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WTO's Identity Crisis (reviewing Joost Pauwelyn,  
Conflict of Norms in Public International Law:  
How WTO Law Relates to Other Rules of  
International Law (2003))

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Review Title: WTO's Identity Crisis

## Introduction

Joost Pauwelyn has written an extensive and thought-provoking treatise on the interaction of norms in public international law (PIL), in particular between norms of World Trade Organization (WTO) and non-WTO norms, through a conceptual lens of “conflict.”<sup>1</sup> His main argument is non-WTO norms should be able to “trump” WTO norms under certain circumstances. After framing the concept of norm conflict in PIL (Chapter 1), and defining the nature of WTO law (“reciprocal” obligations) vis-à-vis that of other branches of PIL such as human rights and international environmental law (“integral” obligations) (Chapter 2), the book unfolds its conflict thesis, including hierarchy of sources (Chapter 3), two mutually exclusive modes of norm interaction, which are accumulation and conflict (Chapter 4), conflict avoidance (Chapter 5), and conflict resolution (Chapters 6 and 7). The final Chapter attempt to apply the conflict thesis developed in previous Chapters to the specific situation of WTO dispute settlement. This review will chiefly focus on the nature, or identity, of the WTO as it is described and defined by Pauwelyn when he addresses the norm conflict between WTO rules and non-WTO rules. In this treatise, WTO's identity is dealt with in two ways: first, in relations to public international law (*external* identity); second, within itself or among its Members (*internal* identity). Importantly, Pauwelyn's position on these two facets of WTO's identity is inextricably linked with his own conceptualization of “conflict” itself, which will be discussed below.

## I. Conflict Thesis

Pauwelyn adopts a broad concept of conflict which contrasts with a traditional view (narrow concept) envisioned by Wilfred Jenks and Wolfram Karl, i.e., a collision of mutually exclusive obligations in two norms.<sup>2</sup> Therefore, non-conflict interactions between/among different norms under the narrow view may nonetheless fall within the rubric of conflict in this book.<sup>3</sup> In a sense, conflict is a conceptual tool with which Pauwelyn examines an interrelation or interaction of different norms of public

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<sup>1</sup> JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003, Cambridge University Press) [hereinafter CONFLICT OF NORMS].

<sup>2</sup> *Id.*, at 169-70.

<sup>3</sup> *Id.*, at 184-88 (conflict scenarios 2-4).

international law. In response to this broad scope of conflict, he introduces comprehensive conflict-avoidance techniques<sup>4</sup> as well as its resolutions.<sup>5</sup> In sum, he captures a broad range of problems and also offers a broad range answers.

Pauwelyn begins his analysis by configuring a universe of PIL, especially in relation to the law of WTO. He views the WTO law as a mere “branch”<sup>6</sup> or a “sub-system”<sup>7</sup> of PIL. As a branch or a sub-system, the WTO does, or *must*, interact with other braches or sub-systems of PIL, such as human rights treaties (HR) and international environmental agreements (IE). The WTO is neither a “closed legal circuit” nor a “self-contained” regime.<sup>8</sup> Non-WTO norms residing in a broader terrain of PIL should be able to “prevail” over WTO norms in various situations of conflict.<sup>9</sup> What facilitates non-WTO norms’ prevalence over or penetration into WTO norms is Pauwelyn’s unique position on the nature of WTO rights and obligations. Based on his rather unsophisticated observation that “trade is and remains a *bilateral* happening,”<sup>10</sup> he concludes that the nature of WTO norms is “bilateral/reciprocal” in accordance with its goal to ensure bilateral market access, despite a collective *effect* of trade.<sup>11</sup> Therefore, as a legal system the WTO is distinguishable from other branches of PIL such as HR and IE whose rights and obligations are “integral” in that they pursue “collective/universal” values or “global commons.”<sup>12</sup> Finally, he views that:

