defendants' rights, since a major reason for having a court, as opposed to summary punishment, is to protect those rights. And so on.

Many authors, not satisfied with the empirical fact that extant regimes are not focused on a single value and are not likely to be, want to argue that as a conceptual

¹² There are other possible problems that have been discussed under the rubric of 'fragmentation', e.g. conflicting judgments by different international courts on what seems to be the identical legal point, or the possibility that a state will find itself subject to conflicting obligations under different regimes; but I shall limit myself to the issues about value conflict treated in the text.

¹³ ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission), UN General Assembly A/CN.4/L.682, 13 Apr. 2006, paras. 492–3.

matter regimes *cannot* be focused on a single value, because they must be open to values embodied in general international law. The ILC Report, for example, argues that a regime based on an agreement between states gets its legitimacy from international law, and so it must acknowledge (and in particular, its dispute-settlement organs must acknowledge) whatever values international law says it must acknowledge.¹⁴ But this does not seem to me right. To be sure, we normally think of the validity of agreements between states as grounded in international law. But the question is whether the regime *must* be viewed as grounded in this way. So far as I can see, the answer is no. Suppose we ask how international law itself is grounded—what is the source of its validity? There are two basic possibilities: (1) that international law is somehow self-subsistent, grounded in nothing more than its own constitutive set of practices and attitudes; or (2) that it is grounded in morality, or natural law, as that operates between states. But if either of these forms of grounding is available for international law as a general system, I see no reason why it should not be available for a narrower, specific regime as well. The regime might be self-subsistent, grounded simply in its own constitutive set of practices and attitudes; or it might be based directly on the inter-state morality of inter-state agreements, without the mediation of international law. If this is right, then there is no reason why a regime could not coherently and legitimately instruct its courts to consider only values recognized by the positive law of the regime itself (and perhaps also values whose consideration is required by international *morality*, which may or may not include even all of what is referred to as *jus cogens*), to the exclusion of other extra-regime values of international law.

A regime that instructs its courts to ignore extra-regime values is ‘self-contained’ in a certain sense, but why should we be troubled by the possibility of a regime that is self-contained in this sense?¹⁵ We are focusing for the moment on state-created regimes, so if the regime is self-contained, it will be because the states that created it (who are the only states bound by its decisions) chose to create it that way. Why not assume they knew what they were doing? The one reason for doubt might be a suspicion that the states’ right hands may not know what their left hands are doing. That is, there may be a trade treaty negotiated by trade ministers, and an environmental treaty negotiated by interior ministries or foreign ministries, and so on, with no real coordination between these governmental departments in any of the states. But even if this happens, the problem is a political failure within each state; it hardly seems that an international court, regime-based or otherwise, is the right place to look for a policy-based solution.

¹⁴ e.g. ILC, *Fragmentation of International Law*, (above, n. 13) paras. 177, 193.

¹⁵ I say ‘self-contained in a certain sense’ because there are various things we might mean by ‘self-contained’, some of which are acceptable even to the people who deny the possibility of self-containment in the present sense, and some of which even I would concede are conceptually impossible. My concern here is *only* with the sense of ‘self-contained’ I define in the text.

The ILC Report advances another argument to show that regime courts are required, in many instances, to take account of extra-regime values. This argument appeals to article 31.3 (c) of the Vienna Convention on the Law of Treaties (VCLT), which says that in interpreting a treaty, ‘there shall be taken into account . . . any relevant rules of international law applicable in the relations between the parties’. Now, this does unquestionably require that non-regime values be taken into account in some cases (at least, if the regime follows the VCLT in interpreting the regime treaty). But just how broad the requirement is depends on a much-debated question about the meaning of the phrase ‘the parties’ in article 31.3 (c). Does this phrase refer to all parties to the treaty under interpretation, or does it refer only to the parties to the particular dispute in which the question of treaty interpretation has arisen? I shall refer to these two possibilities as the ‘all parties’ reading and the ‘dispute parties’ reading. The question which of these readings is correct may seem too recondite to discuss in the present context, but I want to pause over it, because doing so will reveal that there are a variety of ways in which ‘other treaties’ may be relevant to the interpretation of the primary treaty under interpretation. This is a point it is essential to keep in mind in a discussion of fragmentation.

