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## Book Reviews

Pauwelyn, Joost. **Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law**. Cambridge:

Cambridge University Press, 2003.

Pp. 520. £65, US\$95. ISBN

0-521-82488-5.

Neumann, Jan. **Die Koordination**

**des WTO-Rechts mit anderen**

**völkerrechtlichen Ordnungen:**

**Konflikte des materiellen Rechts und**

**Konkurrenzen der Streitbeilegung**.

Berlin: Duncker & Humblot, 2002.

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3-428-10802-7.

### I.

In a contribution published in the 1953 *British Yearbook of International Law*, W. Jenks observed that 'the conflict of law-making treaties... must be accepted as being in certain circumstances an inevitable incident of growth' of international law. Jenks urged the international lawyer 'to formulate principles for resolving such conflict when it arises'.<sup>1</sup> In the five decades following Jenks' visionary article, international law has witnessed an even more radical process of functional specialization leading to a debate on the alleged 'fragmentation' of international law. The law of the World Trade Organization is currently taking centre stage in this debate. International trade regulation

<sup>1</sup> Jenks, 'Conflict of Law-Making Treaties', 30 *BYIL* (1953) 401, at 405.

has a potential impact on areas as diverse as environmental protection, bio-safety, human rights, telecommunications and postal regulation. Some have embraced the WTO as an indispensable 'linkage machine', making human rights and environmental law 'relevant' through its comprehensive dispute settlement process. Others have warned against the dilution of non-trade values through an 'M&A' with the WTO's trade ethos. Two recent books by Joost Pauwelyn and Jan Neumann must be read against the backdrop of this socio-political debate.

### II.

*Conflict of Norms in Public International Law* is the book version of a PhD thesis written by Joost Pauwelyn, a Belgian lawyer now teaching at Duke University. In this volume, the author takes up Jenks' recommendation to formulate principles for resolving conflicts between WTO law and other rules of international law. One message runs like a red thread through the eight chapters of the book: WTO law should not be construed as separate to either general international law or to other international law treaties. Pauwelyn thus seeks to counter once and for all the perception of international economic law as a 'hunting ground of a few specialists, who often jealously hold for themselves the key to this abstruse admixture of law and economics'<sup>2</sup>, as A. Cassese

<sup>2</sup> A. Cassese, *International Law in a Divided World* (1986), at 317.

once characterized the discipline. At the beginning of the book, Pauwelyn establishes that, conceptually, WTO law is but a ‘subsystem’ of public international law and, as such, part of the larger ‘system’ of international law. His study proceeds from the express assumption that international law can be described as a unitary legal order, glued together by the amalgam of ‘general international law’ (e.g., at 38) – a departure point that is similar to P.-M. Dupuy’s concept of ‘*l’unité de l’ordre juridique international*’.<sup>3</sup>

The analysis then turns to the definition of ‘conflict’. In line with the doctrinal, rather than theoretical, focus of his book,<sup>4</sup> Pauwelyn pragmatically adopts a broad definition covering two scenarios: mutually exclusive obligations and the incompatibility of the exercise of a right with an obligation (at 170 *et seq.*). The inclusion of the latter scenario within the definition of conflict has been controversial in legal doctrine. According to scholars such as Kelsen and Jenks, logically, no conflict arises if a state can comply with a prohibition by relinquishing the exercise of a right; a prohibition, thus, always ‘trumps’ an incompatible right. Pauwelyn’s comprehensive definition, by contrast, acknowledges that both rights and prohibitions involve a normative commitment of equal rank on the part of states.