A breach of WTO trade rules may affect a number of members individually, but it does not amount to an offense of the collective right or conscience of *all* state parties, the way that a human rights breach does.<sup>13</sup>

A corollary of this bilateralism/reciprocalism can be found in a somewhat oxymoronic thesis of the “legality of *inter se* agreements deviating from the WTO treaty.”<sup>14</sup> Obviously, what deviates from the WTO treaty is a violation, once and for all, unless the WTO treaty is amended to accommodate such deviation. However, in order to “tolerate” such agreements within the WTO in conflict situations, Pauwelyn invents a new concept of “*inter se* modifications” by which certain WTO Members dispose of or privatize the rule of WTO law by carving out or suspending certain WTO provisions among/between themselves. Again, this privatized suspension of WTO norms is only possible because Pauwelyn deems WTO obligations bilateral/reciprocal. For example, under such a modification the U.S. can ban imports from Mexico despite GATT Article XI once the two have passed whatever treaty between themselves which mandates or authorizes such trade restriction. In sum, these modifications are a representative form of resolving

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<sup>4</sup> *Id.*, ch. 5.

<sup>5</sup> *Id.*, chs. 6-7.

<sup>6</sup> *Id.*, at 25-26.

<sup>7</sup> *Id.*, at 9.

<sup>8</sup> *Id.*, at 35.

<sup>9</sup> *Id.*, at 316.

<sup>10</sup> *Id.*, at 71 (emphasis added).

<sup>11</sup> *Id.*, at 72.

<sup>12</sup> *Id.*, at 72-73.

<sup>13</sup> *Id.*, at 72 (emphasis original).

<sup>14</sup> *Id.*, at 315.

conflicts between WTO norms and non-WTO norms, thereby realizing a unitary vision of PIL.

## II. Critique of Premises

As discussed above, Pauwelyn predicates his thesis largely on the “bilateral/reciprocal” nature of WTO norms which, at least to him, originates from a material aspect of international trade (bilateral happening) as well as its goal (bilateral market access). This rather inferior legal status of the WTO vis-à-vis other branches of PIL, such as HR and IE, which enjoy “integral” nature of rights and obligations as they pursue universal goals, is naturally prone to *inter-branch* conflicts which Pauwelyn envisions. It also tends to justify the penetration of these lofty norms into the humble law of WTO. However, these fundamental premises that Pauwelyn employs are hard to accept.

First of all, Pauwelyn’s simplistic diagram of international trade suffers anachronism. Trade as a bilateral happening might have gathered certain currencies in the era of a Treaty on Friendship, Commerce, and Navigation in the nineteenth century, or even in the earlier days of the old GATT consisting of “contracting” parties. However, the WTO as it stands today is a full-blown “multilateral” trading system in which not only Members but also individual economic players retain their own stakes for its stability and predictability, as the *Section 301* panel eloquently portrayed.<sup>15</sup> Moreover, Pauwelyn argues that “trade and the liberalization of trade *is not a value*” unlike the protection of human rights or the environment.<sup>16</sup> Here, Pauwelyn is oblivious of the solemn historical fact that the very genesis of GATT was attributed to tragic economic balkanization in the interwar period which precipitated the Second World War.<sup>17</sup> If we agree that the prevention of war serves the protection and promotion of human rights, trade liberalization itself may claim its own value. Likewise, an “integrated, more viable, and durable” multilateral trading system<sup>18</sup> itself is a “global commons.” If one accepts *arguendo* Pauwelyn’s premise that trade only realizes a “compilation of individual welfare increases,”<sup>19</sup> wouldn’t such a compilation itself, if global, be sufficient to entitle WTO norms as being collective and universal?

Unlike what Pauwelyn observes,<sup>20</sup> rules of origin serve no confirmation of bilateral nature of WTO obligations. Rules of origin attest an imperfectness of the multilateral

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<sup>15</sup> “7.76 The security and predictability in question are of “the multilateral trading system.” The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.” WTO Panel Report on United States-Sections 301-310 of the Trade Act of 1974, WT/DS152/R (Jan. 27, 2000).