Now, it seems to me that if we interpret the VCLT by VCLT principles, the ‘ordinary meaning in context’ of the phrase ‘the parties’ can only be ‘the parties to the treaty’, which is to say, all the parties. The use of the definite article ‘the’ implies that the relevant set of parties has already been identified, explicitly or implicitly, earlier in the text. No set of parties has been identified explicitly for purposes of article 31.3 (c), and the only set that can possibly have been identified implicitly is the set of all parties to the treaty. The set of parties cannot be the parties to ‘the dispute’, because there has been no reference to a dispute. Nor does article 31 presuppose the existence of a dispute. Article 31 is of course *relevant* to disputes, but what it is about in the first instance is how treaties shall be interpreted by states for purposes of self-application. If textual evidence for that claim is needed (aside from the absence of any reference to a dispute), consider the reference to ‘good faith’ in article 31.1, which would surely be superfluous if the primary addressees were courts.

Nonetheless, the ILC Report opts for the ‘dispute parties’ reading of article 31.3 (c), mainly because this reading will require other treaties to be considered more often than will the ‘all parties’ reading.¹⁶ The ILC Report complains that if we adopt the ‘all parties’ reading, then ‘the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law’.¹⁷ But ‘cut off’ is much too strong. Even if article 31.3 (c) does not *require* a treaty to which only some members of the WTO are party to be taken into account in interpreting the WTO agreements, that does not mean that the treaty can have no possible relevance. Consider, for

¹⁶ ILC, *Fragmentation of International Law* (above, n. 13), para. 472.

¹⁷ *Ibid.*, para. 471.

example, *US—Shrimp*.¹⁸ In that case, the WTO Appellate Body referred to various environmental treaties in support of its finding that sea turtles were an ‘exhaustible natural resource’ under GATT article XX (g). The Appellate Body was not referring to those environmental treaties because of article 31.3 (c). It did not mention 31.3 (c) in this part of its opinion; and it plainly could not rely on 31.3 (c), even on the ‘dispute parties’ reading, because not even all parties to the *dispute* were parties to all the environmental treaties. Rather, the Appellate Body could only have been appealing to those environmental treaties as evidence concerning the understanding of the phrase ‘natural resources’ (and what it is for a resource to be ‘exhaustible’) that was ‘in the air’ when the WTO was being negotiated. This seems perfectly appropriate in the circumstances, even without complete identity of the parties. The environmental treaties are facts in the world, and they are being used just as factual evidence on the empirical question of the likely reference of a phrase in ordinary language. (As I shall explain in a moment, this is quite different from the role the environmental treaties would play if they came within article 31.3 (c).)

There are other ways as well that an extra-regime treaty might be relevant as evidence on an empirical question, even though it would not come within article 31.3 (c) on the ‘all parties’ reading or even the ‘dispute parties’ reading. For example (and still in the WTO context), it might be an issue whether a respondent Member really cares about turtles or is merely using an asserted concern for turtles as a cover for protectionism. In such a case, it would be relevant, although not dispositive, to learn from other treaties that many other states had manifested a concern for preserving turtles, regardless of the precise identity of the parties to those treaties. Or similarly, the existence of other treaties favouring or disfavouring particular shrimp-fishing techniques because of their effects on turtles might be significant evidence on the question whether some measure was ‘relating to’ turtle conservation, or whether it was ‘necessary’ to protect turtles. This is by no means an exhaustive list. Even for the WTO context, it is illustrative only. The general point, to repeat, is that even the ‘all parties’ reading of article 31.3 (c) will not cut off the courts interpreting the regime treaty from all consideration of other treaties.¹⁹

The reader may wonder why I want to insist on the ‘all parties’ reading of article 31.3 (c), since I am willing to admit the possible relevance of treaties that do not come within the article on this (or any) interpretation. The reason is that extra-regime treaties may be relevant in different ways, and we should be attentive to the question of what use may properly be made of those treaties in

¹⁸ WTO, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted 6 Nov. 1998).

