



The Hebrew University of Jerusalem
Faculty of Law



International Law Forum
The Hebrew University of Jerusalem

**PRINCIPLES OF NORMATIVE INTEGRATION AND THE
ALLOCATION OF INTERNATIONAL AUTHORITY:**

**THE WTO, THE VIENNA CONVENTION ON THE LAW
OF TREATIES, AND THE RIO DECLARATION**

Tomer Broude*

*Assistant Professor, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem; BA (Int. Rel.), LLB, Hebrew University of Jerusalem; SJD, University of Toronto Faculty of Law.

Forthcoming: 6 LOY. U. CHI. INT'L L. REV. (2008)

**Research Paper No. 07-08
August 2008**

August, 24, 2008

Published by the International Law Forum of the Hebrew University of Jerusalem Law Faculty

Editor: Dr. Tomer Broude
Assistant Editor: Yonatan Berman

To subscribe, free of charge, contact:
ssrn@savion.huji.ac.il

This paper can be downloaded free of charge

PRINCIPLES OF NORMATIVE INTEGRATION AND THE ALLOCATION OF INTERNATIONAL AUTHORITY: THE WTO, THE VIENNA CONVENTION ON THE LAW OF TREATIES, AND THE RIO DECLARATION

*Tomer Broude**

ABSTRACT

There is a fundamental yet understudied link between the integration of substantive norms in international law and the consolidation of international authority. As well-reflected in WTO case-law (e.g., *EC-Swordfish*, *EC-Biotech*, *Mexico-Soft Drinks* and *US-Shrimp*) but also in international law more generally, norm integration and authority integration maintain a basic correlation that also has elements of causation. The integration of norms between branches of international law leads to pressures towards the integration of authority. As a result, the general reluctance to adopt and adhere to comprehensive norm-integrating principles in international law may stem from institutional fears relating to the potential impact of such principles upon the structure of the authority of international decision-making bodies. The quest for international legal consistency through normative integration, however commendable it may be in itself, is at least subliminally identified with the prospect of a centralization of international authority, which is a considerably less popular proposition. However, not all principles of normative integration were created equal in this respect. By comparing the integrative effects of Article 31(3)(c) VCLT and Paragraph 4 Rio (mainly in the context of the WTO, but with universal implications), the article shows that softer, less binding models of normative integration may permit decision makers to integrate norms with less pronounced (and less threatening) influences on the allocation of authority. This understanding presents proponents of normative integration with a strategy worth considering, that of the path of least resistance. Normative integration that creates less pressures towards authority integration has better chances of being adopted by tribunals, and hence, has better prospects of attaining its normative goals.

* Assistant Professor, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem; BA (Int. Rel.), LLB, Hebrew University of Jerusalem; SJD, University of Toronto Faculty of Law; Visiting Professorial Fellow, Institute of International Economic Law, Georgetown University Law Center (2008-2009).

TABLE OF CONTENTS

I. INTRODUCTION.....	3
II. THE FRAGMENTED FABRIC OF INTERNATIONAL LAW: WEAVING SUBSTANTIVE NORMS AND AUTHORITY ALLOCATION.....	6
III. HOW NORM FRAGMENTATION AND AUTHORITY FRAGMENTATION CORRELATE TO EACH OTHER.....	10
IV. HOW INTER-INSTITUTIONAL POLITICS MATTER: NORMATIVE INTEGRATION AS AUTHORITY INTEGRATION.....	16
V. HOW NORMATIVE INTEGRATION MAY BE DETERRED BY CONCERNS OVER AUTHORITY INTEGRATION.....	23
VI. HOW DIFFERENT PRINCIPLES DEPART IN THEIR EFFECTS: ARTICLE 31(3)(C) VCLT COMPARED WITH PARAGRAPH 4 OF THE RIO DECLARATION.....	28
VII. CONCLUSIONS.....	42

I. INTRODUCTION

In the face of the growing concern over the 'fragmentation of international law',¹ there exists an increasingly cogent advocacy, of both an academic and a more official nature, promoting the principles of normative integration that would be required to counter it. A focal point of discussion in this respect is international trade law, especially the law of the World Trade Organization (WTO), and its normative relationship with the legal regulation of the many international issue-areas that come in contact with it, such as the environment, labor, human rights, culture, health and more.

By 'principles of normative integration' in international law, as a general term, I mean legal methods deliberately aimed at the reconciliation of formally disparate elements of international law through normative hierarchy, inter-institutional comity, margins of appreciation, *lex posterior*, *lex specialis*, subsidiarity, interpretation and other such doctrines and conceivable tools. To lawyers, recourse to principles of normative integration makes eminent sense, because it serves the consistency and certainty that are the mainstays of all legal systems. Might an international jurist reasonably *prefer* a system of fragmented, conflicting norms for any reason based in law or legal theory? This seems unlikely, although some analyses might approve of the regulatory diversity that fragmented international norms can provide, under the general but somewhat fluid heading of 'global legal pluralism'.² However, even the pluralist approach rests at least in part on the assumption that "normative conflict is unavoidable",³ and hence reflects a pragmatic rather than ideal theory; it does not question the general utility of principles of normative integration. From a completely different perspective, normative diversity has been critiqued as a vehicle that serves a political, power-based hegemonic agenda that is in essence anathema to international legalism.⁴ Generally, it might be said that there is little love lost between lawyers and fragmented norms.

And yet, where on this backdrop one might have expected to identify widespread support for normative integration, there is nonetheless significant resistance to it in the legal

¹ See, e.g., Multiple Contributions to the Symposium Issue on Fragmentation in 25(4) MICH. J. INT. L. (2004).

² See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); and also William W. Burke-White, *International Legal Pluralism*, 25(4) MICH. J. INT. L. 963 (2004).

³ *Id.* at 1193.

⁴ See Eyal Benvenisti & George Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN L. REV. 101 (2007).

world. As will be demonstrated below, this is particularly true among some judicial bodies, and especially so in the WTO dispute settlement system, which has perhaps avoided the absolute normative insularity of an explicitly 'self-contained regime', but in practice regularly eschews the application of non-WTO substantive norms in its jurisprudence.⁵

We are thus presented with a puzzle of sorts. Why do international decision-making bodies contribute to the perpetuation of normative fragmentation in international law, where one would have instead expected concerted efforts to systematize the law?

In this article, I argue that the answer to this conundrum cannot be found within the bounds of norm-integrative rules and their substantive effects, as such. Rather, the reasons for the general reluctance to adopt and adhere to norm-integrating principles in international law results from the potential impact of such principles upon the structure of the authority of international decision-making bodies. In a nutshell, I claim that the quest for international legal consistency through normative integration, however commendable it may be in itself, is at least subliminally identified with the prospect of a centralization of international authority. This is not without cause, for as will be demonstrated, *normative integration* indeed maintains a distinct correlative and functional relationship with *authority integration*. Consequently, the possible success of norm integration threatens the particular authorit(ies) of decision-making (and norm-making) bodies in international law, and is further associable with justifiably unpopular ideas of centralized global 'government' rather than governance.

Moreover, this fundamental link between normative integration, on one hand, and the consolidation of international authority, on the other hand, has by and large been ignored and neglected in the discourse on international fragmentation. As a leading example, the International Law Committee (ILC) Study Group Report,⁶ truly an important document, not least because it transfers some of the leading academic thinking on fragmentation to a more official plane,⁷ is faulted, like other treatments of the problems of integration,⁸ because it

⁵ See Anja Lindroos & Michael Mehling, *Dispelling the Chimera of 'Self-Contained' Regimes in International Law and the WTO*, 16(5) EUR. J. INT. L. 857 (2006).

⁶ See The Study Group of the International Law Commission on Fragmentation Of International Law, report on *Difficulties Arising From the Diversification and Expansion of International Law* A/CN.4/L.682, (2006) (Finalized by M. Koskenniemi), [hereafter: ILC Study Group Report].

⁷ Particularly those of JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003); and C McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT. & COMP. L. Q. (2005) 279.

⁸ It would seem that in some cases scholars are in fact sensitive to the implications of norm integration for authority integration, but this only results in a 'downplaying' of the institutional element of international

focuses only upon the normative dimension of fragmentation (and the corresponding remedial responses of integration). The ILC Study Group Report is essentially totally silent on questions relating directly to the fragmentation of international authority. However, as argued here, the structure of international law is such that one cannot effectively (or, indeed, even legitimately) address one manifestation of fragmentation—norm fragmentation or authority fragmentation—without addressing the other, as the ILC Study Group Report has attempted to do (in accordance with its mandate, one must add). It is the difficulty (if not intractability) of accepting the integration of authority in international law that sustains the controversy over the integration of norms. And in the WTO, the problem of authority integration is a central obstacle to the integration of non-trade rules into the WTO system.

In the second section of this article below, I will expand on the analytical distinction between the consistency-focused trends of normative fragmentation/integration, on one hand, and power-related questions of authority fragmentation/integration, on the other, demonstrating how the debate over international fragmentation has itself been bisected and ‘fragmented’ between them, amid many specific debates relating to particular issue areas and legal regimes and their interrelationships. In the subsequent third section, I will demonstrate that there exists in fact an important, fundamental linkage between the fragmentation of norms and the fragmentation of authority, in the simple sense that an increase in normative integration generally results in a corresponding increase in authority integration, and vice versa. Then, in the fourth section, I will pursue the causal (rather than merely correlative) claim that normative integration in international law creates pressures that are strongly associated with more integrated international authority—clearly presenting a significantly more political and hence problematic proposition. In the fifth section I will show that as a result of this relationship between norm integration and authority integration, some international tribunals and institutions – not least evidently the dispute settlement system of

integration; see, e.g., Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *General Course on Public International Law*, in 281 RECUEIL DES COURS 10, 25 (1999); as Armin von Bogdandy describes Tomuschat's approach to normative integration in his Hague course, the emphasis is on normative reconciliation, assigning little importance to the integration of international institutions such as the International Court of Justice (ICJ): his understanding of an integrated international system is not a defense of the “ancien regime” of international law with the International Court of Justice (“ICJ”) at its pinnacle. Indeed, the ICJ plays quite a limited role in Tomuschat's construction. Rather, the integration of various parts of international law is to be provided by “scholarly effort and practical reason”; see Armin von Bogdandy, *Constitutionalism in International Law: Comments on a Proposal from Germany*, 47(1) HARV. INT. L. J. 223 (2006), 226.

the WTO - are deterred from pursuing normative integration, however sensible it may be from a purely legal perspective, in order to avoid the associated effects of authority integration. In the sixth section I will add another element to the argument whereby normative integration tends to increase authority integration, by showing how qualitatively different models of norm integration can lead to different degrees of authority integration—exerting different levels of intrusiveness into the problem area of international authority allocation. This will be exemplified by a comparative discussion of WTO jurisprudence related to Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),⁹ which I view as a method of normative integration that is relatively aggressive in its potential impact on authority; and the 'principle of integration' in Paragraph 4 of the 1992 United Nations (UN) Rio Declaration on Environment and Development (the Rio Declaration),¹⁰ that in my view presents a method of normative integration that is less intrusive in the area of authority integration. This analysis suggests that while all international norm integration methods result in authority integration, the degree of their effects can be differentiated, and hence, pre-selected by policy makers taking into account their effects on international structures of authority.

In conclusion, I will argue on these bases that the model of normative integration that creates less pressures towards authority integration has better chances of attaining its normative goals.

II. THE FRAGMENTED FABRIC OF INTERNATIONAL LAW: WEAVING SUBSTANTIVE NORMS AND AUTHORITY ALLOCATION

The 'fragmentation' of international law is itself bifurcated and fragmented, a shredded concept. Moreover, from one analytical viewpoint, the problems associated with the fragmentation of international law can be seen as falling into two broad categories, reflecting two distinct points of entry.