The author’s central objective is to give the international lawyer a ‘toolbox’ which may be kept at hand for avoiding and resolving such conflicts. The tools Pauwelyn unpacks are by no means

rocket science, and deliberately so: Pauwelyn’s argument is precisely that conflicts of rules do not *require* a rocket-science solution, but rather a faithful and consistent application of the existing rules of international law. He applies the provisions on treaty interpretation contained in the Vienna Convention, the *lex posterior* principle and the *lex specialis* principle. In Pauwelyn’s view, the toolbox of the law of treaties enables the international law practitioner to determine both the relationship of WTO law with rights and obligations arising under other treaties (e.g., multilateral environmental agreements (MEA)), and the relationship of WTO law with so-called ‘general international law’.

Pauwelyn’s argument is persuasive if (and to the extent that) the reader shares the author’s underlying unitary perception of international law. The theory of international law as a unified system, however, is debatable. While some scholars endorse unity as an empirical reality, as a necessary doctrinal concept<sup>5</sup> or, more modestly, as a normative postulate, others categorically reject ‘the vain search for legal unity’.<sup>6</sup> Whether Pauwelyn’s readers will agree or disagree with the recipes presented for the resolution of ‘conflicts of norms in public international law’ will essentially depend on whether they share the author’s concept of international law in the first place.

The author’s dedication to unity of the legal order becomes apparent when he

<sup>3</sup> Dupuy, ‘L’unité de l’ordre juridique international’, 297 *RdC* (2002) 1.

<sup>4</sup> E.g., Pauwelyn does not engage with the extensive theoretical work by Dworkin, Raz, or Alexy on conflicts of rules and principles.

<sup>5</sup> Oscillating between ‘*réalité effective*’ and ‘*issu du registre doctrinal*’: see Dupuy, *supra* note 3, at 59 ff.

<sup>6</sup> Cf. for a recent critique G. Teubner and A. Fischer-Lescano, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ [2004] *Mich J Int’l L*, forthcoming.

introduces the *lex posterior* and *lex specialis* principles as tools for resolving conflicts between two law-making treaties (e.g., WTO law and a MEA). Both principles assume that states conclude treaties with a unified legislative will. Following Pauwelyn, it is simply inconceivable that a state's 'intent' would be directed to both X and non-X at the same time. Pauwelyn's study is thus strongly inspired by domestic-law analogies. He explicitly endorses the contractual analogy as a model for international treaties. While such modelling of international law on its domestic counterpart is a commonplace discursive technique of international lawyers, scholars such as P. Allott and E. Raftopoulos have pointed out its limitations.<sup>7</sup> Hence, some doubts remain whether the 'social reality' of treaty-making may not look quite different. As M. Koskeniemi put it in his 2004 Preliminary Report for the International Law Commission, '[t]here is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives – they are “bargains” and “package-deals” and often result from spontaneous reactions to events in the environment.’<sup>8</sup>

On the other hand, if unity of the legal order is accepted (at least as a normative postulate), Pauwelyn's well-known and controversial conclusion formulated earlier in the *American Journal of International*

Law<sup>9</sup> seems inevitable: there is no systemic reason why obligations under non-WTO treaties should not prevail over WTO law as *leges speciales*. According to Pauwelyn's theory, environmental considerations cannot only be raised as a justification pursuant to the restrictions imposed by Article XX GATT. Rather, a panel must determine in each dispute whether the parties to the dispute have effectively 'contracted out' of a standard required by WTO law by way of concluding an *inter se* environmental agreement.

Similarly, the *lex specialis* principle is the focal point of Pauwelyn's analysis of the relationship between WTO law and general international law.<sup>10</sup> In line with Dupuy and other 'universalists', Pauwelyn establishes a *presumption* in favour of general international law. The overarching catalogue of the *leges generales* of treaty interpretation and state responsibility is automatically applicable to the extent that the WTO regime contains no explicit derogation. '[I]t is for the party claiming that a treaty has “contracted out” of general international law to prove it' (at 213).<sup>11</sup> While this presumption is widely shared among public international lawyers (quite in contrast to Community lawyers and many WTO

<sup>7</sup> Allott, 'The Concept of International Law', 12 *EJIL* (1999) 31, at 44; E. Raftopoulos, *The Inadequacy of the Contractual Analogy in the Law of Treaties* (1990).