¹⁹ ILC, *Fragmentation of International Law* (above, n. 13). The ILC Report refers to the sort of arguments I have just suggested for the relevance of extra-regime treaties as ‘contrived’ (para. 450). I see nothing contrived about them. Of course, they would be contrived if they were offered in support of the wholesale relevance of extra-regime treaties that the ILC seems to favour. But as I explain in the continuation in the text, my point is precisely that extra-regime treaties may be relevant for different purposes in different circumstances. Such a view hardly seems to be a ‘contrivance’.

various circumstances. As already noted, the uses of extra-regime treaties that I suggested above all involve considering the treaties as evidence on some *empirical* question—the meaning of some phrase in general contemporary usage, or the likely purposes of governments, or the usefulness or necessity of some particular measure to a putative goal. The extra-regime treaties are facts in the world, after all; and where they are relevant, just as such facts, as evidence on a disputed empirical question, it seems obviously proper for a regime court to consider them, regardless of identity of parties. Of course, the broader the membership of the extra-regime treaties, and the greater the overlap with the regime membership, the weightier evidence the extra-regime treaties will be on the sort of question I have mentioned. But identity of parties is not necessary for the treaties to be useful as *empirical* evidence.

In contrast, other uses of extra-regime treaties accord them *normative* significance. Even here, there are at least two cases to be distinguished: (1) If an extra-regime treaty is relevant to a dispute between two regime parties because of article 30 on successive treaties (which will be the case whenever the disputing regime parties are both party to the extra-regime treaty), then whether we are technically under article 30.3 or 30.4 (a), to the extent the treaties are incompatible, the later in time will control the dispute.²⁰ But article 30 is about the *application* of treaties, as its title makes clear. It presupposes that we have already determined, in accordance with the principles of article 31, what each treaty means; and then the question is whether there is a conflict between the requirements of the treaties, and if so, which should prevail. So, article 30 gives directions for dealing with a normative conflict between treaties, but it takes the normative requirements of each treaty individually as given. In contrast, (2) if we are in a situation where article 31.3 (c), under whatever reading we favour, requires some ‘other treaty’ to be taken into account in the interpretation of the primary treaty, then that other treaty exercises a sort of ‘normative gravitational force’ on the *meaning* of the primary treaty being interpreted. We should try to interpret the primary treaty so that it forms part of a coherent overall normative structure with the other treaty. This ‘normative gravitational force’ gives the other treaty a much stronger role in determining the meaning of the primary treaty than it has *either* when it is appealed to as evidence on some empirical issue *or* when we interpret the treaties separately and then apply the ‘later in time’ rule of article 30.²¹

²⁰ It may seem that this explicit endorsement of *lex posterior* when both treaties are relevant pays too little attention to arguments about *lex specialis* and *lex superior*, but we can build such considerations into the analysis of ‘compatibility’.

²¹ I have distinguished between cases where the issue is interpretation and cases where the issue is application. The ILC Report suggests that issues of interpretation and conflicts cannot be separated (para. 412). This is true, if the claim is that there are *some* cases where these issues cannot be separated, namely, cases where one treaty is subject to a ‘normative drag’ on its interpretation from another treaty coming under 31.3 (c). But still, the VCLT itself has distinct provisions on interpretation and application; it seems to presuppose, what also seems

Space limitations prevent me from giving an extended example to illustrate concretely the three ways we have now distinguished in which ‘other treaties’ may be relevant to the interpretation or application of a primary treaty. But to summarize: (1) The ‘other treaty’ may be appealed to purely as empirical evidence on some question relevant to the interpretation or application of the primary treaty. This use may well be appropriate even when some parties to the *dispute* are not parties to the ‘other treaty’. (2) The ‘other treaty’ may be appealed to prevent the application of the primary treaty, if all parties to the dispute are also parties to the other treaty and the other treaty is incompatible with, and later in time than, the primary treaty. This is a normative use of the other treaty, and so it depends on the parties to the *dispute* being parties to the other treaty, but it does not require that all parties to the primary *treaty* be parties to the other treaty. The treaties should still be interpreted independently (unless all parties to the primary treaty are also parties to the other treaty). The reason for preferring the later treaty is not that the treaties are presumed to form a coherent whole, but is rather a version of estoppel (or a finding of bad faith, or *abus de droit*) against the party who tries to rely on the earlier treaty after signing the incompatible later one. Finally, (3) the ‘other treaty’ may be appealed to for its ‘normative gravitational force’ on the meaning of the primary treaty, which requires that the primary treaty be interpreted (if possible) so as to form a coherent normative whole with the other treaty. This is appropriate only where the parties to the primary treaty are all parties to the other treaty.

Whether or not the reader accepts all my claims about when various uses of the ‘other treaty’ are appropriate, I hope she will at least recognize that there are different uses, and that we need to attend to the question of what the right circumstances are for each use, instead of just discussing whether regime courts can/should/must look to extra-regime sources without distinguishing between possible uses.