<sup>16</sup> *Id.*, at 73.

<sup>17</sup> See Dennis Kennedy, *Regional Trading Blocs, Multilateralism and the New GATT Agreement: An Introduction*, in REGIONAL TRADE BLOCS, MULTILATERALISM, AND THE GATT: COMPLEMENTARY PATHS TO FREE TRADE 1 (Till Geiger & Dennis Kennedy eds., 1996); Patricia Clavin, *The Triumph of Regionalism over Globalism: Patterns of Trade in the Interwar Period*, in COMPLEMENTARY PATHS, *supra*, at 31-33.

<sup>18</sup> Marrakech Agreement Establishing the World Trade Organization, pmbl.

<sup>19</sup> CONFLICT OF NORMS, *supra* note 1, at 78.

<sup>20</sup> *Id.*, at 71, n. 144.

trading system at the current stage. A main function of rules of origin is to single out specific countries to either advantage or disadvantage them vis-à-vis the rest of WTO Members.<sup>21</sup> In other words, trading nations need rules of origin when they extend preferential tariffs to a selected group of trading partners or impose antidumping duties on products from them. Yet, the underlying rationale of rules of origin derives from exceptions (in case of regional trading blocs) or abnormalities (in case of antidumping) of general trade rules, i.e., non-discrimination. Note that either the U.S. or the European Union (EU) does not need rules of origin in its internal trade. If the world becomes one big customs union through perfect trade liberalization, we would no longer need rules of origin. In other words, rules of origin do not concern the *nature* of WTO obligations but is a mere manifestation of imperfect trading system as of now. This observation gains strength when considering the “spaghetti bowl” phenomenon of rules of origin in regional trading blocs which plagues the current multilateral trading system.<sup>22</sup>

Pauwelyn also assigns bilateral aspects of WTO retaliation (countermeasures) to a bilateral nature of WTO obligations.<sup>23</sup> Yet, a bilateral nature of retaliation does not necessarily reflect a bilateral nature of WTO obligations, but merely a remedial consequence of adversarial adjudication. Even if the International Court of Justice (ICJ) adjudicates a case on human rights violation between two parties, countermeasures as a remedy cannot but help being bilateral at the end. Furthermore, retaliation is far from being an ideal form of remedy. It may be self-inflicting in that it hurts consumers of retaliating country and also ineffective in that rich countries are hardly affected by poor countries’ retaliation.<sup>24</sup> As the WTO Dispute Settlement Understanding (DSU) emphasizes in many provisions, a withdrawal of violation should be a primary mode of remedy.<sup>25</sup> After all, this is what a panel or the Appellate Body recommends in its decision, i.e., to bring the violative measure into conformity to the WTO obligations.

Turning to the titular “integral” obligations in HR or IE, they are not always so. Devilish details of HR or IE would reveal the fact that not every item in the list of human rights deserves the crown of *erga omnes*. Most human rights treaties have limited number of signatories. In fact, more items in that list are controversial in their ontology than others which receive a wide consensus and approval.<sup>26</sup> Likewise, a number of human rights

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<sup>21</sup> See Moshe Hirsch, *Rules of Origin as Trade or Foreign Policy Instruments?: The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*, 26 FORDHAM INT’L L.J. 572, 574-76 (2003). See also Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CALIF. L. REV. 401, 410 (2002) (observing the dark nature of rules of origin is often “hidden by a facade of technical and seemingly innocuous details”).

<sup>22</sup> JAGDISH BHAGWATI, *A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION AND DEMOCRACY* 290 (1998).

<sup>23</sup> CONFLICT OF NORMS, *supra* note 1, at 77, 86-87.

<sup>24</sup> See Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763, 784-86 (2004) [hereinafter Cho, *Remedies*].