<sup>8</sup> Koskeniemi, 'Study on the "Function and Scope" of the *lex specialis* Rule and the Question of "Self-Contained Regimes"', Preliminary Report by the Chairman of the Study Group submitted for consideration during the 2004 session of the International Law Commission, para. 28.

<sup>9</sup> Pauwelyn, 'The Role of Public International Law in the WTO: How far Can We Go?', 95 *AJIL* (2001) 535.

<sup>10</sup> For a critique of the *lex specialis* principle as a 'linkage tool' between general international law and special systems, cf. Simma and Pulkowski, 'Leges speciales and Self-Contained Regimes', in J. Crawford and A. Pellet, *Le droit de la responsabilité des États* (forthcoming, 2005).

<sup>11</sup> Similarly, the ILC's Special Rapporteur on State responsibility, J. Crawford, has spoken of a 'presumption against the creation of wholly self-contained regimes in the field of reparation': J. Crawford, Third Report, A/CN.4/507 (2000), para. 147.

specialists), it is not easy to solidly ground it in theory. The application of the *lex specialis* principle is controversial with regard to subsystems that have attained a particularly high degree of regulatory ‘thickness’ and, thus, autonomy. On a sliding scale, the more a system’s operation is ‘closed’ towards its international-law environment, the less likely it is to fall back on general international law. Discussing special regimes such as the EC or the WTO, other scholars have consequently put forward the contrary presumption, namely a presumption in favour of exhaustive regulation within the respective special regime.<sup>12</sup> There are certainly good reasons of *Rechtspolitik* to link the WTO regime to general international law. However, some doubts remain whether a presumption – in favour of or against a fall-back on general international law – can be systematically sustained.

Sometimes, while reading this volume, the reader wonders if Pauwelyn does not rely on the principles of treaty interpretation all too heavily. Can a conflict between environmental law and trade law really be resolved conclusively by the notion of *lex specialis* as a ‘principle of legal logic’ (at 388)? Lawyers make use of various (and sometimes contradictory<sup>13</sup>) ‘tools’ of interpretation to reconcile competing rationalities expressed in different rules

of law. G. Schwarzenberger, thus, referred to the principles of treaty interpretation as merely ‘tool[s] in aid of the *jus aequum* rule’.<sup>14</sup> In that sense, their function may resemble what V. Lowe labelled as ‘interstitial norms’: ‘The choice is made by the judge not on the basis of the internal logic of the primary norms, but on the basis of extraneous factors.’<sup>15</sup> When a panel is compelled to pronounce itself on the impact of environmental norms on WTO law, the application of principles of treaty interpretation is not merely an exercise of legal logic. Which tools of interpretation a panel deploys is equally ‘a matter of harmony with what, for want of a better word, one might term experience and common sense [...] an unsystematized complex of moral, cultural, aesthetic, and other values and experiences.’<sup>16</sup> To put it differently: Is Pauwelyn’s argument that certain rules of environmental law should be *leges speciales vis-à-vis* WTO law really about the rather formal notion of ‘specialty’? Or is it, rather, a disguised value argument in favour of an emerging *ordre public international*, in which human rights and environmental standards trump the ‘money-making exercise’ (at xi) of international trade?

### III.

Joost Pauwelyn’s study and Jan Neumann’s book *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen*

<sup>12</sup> Cf. for the WTO, Trachtman, ‘The Domain of WTO Dispute Resolution’, 40 *Harvard Int’l LJ* (1999) 333, at 342; McRae, ‘The WTO in International Law: Tradition Continued or New Frontier?’, 3 *JIEL* (2000) 27; Dunoff, ‘The WTO in Transition: Of Constituents, Competence and Coherence’, 33 *Geo Wash Int’l L Rev* (2001) 979.