IV. FRAGMENTATION AND THE WTO: EXAMPLE OR COUNTER-EXAMPLE?

In this last section, I want to consider briefly four suggestions that one encounters in discussions of fragmentation: (1) that specialized regimes recognize only one ‘regime’ value; (2) that even if a regime court considers other values than its own regime value, it will inevitably be biased in favour of the regime value (for example, by construing narrowly treaty exceptions in favour of non-regime values); (3) that what is needed is greater sensitivity on the part of regime courts to values from elsewhere in international law; and (4) that if such extra-regime values are

obviously true, that there are cases where the interpretation of each of two treaties can be settled before issues of conflict or application arise.

recognized, the court will be required to ‘balance’ the regime value(s) and the extra-regime values. I shall not attempt a general discussion, but since the WTO is often pressed into service as an example for these various claims—both as illustrating a problem under (1) and (2) and sometimes as illustrating a possible solution under (3) and (4)—I want to consider briefly what the WTO experience really indicates. Incidentally, although Paulus refers to the WTO more than once, and my comments are partly stimulated by his references, my comments should not be taken as directed at Paulus’s claims specifically, since I do not want to discuss just how far he is committed to each of the four propositions. Now, as to the propositions and the WTO:

(1) It is not true that the WTO recognizes only the value of promoting trade. As the Appellate Body reminds us in *Shrimp*, the Preamble to the WTO Agreement makes specific reference to the value of the environment, via the phrase ‘sustainable development’. In addition, GATT article XX and GATS article XIV (both entitled ‘General Exceptions’) recognize a number of non-trade values that can justify national measures that would otherwise violate the GATT or GATS—including ‘public morals’ (which the Appellate Body has signalled it will interpret very generously),²² ‘human, animal or plant life or health’, ‘protection of national treasures of artistic, historic, or archaeological value’ (in GATT), and ‘privacy’ (in GATS).²³ Similarly, there are references to the environment and other non-trade values in the Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement (SPS), the Agriculture Agreement, and so on. There is a sense in which the core purpose of the GATT was, and the core purpose of the WTO is, to promote trade. But we must be careful how we understand this claim. There is nothing in the texts to suggest that trade is valued in such a way that more trade is always better. The focus of the system is not on increasing trade by forbidding or even disfavouring all national measures that reduce trade. Rather, the focus is on restraining or eliminating *certain sorts* of national measures that *distort* trade. Some of the measures that are forbidden are in fact trade-*promoting*, as in the case of export subsidies. There is much controversy, to be sure, about what amounts to a ‘distortion’, and trade experts sometimes speak as if any reduction of trade is a distortion. But wiser heads have always rejected such a view. And to repeat, there is nothing to suggest such a ‘trade above all’ view in the WTO texts.

(2) The WTO is also a counter-example to the claim of inevitable bias on the part of regime courts in favour of the ‘regime value’. It is true that many GATT Panels

²² See WTO, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted 20 Apr. 2005).

²³ In my own view (admittedly not uncontroversial), a proper interpretation of the basic prohibitory provisions of the GATT and GATS imposes essentially no limit on the purposes that can be pursued by Member States, even at the cost of a reduction in trade, provided the measures are facially neutral and not adopted with a protectionist purpose (and in the case of GATS, do not involve quotas).

(from the days before the formation of the WTO) seemed to be biased in favour of trade. The worst examples are the two *Tuna-Dolphin* cases, which unfortunately are all that many people know about the WTO (even to the exclusion of the Appellate Body's very different treatment of the same basic problem in *Shrimp*). The *Tuna-Dolphin* reports were indefensible, but they were not adopted by the Contracting Parties to the GATT and never became part of the GATT *acquis*. Even under the GATT, some Panels were considerably more sensitive to non-trade values, although I would not contest the claim that overall, GATT Panels showed an unfortunate pro-trade bias. But with the advent of the WTO and the Appellate Body, things have changed dramatically.