The first of these categories deals with the fragmentation of *substantive norms*, that is, the complex interactions caused by the existence of a staggering variety of substantive sources of

⁹ Vienna Convention on the Law of Treaties, May, 23, 1969, 1155 UNTS 331.

¹⁰ See The UN Conference on Environment and Development, Rio de Janeiro UN Doc A/CONF.151/26 (Vol I), 3–14 June 1992, Annex I; Rio Declaration on Environment and Development, 31 *ILM* 874 (1992).

international law,¹¹ made up of tens of thousands of international treaties in addition to innumerable rules of customary international law. In this puzzle, the lawyer's operative concern is how to determine which rules are relevant and applicable to a given issue and/or dispute, and most importantly, how to reconcile conflicts between such rules as they arise.¹² Focusing on the WTO, the 'trade and...' debate is illustrative in this respect. International trade disciplines promote economic liberalization. However, non-economic values and concerns, enshrined in international legal conventions, may in some cases seek to restrict it.¹³ It thus becomes necessary to regulate the relationship between these norms. The WTO is far from the sole locus of such conflicts. Structurally similar problems arise with respect to 'investment and...';¹⁴ the relationship between international humanitarian law and international human rights law,¹⁵ multilateral rules and regional rules, treaty rules and customary rules—given the diversity of international law today, the possible configurations and combinations of conflicts are abundant.

Moreover, norm fragmentation raises problems even when normative conflicts do not exist overtly—that is, in cases where different legal sources contain essentially the same substantive obligations and imperatives (or substantially similar ones), but produce potentially different results. For instance, the legality of the use of force in self-defence is based on both international customary law and treaty law—article 51 of the UN Charter; despite the substantive similarity between the two norms, their (fragmented) independent existence gave rise to significant legal controversy before the International Court of Justice (ICJ) in the Nicaragua case.¹⁶ This is but one of many examples of multi-'sourced

¹¹ Here I refer of course to normative 'sources' of international law in the sense specified in art 38(1) of the ICJ Statute, not in the sense of law-making institutions.

¹² The leading treatise on this subject is currently Pauwelyn, *supra* note 7.

¹³ For example, the 'trade and...' problem is expressed in conflicts between trade rules and environmental norms (See, eg, S. Shaw & R. Schwartz, *Trade and Environment in the WTO: State of Play*, 36(1) JOURNAL OF WORLD TRADE 129 (2002)), or between trade rules and agreements relating to cultural diversity (See T. Broude, *Taking 'Trade and Culture' Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26 U. PENN. J. INT. ECON. L. (2005) 623; and T. Voon, *UNESCO and the WTO: A Clash of Cultures*, 55 INT. & COMP. L. Q. 635 (2006).

¹⁴ See Moshe Hirsch, *Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY (Tomer Broude and Yuval Shany eds., 2008).

¹⁵ See Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40(2) IS. L. R. 310 (2007); and Aeyal Gross, *Human Proportions: Are Human Rights the Emperor's new Clothes of the International Law of Occupation?* 18(1) EUR. J. INT. L. 1 (2007).

¹⁶ See *Military and Paramilitary Activities (Nicar. v U.S.)*, *Merits*, 1986 ICJ 14 (June 27).

obligations' or 'parallel regimes', that raise problems due to norm fragmentation, even in the absence of obvious substantive normative conflict.

Beyond normative fragmentation, the other category of problems relates to the fragmentation of international *authority*. Here the concern is not with the interrelationship between rules, as such, but rather with the distribution of authority and power (in the legal sense of the word) among the plethora of international and national institutions and organizations who produce, interpret and apply international law. The question is not "what is the law?", but rather, "who makes it?" or "who decides what it is?"; We ask, who has the authority to make a determination on a particular question arising under international law? And if more than one body has such authority, whose determination should prevail? This problem has attracted considerable attention in the area of international dispute settlement, because it is a growing phenomenon that similar or even identical legal and factual questions are brought before different tribunals.¹⁷ But clearly this dimension of fragmentation exists among political bodies as well. For example, the Kimberly Process Certification Scheme relating to 'blood diamonds' was sanctioned by the UN Security Council, and yet its participants requested (and received) a waiver from the WTO Goods Council for the operation of some of its elements, implying that UN approval was not sufficient for this purpose. Had the WTO waiver not been forthcoming, the fragmentation of political authority between the UN and the WTO would have been acute, because an ostensible clash between UN and WTO authorities would have arisen.¹⁸ The fragmentation of authority in international law also manifests itself in unsettled relationships between judicial and political international institutions, even organs of the same international organization, as cases of

¹⁷ The leading treatise on this subject is YUVAL SHANY, *THE COMPETING JURISDICTION OF INTERNATIONAL COURTS AND TRIBUNALS* (2003); See also Nikolaos Lavranos, *Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals*, EUR. ENV. L. REV. (2005), part I, September 2005, 213–225, and contributions by Nikolaos Lavranos, Iris Canor & Amichai Cohen, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY* (Tomer Broude and Yuval Shany eds., 2008).

¹⁸ See Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for 'Conflict Diamonds?* 24 MICH. J. OF INT. L. 1177 (2003). Moreover, this problem would have been firmly connected to problems of normative fragmentation as well, i.e., the status of the normative hierarchy established by Article 103 of the UN Charter in the WTO system, and the effect of Article XXI GATT.

international ‘constitutional’ crisis have appeared in the UN, the WTO and the EU,¹⁹ amid concerns over international ‘judicial activism’ and problems of separation of powers.²⁰

Having clarified the analytical distinction between these two forms of fragmentation - that of norms and that of authority - the present article is an attempt to draw the contours of the linkages between them. The fundamental point I would like to elucidate and discuss in this article is that the problems of substantive norm fragmentation, on one hand, and the problems of authority fragmentation, on the other, are bound at the hip, two sides of the same coin. It is indeed at times convenient for lawyers to analyze them in isolation from each other, and there is no doubt that they do pose discrete problems in the technical or doctrinal legal senses. Still, even the few examples presented so far show that norm fragmentation and authority fragmentation are inseparable. Substantive conflicts between trade and environmental norms arise because rules are made in both multilateral and particular treaties between different (but overlapping) groups of states, or in international institutions, each endowed with the authority to make law(s); and these conflicts manifest themselves most clearly when different tribunals address them differentially, each within its own mandate—a mandate, which is itself derived from agreed upon but fragmented norms. Multi-sourced obligations are similarly problematic because they are the consequences of fragmented authority, and may lend themselves to dissimilar application by differently authorized institutions. Conversely, the fragmentation of authority is most challenging when it results in fragmented normative determinations, such as conflicting judicial decisions made by different courts.

Authority fragmentation (together with the authority allocation rules that govern it) and norm fragmentation (along with the principles regulating the relations between substantive norms) are the warp and weft of the complex and indeed fragmented fabric that is international law. There are many interactions between fragmented authority and fragmented norms worthy of exploration, but in this article I will dwell only on two such interactions: first, the general link between these two ‘fragmentations’, according to which changes in one

¹⁹ For a comparative analysis of such problems, see TOMER BROUDE, *INTERNATIONAL GOVERNANCE IN THE WORLD TRADE ORGANIZATION: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION* (2004).

²⁰ See e.g. P. Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights*, 11 *HUMAN RIGHTS LAW JOURNAL* 57 (1990); L. Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53(4) *INT’L & COMP.L.Q* 861 (2004); and P. Kooijmans, *The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy*, 56(4) *INT’L & COMP.L.Q* 741(2007).

will lead to corresponding effects in the other; and second, the way in which the pursuit of norm integration leads to pressures towards an integrative allocation of authority.

III. HOW NORM FRAGMENTATION AND AUTHORITY FRAGMENTATION CORRELATE TO EACH OTHER

There is an under-explored correlation between norm fragmentation and authority fragmentation.²¹ Put simply, the significance of authority fragmentation and the seriousness of the problems it presents largely depend upon the degree of norm fragmentation, and vice versa. Where substantive norms are integrated or harmonized rather than fragmented, identifying the proper forum for producing them or for making determinations based upon them is of less importance, because the room available to different fora for manoeuvring between different and potentially conflicting decisions is reduced. The normative commonality overcomes institutional differences. Thus, for example, the rapidly growing area of international criminal law is enforced nowadays by many different tribunals, both national and international. Although differences of opinion and interpretation exist among these judicial bodies, the body of law they apply is essentially the same, turning these disparate and loosely linked institutions into a ‘community of courts around the world, engaged in a common endeavor’.²² The ‘common law’ of international criminal norms becomes the tie that binds formally independent institutions together.

²¹ But see Joel P. Trachtman, *Trade and... Problems, Cost-Benefit Analysis and Subsidiarity*, 9(1) EUR. J. INT. L. 32 (1998); and Joel P. Trachtman, *Institutional Linkage: Transcending “Trade and...”*, 96 AM. J. INT. L. 77 (2002). In these articles (especially in the second) Trachtman astutely reflects upon issue linkages (that is, interactions between different international normative regimes) as problems of allocation of regulatory jurisdiction between states, between national and international decision makers and among international organizations. Trachtman suggests that the solutions to fragmented norms are to be found in institutional (ie, authority allocating) devices. The present article is a partial mirror image of this analysis: where Trachtman traces the effects of institutions on norm fragmentation, here I probe the impact of normative integration on institutional structures. See also Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT. L. J. 333 (1999), discussing normative linkages with WTO law in terms relating to the authority of the WTO. And see Marti Koskenniemi & Päivi Lenno, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT. L. 553-579 (2002), asserting that ICJ judges’ concerns about normative fragmentation should be seen as worries about a loss of ICJ influence.

²² See Lawrence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 372 (1997); and William Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT’ L. 1 (2002).

Similarly, if decision-making authority were formally more integrated, the fragmentation of norms would be naturally mitigated and, in any case, would not be as problematic. This is because institutionally integrated decisions would largely reconcile fragmented norms in a consistent manner. Consider, for example, the debate over the need to establish an ‘appellate mechanism’ in the area of investment treaty arbitration.²³ Such authority integration in the form of a ‘supreme’ court of investment appeals would surely remedy the acute case of authority fragmentation found in the investment protection arena, where tribunals are established ad hoc on a case-by-case basis, deriving their jurisdiction from many different sources, and employing different procedural rules (mainly ICSID or UNCITRAL). An extreme example of authority fragmentation, and, indeed, of the ‘forum shopping’ that thrives upon it, can be found in the circumstances of the celebrated ‘Lauder’ cases, which involved the issuance of conflicting awards in two separate actions relating to essentially the same events brought by the same investor against the same host state, albeit under different treaties (one brought directly to an investment tribunal established in London under the US-Czech Bilateral Investment Treaty (BIT), and a second brought indirectly, through a holding company, to an investment tribunal established in Stockholm under the Netherlands-Czech BIT; of course, even had the tribunals been consolidated, the different legal basis for each claim would have to be considered).²⁴ Clearly, an appellate mechanism would have reduced the severity of this conflict of authority, and perhaps even pre-empted the problem entirely, as the investor would have had less of an incentive to file in two different proceedings with the knowledge that ultimately they would both reach the same higher authority. However, an appellate mechanism for international investment law would do much more than achieve authority integration; in fact, the proponents of an appellate system seem more concerned with normative fragmentation, arguing that it would prevent inconsistent rulings.²⁵ There are literally thousands of investment protection treaties, which are similarly constructed, though

²³ See David A Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT’L L. 39 (2006); several contributions in INVESTMENT TREATY LAW: CURRENT ISSUES, Vol. I (F. Ortino, A. Sheppard & H. Warner eds. 2006); and A. Qureshi, *A Possible Appellate System*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (P. Muchlinski, F. Ortino & C. Schreuer eds., 2008)(forthcoming).