<sup>13</sup> For instance, the notion of effective interpretation (*ut res magis valeat quam pereat*) and the *in dubio mitius* maxim will often result in conflicting interpretations.

<sup>14</sup> G. Schwarzenberger, *International Law* (3rd ed., 1957), i, 496.

<sup>15</sup> Lowe, ‘The Role of Law in International Politics’, in M. Byers (ed.), *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?* (2000), at 216.

<sup>16</sup> *Ibid.*, at 220.

*Ordnungen*<sup>17</sup> revolve around the common theme of exploring the potential of conflicts between WTO law and other international treaties. Conceptually, however, the two books are a world apart. Neumann's starting point is fragmentation rather than unity. Relying on the *Tadic* judgment of the ICTY,<sup>18</sup> he finds that '[i]nternational regimes and organizations are, in principle, independent from each other' (at 65). Consequently, a rule of international law does not apply in a different 'treaty order' (*Vertragsordnung*) unless that treaty order specifically provides for its application. Given Neumann's more 'particularistic', regime-oriented outlook on international law, it comes as no surprise that Neumann rejects Pauwelyn's theory of environmental obligations as *leges speciales vis-à-vis* WTO law. For the majority of conflicts between norms contained in different treaty regimes, according to Neumann, it is impossible to ascertain that one rule is more special than another. The author illustrates this point by discussing the export of hazardous waste. If the emphasis is on the export activity as such, the GATT must be considered closer to the subject matter and, hence, more special. However, such a perspective would neglect the environmental dimension of exporting hazardous waste (at 87). The author concludes that the question of 'specialty' of a treaty order is ultimately a political and cultural value judgment. Consequently, the *lex specialis* rule can only apply if one of the treaties expressly

states which norm is to prevail as more 'special' (at 89).

More radically, Neumann maintains that the traditional conflict rules under the law of treaties generally are inadequate tools for resolving veritable conflicts between WTO law and obligations under other treaties. Neumann's thesis is based on a distinction between 'simple collisions of norms' and 'programmatic conflicts' (*Programmkonflikte*). Programmatic conflicts arise when superior goals and rationalities of two different 'treaty orders', such as trade and environmental protection, collide (at 64). Such programmatic conflicts cannot be reduced to conflicts of norms. Rather, the collision of two contradictory norms is but an epi-phenomenon of the underlying programmatic conflict. Programmatic conflicts, Neumann argues, cannot be resolved by an application of legal method but only by political compromise (at 64, n. 22).

Given that Neumann sees programmatic conflicts at the root of the 'fragmentation problem', the focus of his study must necessarily extend beyond conflicts of rules. For instance, Neumann observes that *Programmkonflikte* surface in a WTO context when a norm embodying the rationality of free trade is reinterpreted to accommodate new global values – irrespective of whether such values have yet attained the status of a legal norm. As an example, Neumann points to a gradual reinterpretation of Article III GATT (non-discrimination) with regard to the notion of 'like products'. Formerly, there was broad agreement that a particular production method could not, in itself, justify discrimination (cf. *Tuna I*). However, consumers 'with an environmental conscience' often prefer product X, manufactured in an

<sup>17</sup> 'The coordination of WTO law with other orders of international law' – convenience translation by the present author.

<sup>18</sup> 'In International Law, every tribunal is a self-contained system (unless otherwise provided)', 35 ILM (1996) 32, at para. 11.

environment-friendly manner, over the physically identical product *Y*, manufactured conventionally. Hence, there are strong grounds for finding that products *X* and *Y* are not ‘like products’ in the first place (at 129 *et seq.*).<sup>19</sup> The example demonstrates that environmental concerns are relevant for the interpretation of trade law, even when WTO law does not strictly speaking clash with an environmental agreement. For the argument is not that Article III GATT should be interpreted in light of an environmental *norm* (Article 31(3)(c) Vienna Convention). Rather, the question is whether a legal norm (Article III GATT) must be reinterpreted in light of a new global *consciousness* of the environment.

