Conflict of Norms in Public International Law
How WTO Law Relates to Other Rules of International Law

JOOST PAUWELYN
Conflict of Norms in Public International Law
How WTO Law Relates to other Rules of International Law

Joost Pauwelyn
It might be possible for the parties to a treaty expressly to agree that the rules of
treaty interpretation in Articles 31 and 32 of the Vienna Convention do not apply,
either in whole or in part, to the interpretation of a particular treaty. Likewise,
the parties to a particular treaty might agree upon rules of interpretation for
that treaty which differ from those rules of interpretation in Articles 31 and 32
of the Vienna Convention. But this is not the case here.\footnote{Ibid., Statute 40.}

\textbf{Conflict: ‘contracting out’ of general international law}

In the previous section we examined a particularly important instance of
‘accumulation’ of norms, namely treaties accumulating with general
international law or, put differently, ‘fall-back’ on general international
law for areas not regulated in the treaty. In this section we elaborate on
a crucial form of ‘conflict’ of norms, namely treaties in conflict with,
or ‘contracting out’ of, general international law. In many ways, this
‘contracting out’ is the flip side of the ‘fall-back’ discussed in the previous
section. Indeed, only if a treaty does not ‘contract out’ of a particular
rule of general international law is ‘fall-back’ on this rule called for.
The ‘fall-back’ on pre-existing law is limited only by the extent to
which the new law conflicts or ‘contracts out’ of pre-existing law. To
find out whether a new treaty ‘contracts out’ of general international
law, the definition of conflict set out earlier should apply. The question
then is: does the mere conclusion of the treaty norm breach a norm of
general international law or, more importantly, if a state complies with
the obligation set out in the treaty norm or exercises an explicit right
(be it an exemption or a permission) under this treaty norm, would it
breach the allegedly conflicting norm of general international law (or
vice versa, if one were to exercise rights or comply with obligations
under general international law, would one breach the treaty norm)? If
so, the two norms are in conflict,\footnote{Unless the treaty provision explicitly states that it is an exception or derogates from
general international law, in which case the two norms enter a ‘rule-exception’
relationship and, as discussed earlier, simply accumulate without there being a
conflict.} that is, the treaty norm ‘contracts out’ of the general international law norm.

Crucially, the extent of this ‘contracting out’ or conflict determines
the extent to which the treaty norm does not fall back on pre-existing
law, that is, the extent to which the treaty is lex specialis vis-à-vis gen-
eral international law. Finally, given the presumption against conflict
(discussed in chapter 5 below) and, hence, against ‘contracting out’, it

is for the party claiming that a treaty has ‘contracted out’ of general
international law to prove it. In other words, the party claiming that
there should not be a ‘fall-back’ on general international law bears the
burden of proof.

‘Contracting out’ is a question of degree

\textbf{The need to examine provision by provision}

The question of contracting out, or determining the extent to which a
treaty is lex specialis vis-à-vis general international law (say, most parts
of the Vienna Convention on the Law of Treaties and the law on state
responsibility), is one of degree. It is not one of black and white, ev-
erything ‘in’ or everything ‘out’. As noted in chapter 2, the WTO treaty
is not a self-contained regime in the sense that it was created outside
the system of international law. Nor has the WTO treaty contracted out
of all fields of international law such as the law of treaties or state
responsibility. All fields of general international law, to the extent rele-
vant to the WTO treaty, continue to play a role. The extent of this role
cannot be determined without looking at each and every WTO provision
in detail. Only this type of detailed treaty interpretation can determine
the extent to which the WTO treaty ‘contracted out’. It is of no use to
say: the WTO is lex specialis in terms of the law on treaties, state respon-
sibility or the settlement of disputes. Of course it is. But the question
is: to what extent? Nor is it really enlightening to say: WTO law is part
of international law. Of course it is. But the question is: to what extent is
this international law relevant in the WTO?

As Art. 55 of the 2001 Draft Articles on State Responsibility (entitled ‘lex specialis’) provides, in respect of treaties contracting out of general
international law on state responsibility: ‘These articles do not apply
where and to the extent that the conditions for the existence of an inter-
nationally wrongful act or the content or implementation of the interna-
tional responsibility of a State are governed by special rules of international
law.’\footnote{See also Art. 5 of the Vienna Convention.}

To discover the ‘extent’ to which a treaty has contracted out of gen-
eral international law, each and every treaty norm must be examined
pursuant to normal rules of treaty interpretation and each time the ex-
tent of conflict and contracting out must be determined. For that reason,
the statement made at the Sixth Committee of the UN General Assembly
that the ILC Draft Articles on State Responsibility ‘would not apply to