²⁴ For more details and analysis of the *Lauder* cases, see Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); and Yuval Shany, *Similarity in the Eye of the Beholder: Revisiting the Application of Rules Governing Jurisdictional Conflicts in the *Lauder/CME* cases*, in INTERNATIONAL ARBITRATION AND MEDIATION (A. Rovine ed., 2008).

²⁵ See, e.g., Frank, *ibid.*

concluded between different parties. Although the considerable degree of similarity between investment protection treaties means that the actual level of normative fragmentation is reduced from the outset, non-integrated investment arbitration tribunals issue conflicting interpretations of the same literal clauses in investment protection treaties.²⁶ An appellate investment mechanism would overcome this by creating consistent jurisprudence, achieving greater normative integration. A ‘supreme court’ of investment disputes would become the tie that binds together the similar distinct norms.²⁷

This scenario in the field of investment is somewhat analogous to the effect of the consolidation of dispute settlement procedures in the multilateral trading system and the establishment of the WTO Appellate Body (AB) by the Uruguay Round Agreements in 1995. Prior to this development, many of the 1979 Tokyo Round Agreements had included separate dispute settlement procedures.²⁸ Under both the general GATT procedures and the separate procedures relating to areas such as antidumping and government procurement, dispute settlement panels were established ad hoc, and although efforts were made to produce consistent jurisprudence, they did not always succeed. The normative integration achieved by the ‘single undertaking’ of the Uruguay Round agreements was significantly augmented by the unified Dispute Settlement Understanding (DSU) and even more so, by the creation of an Appellate Body. Recently, the integration of judicial authority within the WTO came under significant challenge, when a dispute settlement panel consciously chose to stray from AB jurisprudence in a particularly contentious area of antidumping law.²⁹ The effectiveness of authority integration in promoting normative integration was subsequently vindicated, when the AB reprimanded the Panel for its judicial conduct, emphasizing that

²⁶ See Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, 99(4) AM. J. INT. L. 835 (2005).

²⁷ The opposite is also possible: effecting a normative change that will promote authority integration, eg, changing the status of investors so that they are treated as third-party beneficiaries to investment treaties rather than owners of derivative rights, allowing greater co-ordination between competing tribunals; see Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Tribunals is Not Working*, 59 HASTINGS L. J. (2008).

²⁸ See E-U PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* (1997) 271–284.

²⁹ See UNITED STATES – FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL FROM MEXICO, Report of the Panel, WT/DS344/R, Dec. 20, 2007, para. 7.106: (“[W]e have decided that we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews.”) For analysis, see Sungjoon Cho, *A WTO Panel Openly Rejects the Appellate Body's 'Zeroing' Case Law*, 12(3) ASIL INSIGHTS, INTERNATIONAL ECONOMIC LAW EDITION, (2008) (http://www.asil.org/insights/2008/03/insights080311.html#_edn1).

Panel's are not free to disregard AB jurisprudence, even if it is non-binding in the technical sense.³⁰

It would be taking the argument too far to say that the question of authority allocation only matters if there are differences in questions of substance, and/or that fragmentation among substantive norms only matters if they inform fragmented authority; but surely there is a strong correlative link between the fragmentation of both authority and norms, if only because one produces and feeds upon the other. In logical terms, both norm integration and authority integration each appear to constitute a sufficient condition for countering fragmentation in international law. That is, it might not be necessary to integrate both norms and authority; the integration of one has a tempering effect on the fragmentation of the other.

A specific example from the experience of the WTO should prove illuminating in this regard. Think, for instance, about the Swordfish dispute between the European Union (EU) and Chile.³¹ Chile had taken conservation measures with respect to Swordfish fishing in the South Pacific, with which the EU declined to comply. The EU initiated dispute settlement proceedings at the WTO, arguing that measures taken by Chile to enforce its conservation regime violated Articles V and XI of the GATT 1947—two clauses relating to the commercial movement of goods, either in transit, or in access to the local Chilean market.³² Since the Chilean measures in question were conservation measures, had a dispute been litigated at the WTO, it would have additionally raised the question of the applicability of the general exception relating to 'exhaustible natural resources' in Article XX(g) GATT, and perhaps the applicability of other exceptions.³³ In parallel, Chile charged the EU with violations of the UN Convention on the Law of the Sea (UNCLOS) before a chamber of the International Tribunal for the Law of the Sea (ITLOS). Chile argued that the EU had violated conservation related obligations under Articles 64 and 116-119 UNCLOS, and also

³⁰ See UNITED STATES – FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL FROM MEXICO, WT/DS344/AB/R, Appellate Body Report circulated on Apr. 30, 2008, at Para. 158.

³¹ See M. Orellana, *The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea*, ASIL INSIGHTS (2001), available at <http://www.asil.org/insights/insigh60.htm>; M. Orellana, *The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO*, 71(1) NORDIC J. INT. L. 55 (2002).

³² See *Chile—Measures Affecting the Transit and Importation of Swordfish—Request for Consultations by the EC*, WT/DS193/1, G/L/367, (Apr. 26, 2000).

³³ Art XX(b) ('necessary to protect human, animal and plant life') or art XX(d) ('necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement') might also have applied.

dispute settlement obligations under Articles 297 and 300 UNCLOS. The EU countercharged that Chile had itself violated these (and other) UNCLOS provisions by unilaterally applying its conservation regime.

This dispute was ultimately settled (if not definitively so) by mutual arrangement between the EU and Chile, avoiding the need for judicial decision.³⁴ Moreover, was the way it developed an outcome or expression of fragmented authority or fragmented norms? Clearly, it was a bit of both: WTO v ITLOS, as well as GATT v UNCLOS. But now consider this perspective: the parallel invocation of the jurisdiction of two international tribunals over disputes derived from what was essentially the same set of facts was troubling not because of the institutional idiosyncrasies of the different tribunals, but rather mainly because the *law* that would have been applied by each tribunal was substantively different. Whereas the WTO would have tended to apply GATT rules, ITLOS would have applied UNCLOS provisions. Counterfactually, if GATT and UNCLOS rules had been fully integrated, equally applicable in both tribunals and subject to the same conflict rules, a WTO Panel and an ITLOS chamber should have reached substantially the same decisions, subject to reasonable differences of opinion and interpretation among decision makers. Such differences might not be negligible, but they would then be akin to the regular ‘fragmentation’ that arises when different national courts or benches of the same national court with different personal composition adjudicate cases in which similar questions arise. On the national level, such instances of fragmentation are often overcome by the intervention of a supreme judicial authority, an institutional harmonizer in the form of a ‘high’ court that has the final integrating word. But in the Swordfish case, the starting point was an uncertain, non-integrated relationship between GATT obligations, on one hand, and UNCLOS obligations, on the other. Also, there was no unified judicial decision maker for both trade and law of the sea disputes, no international *supreme* court of international justice with jurisdiction over the disputes, and in the alternative, no agreed rules on the choice of forum. Thus, the diversity of norms accentuated the problem of fragmented authority, and the existence of parallel

³⁴ Both WTO and ITLOS proceedings have not, however, terminated, but have been continuously suspended through agreement of the parties (see *Chile—Measures Affecting the Transit and Importation of Swordfish—Arrangement between the EC and Chile—Communication from the EC*, WT/DS193/3, (Apr. 6 2001) and the approval of the Special Chamber of the ITLOS (see, most recently, ITLOS, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*, Case No 7, Order 2007/3, (Nov. 30, 2007). In both tribunals, complaining parties have reserved the right to revive the proceedings at any time.

authority exacerbated the problem of non-integrated substantive norms. Integration of either sort, of norms or of authority, would have eliminated the awkwardness of the Swordfish case.

The authority-norm fragmentation correlation is quite clear in dispute settlement issues that involve both jurisdictional competition and fragmented norms, but it manifests itself in international law-making as well. Lawrence Helfer has assiduously explored the idea of ‘regime shifting’,³⁵ which is highly relevant in the present context. For example, the fragmentation of international law-making authority in issues that even peripherally relate to international intellectual property rights has resulted in a fragmented spectrum of international norms on the subject, permitting interest groups and states to pursue what is essentially a form of legislative ‘forum shopping’: if their goals are not met by the norms produced in one forum - such as the WTO - they seek to achieve them elsewhere, in other international law-making fora. Had overall law-making authority been institutionally integrated (i.e., centralized), regime shifting would have been neither attractive nor indeed possible to those who would pursue it, and as a consequence the phenomenon of fragmented norms would not have arisen, at least not within certain margins. Conversely, had norm integration been standard practice, there would be little point in taking advantage of authority fragmentation through attempts at regime shifting in law-making, whose results would ultimately be integrated in substance.

With specific reference to the WTO, consider also the interplay between multilateral and regional systems of trade regulation. The stalling of the Doha Round of multilateral negotiations at the WTO has been viewed by some as one of main reasons for the proliferation of parallel regional and bilateral agreements that enable trading parties to achieve their negotiating goals on a differential and fragmented basis.³⁶ Dispute settlement in trade agreements is currently fragmented, with each agreement establishing its own dispute settlement arrangement. Hypothetically, however, had the settlement of trade disputes been institutionally integrated so that disputes based upon either regional agreements or the WTO

³⁵ See Lawrence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29(1) YALE J. INT. L. 26 (2004).

³⁶ See, e.g., Roberto V. Fiorentino, Luis Verdeja and Christelle Toqueboeuf, THE CHANGING LANDSCAPE OF REGIONAL TRADE AGREEMENTS: 2006 UPDATE, WTO Discussion Paper No 12 (2007), available at http://www.wto.org/english/res_e/booksp_e/discussion_papers12a_e.pdf at 1.

would be ultimately settled by the same dispute settlement mechanism, perhaps the attraction of multilateral/regional norm fragmentation would be reduced.

There are, therefore, good grounds for conceptualizing a basic general correlation between norm fragmentation and authority fragmentation, between norm integration and authority integration. The decrease or increase of one results in a corresponding effect in the other, and vice versa. I would go so far as to suggest, as a theoretical, qualitative matter, that this correlation can be graphically envisaged as a mathematical function, although its precise nature, its slope, concavity or convexity - would all depend on many additional empirical data.

Correlation does not prove causation, of course, and there is significant room for additional exploration. I will now focus on one element of this correlation, in order to demonstrate, at least at a *prima facie* level, a degree of causation within the same correlation. Namely, I wish to substantiate the way in which normative integration can in effect act as a catalyst for authority integration.

IV. HOW INTER-INSTITUTIONAL POLITICS MATTER: NORMATIVE INTEGRATION AS AUTHORITY INTEGRATION

That on the descriptive, almost mechanical, level there exists a basic correlation between norm fragmentation and authority fragmentation is not, I believe, an overly controversial proposition (and let me emphasize again that the quasi-scientific depiction above is deliberately overstated for the sake of illustration and does not actually mean that I claim that the correlation is indeed precisely provable). The second type of connection between the two expressions of fragmentation, which I address in this section, is strongly associated with the first; but it relates to causation, and is hence less obvious, and in addition has more nuanced political and operative implications.