By making conflicting ‘programmes’ central to his analysis, Neumann sheds light on the rationalities underlying international treaties. Awareness of the socio-political context of norms is a distinct strength of his study. Some doubts remain, however, whether Neumann’s discussion of *Programmkonflikte*, inspired by the complicated idiom of sociological theorists, does not ultimately boil down to a rather familiar, less complicated question: the question of the political contingency of international law.

#### IV.

Both authors have chosen their respective titles with diligence. To Pauwelyn, the ‘fragmentation problem’ is essentially a

problem of conflicting rules – hence his exclusive focus on avoidance and resolution of ‘conflicts of norms in public international law’. Neumann, by contrast, perceives the root of the problem in what he calls ‘programmatically conflicts’. Not surprisingly, according to Neumann, the tools of treaty interpretation fail to capture the gist of such conflicts. Rather, coordination of issue-specific regimes is what is at stake for the international lawyer who administers a fragmented international law.

The comprehensive focus of Neumann’s book makes it, in many ways, a more insightful account of how a fragmented international law ‘works’. Neumann explores in great detail which techniques tribunals have applied to reconcile programmatic conflicts in concrete disputes. He develops in similar detail and thoroughness his own solutions for cases in which conflicts have – so far – remained theoretical. Yet, it is this very quest for comprehensiveness that ultimately waters down the solutions Neumann proposes to resolve the *Programmkonflikte* that he identifies. According to Neumann, such conflicts should be resolved by a ‘coordinative networking of WTO law with other treaty regimes’ (at 227). Coordination of legal regimes, he proposes, should be guided by the principle of ‘non-disturbance’ (at 397 *et seq.*). While non-disturbance is a rather modest claim, its normative basis nonetheless remains opaque.<sup>20</sup> Is ‘non-disturbance’ not a prettier name for a neo-liberal model of regulatory competition? It appears, at least,

<sup>19</sup> Consequently, environmental considerations are not limited to the ‘legal’ exception of Art. XX GATT. The Appellate Body ruling in *EC – Asbestos* has been hailed by some as a harbinger of a new interpretation of Art. III GATT, giving more leeway to the competing rationality of environmental protection.

<sup>20</sup> The author appears to suggest that ‘non-disturbance’ is a new principle of customary international law in the making.

doubtful whether 'non-disturbance' could prevent the most powerful regime from eventually devouring a less potent one.

Here, the strength of Pauwelyn's approach becomes apparent. Pauwelyn, focusing exclusively on conflicts of rules, makes no claim to capturing the political dynamics of an international law torn between diverging rationalities. Instead, he construes international law as a normative order that is both autonomous and unified. *Conflict of Norms in Public International Law* is a vision of a 'normative space' in which WTO law finds its natural place.

Written in the language of legal formalism, Pauwelyn crafts an argument that is utopian<sup>21</sup> in the best sense. It is precisely by intentionally limiting the focus of the book to rules that Pauwelyn's argument is endowed with clarity and a powerful thrust: the book reflects a firm belief that, whatever the socio-political reasons for the diversification of international law, formalism and legal doctrine can help resolve the practical problems that arise. In the preface to his book, Pauwelyn states the politics behind his project of utopian formalism with commendable clarity. The book is motivated by a belief that 'trade is but an instrument to pursue nobler goals' – goals that can only be effectively realized if 'WTO law is not a secluded island but part of the territorial domain of international law' (at xi). Pauwelyn's unitary approach

can be endorsed or discarded for a number of theoretical and political reasons. However, its logical consistency does provide the kind of impetus that makes his message likely to be heard – in the professional circle of trade lawyers and beyond.