<sup>25</sup> *Id.*, at 781-84.

<sup>26</sup> See José E. Alvarez, *How Not To Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L SYMP J 1, 6 (2001).

treaties have not even been ratified.<sup>27</sup> Even if they are ratified, “reservations,” which are nothing but privatized contracting-out from those integral obligations, abound.<sup>28</sup>

Pauwelyn offers a practical solution to norm conflict between WTO norms and non-WTO norms via *inter se* modifications under two requirements, which are (i) “they are not explicitly prohibited in the WTO treaty” and (ii) “they do not affect the rights of other WTO members.”<sup>29</sup> Although these requirements appear fair and plausible at first glance, a closer examination soon reveals that they are nearly impossible to be met. First, those modifications are by definition “deviations” from the WTO obligations, such as GATT Articles III (National Treatment) and XI (Prohibition of Trade Restriction), and therefore *are* “explicitly prohibited,” unless they are justified. If those modifications are ever exempted under GATT Article XX, they are neither deviations nor explicitly prohibited, hence no conflict to be resolved at all.<sup>30</sup> Therefore, the first requirement can never be met. Second, in this highly interdependent world, any *inter se* modification is likely to affect third parties, one way or another. Consider the following example. Suppose that the U.S. and Mexico signs a bilateral treaty which penalizes low labor standards through an import ban. If this bilateral treaty is an *inter se* modification, the U.S. can halt the imports of Mexican toys when they are allegedly manufactured in a condition where a right to strike is not fully protected. Yet, what if these toys are actually produced in a Mexican factory built by Korean investors? Wouldn’t such modification affect rights of other WTO member like Korea? One must notice that globalization is testimonial to a “collective” nature of WTO rights and obligations.

Pauwelyn believes that making the WTO system porous via these *inter se* modifications is a logical step to reject the “self-contained” regime. Yet, this is a mischaracterization of what an open system could or should be. That the WTO is an open system does not necessarily mean that non-WTO norms should trump WTO norms through such mechanism as modifications. Borrowing Pauwelyn’s own analysis, “fall-back,” i.e., interpretive references to non-WTO norms, also contributes to an openness of the WTO system<sup>31</sup> without necessarily relying on modifications. Unlike what Pauwelyn criticizes, Gabrielle Marceau is right when she argues that “WTO obligations are always the same for all Members” to the extent that such position does not tolerate any bilateral modifications of WTO rights and obligations.<sup>32</sup>

Pauwelyn also overlooks negative potentials that his conflict rules may cause to the WTO system. First, under certain circumstances, WTO’s subordination to HR or IE in the name of conflict resolution may motivate, or be motivated from, “disguised” form of

<sup>27</sup> See Even the U.S. has ratified only five out of thirteen basic human right treaties. See Office of the United Nations High Commissioner for Human Rights, *Treaty Data Base, Status by Country: United States*, <http://www.unhcr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>.

<sup>28</sup> See Martha Minnow, *What is the Greatest Evil?*, 118 Harv. L. Rev. 2134, 2156-57 (reviewing MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004)).

<sup>29</sup> CONFLICT OF NORMS, *supra* note 1, at 316.

<sup>30</sup> *Id.*, at 162-63, 185 (“Conflict arises only when the question of whether the two norms are in a ‘rule-exception’ relationship is not explicitly regulated in either norm.”).

<sup>31</sup> *Id.*, at 201.