Stated generally, my second claim is as follows: if in a fragmented system of law, as international law surely is, the integration of norms is generally associated with a correlative reduction in the fragmentation of authority (or at least in a reduction in its significance) – that is, in an integration of authority - then the quest for normative integration is by default associated with a drive for more integrated authority in international affairs. Viewed this way, legal principles of normative integration are not merely technical, lawyerly methods for

producing consistent legal outcomes. They have a political meaning for the entire international system's structure of authority and governance. Their result (even if not their goal) is not only normative consistency, coherence and regularity, but also a trend towards greater centralization and rationalization of governance and/or harmonization of authority. It would be unnecessarily tenuous to delimit and dichotomize norms and authority as legal 'outputs' or 'inputs', respectively (or otherwise – the obverse is also conceivable), since there is a virtuous (or vicious, depending on one's viewpoint) circle between them. However, there is certainly a dynamic interaction between norms and authority that makes it difficult, if not impossible, to integrate one without simultaneously influencing the integration of the other.

The causal element of this claim can be illustrated and refined, if instead of a general, systemic viewpoint we adopt the perspective of an international decision maker (for various reasons³⁷ it is convenient to think first of a *judicial* decision maker, but I believe that much the same logic should apply to other forms of authority in international law) faced with a broad range of fragmented international norms that might inform its decision.

As a working example, let us return to the pre-settlement *Swordfish* dispute.³⁸ In a counterfactual, fully integrated legal system (both normatively and institutionally, i.e., in terms of authority), a single, central tribunal would have full jurisdiction to consider all relevant claims, defences and counterclaims on the basis of all valid normative sources. The relationship between GATT/WTO market access and transit rules, on one hand, with UNCLOS rules on conservation measures, on the other hand, would then have to be examined under both generally accepted conflict-of-norms rules (eg, *lex specialis*) and

³⁷ Not least among these are the impartiality and independence expected of international judicial decision makers. Rules of ethical judicial conduct, written (eg, Working Procedures for Appellate Review art 2(3), WT/AB/WP/5, (Jan. 4 2005) and unwritten, require international judges to ignore personal interests as well as the interests of their home state. To the extent that this is complied with, this should allow us to focus on the interpretation of the law as influenced by inter-institutional considerations, neutralize some of the international and national political considerations that otherwise affect decision making in non-judicial institutions. On impartiality in international tribunals see Eric A. Posner and Miguel de Figueiredo, *Is the International Court of Justice Biased?* 34 J. LEG. AFF. 599 (2005); Eric A. Posner and John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 37 (2004) (suggesting that ICJ judges are nationally biased on the basis of empirical research); and *contra*, E Voeten, 'What Motivates International Judges: Evidence from the European Court of Human Rights', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=705363 (suggesting that the impartiality of international depends upon the legal culture of their home state; counter-intuitively, judges from countries with low levels of domestic judicial independence tend to find against their own state's positions more often).

³⁸ See text accompanying n 31 *et seq.* I deliberately wish to address a case in which the problems discussed did not reach actual judicial determination, as well as one that displays both forms of fragmentation.

particular ones (eg, the provisions of article XX GATT).³⁹ The situation of a decision-making body established under a special section of a fragmented legal system—namely, in this case, a hypothetical WTO panel—would be, however, quite different. Normative integration would not necessarily be taken for granted, if only because the jurisdiction of this decision-making body were specific, not general. The panel placed in this situation would need to consider the question of integrating UNCLOS rules on conservation measures into its GATT/WTO-focused normative deliberation. Crucially, such a panel would also have to be sensitive not only to the (not inconsiderable) questions of *normative* integration, but also to the dynamic ramifications of its findings in this respect for *authority* integration. These fall under the following consecutive headings.

First, *to integrate (with) the norms of another system is to acknowledge the authority of that other system to produce pertinent norms*. Dealing with the case as a question of norm integration, a WTO panel in the Swordfish dispute would have to consider whether rules derived from outside its normative sub-system may apply, or perhaps must apply, in the issue at hand, before even debating the diverse possible relationships between the different applicable rules. Otherwise they would simply be irrelevant to its work. The formal integration of disparate rules into a normative decision-making process requires an at least minimal acknowledgment of the normative force of each such rule. So the normative integration of UNCLOS provisions with those of the GATT/WTO would require a finding by a WTO panel, implicit or explicit, that UNCLOS norms are indeed valid, binding and with legal effect in the WTO, even if possibly subordinate to WTO rules when their interrelationship were to be subsequently examined. In a shift from questions of normative integration to questions of authority integration, however, such a finding would in itself suggest recognition by a WTO body of the authority of a non-WTO international law-making collective—the states parties to the UNCLOS (whose membership does not fully overlap with the membership of the WTO)—to produce norms that influence decisions taken in the WTO. This would be even more obviously the case if the integration of UNCLOS norms included, for example, reference to interpretations of UNCLOS by the ITLOS or other competent tribunals. In any event, the

³⁹ This is in fact the situation that would exist if the case had been brought to a tribunal of general jurisdiction, such as the ICJ. Proponents of full norm integration in international law, such as Pauwelyn, *supra* note 7, and the ILC Study Group Report, *supra* note 6, would argue in accordance with a generally formal normative perspective that the same situation should apply in tribunals of specific jurisdiction, ie, both in the WTO dispute settlement system and in the Special Chamber of the ITLOS.

significant point here is that the recognition of 'other' norms implies recognition of the 'other's' authority.

Second, *to integrate the norms of another system is to assert authority over them*. Formal integration of UNCLOS rules into the WTO adjudicative process of a case would necessarily imply that the WTO dispute settlement system possesses judicial authority to apply UNCLOS rules and disputes.⁴⁰ Thus, the question of normative integration is in fact, if indirectly, one that is determinative of the boundaries of the WTO's authority. At this stage I refer to the determination by the panel, as an international decision-making body, of the scope of its own authority looked at from within its jurisdiction as an autonomous matter, *irrespective* of its relationship with other authorities. The important issue here is that the integration of norms becomes a statement of positive authority. To press the point, even had the parties to the *Swordfish* dispute expressly agreed among themselves to settle their UNCLOS differences in the WTO (a scenario that would indeed be possible under UNCLOS rules)⁴¹ thus entirely setting aside the problem of competing or conflicting jurisdiction, the panel would still have to consider whether it at all had the competence to entertain such an agreement in the first place, which would entail subjecting UNCLOS provisions to WTO authority. In the WTO, such a question would relate to the interpretation of various articles in the WTO DSU that suggest that panels and the AB may apply only provisions of the WTO 'Covered Agreements', eg, Articles 1:1, 3:2, 7:1 and 7:2 DSU. This formal question is a key element in the debate over normative integration in the WTO.⁴² I do not wish to revisit this debate here, but only to point out that while it focuses on normative integration, at the same time it distinctly affects the autonomous delimitation of authority.

Third, *to integrate the norms of another system is to introduce the problems of overlapping authority*. The integration of UNCLOS norms and the statement of panel authority that comes with it would inevitably lead to an overlap between WTO authority and ITLOS jurisdiction. As

⁴⁰ I deliberately eschew the term 'jurisdiction' here: I believe that this would be a question of applicable law, not jurisdiction (the latter meaning the authority to adjudicate actions brought under non-WTO law, as opposed to the authority (or duty) to apply non-WTO law in disputes brought under WTO law).

⁴¹ Art 280 UNCLOS states that 'Nothing in this Part [Part XV UNLOS—Settlement of Disputes] impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice'; see also art 281–282 UNCLOS.

⁴² Compare Trachtman, *supra* note 21, 342–343; and Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* 95 AM. J. INT. L. 535, 541 (2001); and also Joel P. Trachtman, Book Review: *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* By Joost Pauwelyn, 98 AM. J. INT. L. 855 (2004).

noted in the previous section, the Swordfish dispute was a case of both norm fragmentation and authority fragmentation. The crucial point for present purposes, however, is that it would be the integration of norms (the acceptance of UNCLOS rules on conservation measures as valid in the WTO) that would perfect the competition of authority between the WTO and ITLOS. If the applicability of UNCLOS rules in the WTO were denied by the panel, both norm fragmentation and authority fragmentation would be maintained. If applicability were accepted, however, the two tribunals would be applying the same law.

Fourth, *problems of overlapping authority agitate towards authority-integrating solutions*. In the circumstances described here, the panel would have to consider its inter-institutional relationship with the ITLOS chamber. Having integrated the norms of UNCLOS, and thereby ostensibly accepted the authority of UNCLOS rule-making processes, the panel would be pressed to act in ways that reduce inter-institutional tension. The result would, in a number of scenarios, be authority-integrating or at least fragmentation-mitigating. The panel might decide to defer, formally or in practice, to the ITLOS; or await a signal of deference from the ITLOS. The commonality of legal sources applied, if the path of norm integration were followed, would likely lead, as argued above, to a convergence of decisions in any case, reducing the risks of fragmentation. To be sure, this would not always be the result. Conflicting decisions and interpretations might arise. However, the pressure would be to reach authority-integrating solutions.

Importantly, this pressure would have been lower if norms had not been highly integrated; although the facts of the WTO dispute would essentially be the same as the one in ITLOS, the law applied would be different and each tribunal would be free to act within its own ‘territory’ of authority. This can be thought of as a result that relates to decision-making legitimacy. In the non-integrated norms scenario, it is legitimate for each tribunal to apply the rules of its own system to the facts of the case, even if the results of each dispute are inconsistent in practice, eg, a WTO finding that Chile had violated GATT, versus an ITLOS decision that the EC had violated its UNCLOS obligations. If the same law is applied, however, the burden of legitimating inconsistent decisions is much higher.⁴³ One

⁴³ As a non-WTO example, consider the efforts made by Chief Justice Aharon Barak of the Israeli Supreme Court in HCJ 7957/04 *Mara’abe v Prime Minister of Israel* [2005], to legitimate the Supreme Court’s findings with respect to the legality of the separation barrier, because they were different from those of the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) 43

aspect of this is that, quite simply, when the law being applied is the same, conflicting rulings mean there is a strong likelihood that one of the tribunals has been either wrong or wicked.

Note that these observations accumulate into a dialectic situation: the decision to integrate 'external' norms with those of one's 'own' system simultaneously entails a recognition of the authority of the other (an integrative element) *and* an assertion of one's own authority (a potentially fragmenting element), leading to authority parallelism (a problem of fragmentation) that must ultimately be resolved through authority integrating means.

The dialectic dynamics of norm/authority integration described here as resulting from the strategic considerations of inter-institutional relations are well exemplified in a non-WTO context, in the so-called "*Solange*" (as-long-as) jurisprudence of the German Federal Constitutional Court (Bundesverfassungsgericht or BVerfG).⁴⁴ In a series of cases relating to the relationship between EC law, on one hand, and fundamental rights protected by the German constitution, on the other hand, the BVerfG developed a stance whereby the level of deference it would accord to the ECJ in such matters would in essence be contingent on the degree to which EC law includes fundamental rights that are adequate in comparison to the fundamental rights protected by the German constitution (the *Grundgesetz*). That is, in the original negative formulation of this doctrine from 1974,⁴⁵ 'as-long-as' EC law does not incorporate fundamental rights – and hence, establishes a problem of normative integration – then the German court will reserve to itself the jurisdiction to review the constitutionality of EC laws – hence perpetuating a situation of authority fragmentation. In 1986 this received a positive formulation, when the BVerfG acknowledged the gradual incorporation of fundamental rights by the ECJ into EC law and jurisprudence.⁴⁶ In *Solange II*, the BVerfG

ILM 1009 (9 July). Barak's main contention is that although the law applied by both tribunals is essentially the same, the Israeli court's access to facts and ability to analyze them in detail is superior. See also Yuval Shany, *Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38 Is. L. R. 230 (2005).

⁴⁴ For an overview and critique of this jurisprudence, see Nikolaos Lavranos, *Towards a Solange Method between International Courts and Tribunals?* in Broude & Shany *supra* note 14.