The German sociologist N. Luhmann observed that 'the sinful fall of diversification, itself, can never be taken back. There is no return to paradise.'<sup>22</sup> International lawyers are only starting to come to terms with this conclusion. The two books develop strategies for managing diversity. Not surprisingly, the strategies proposed reflect their authors' general outlook on the international legal order: If the WTO is part of a unified international legal order (Pauwelyn), integration of its law with other rules of international law is an imperative. If, on the other hand, the WTO is a legal regime that is, in principle, self-contained (Neumann), lawyers can only attempt to coordinate the various issue-specific regimes. Departing from such diametrically opposed assumptions, both authors craft a comprehensive and highly practical argument on how the WTO can be fitted into the wider body of international law. Both contributions can only be strongly recommended to both trade lawyers and scholars interested in fragmentation studies. And yet, the two voluminous books are by no means the 'final word' in the professional discourse on the relationship of the WTO with other global regulatory systems. Pauwelyn and Neumann's work highlights how any in-depth discussion of their topic

<sup>21</sup> Pauwelyn's study falls squarely within the school of thought that Koskeniemi denoted as the 'rule approach', an approach 'stressing the law's normativity' that 'achieve[s] logical consistency', albeit sometimes 'at the cost of applicability in the real world of state practice': Koskeniemi, 'The Politics of International Law', 1 *EJIL* (1990) 4, at 10.

<sup>22</sup> 'Nie kann der Sündenfall der Ausdifferenzierung selbst zurückgenommen werden. Man kehrt nicht ins Paradies zurück': N. Luhmann, *Die Wirtschaft der Gesellschaft* (1994), at 344, translation by the author.

inevitably boils down to the fundamental debate on the nature and the structure (if there is any) of international law as a whole. The challenge for the international lawyer remains, as O. Korhonen put it, 'how a synthetic order, which is both common enough to produce cohesion and pluralistic enough not to reduce the various cultural differences, can be achieved without succumbing to either hegemony or unmanageable fragmentation'.<sup>23</sup> The debate continues.

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Hirschl, Ran. **Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.**

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As in the classic Dylan song, something's happening but we don't know what it is; what we do know, however, is that it goes by names such as constitutionalism and judicial review. Both together and separately, constitutionalism and judicial review have become staples of present-day legal and political discussions in a host of states (some have already identified a 'rise of world constitutionalism'<sup>1</sup>), and they are making their way into international legal debates as well. There has already been a considerable number of contributions on judicial review of Security Council acts; judicial review in EC law has come

to be accepted as normal fare, with discussions merely raging on such issues as the standing of individuals or NGOs; so too in the WTO, review has become an issue, in the guise of heated debates on the pros and cons of allowing *amicus curiae* briefs; and within the World Bank system, the Inspection Panel is a novel way of institutionalizing something approximating judicial review.

Yet for all the attention, the discussions remain remarkably inconsequential: few have studied conditions under which judicial review can best come about, fewer have even specified whether they have constitutional review or administrative review in mind, let alone whether judicial review would be at all suitable for the international legal system (assuming in any case that it is suited to domestic legal systems).<sup>2</sup>

In this light, the publication of Ran Hirschl's *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, is to be welcomed. Hirschl, a political science professor at the University of Toronto, has written a comparative study in public law (and, to some extent, political theory), and as might be expected with a book endorsed on its back cover by the likes of Mark Tushnet, Ian Shapiro and Joseph Weiler, it is indeed quite a good book.

Hirschl studies in depth the 'constitutionalization' (to give it a name) which has taken place over the last decade or two in Canada, New Zealand, South Africa and, in particular, Israel, with a view to discovering under what conditions, and why, states institute mechanisms of

<sup>23</sup> O. Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* (2000), at 42.

<sup>1</sup> See Ackerman, 'The Rise of World Constitutionalism', 83 *Virginia LR* (1997) 771.

<sup>2</sup> Some of these issues are addressed in Klabbers, 'Straddling Law and Politics: Judicial Review in International Law', in R. St. J. MacDonald and D.M. Johnston (eds.), *Towards World Constitutionalism* (2005, forthcoming).