The Appellate Body cannot plausibly be accused of trade bias. Of course there are particular decisions of the Appellate Body that environmentalists and other sections of the global audience loudly disapprove of—most salient is *EC-Hormones*.²⁴ But on the whole (and even in *Hormones*) the Appellate Body has done a remarkably fair-minded job of interpreting and applying the WTO treaties, which as I have explained are *not* essentially biased in favour of trade. There is a great deal in *Hormones* that is very regulator-friendly: for example, the Appellate Body holds that a Member need not do required risk assessments itself, but can rely on risk assessments carried out by others; it says that the risk assessment can be in qualitative terms rather than quantitative; it says a goal of zero-risk is acceptable (provided the risk in question is not purely 'theoretical'); it says a Member can rely on respectable *minority* scientific opinion; and more. The problem in *Hormones* was that for some aspects of the EC regulations, there simply were no supporting risk assessments at all as required by the SPS. The EC tried unsuccessfully to excuse this lack by appeal to the 'precautionary principle'; but in a peculiar argumentative move, the EC refused to rely on the particular provision of the SPS that explicitly embodies a version of the precautionary principle. Even *Hormones* is no real evidence of trade bias in the Appellate Body.

I cannot discuss here all the Appellate Body's decisions that touch on the environment or other values. But let me point out that two important recent cases are counter-examples to the specific claim that exceptions in favour of non-trade values will be construed narrowly. In *US—Shrimp* the Appellate Body was interpreting the 'General Exceptions' article of the GATT when it eventually upheld the United States' revised import ban on shrimp harvested with turtle-endangering methods;²⁵ and in *US—Gambling*, the Appellate Body treated as matters of 'public morals' under the 'General Exceptions' article of the GATS: preventing under-age gambling, preventing compulsive gambling, preventing fraud, and preventing

²⁴ WTO, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26&48/AB/R (adopted 13 Feb. 1998).

²⁵ WTO, *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5)*, WT/DS58/AB/RW (adopted 21 Nov. 2001).

money-laundering. Indeed, the Appellate Body has explicitly rejected the idea that exceptions are to be read narrowly. It has said, quite correctly, that exceptions are as essential to the structure of the treaty as any other provisions, and they are to be read in the same way as other provisions.²⁶ It is striking that the greater legalization of the dispute-settlement process that was part of the establishment of the WTO in 1995 has led to *reduced* trade bias in decisions made under a treaty that is portrayed as being all about promoting trade. But to my mind this makes perfect sense. Much more than under GATT, dispute settlement is now about serious interpretation of the treaty by traditional means. What is being revealed is that the treaty was never the pure pro-trade instrument of the trade-sceptic's horror story.²⁷

(3) Is the sensitivity of the Appellate Body to non-trade values the result of their taking into account the normative demands of extra-regime treaties, either in interpretation or application of the WTO agreements? So far as I can see, the answer is no. I have already argued that in *Shrimp*, when the Appellate Body refers to other treaties in connection with the interpretation of the phrase 'exhaustible natural resources', it is using those treaties only as evidence on an empirical question. That is, it is treating them as facts in the world, not as sources of relevant norms. It is also often suggested that in a different part of the *Shrimp* opinion, the Appellate Body relies on normative support from other environmental treaties to find a duty to negotiate. Just what the Appellate Body says about negotiation is far from clear, and this is not the place for an extended discussion. My own view is that they do not find a duty to negotiate at all, but only a duty not to *discriminate* by negotiating with some affected countries and not others. (They may also have in mind a slightly different non-discrimination duty, as explained in the next footnote.) The central point in favour of this reading is that the bit of article XX that the Appellate Body finds the United States has run afoul of is about 'unjustifiable discrimination'. This treaty language simply would not support a finding of an unconditional duty to negotiate. And if the Appellate Body did not find a duty to negotiate, they can hardly have relied on other treaties in finding such a duty.²⁸

²⁶ WTO, *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (adopted 5 Apr. 2001).

²⁷ Arguably, one of the reasons for the decline in trade bias was that the early Appellate Body members were not all trade lawyers, but included general international lawyers and an EU lawyer. But to my mind, the reason this was important is not the greater sensitivity of these members to extra-regime values as such, but rather their greater attention to what the WTO agreements themselves actually said about non-trade values.