⁴⁵ See BVerfGE 37, 271 2 BvL 52/71 *Solange I*-Beschluss; 2 CMLR 540 (1974) (*Solange I*) (Trans. Available online at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588): "As long as the integration process has not progressed so far that the Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the *Grundgesetz*".

⁴⁶ See BVerfGE 73, 339 2 BvR 197/83 (1986) (*Solange II*) (Trans. Available online at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=572): "As long as the European Communities, in particular European Court case law, generally ensure effective

essentially said that because the norms in the area of fundamental rights had achieved a high level of similarity (or normative integration) between German and EC levels – it would be willing to integrate authority by deferring to the ECJ (subject to certain additional terms and conditions). The *Solange* jurisprudence of the BVerfG has had subsequent developments,⁴⁷ and has to large extent been mimicked by the European Court of Human Rights (ECtHR).⁴⁸ The importance of these case for present purposes is that in them we find an explicit and calculated linkage between normative integration and authority integration. When norms are fragmented, authority fragmentation is easier to maintain. As norms integrate, the problem of overlapping authority crystallizes and there is pressure to integrate authority, and indeed authority fragmentation is more difficult to justify.

The cumulative outcome of this analysis is that the decision to integrate norms – a decision that may stem from a variety of sources such as judicial like-mindedness, shared regulatory policy concerns, simple expedience, pressure by constituencies or other reasons - leads to an integration of authority, of one sort or another, be it vertical or horizontal consolidation or deference. One might even say that in many cases normative integration can lead to a *sharing* of authority, which in some cases is tantamount to a loss of authority (this is bluntly true in the case of deference, but also in the case of consolidation, when it comes at the expense of one institution's authority). As will be discussed in the next section, international decision-making bodies (and again the focus will be mainly on tribunals, although similar considerations apply to other international organs and institutions) who are sensitive to the maintenance and preservation of their authority – and most if not all such bodies surely are - may be deterred from pursuing the integration of norms, therefore leading to a continued state of both norm fragmentation and authority fragmentation.

protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safe-guard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law".

⁴⁷ See Lavranos *supra* note 44 and Dieter H. Scheuing, "The Approach to European Law in German Jurisprudence", 5(6) GER. L. J. 703 (2004).

⁴⁸ *Bosphorus Hava Yollari Turizm v. Ireland* 45036/98 Eur. Ct. H. R. (2005) at para.135-137 , (<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3666597&skin=hudoc-en&action=request>). See also Lavranos *supra* note 44 and Frank Schorkopf, *The Judgment of the European Court of Human Rights in the Case of Bosphorus Hava Yollari Turizm v Ireland*, 69 GER. L. J. 1255 (2005).

V. HOW NORMATIVE INTEGRATION MAY BE DETERRED BY CONCERNS OVER AUTHORITY INTEGRATION

I have just postulated that international decision-makers may be deterred from pursuing normative integration, despite its juridical value in terms of systemic coherence and consistency, because it necessarily requires complex authority integrating solutions, some of which may even bring about a loss of authority. The discussion of a few examples – not comprehensive, but indicative - demonstrates that this is not merely a theoretical conclusion. WTO jurisprudence is especially illustrative in this regard. The most immediately instructive instance, I believe, is the *Mexico – Soft Drinks* dispute,⁴⁹ although there are several other cases that represent similar traits.

In *Mexico – Soft Drinks*, the relationship between the WTO and regional trade agreements (as non-WTO rules, and hence with more general implications) arose acutely, in terms of both authority and norms. *Mexico – Soft Drinks* was a complaint by the US against a discriminatory taxation scheme imposed by Mexico. In its defense, Mexico as respondent had first requested that the WTO dispute settlement system decline to exercise jurisdiction over the dispute in favour of an Arbitral Panel under Chapter 20 of the North American Free Trade Agreement (NAFTA).⁵⁰ In the terms of the present article, this was, most overtly, an authority-integrating proposition, a jurisdictional question in which a party proposed deference to NAFTA tribunal jurisdiction while suspending that of the WTO's – truly a political 'hot potato' for the WTO AB to handle.

Mexico's second important argument on appeal was that the measures complained against were justified under the general exception in article XX(d) GATT, which excuses (under the terms of the *chapeau* of article XX GATT) measures "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATT. This exception applied, according to Mexico, because its taxation measures were taken in order to secure compliance by the US with its obligations under the NAFTA. This second argument

⁴⁹ See Appellate Body Report *Mexico – Tax Measures on Soft Drinks and Other Beverages* WT/DS308/AB/R (Mar. 6, 2006).

⁵⁰ *Id.*, at 15. The reasons for Mexico's request, involving a complaint by Mexico against the US through NAFTA channels (including the fact that a Chapter 20 tribunal had not been established in fact), are briefly noted by the WTO Appellate Body, *id.*, p. 22, n. 106.

was, in this article's parlance, quite simply a bold norm-integrating one, asking the WTO to consider the rules of the NAFTA, not on the basis of a general principle of integration, but on that of a GATT-specific exception.

Thus, *Mexico – Soft Drinks* involved both norm-integrating and authority-integrating claims. Now, had the dispute been adjudicated in a counterfactual system of integrated authority, it would have been purely a case of norm integration, and arguably the integration of WTO and NAFTA norms would not have been especially difficult. That is, the challenges of authority integration and norm integration were (at least technically) severable. In the case itself, the AB could have conceivably declined Mexico's authority-integrating, jurisdictional request (ie, accepting no deference to the NAFTA process),⁵¹ and still have accepted Mexico's norm-integrating article XX(d) GATT claim (ie, allow measures taken specifically under NAFTA to override GATT obligations), and vice versa. Yet ultimately, the AB rejected both of Mexico's claims, the jurisdictional and the substantive. Surely there are several acceptable legal bases for this result, but it is the AB's reasoning that is illuminating here, because it emphasizes both the norm-authority integration linkage, and the way a tribunal might avoid norm integration because of its disdain of authority integration.

In terms of authority, the AB upheld the general *kompetenz-kompetenz* of WTO panels, the overall right of a (indeed, of any) international judicial body to determine the scope of its own authority,⁵² a finding that ostensibly left the field open to a siding with Mexico's request for authority-integration and inter-institutional consideration. However, in its reasoning the AB did not examine the policy considerations⁵³ or even the textual imperatives⁵⁴ that might inform its decision regarding the scope of its own competence, but instead soon turned to a discourse of norms, not authority, relying on previous WTO jurisprudence⁵⁵ in order to find that a panel's discretion to determine its own authority could not in itself modify the rules,

⁵¹ A separate substantive question I will not deal with here, is whether the AB *should* have accepted Mexico's jurisdictional argument.

⁵² *Id.* at 18: "Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction".

⁵³ This is not, in itself, very surprising. The WTO dispute settlement system is notorious for its textual, even decontextualized interpretations. See Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US-Gambling: A Critique*, J. INT. ECON. L. 9(1) 117 (2006); and Tomer Broude, *Genetically Modified Rules: The Awkward Rule-Exception-Right Distinction in EC-Biotech*, WORLD TRADE REV. 6, 215 (2007).

⁵⁴ Eg, article XXIV GATT relating to regional trade agreements and their substantive relationship with the other rules of the GATT.

⁵⁵ Appellate Body Report *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* WT/DS50/AB/R,, (Jan. 16 1998), at para. 92.

rights and obligations contained in the WTO's "covered agreements". This was an explicit example of the norm-authority linkage and cross-over between them, under which the AB found that the impermeability of WTO norms (a counter-integrative normative force) overrode the request by Mexico to decline WTO jurisdiction (a pro-integrating force). It was the AB's reluctance to face the far-reaching political implications of authority integration within its discretion – including both an *assertion* of authority over regional trade agreements and also a discretionary, comity-based *surrender* of authority to a NAFTA tribunal, well in accordance with the dialectics noted in the previous sections – that led it to harden the normative segregation of WTO norms, as a justifying factor for the limitation of its own discretion.

To be sure, there is an optical judicial illusion involved in this part of the *Mexico – Soft Drinks* AB Report. It might appear that the cause of the decision to reject authority integration was norm fragmentation (i.e., the incapacity to modify WTO rules etc.), but it is actually the AB's reluctance to partake of authority integration – that was self-admittedly within the discretion of the AB, as a matter of competence – that caused it to rely on the fragmentation of norms as the basis for its decision.

In any case, the AB's logic appears tautological, even vacuous, when read in the context of the present discussion. Surely *any* decision by a tribunal not to exercise authority might result in a modification of (some of) the rights of parties, even in a diminishment thereof.⁵⁶ In the AB's reading, it appears that any tribunal's *kompetenz-kompetenz* (as a matter of authority) is empty, because it is ultimately limited by the bounds of parties' (segregated) rights.

In considering Mexico's request to decline jurisdiction, the AB further noted that Mexico "could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA".⁵⁷ Was this a problem of norm integration or of authority integration? Taken together, it was an expression of the WTO's splendid normative isolation – the AB essentially asking, what is its authority to consider these 'other' norms, after it had already consolidated its authority to determine its

⁵⁶ Consider, for example, the normative impact of ICJ jurisdictional decisions – a considerable part of ICJ jurisprudence. Should it not be said that they impart upon parties' rights? This would seem self evident, but see Tomer Broude, *The Legitimacy of the ICJ's Advisory Competence in the Shadow of the Wall*, IS. L. REV. 38(1-2) 189 (2005) and sources cited therein.

⁵⁷ *Mexico – Soft Drinks*, *supra* note 49, at para. 54.

own authority, and although the substantive relationship between the NAFTA and the WTO was not problematic in itself. This, again, is an optical illusion, the seemingly minor, legalistic *problematique* of norm-integration overtaken by the jurisdictional problem so subdued in the phrases ‘legal basis’ and ‘in a WTO dispute settlement proceeding’. For present purposes, what is important is that the real problem of inter-jurisdictional relations is scantily clad in the clothing of normative conflict. The substantive, normative gap between WTO and NAFTA claims, however small, was relied upon as a basis for the AB’s unwillingness to accommodate authority-integration in the form of deference to NAFTA jurisdiction.

The AB also discounted Mexico’s claims regarding jurisdiction as such that would “imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements”.⁵⁸ This is a key sentence in the AB’s logic, perhaps the clearest expression of this article’s thesis. The AB fundamentally deflected the very idea of integrating NAFTA rules with those of the WTO by voicing abhorrence towards the possibility that it would then have to exercise its authority over NAFTA rules. It declined the application – read integration - of non-WTO norms because this would have implied jurisdiction over them, creating the problem of overlapping authority with NAFTA, agitating towards authority integration. These were problems the WTO AB did not wish to deal with; it was far simpler to exclude them by relying on a limited normative basis – the “covered agreements”.

With respect to Mexico’s other major claim, that its measures were necessary to enforce NAFTA obligations, the AB made two additional findings. First, NAFTA obligations were not “laws and regulations” within the meaning of article XX(d) GATT because they were not part of the domestic legal order;⁵⁹ and second, even if this were not the case, the AB ‘would have to assess whether the relevant international agreement [NAFTA] has been violated’ in order to examine the applicability of article XX(d), and ‘this is not the function of panels and the AB as intended by the DSU’.⁶⁰ Thus, the AB deflected Mexico’s second norm-integrating claim in terms of both normative fragmentation (ie, NAFTA rules are not domestic) and authority fragmentation (ie, the WTO dispute settlement system cannot judge NAFTA compliance). All this, although Article XX(d) necessarily implies norm integration,

⁵⁸ *Id.*, para. 56.