<sup>32</sup> *Id.*, at 316.

discrimination. Domestic industries often capitalize on moralistic streaks that HR or IE may symbolize in an attempt to justify sheer protectionism. Under these circumstances, conflict rules, as Pauwelyn posits, may open the Pandora's Box. Second, higher regulatory standards are largely infeasible to poor nations for their technical and financial shortage. It is rather nonsensical to restrict their imports and hamper their development through applying non-WTO norms in such areas as human health and safety. One might be inclined to exempt these poor countries from such regulatory burden. Then, could the conflict rule still achieve what it aims? What if rich countries who are bound by certain HR or IE via modifications build a factory in one of those poor countries, manufacture products, and export them to another rich country as the poor country's origin? Third, even if the WTO yields to non-trade norms, its tribunal (a panel or the Appellate Body) should "investigate" facts and evidences before it "applies" these non-WTO norms to the WTO case in question. Could and should the WTO tribunal agonize over those intensive factual questions such as a violation of a right to strike or exhaustion of CO2 emission limit in specific cases? Lastly, but not least, disputes involving HR or IE can often be politically combustible and turn into the so-called "wrong cases,"<sup>33</sup> in which situation putative non-trade values are not safeguarded while the WTO's integrity is severely undermined.

### III. Toward an Identity Formation of the WTO

Pauwelyn's definition of conflict, as is employed in his treatise, captures a close encounter by the WTO with non-WTO norms. In fact, he begins his book with the following question:

How should a WTO panel react when faced with the argument that an allegedly WTO inconsistent trade restriction is justified under an environmental treaty, IMF rules or customary international law?

In other words, this encounter is at the heart of his treatise and he characterizes it as "conflict." To define a situation as a conflict is naturally followed by the next step of "resolving" such conflict via conflict rules, which are not WTO norms themselves but other rules under PIL. Under these conflict rules of his own prescription, *various* non-WTO norms may penetrate into and prevail over WTO norms. Then, the WTO's identity as a "trade" organization might be confused, diffused and finally lost.<sup>34</sup>

The foregoing apprehension does *not* endorse the thesis that the WTO is a self-contained regime. The WTO, of course, must be open and communicate with other legal terrains, if

<sup>33</sup> See Robert E. Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 159 (1980). See also William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 67-78 (1987); John H. Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747, 779-80 (1978) (introducing a similar concept of "big cases").

<sup>34</sup> In this essay, I use certain concepts in developmental psychology, such as "identity diffusion" and "identity formation," which were largely developed by Erik Erikson, only in a metaphorical sense. See Susan Harter, *Self and Identity Development*, in S. SHIRLEY FELDMAN & GLEN R. ELLIOTT, *AT THE THRESHOLD: THE DEVELOPING ADOLESCENT* 375-79 (1990).

it remains a viable organization. No system is an island, and it is especially so in this highly integrated and interdependent world that we live in (globalization) as well as the very subject-matter before us (international trade). Nonetheless, while the WTO interacts with, responds to, and is even influenced by its legal environment to remain open and linked, it must maintain its autonomy or “autopoietic” status by upholding its legal integrity or “operative closure.”<sup>35</sup> In other words, those human rights law or international environmental law could and should not become the law of WTO per se, although we all acknowledge their paramount values. These non-trade values could and should only be addressed by the WTO itself through “altering” its own internal legal *and* institutional choices in the course of its evolution.<sup>36</sup> What is inconsistent with the WTO rules cannot be WTO-legal through any devices such as *inter se* modifications.

Critically, however, if we re-characterize Pauwelyn’s broad notion of conflict as “linkage” between WTO and non-WTO values, which has thus far captured a good deal of scholarly attention,<sup>37</sup> the WTO can still remain open and connected to its environment. By reaching out to non-WTO values such as the protection of the environment or human health, the linkage narratives can cope with the reconciliation between trade and non-trade values from the WTO’s standpoint, not from the PIL’s, thereby preserving the WTO’s autonomy, and most importantly, its “identity.”