²⁸ This does leave the question of why the Appellate mentions the other treaties at all—and frankly I am not certain there is an explanation that makes the reference to the other treaties anything more than window-dressing. The best explanation I can think of is that the other treaties confirmed the empirical usefulness of talking to other countries about what techniques of turtle protection were needed in different shrimping grounds. This is relevant because the Appellate Body opinion suggests that perhaps the failure to negotiate with Malaysia was not just illegal because of the more favourable negotiation treatment of the Caribbean countries, but also because the failure to 'negotiate' at least to the extent of exchanging technical information exacerbated the distinct discrimination (according to the Appellate Body) involved in requiring Malaysia to use a turtle-protection

(4) Finally, does the Appellate Body in *Shrimp* balance the value of the environment against the value of trade? No, it does not. It does not even claim to.²⁹ If the Appellate Body is balancing any value against the value of trade, it is not the value of the environment, but rather the value of national regulatory autonomy—which the United States is using in this case to protect the environment, but which is hardly the same thing. But I would say they are not balancing at all; they are simply interpreting the limits on national regulatory autonomy in the treaty. To see that the Appellate Body does not balance the environment and trade, observe that they do not impose any conclusion of their own about the proper ‘balance’ on any Member. Rather, they leave it up to each member to balance for itself in respect of its own production and its imports. On the one hand, the Appellate Body eventually upholds the United States’ revised turtle-protective import regulations; but on the other hand, it does *not* require Malaysia to adopt turtle-protective shrimping techniques, nor could it conceivably do so under the agreements. Indeed, by apparently requiring the United States to offer shipment-by-shipment certification for shrimp from non-certified countries, the Appellate Body carefully guarantees that Malaysia can *both* sell turtle-friendly shrimp into the United States market (if it so chooses) *and* continue to harvest shrimp by turtle-hostile techniques for its own or third country markets. So, the Appellate Body never chooses for itself between trade and the environment. It finds (correctly) that the treaty leaves the choice up to each Member in its treaty-defined sphere.

Paulus suggests that in cases of value conflict, we cannot fully trust regime courts. Even if they appear to take account of extra-regime values, he still wants them to be supervised by extra-regime international courts as ‘neutral arbiters’ between the competing values and the associated interests.³⁰ In other words, faced with a conflict between trade and the environment, for example, Paulus wants to move ‘upwards’ from the WTO to a systematic international law. In fact, as we see in *Shrimp*, we move ‘downwards’ from the WTO back to the several Member states (whose choices remain subject, of course, to the WTO’s various non-discrimination principles and the like).

In the WTO context, this ‘downwards move’ is the right move, even though it would not be in many other contexts. The WTO is a very distinctive regime, not

technique that was actually unnecessary in the waters their shrimpers frequented. Still, there is no evidence at all that the Appellate Body found a duty to negotiate in other treaties and imported it into the WTO, or even that they gave any *normative* weight to the other treaties.

²⁹ The Appellate Body does talk about balancing, but what it claims to balance is the complaining member’s ‘rights’ against the respondent member’s duties. (para. 156 ff.) Even this talk of balancing is logically inappropriate, since the only rights created by the WTO agreements are the Hohfeldian correlates of the duties the agreements impose on other member countries, and such correlates obviously cannot be ‘balanced’ against each other. (The agreements may create some non-correlative rights like the right to invoke the dispute-settlement process, but that is clearly a different sort of issue.)

³⁰ Paulus, A., this volume, 214.

so much because it is devoted to the value of trade, which we have seen is true in only a limited sense, but because the only national laws it purports to constrain are laws that directly affect trade. Its specific concern is with those laws' trade effects, which consist of allowing or prohibiting market transactions. This is quite unlike international environmental law, say, which concerns itself with physical cross-border effects that are not market-mediated. Such physical effects may result from behavior undertaken for commercial purposes, but the effects themselves move independently of any market transactions. Effluents dumped into a river by an upstream country affect the downstream country even if the countries have no trading relationship. It is the WTO's focus on market-mediated effects that makes the 'downwards move' apt, although I have no space for a full explanation here.³¹ That also means, of course, that the downwards move is not a solution for the problems of many other international regimes.

So, I am not holding up the WTO as a model of how all regimes should operate. But since the WTO often appears in discussions of fragmentation, it seems desirable to understand how it actually operates. Also, the Appellate Body's 'judicial restraint' with regard to balancing competing values may be suggestive for other areas. Many writers move too easily from the premise that we need a lot more effective international law than we currently have, which is certainly true, to the problematic conclusion that since no other institution is currently able to give it to us, judges should step in to supply our need.

³¹ See Regan, D., 'What Are Trade Agreements For?—Two Conflicting Stories Told by Economists, With a Lesson for Lawyers', *Journal of International Economic Law*, 9/4 (2006), 951.