⁵⁹ *Id.*, para 69 *et seq.*

⁶⁰ See *Id.*, para. 78.

with its explicit application to rules “which are not inconsistent with the provisions of [the GATT]”. The AB needed not have shied away so quickly from norm-integration, because this exception envisions it; but it might have been deterred from the exercise because it would require an institutional integration it could not risk.

The *Mexico-Soft Drinks* case shows not only that normative and authority integration are intertwined, and causally related, as argued in the previous sections of this article, but also that norm-integrating decisions (such as the prospect of examining NAFTA norms in the context of the WTO) might be scuttled due to authority-fragmenting considerations (such as the rejection of international rules as ‘laws and regulations’ whose enforceability might be of interest in the GATT/WTO).

Overall, the *Mexico-Soft Drinks* case is an extraordinarily vivid instance with respect to concurrent authority and norm integration concerns. As already noted, these concerns do appear, however, in other contexts as well. Indeed, any decision of an authority fragmenting nature should be examined, to better understand its norm-integrating roots.

Inter-institutional reflexivity in international law is evidently such that parties involved in cases in which norm integration is a politically or otherwise sensitive issue simply refrain from authority-integrating claims. This is apparent, *sotto voce*, in the *Mexico-Soft Drinks* case: Mexico was very careful not to argue that the WTO did not hold any jurisdiction over the case,⁶¹ arguing instead that jurisdiction should be declined. Returning to the *Swordfish* case, this trend is apparent as well. Chile’s UNCLOS request made no explicit reference to the WTO;⁶² and the EC’s requests to the WTO made no reference to the ITLOS.⁶³ In this perhaps most explicit case of combined authority/norm fragmentation, it would have done no good to either party to cite at so early a stage in the process that inter-institutional problems were involved.

⁶¹ See *Id.*, p. 17: “Mexico “does not question that the Panel has jurisdiction to hear the United States’ claims”.

⁶² See ITLOS, Case No 7, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community – Constitution of Chamber)*, 20 December, 2000); the WTO was not mentioned, but Chile treaded very lightly in its assertion that the EC had “challenged the sovereign right and duty of Chile, as a coastal State, to prescribe measures within its national jurisdiction for the conservation of swordfish and to ensure their implementation in its ports, in a non-discriminatory manner, as well as the measures themselves, and whether such challenge would be compatible with the Convention”. This wording might refer to the EC’s unilateral acts, but also to its complaint in the WTO.

⁶³ See *supra* note 32.

As another example, not from the WTO field, in the aforementioned *Lauder* investment cases⁶⁴ it is also evident that international tribunals opt for technical, norm-fragmenting techniques (such as strict interpretations of the 'same proceedings' requirement)⁶⁵ in order to avoid authority integration: had the investment tribunals involved considered the cases before them as the 'same' proceedings, they would also have had to confront their concurrent jurisdiction.

Finally, the same phenomenon – the norm-authority integration correlation and a reluctance to integrate norms because of authority-integrating implications - can be found in the interaction between political decision-making fora (that is, international norm-making actors that do not serve as dispute settlement actors and have a more legislative role), as well as in the judicial setting. In the Kimberley process mentioned above,⁶⁶ it is perhaps not coincidental in the present context that the relevant UN Kimberley Resolutions made no operative reference to the possible need for a WTO waiver; and, in the obverse, that the WTO waiver made no operative reference to UN authority, only mentioning in preambulatory form the prior existence of the UN Resolutions, as semi-historical context but not as a normatively influencing element. This is a point perhaps worthy of further research, but it would seem that political norm-making bodies are at least as wary of normative 'mutual recognition' as judicial branches are, and much for the same reasons – the fear of authority integration.

VI. HOW DIFFERENT PRINCIPLES DEPART IN THEIR EFFECTS: ARTICLE 31(3)(C) VCLT COMPARED WITH PARAGRAPH 4 OF THE RIO DECLARATION

(a) Comparing Principles of Integration

The foregoing analysis indicates that the appreciable reluctance to accept international normative integration despite its obvious juridical advantages, is an innate result of the structure of international law, in which substantive norms are inextricably intertwined with

⁶⁴ See *supra* note 24 .

⁶⁵ See Shany *supra* note 24.

⁶⁶ See text accompanying *supra* note 18.

the allocation of authority. In any fabric, but especially in a fragmented one, one cannot pull at any of the threads of the warp without unraveling some of the weft. The integration of norms necessarily has implications for the integration of authority, and at different levels decision-makers will resist the former to the extent that they are deterred by the latter.

However, while this observation may serve as a general rule, there is no reason to assume that different models of normative integration will produce precisely the same degree of effect on authority integration. While I believe I have demonstrated that normative integration inherently – yet generally, and with possible exceptions - exerts pressures towards the integration of authority, it may be the case that different principles and methods of norm integration exert these pressures on authority with different force. The political and institutional implications of some forms of norm integration may be weaker than those of others, making it possible to pursue normative integration without correspondingly integrating authority to the same degree.

On this conceptual background, we can consider and compare the differential application of two distinct and independently derived legal principles that on their face constitute varied models of *normative* integration. The first is Article 31(3)(c) VCLT, that has been heralded as a principle of 'systemic integration';⁶⁷ the second is the 'principle of integration' established in Paragraph 4 of the Rio Declaration.⁶⁸ In the current section I will focus on the direct and indirect application (or non-application) of these two principles of integration in WTO case-law, in order to demonstrate that the different principles of normative integration may intrude differently, and to different degrees, on authority allocation.

(b) Article 31(3)(c) VCLT in the WTO

Article 31(3)(c) VCLT provides, as part of the general rule of interpretation of treaties, that "[T]here shall be taken into account, together with the context [...] any relevant rules of international law applicable in the relations between the parties". The provision is clearly a juridical reasoning instrument of normative integration, aimed at incorporating and

⁶⁷ *Supra* note 9.

⁶⁸ *Supra* note 10.

conciliating through interpretation such international rules (both conventional and customary) as may apply between the parties. Indeed, it is a method of normative integration strongly advocated by the ILC Study Group Report and by others.⁶⁹

Importantly, Article 31(3)(c) VCLT does not display any overt or otherwise obvious institutional, *authority*-integrating aspects. However, the provision's potential for indirect effects on authority integration is considerable. It can be seen as an embodiment of the norm/authority dialectic discussed above:⁷⁰ first, it mandates norm integration via interpretative reference to pertinent ("relevant") rules from other systems (i.e., from outside the particular normative and institutional system associated with the treaty being interpreted);⁷¹ second, in so doing it asserts the interpretative authority of the particular interpreter over these 'external' norms; third, it consequently introduces the problem of overlapping authority, insofar as the 'external' norm is subject to the concurrent interpretative authority of other jurisdictions (not an unforeseeable occurrence, given that these rules must be "applicable" between the parties, somewhere in their legal relations); and fourth, this overlap agitates towards authority-integrating techniques, such as deference to 'external' interpretations of 'external' obligations. Thus, although the provision is on its face silent on the sensitive issue of authority integration, recourse to Article 31(3)(c) VCLT as a principle of norm integration can produce results that are intrusive in terms of authority integration.⁷²

⁶⁹ Both McLachlan *supra* note 7, and the ILC Study Group Report *supra* note 6 (at 8–10) refer to art 31(3)(c) VCLT in terms of 'systemic integration', but in the context of these writings, this phrase is not used in the sense of integration between institutional systems of authority but rather in the sense of integration between different systems of norms.

⁷⁰ See section IV *Id.*

⁷¹ Note, however, that Article 31(3)(c) VCLT, strictly read, does not require the *application* of these 'external' norms, but only that account be taken of them in *interpretation*. The distinction between applicable law and interpretative reference can be difficult to trace in practice. For example, in the ICJ's *Oil Platforms* judgment (ICJ, Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), 2003, I.C.J. Rep. 161 (Nov. 6); 42 I.L.M. 1334), Judge Higgins was critical of the way the Court used Article 31(3)(c), stating that it had "invoked the concept of treaty interpretation to displace the applicable law" (*Id.*, pp. 1386-1387).

⁷² On this backdrop it is interesting to revisit the role of Article 31(3)(c) VCLT in the ICJ's *Oil Platforms* (*Id.*). There, the court's jurisdiction was acquired on the basis of the compromissory clause in Article XXI(2) of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, signed in Tehran on 15 August, 1955; once jurisdiction was established, however, Article 31(3)(c) VCLT was employed to enable recourse to the general prohibition on the use of force under UN Charter Art. 2, para. 4 of the—which in itself could not have provided the ICJ with jurisdiction (*see* paras. 41-42 of the *Oil Platforms* judgment). Article 31(3)(c) therefore integrated norms – but also expanded the ICJ's authority (as noted in Judge Buergenthal's critical Separate Opinion: "on the basis of jurisdiction conferred on it in Article [XXI(2) of the 1955 Treaty], the Court proceeds to apply international law on the use of force simply because that law may

In this light, it is therefore not very surprising that WTO dispute settlement has so far narrowly construed Article 31(3)(c) VCLT to the point of disutility. The (unappealed) panel in the *EC-Biotech* dispute,⁷³ charged with the delicate task of interpreting the WTO's SPS Agreement,⁷⁴ and faced with claims that it should do so while taking account of non-WTO treaty norms, especially the Convention on Biological Diversity (CBD)⁷⁵ and the Cartagena Protocol on Biosafety,⁷⁶ chose to severely restrict the application of Article 31(3)(c) VCLT, reducing it to what appears to be insignificance when applied to non-WTO treaties (rather than international custom and general principles of law).⁷⁷ The *EC-Biotech* panel interpreted Article 31(3)(c) VCLT⁷⁸ as engaging only non-WTO treaties to which *all* WTO Members have subscribed to (as of this writing – 153 Members in number), instead of a more inclusive approach that would have taken into account all mutual obligations that apply between the parties to a particular dispute. Ultimately, this could mean that not only multilateral treaties to which not all WTO Members are party, but also *inter se* agreements between parties to a dispute, such as a bilateral trade agreement, would not be taken into account under Article 31(3)(c) VCLT.⁷⁹

The *EC-Biotech* panel's practical rejection of Article 31(3)(c) VCLT as an effective norm-integrating tool is consonant with this provision's indirect yet intrusive authority-integrating implications. This can be learned from a few circumstantial and comparative indicators.

First, key in the panel's logic on this issue is its reflection that Article 31(3)(c) VCLT makes the consideration of qualifying non-WTO treaty rules mandatory rather than

also be in dispute between the parties before it and bears some factual relationship to the dispute of which the Court is seised. That it may not do" (*see* I.C.J. Rep. 2003, p. 282). Moreover, authority integration was not an issue in this case, because no other international tribunal had potential jurisdiction over it.

⁷³ *See Panel Report EC – Measures Affecting the Approval and Marketing of Biotech Products* WT/DS291/R, WT/DS292/R, WT/DS293/R, (Sept. 29, 2006).

⁷⁴ Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 3, opened for signature 15 April 1994, (entered into force 1 January 1995), annex 1A (Agreement on the Application of Sanitary and Phytosanitary Measures) 1867 UNTS 493 ('*SPS Agreement*').

⁷⁵ Opened for signature 5 June 1992, 1760 UNTS 79 (entered in force 29 December 1993).

⁷⁶ Opened for signature 29 January 2000, 39 ILM 1027 (2000) (entered into force 11 September 2003) ('*Cartagena Protocol*').

⁷⁷ at paras. 7.67-7.71

⁷⁸ The relevant section being the words "applicable in the relations between the parties".