The WTO’s identity has been formed and transformed since its past life, i.e., the GATT 1947. As a post-war rehabilitation plan for international economic order, the GATT was understandably obsessed with trade liberalization, in particular tariff reduction, to prevent the recurrence of prewar economic balkanization.<sup>38</sup> Thus, the GATT was originally designed as a multi-party contract for reciprocal tariff reduction. In earlier days, *legal* obligations were a mere tool for preserving a balance of concessions (give-and-takes) in tariff negotiations.<sup>39</sup> Yet, a half-century evolution of the GATT, both jurisprudential and institutional, transformed this provisional *contract* into a full-blown legal *system*, i.e., the WTO. The very *telos* of the WTO, such as “sustainable development” and/or an “integrated, more viable and durable multilateral trading system,” in fact connotes the linkage theme. If the WTO remains closed and disconnected from other (non-trade) values and concerns, its existence would be unsustainable and thus threatened.

This identity-defining transformation of *telos* in the history of GATT/WTO has left its mark in the WTO’s jurisprudence or interpretative practice. In fact, the broad scope of conflict which Pauwelyn adopts can eventually be solved by interpretation. Treaty interpretation is a serious enterprise transcending mere clarification of lexicographical meanings of treaty provisions. Although Pauwelyn himself recognizes interpretation as a conflict-avoidance tool, he maintains a rather narrow version of interpretation tantamount

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<sup>35</sup> Richard Nobles & David Schiff, *Introduction*, in NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 8 (Fatima Kastner et al. eds 2004).

<sup>36</sup> *Id.*

<sup>37</sup> See Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving beyond the Entropic Dilemma*, 5 CHI. J. INT’L L. 625, 627 (2005) [hereinafter Cho, *Linkage*].

<sup>38</sup> See *supra* text accompanying note 17.

<sup>39</sup> Cho, *Remedies*, *supra* note 24, at 766-67.



to strict textualism.<sup>40</sup> According to him, this narrow interpretation may *avoid* apparent conflicts, but still cannot *resolve* genuine conflicts whose solution requires other disciplines of international law such as the law of treaties and state responsibilities. However, interpretation often involves a “teleological” undertaking that invokes the objective and purpose (*telos*) of a given legal system. The teleological interpretation breathes a new life into often ambiguous and ambivalent treaty provisions, which are by and large a product of compromise at the time of negotiation.<sup>41</sup> If we appreciate this teleological interpretation, the titular conflict situations, be they a conflict between WTO norms or a conflict between WTO norms and non-WTO norms, can be addressed without recourse to separate conflict disciplines. In other words, in accordance with the *telos* of the WTO a panel or the Appellate Body will eventually interpret away any alleged conflict situations that may arise in the WTO disputes.

Certainly, the old hermeneutics under the old GATT is strikingly different from the new one under the WTO in dealing with the linkage issues, i.e., reconciliation between trade and non-trade values. Grounded on a pro-trade bias, the old GATT panels often downplayed domestic regulatory (non-trade) concerns. For instance, in *Thai Cigarette* (1990) a WTO panel struck down the Thai government’s ban on foreign tobaccos as a violation of GATT Article XI which generally prohibits any type of border measures restricting trade. Under GATT Article XX defense, Thai government highlighted Thailand’s unique situation as a developing country which would confront grave public health concern once it allowed unchecked flux of foreign cigarettes produced by big multinational tobacco companies.<sup>42</sup> Yet, the panel rejected this defense and ruled that Thailand should have sought the “least trade-restrictive” means instead of the import ban to be qualified for being “necessary” to protect human health under GATT Article XX, Paragraph (b).<sup>43</sup> Under this biased hermeneutics, the GATT could not fully address non-trade values such as public health. The *Thai Cigarette* panel even ignored expert opinions by the authority in this field, i.e., the World Health Organization (WHO).<sup>44</sup>

However, under the new WTO the Appellate Body has more sensitized non-trade values by providing ample maneuvering leeway to regulating governments pursuing these values. In paradigmatic cases such as *Gasoline* (1996)<sup>45</sup> and *Shrimp-Turtle* (1998),<sup>46</sup> the Appellate Body, under GATT Article XX, gave domestic regulators broad deference in

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<sup>40</sup> CONFLICT OF NORMS, *supra* note 1, at i244-45 (“Interpretation must be limited to giving meaning to rules of law.”).

<sup>41</sup> Cf. John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J. INT’L ECON. L. 3, 8 (2000) (viewing that “treaties are often an awkward albeit necessary method of designing institutions needed in today’s interdependent world, but they do not solve many problems.”).

<sup>42</sup> GATT, Report of the Panel, Thailand--Restrictions on Importation of and Internal Taxes on Cigarettes PP 52-53, 55-56, GATT BISD DS10/R-37S/200 (Nov 7, 1990).

<sup>43</sup> *Id.* Regarding the criticism of this panel report, see David P. Fidler, *Neither Science Nor Shamans: Globalization of Markets and Health in the Developing World*, 7 IND. J GLOBAL LEGAL STUDIES 191, 200-01 (1999).

<sup>44</sup> Cho, *Linkage*, *supra* note 37, at 673.

<sup>45</sup> WTO, Report of the Appellate Body, United States--Standards for Reformulated and Conventional Gasoline, WTO Doc No WT/DS2/AB/R (Apr 29, 1996) [hereinafter *Gasoline*].

<sup>46</sup> WTO, Report of the Appellate Body, United States--Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc No WT/DS58/AB/R (Oct 12, 1998) [hereinafter *Shrimp-Turtle*].

establishing the *content* of regulations, while it focused on the *manner* as to how they were applied.<sup>47</sup> In these cases, the Appellate Body no longer second-guessed the foundation of domestic regulations unlike *Thai Cigarette* (1990). Such hermeneutical turn tends to advance the WTO's openness by allowing governments to freely choose policy tools in achieving non-trade values through domestic measures or even non-trade treaties.

The *Shrimp-Turtle* (1998) is a case in point. In this case, the Appellate Body approved the legitimacy of the U.S. environmental measure (Section 609) to protect the endangered species, i.e., sea turtle, under GATT Article XX, Paragraph (g). The complainants claimed that sea turtles are not "exhaustible natural resources" under this paragraph which was originally concerned "finite resources such as minerals, rather than biological or renewable resources."<sup>48</sup> Noting that this paragraph was drafted fifty years ago, the Appellate Body emphasized that its interpretation should reflect the "contemporary" environmental concern, such as the protection of sea turtles.<sup>49</sup> The Appellate Body based its "evolutionary" approach on the new *telos* of the WTO, i.e., "sustainable development."<sup>50</sup> Markedly, in supporting its reasoning the Appellate Body referenced non-trade (environmental) conventions, such as the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as well as related International Court of Justice decisions, such as *Namibia* (1971) and *Aegean Sea Continental Shelf* (1978).<sup>51</sup> In sum, the Appellate Body acknowledged and endorsed the non-trade value of environmental protection in interpreting trade rules.

In contrast, the Appellate Body concentrates its interpretive energy on the *manner* in which the regulating government executes measures of its own choice.<sup>52</sup> This is an important "constitutional" methodology under which a centripetal force of free trade (trade value) is harmonized with a centrifugal force of regulatory autonomy (non-trade value) toward a legal, institutional equilibrium. It is the same interpretive technique which is witnessed in other polities, including the U.S.<sup>53</sup> Interestingly, a legal basis of this manner-oriented interpretation is nothing but "general principles of law," such as good faith, fairness, and consistency. These general principles of law function as a fulcrum according to which non-trade values can be balanced with trade values in the WTO system. Moreover, to the extent that these principles are shared by other branches of PIL,

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<sup>47</sup> *Id.*, paras. 146-86 (regarding the so-called "chapeau test"). See SUNGJOON CHO, FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM 45-62 (2003); Cho, *Linkage*, *supra* note 37, at 652-53.

<sup>48</sup> *Shrimp-Turtle*, *supra* note 46, para. 127.

<sup>49</sup> *Id.*, para. 129.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, paras. 130, 132.