⁷⁹ The panel's finding is controversial, to say the least. It was harshly criticized by the ILC Study Group (*supra* note 6 at para. 450). For discussion of its pros and cons, *see* Margaret A. Young, *The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case*, 56(4) INT. & COMP. L. Q. 907 (2007), available online: <http://www.law.cam.ac.uk/docs/view.php?doc=4248> (subsequent page numbers refer to the online version) at 12-16.

optional.⁸⁰ The panel explains that because of this, it would not make sense to apply Article 31(3)(c) VCLT to treaty commitments that have not been undertaken by all parties to the treaty being interpreted. This is somewhat of a *non sequitur*, however: would things really have been different had Article 31(3)(c) VCLT made such reference optional, rather than mandatory?⁸¹ At this juncture I am not questioning the result of the panel's analysis – there is certainly something to be said for it in terms of state consent and so forth – but rather the panel's logic. The focus on the mandatory nature of Article 31(3)(c) VCLT contributes very little, if at all, to the legal-analytical question of the provision's scope of application, yet it suggests an indisposition on the part of the panel to the potential loss of institutional control that would be implied by its expansion. The norm-integrating powers of Article 31(3)(c) VCLT appear to be avoided because their mandatory nature would impinge on the institutional authority of the WTO panel.

Second, the *EC-Biotech* panel's non-application of Article 31(3)(c) VCLT as a norm-integrating, interpretative conduit is doubly notable because the panel was otherwise not entirely averse to turning to non-WTO treaty sources for interpretative guidance. In fact, the panel was, in principle, willing to consider such sources, even sources that were not applicable between all WTO Members, for the sake of casting light on the "ordinary meaning" of the treaty provision being interpreted, in the sense of Article 31(1) VCLT.⁸² To the panel, recourse to external sources for the purposes of Article 31(1) VCLT was legitimate in this respect not only because it followed the approach sanctioned by the WTO AB in the *US-Shrimp* dispute,⁸³ but because it would be conducted merely to the extent that these external sources are "informative" - subject to the treaty interpreter's ultimate

⁸⁰ See paras. 7.69-70.

⁸¹ E.g., had the word "shall" in the Article 31 been substituted with "may". To press the point: in para. 7.71 the panel opines that "Indeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept". Would have it have been any more apparent why a state would accept a rule of treaty interpretation that makes that consequence subject to the interpreter's discretion?

⁸² See para. 7.91. Young, *supra* note 79, attaches great significance to this seeming openness of the panel's approach to non-WTO sources, much more than is warranted in practice, given that the panel ultimately did not accord any interpretative weight to them (*see* para. 7.95).

⁸³ See WTO, Appellate Body Report, *Import Prohibition of Certain Shrimp and Shrimp Products US, WT/DS58/AB/R*, (Nov. 6, 1998) (hereinafter – *Shrimp I*). I shall expand on normative integration in this case below.

discretion.⁸⁴ These sources were considered by the panel as "evidence" rather than as "legal rules".⁸⁵ So construed, in contrast to Article 31(3)(c) VCLT, reference to external sources through the "ordinary meaning" avenue of Article 31(1) VCLT can have (little or) no impact on the allocation of authority, at least no more than reference to *Webster's* dictionary can. The panel put this approach to practice, when in its analysis of Annex A SPS it entertained references to terminological definitions used by the International Plant Protection Convention (IPPC), the Food and Agriculture Organization (FAO), the World Organization for Animal Health (OIE), the World Health Organization (WHO), and the Codex Alimentarius Commission (CAC).⁸⁶ Ultimately, the panel rejected essentially all the interpretative implications of these "informative" sources.⁸⁷ As a matter of principle, however, we see that the Panel preferred the discretionary (and hence, judicially avoidable) approach to norm integration presented by Article 31(1) VCLT, rather than the more constricting and binding principle of integration found in Article 31(3)(c) VCLT.

Third, while scorning the idea of resorting to Article 31(3)(c) VCLT as a method of norm integration, and in particular the idea of recourse to the CBD, the panel was nevertheless open to consultation with non-WTO bodies, such as the CAC and the FAO, the IPPC Secretariat, WHO, OIE, the UN Environment Programme (UNEP) and even the CBD Secretariat.⁸⁸ One might think this inter-institutional openness displays a preference for authority integration over norm integration. This is hardly the case, however: the preference is for the flexibility of consultation in the stead of the relative (and perceived) rigidity of integration through Article 31(3)(c) VCLT. Consultation of the kind pursued by the *EC-Biotech* panel allows for a minimal impact on authority integration. Advice received in this manner can be discarded, ignored and interpreted away. Not only did it not bind the Panel (in its own analysis), it could conveniently be portrayed as a fact finding mechanism rather than a normative one (relying on provisions such as Article 13 DSU and Article 11 SPS).

⁸⁴ See para. 7.92-7.93.

⁸⁵ See para. 7.92.

⁸⁶ See paras. 7.246-7.249 (discussing International Standard for Phytosanitary Measure No. 11, *Pest Risk Analysis for Quarantine Pests Including Analysis of Environmental Risks*, FAO, Rome, 2004 (adopted April 2004), Annex 3); the panel stresses in footnote 352 that it is "neither applying ISPM No. 11 as such nor treating it as dispositive of the meaning of terms used in Annex A(1) of the *SPS Agreement*. However, we think we may refer to it if we find that it is informative and aids us in establishing the meaning and scope of the terms used in Annex A(1)."; see also paras. 7.289-7.290, paras. 7.305-7.316, para. 7.327, para. 7.3056 (at note 1808).

⁸⁷ For discussion, see Young *supra* note 79, at 22-25.

⁸⁸ See paras. 7.31 and 7.96 of the *EC-Biotech* Panel Report.

Indeed, it was this consultation process that allowed that Panel to include several non-WTO sources in its Article 31(1) VCLT analysis of important SPS key terms, as described above, but the Panel maintained its full independence in interpreting these terms in a normative sense and as mentioned already, ultimately accorded little or no consequence to the "external" sources introduced through consultation.

In sum, in the *EC-Biotech* Panel Report we see quite clearly how different principles of integration can be understood as having differential effects on norms and authority; and also how a judicial decision-maker straightforwardly prefers a weak form of normative integration (Article 31(1) VCLT and its "informative" reference to external sources), and a weak form of authority integration (inter-institutional consultation of a "factual" nature) that in conjunction result in virtually no normative integration, over a strong method of normative integration (Article 31(3)(c) VCLT and its "mandatory" interpretative consideration of applicable law) that would introduce problems of real authority integration.

(c) Paragraph 4 of the Rio Declaration and the WTO

Now let us turn, by way of comparison with Article 31(3)(c) VCLT, to Paragraph 4 of the Rio Declaration, whereby "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".⁸⁹ This requirement has correctly been depicted as a principle of integration in the area of sustainable development,⁹⁰ a concept that is argued to encompass not only purely environmental issues in their relation to economic growth but also human rights and social objectives related to the "development process".⁹¹ It may therefore fall short of being a principle of integration of general application in the order of Article 31(3)(c) VCLT, in the sense that it would not necessarily apply, in all cases, to all issue areas of international law – if, for example, a particular instance does not involve questions of sustainable development, writ however large. Moreover, its potential scope of

⁸⁹ *Supra* note 10.

⁹⁰ See 2002 International Law Association (ILA) New Delhi Declaration of Principles of International Law relating to Sustainable Development, *Report of the Seventieth Conference, New Delhi* (London, ILA, 2002) 29 (also available as UN Doc. A/57/329 (2002)).

⁹¹ See, e.g., Sebastián Jodoin, *The Principle of Integration and Interrelationship in Relation to Human Rights and Social, Economic and Environmental Objectives*, Centre for International Sustainable Development Law (CISDL), (March 2005) (available at: http://www.cisd.org/pdf/sdl/SDL_Integration.pdf).

substantive influence is undeniably broad, especially in areas of international economic law, such as at the WTO.

Furthermore, the Paragraph 4 Rio principle is in some respects actually broader (or deeper) than Article 31(3)(c) VCLT. For example, it is not limited in its scope only to international law and instances of horizontal integration alone. Rather, it is clearly intended to act as a principle guiding also normative interrelationships of a vertical character, between domestic norms, on one hand, and international norms, on the other – whereas Article 31(3)(c) VCLT does not purport to do so.

It might, however, first be questioned whether Paragraph 4 Rio is at all a principle of normative integration, and if so – of what nature, more specifically? After all, the principle refers not to rules and their interrelationships, but to what may be seen as general 'policy' considerations: sustainable development, environmental protection, the development process. Indeed, the principle avoids legal terminology (e.g., 'environmental law'). Nevertheless, as the work of the ILC Committee on the International Law of Sustainable Development has shown, these are general rather than restrictive phrases aimed at a number of forms of potential normative integration: intra-treaty integration (such as within the WTO Agreements); inter-disciplinary integration (between different areas of law, e.g., trade, investment, human rights, environmental law; this is the most important aspect as far as international normative fragmentation is concerned); and intra-disciplinary integration (e.g., reformulating existing areas of law such as fisheries or water law, to reflect sustainable development concerns).⁹² In other words, decision-making authorities, judicial or otherwise, are urged by Paragraph 4 Rio to incorporate environmental considerations into their deliberations and decisions. Clearly, where rules of international environmental or sustainable development law are relevant, they should be taken into account among these considerations, as expressions thereof,⁹³ but even if such rules are not applicable in the formal sense, or if such rules do not exist, environmental considerations should still be integrated into the decision.

⁹² See ILC, REPORT OF THE 72ND CONFERENCE, Toronto, June 2006, 12-18 (available at <http://www.ila-hq.org/pdf/International%20Law%20on%20Sustainable%20Development/Report%202006.pdf>).

⁹³ The ILC Committee in the International Law of Sustainable Development adds that the Paragraph 4 Rio principle of integration acts as a "judicial reasoning tool", *Id.* at 18-22.

Although the explicit application of Paragraph 4 Rio by international tribunals has so far been a rare occurrence, existing jurisprudence bears out this approach by applying it as a principle of normative integration. The arbitral tribunal of the Permanent Court of Arbitration in the *Arbitration regarding the Iron Rhine Railway (Belgium/The Netherlands)* (the "Iron Rhine" case) explained that "Environmental *law* and the *law* on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm" (emphases added);⁹⁴ and, furthermore:

"[T]he mere invocation of such matters does not, of course, provide the answers in this arbitration to what may or may not be done, where, by whom and at whose costs. However, the Tribunal notes that, as regards the Questions put to it, neither Party denies that environmental *norms* are relevant to the relations between the Parties. To that extent, *they may be relevant to the interpretation of those treaties in which the answers to the Questions may primarily be sought*".⁹⁵

Thus, the *Iron Rhine* arbitral tribunal conclusively converted the general terms of Paragraph 4 Rio into legal, normative terms, and perceived it as an interpretative norm integration tool. Moreover, an even more forceful and persuasive exposition of Paragraph 4 Rio as a principle of legal, normative integration is found in Judge Weeramantry's separate opinion in the ICJ's *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case, which expounded on the international law of sustainable development, finding, *inter alia* that:

"The problem of steering a course between the needs of development and the necessity to protect the environment is *a problem alike of the law of development and of the law of the environment*. Both these vital and developing areas of law require, and indeed assume, the existence of a principle which harmonizes both needs. *To hold that no such principle exists in the law is to hold that current law recognizes the*

⁹⁴ *Id.* at Para. 59

⁹⁵ *Id.*, at para. 60 (emphases added).

juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation."⁹⁶

Hence, Paragraph 4 Rio should indeed be considered a principle of normative integration, albeit of a 'soft' character that emphasizes the integration of policy considerations over black-letter law. The legal status of the principle, like that of the Rio Declaration as a whole, may not, however, be universally agreed. The tribunal in the *Iron Rhine* case did not hesitate to establish the duties implicit in this principle as constituting a "principle of general international law".⁹⁷ The WTO AB, has certainly not gone so far in its explicit reasoning, but in the *Shrimp* case it did make extensive interpretative use of the Rio Declaration, including specific reference to the Paragraph 4 Rio principle of integration.⁹⁸

What emerges is that Paragraph 4 Rio serves as a loose principle of normative integration. It is recognized as a principle that allows the mutual incorporation of policy considerations as well as rules one into another; and it is at most a principle of general international law, but not an international customary rule.

On this background, in the present article's context we must ask, what are this principle's impacts on *authority* integration? While Paragraph 4 Rio undoubtedly seeks to inform the process of decision making, requiring environmental protection to be considered as "an integral part of the development process", notably this requirement tells us nothing about *who* (i.e., which authority) should be making such integrated decisions. The Rio principle of integration is therefore formally agnostic as to the locus of decision-making authority, as long as environmental protection is considered in substance and sustainable development is achieved.

However, the ILA's Committee on the International Law of Sustainable Development has put forward the view that Paragraph 4 Rio prescribes integration not only in systemic, legal, normative and judicial reasoning dimensions, but also in the institutional realm.⁹⁹ This is an interesting and indeed important manifestation of the normative-authority integration

⁹⁶ ICJ Rep. (1997) 90 (emphasis added).

⁹⁷ See *supra* note 93, at para. 59.

⁹⁸ See *Shrimp I supra* note 83, at note 147.

⁹⁹ See ILA Report, *supra* note 92. See also John C Dernbach, *Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking*, 10 *Indiana Journal of Global Legal Studies* 247, 252 (2003), stating that Paragraph 4 of the Rio Declaration "asserts that environmental protection and development must be considered together, which would require integration of decisionmaking".

link described above:¹⁰⁰ The ILA commentary considers that in order to perfect the normative integration required by Paragraph 4 Rio, it is necessary to pursue authority integration.

Although Paragraph 4 Rio displays the general tendency of principles of normative integration to exert pressure towards authority integration, this pressure is significantly weaker than that of Article 31(3)(c) VCLT. This can be seen, as a theoretical matter, by tracing the reduced weight of the dialectic described above,¹⁰¹ which is the dynamic link between norms and authority, in the operation of Paragraph 4 Rio.

First, where Article 31(3)(c) VCLT mandates direct norm integration via interpretative reference to all relevant rules from other systems, Paragraph 4 Rio does not refer to rules at all, but rather to policy considerations. Paragraph 4 Rio aims at normative integration, but it is not a 'norm-splicer' like Article 31(3)(c) VCLT; rather, it operates at a meta-level, causing norms to take into account the objectives of other norms, but not their substance.

Second, in this way it is less necessary for the decision-maker to assert interpretative authority over "external" rules. It is only necessary to learn from their objectives and to take them into account.

Third, and as a consequence, the problem of overlapping authority is mitigated; hence, there is less pressure to pursue authority integrating techniques and methods. They may still be desirable, but through Paragraph 4 Rio it is possible to produce normative integration with less authority integration.

This is an abstract analysis. In more practical terms it translates into the hypothesis that decision makers will be more amenable to normative integration in the loose manner of Paragraph 4 Rio, than to normative integration in the more rigorous manner of Article 31(3)(c) VCLT, because the former places less demands on the allocation of authority. This hypothesis is borne out by the experience of normative integration in WTO jurisprudence. As we have seen, the application of Article 31(3)(c) VCLT has been all but rejected in the WTO. And yet, at the same time, the WTO AB has displayed considerable willingness to pursue normative integration that recalls the loose structure of Paragraph 4 Rio. We have already seen this in the above discussion of the *EC-Biotech* panel report. The panel's

¹⁰⁰ See *Id.* section III.

¹⁰¹ See *Id.* section IV.

willingness to consider non-WTO rules and interpretations under the heading of Article 31(1) VCLT 'ordinary meaning' interpretation is an indirect application of the Rio principle of integration; that is, the panel at least facially took into account a broad range of non-WTO sources in order to better understand their goals and the way they might impact upon WTO rules – without applying them interpretatively.¹⁰²

However, the indirect application of the Rio principle of integration is most evident in the WTO AB's report in the *Shrimp I* case.¹⁰³ By "indirect application", my meaning is that the Paragraph 4 Rio principle of integration was effectively applied without actually being relied upon.¹⁰⁴ In *Shrimp*, the AB was tasked with deciding the WTO consistency of US measures¹⁰⁵ barring imports of shrimp and shrimp products from WTO members who had not adopted and enforced national programs for the protection of sea turtles from by-catch during shrimp harvesting, with Turtle Extracting Devices ("TEDs"). The *Shrimp* dispute is therefore prototypical of the trade and environment 'interdisciplinary' nexus. The indirect application of Paragraph 4 Rio can be discerned in a number of attributes of the *Shrimp* AB report.

In *Shrimp*, the AB explicitly recognized the "objective of sustainable development" as informing all of WTO law, based on the preamble of the 1994 WTO Agreement. Importantly, the objective of sustainable development was referred to by the AB in two separate legal instances: first, for the purpose of interpreting the Article XX(g) exception as substantively concerned with environmental protection;¹⁰⁶ and second, for the purpose of accepting environmental protection as the basis for a trade restriction that is not "unjustifiable or arbitrary discrimination" under the *chapeau* of Article XX GATT.¹⁰⁷ In other words, environmental protection for the purpose of sustainable development was adopted by the AB as the baseline for examining whether the US legislation was an abuse of the environmental exception, in the sense that it overstepped the "line of equilibrium" between the right of one Member to invoke the exception and the substantive trade rights of other

¹⁰² See *Id.* section VI.(b).

¹⁰³ See *supra* note 83.

¹⁰⁴ See Tomer Broude, *Elements of the Principle of Integration in WTO Jurisprudence: Another Look at the Shrimp Cases*, in IIA Report *supra* note 92.

¹⁰⁵ Sec. 609 of Public Law 101-162, 16 United States Code (U.S.C.) §1537.

, *supra* note 83, para. 129.

¹⁰⁷ *Id.*, para. 152 *et seq.*

Members.¹⁰⁸ This balance of rights and exceptions informed by the objective of sustainable development is concordant with the Rio principle of integration: environmental protection is integrated with other development factors, and is not considered in isolation from them.

Furthermore, and most famously, the AB interpreted the Article XX(g) GATT term "exhaustible natural resources" to include living resources rather than merely non-living resources. This is an example of integrating an environmental protection concern with trade law, based upon the goal of sustainable development, and hence exemplifies an implementation of an integrative approach easily derived from the Principle of Integration.

Additionally, the AB's understanding of the internationally accepted condition of sea turtles as species threatened with extinction, is an illustration of the integration of factual determinations and substantive agreements encapsulated in non-WTO sources, that are related to environmental protection, with the requirements of the WTO.¹⁰⁹

The *Shrimp* report also considered the mandate of the WTO Committee on Trade and the Environment ("CTE") as indicative of the balance to be struck between free trade and environmental protection. In considering the compatibility of the US legislation under review with the *chapeau* of Article XX GATT, the AB turned to the WTO Ministerial Decision on Trade and the Environment,¹¹⁰ the preamble of which provides:

"Considering that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other".

This text, which frames the mandate of the CTE, can be understood as a reflection and embodiment of the Rio principle of integration. The consideration that there "should not be... any policy contradiction" between trade disciplines and environmental protection is substantively equivalent to a harmonization of trade and environmental concerns, in the service of sustainable development – in line with the Paragraph 4 Rio principle of integration; and it was described by the AB as "the most significant" of certain developments

¹⁰⁸ *Id.*, para. 159.

¹⁰⁹ *Id.*, para. 132.

¹¹⁰ Adopted by Ministers at the Meeting of the Trade Negotiations Committee at Marrakesh, 14 April 1994.

that "help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment".¹¹¹ Significantly, in citing this reference, the Appellate Body noted two principles of the Rio Declaration: Principle 3, which is the formulation of the concept of sustainable development; and Principle 4 - the Rio formulation of the principle of integration.¹¹²

To this one must add the role of environmental grounds in the rejection of the US legislation. Ultimately, in *Shrimp I*, the AB denounced the US legislation as "unjustified and arbitrary discrimination" incompatible with the *chapeau* of Article XX GATT. It was this finding, with the result of determining the US legislation as WTO inconsistent, that was perceived by many at the time and today as well, as symbolic of the danger posed by the WTO to environmental concerns. However, a re-reading of the relevant part of the *Shrimp* report reveals that the finding of "unjustified and arbitrary discrimination" was based largely on environmental considerations *as integrated* into the trade law framework, and as such, may be seen as an application and expression of the Principle of Integration. Indeed, it is arguable that the same result would have been reached had the US legislation been reviewed as an environmental measure, exclusively under the Rio framework, .

In the *Shrimp* report we see, therefore, that WTO decisions can be highly integrative in ways that closely follow the loose imperatives of paragraph 4 Rio¹¹³ - in stark contrast to the rejection of the strict integrationist confines of Article 31(3)(c). This is neither contradiction nor coincidence: the path of normative integration is easier to follow when it is chosen by decision-makers, not forced upon them, and so does not lead to a threatening integration of authority.

¹¹¹ *Shrimp I*, *supra* 83, para. 154.

¹¹² *Id.*, at note. 147.

¹¹³ For a detailed analysis of WTO AB decisions as essentially integrative, highly critical of the interpretation of article 31(3) VCLT by the *EC-Biotech* panel, see Robert Howse, "The Use and Abuse of 'Other Relevant Rules of International Law' in Treaty Interpretation: Insights from WTO Trade/Environment Litigation", Institute for International Law and Justice, NYU School of Law, Working Paper 2007/1, <http://www.iilj.org/working%20papers/documents/2007-1.Howse.web.pdf>.

VII. CONCLUSIONS

In this article I have made a number of cumulative arguments with respect to the relationship between the integration of norms, on one hand, and the integration of authority, on the other hand, in international law. We have seen that the two concepts maintain a basic correlation that has elements of causation as well: an increase in norm integration leads to pressures towards the integration of authority. We have also seen that whereas normative integration is a juridically attractive objective in itself, its correlation to authority integration may deter decision makers from promoting and pursuing it. Thus, to some international fora, decisions on normative integration may seem like 'poison pills' to be treated with care: they can enhance their position through increased substantive reach and greater coherence, but they may also drain their exclusive powers.

However, in the previous section, by comparing the integrative effects of Article 31(3)(c) VCLT and Paragraph 4 Rio (mainly in the context of the WTO, but with universal implications), we have seen that while arguably all normative integration has effects upon the allocation of authority, not all principles of normative integration were created equal in this respect. Norm integration can be more or less intrusive on authority. Softer, less binding models, such as Article 31 VCLT or Paragraph 4 Rio may permit decision makers to integrate norms (*de jure*) or their outcomes (*de facto*) with less pronounced influence on authority.

This understanding presents proponents of comprehensive normative integration in international law with a strategy worth considering, that is, a strategy of the path of least resistance. The examples discussed above demonstrate that normative integration that creates less pressures towards authority integration has better chances of being adopted by tribunals, and hence, has better chances of attaining its normative goals. On the other hand, principles of integration that in theory would be more effective in achieving normative integration, may (at least at this stage in the development of international law), be left at the wayside, if advocated or argued to forcefully, because of their unpredictable effects on authority.

A master weaver can use different reeds to beat the weft into unity while leaving the warp virtually untouched, whether a tight or loose one. So must lawyers, jurists and judges distinguish between those methods of effective norm integration that will be more or less intrusive to authority as it is structured in international law, and use those whose touch is more gentle, weaving the fabric of international law without fraying it at the same time.