<sup>52</sup> See *supra* text accompanying note 47.

<sup>53</sup> "In the newer cases *what* is regulated is less important than *how* it is regulated. The practical operation of a regulatory scheme is more important than whether it affects intrastate or interstate commerce directly or incidentally." (emphasis original). Donald P. Kommers & Michel Waelbroeck, *Legal Integration and the Free Movement of Goods: The American and European Experience*, in FORCES AND POTENTIAL FOR A EUROPEAN IDENTITY (BOOK 3), METHODS, TOOLS AND INSTITUTIONS (VOLUME 1), INTEGRATION THROUGH LAW: EUROPEAN AND THE AMERICAN FEDERAL EXPERIENCE 174 (Mauro Cappelletti et al eds. 1985).

the WTO norms are communicable with non-WTO norms, and thus remain open to and coherent with its legal environment.

The case for the WTO's identity formation, not identity diffusion, in its interaction with non-WTO norms goes beyond the foregoing hermeneutical dimension and stretches to an "institutional" domain. Simply, no narratives, and thus no *nomos*,<sup>54</sup> corresponding to human rights and international environment exist within the WTO which might have justified a direct normative control of the WTO by non-WTO norms. The GATT/WTO *acquis*, comprising not only jurisprudence but also other rich institutional memory, does not truly connote and denote particularities of human rights or international environmental law. This is one of the main reasons why WTO panels and the Appellate Body may treat non-WTO norms and their performance/operation in other terrain of international law as "facts"<sup>55</sup> which may base their legal reasoning, but not as directly applicable and binding "norms" per se. To wit, non-WTO norms could be supplemental or complementary, yet not supplant to WTO norms. Certainly, this institutional deficiency within the WTO vis-à-vis non-WTO norms can be addressed by engaging in a cross-institutional dialogue with other international organizations in the form of committees (e.g., the WTO Committee on Trade and Environment), agreements (e.g., WTO-IMF Cooperation Agreement), or harmonization (e.g., Agreement on the Application of Sanitary and Phytosanitary Measures, Article 3). Admittedly, these institutional aspects related to norm conflict are not covered by this book.<sup>56</sup>

## Conclusion

Pauwelyn's book deserves many credits for its unique value and contributions. It touches on an important subject-matter in the area of public international law. Undoubtedly, it is a laudable attempt to define conflict of norms in public international law, especially between WTO norms and non-WTO norms, in times of globalization and growing interdependence. The book is a product of serious enterprise both in its inclusiveness and profundity. It is very well-researched and rich in citations of jurisprudence and literatures.

It is not my intention to trivialize possible, and even desirable, nutritional inputs or contributions from non-WTO norms to WTO norms which can provide opportunities for cross-fertilization and help better reconcile between trade and regulatory goals. Yet, such cross-fertilization or reconciliation should be the WTO's call. No other treaties should replace the WTO in that call. After all, it is all about "trade and environment (human rights)," *not* "environment (human rights) and trade."

In the absence of an Austinian World Government, horizontal conflict of norms between the WTO and other branches of PIL may be inevitable. Pauwelyn's solution for such conflict leans toward PIL as long as he is willing to sacrifice the autonomy of the WTO

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<sup>54</sup> Cf. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>55</sup> CONFLICT OF NORMS, *supra* note 1, at 463-64.

<sup>56</sup> *Id.*, at 7.

system to outsource PIL.<sup>57</sup> However, WTO norms exist on its own just as HR and IE claim their own legal distinctiveness. While Pauwelyn's thesis of conflict resolution might turn the WTO porous beyond his wildest dream, at the same time it certainly risks weakening the WTO system through osteoporosis and thus encroaching upon the WTO's identity.

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<sup>57</sup> "The effect of the approach suggested here, that WTO rules would apply differently to different WTO members depending on whether or not they have accepted other non-WTO rules, may complicate the matrix of rights and obligations between WTO members." *Id.*, at 476.