

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

by Joost Pauwelyn (Cambridge, New York: Cambridge University Press, 2003) Pp. 522.

PART I

IN 2001, JOOST PAUWELYN published an article that posed the provocative question, "*The Role of Public International Law in the WTO: How Far Can We Go?*"¹ The 2001 article briefly outlined Pauwelyn's answer to that question. *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*² elaborates, at great length and in depth, on the basic claims and conceptual framework originally presented in "*How Far Can We Go?*"

The book provides the reader with not less than four hundred and ninety-two pages of close legal analysis, structured into nine chapters, subdivided into thirty-two parts. Others have already recognized that *Conflict of Norms* is "authoritative,"³ examines the question "from every salient angle,"⁴ reveals a "great ... effort" and a "great ... talent,"⁵ "will serve as a useful reference and as the *locus classicus* of the argument he espouses,"⁶ "is complex and nuanced,"⁷ raises and illuminates issues "with intensive research and great analytical acuity,"⁸ "will be useful for everyone interested in general categories of, and generalist approaches to, public international law,"⁹ achieves its aim "in an impressive manner,"¹⁰ and is "thorough"¹¹ and "detailed."¹² All of those assessments are deserved, and it is only necessary to add that Pauwelyn's writing is lucid and refreshing. This is, by any standard and by all accounts, an impressive work of scholarship.

Conflict of Norms advances four central claims: (1) WTO panels, whose jurisdiction is limited to the "covered agreements", do not have jurisdiction

1. (2001) 95 A.J.I.L. 535 [emphasis added].

2. Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge, New York: Cambridge University Press, 2003) [*Conflict of Norms*].

3. Joel P. Trachtman, Book Review of *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* by Joost Pauwelyn (2004) 98 A.J.I.L. 855 at 855 [Trachtman].

4. *Ibid.*

5. *Ibid.*

6. *Ibid.*

7. *Ibid.*

8. *Ibid.* at 861.

9. Alexander Orakhelashvili, Book Review of *Conflict of Norms in Public International Law* by Joost Pauwelyn (2004) 63:1 Cambridge L.J. 247.

10. Book Review of *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* by Joost Pauwelyn Heiderberg J. Int'l L., online: Cambridge University Press <<http://www.cambridge.org/uk/catalogue/catalogue.asp?isbn=0521824885>>.

11. Karima Bennouna, "Towards a Human Rights Approach to Armed Conflict: Iraq 2003" (2004) 11 U.C. Davis J. Int'l L. & Pol'y 171 at fn 264.

12. William W. Burke-White, "International Legal Pluralism" (2004) 25 Mich. J. Int'l L. 963 at fn 34.

to examine claims under non-WTO rules; (2) WTO panels can apply general principles of international law where the WTO Agreement is silent, for example on burden of proof and the treatment of municipal law in dispute settlement proceedings; (3) WTO panels should interpret the WTO Agreement in light of, and so as to avoid, conflict with any relevant rules of international law binding on, or reflecting the "common intentions" of, all WTO Members; and (4) in the event of a conflict between the WTO Agreement and another rule of international law, a WTO panel could in some cases resolve the conflict in favour of the *non-WTO* rule.¹³

A number of commentators view Pauwelyn's arguments as *de lege ferenda* (what the law ought to be) and not *lex lata* (what the law is). In other words, there is the notion out there that Pauwelyn's arguments *go too far* in pushing the envelope regarding the role of public international law in WTO dispute settlement. Along these lines, Trachtman writes, in his recent review of this book, that "core components of Pauwelyn's arguments are unconvincing".¹⁴ Steger has expressed similar sentiments.¹⁵ Such reactions are what occasion this review.

My aim here is not to convince anyone that Pauwelyn's central claims, or the core components of the arguments supporting those claims, are legally sound. My aim is to put Pauwelyn's claims in some perspective, by questioning whether his arguments and his "theory" are really all that contentious and far-reaching, and whether that is really as far as we can go in terms of importing public international law into the WTO.

PART II

Pauwelyn's first claim is that WTO panels, whose jurisdiction is limited to the "covered agreements", do not have jurisdiction to examine claims under non-WTO rules. While that is true, *strictu sensu*, *Conflict of Norms* largely avoids the question of whether it might be necessary for a WTO panel to decide on whether non-WTO rules have been violated as part of its assessment of a claim under the WTO Agreement.

Conflict of Norms does touch on this question, but only briefly, and only in respect of non-violation complaints:

13. These claims are presented in the form of a table in the final section of this review.

14. Trachtman, *supra* note 3.

15. See generally, Debra P. Steger, "The Jurisdiction of the World Trade Organization: Remarks by Debra P. Steger" (2004) 98 Am. Soc'y Int'l L. Proc 142 at 143-144.

In non-violation cases a WTO panel could, indeed, be called upon to refer to non-WTO rules [...] in its assessment of whether certain governmental measures, though not in violation of WTO rules, have affected the 'legitimate expectations' that could have been derived from a trade concession. A complainant could invoke these non-WTO rules along the following lines: 'when we obtained your trade concession (duty free access for our computers), we did so with the expectation that you would continue to respect international labour standards (in particular, not to employ children under the age of ten); now you have violated these non-WTO rules (children under the age of ten assemble computers in your country); this violation of labour standards does not violate WTO rules as such, but it nullifies the trade value of your concession, a nullification that we could not have foreseen [...] so in the WTO we should be compensated for this nullification under the heading of non-violation'.¹⁶

Conflict of Norms' treatment of this line of argument is cursory. It simply notes that the Appellate Body jurisprudence pertaining to non-violation complaints goes against endorsing such a wide interpretation of the non-violation remedy, and then moves on. If one is interested in knowing "how far we can go" regarding the importation of public international law into WTO dispute settlement, this is a good place to stop for a moment.

The question of whether it might be necessary for a WTO panel to decide on whether non-WTO rules have been violated as part of its assessment of a claim under the WTO Agreement could arise in other cases, outside of the non-violation context. For example, there is a much stronger argument that it might be necessary for a WTO panel to decide on whether non-WTO rules have been violated as part of its assessment of a claim under one of the various Most-Favoured-Nation (MFN) obligations of the WTO Agreement. Jackson explains the MFN clause in the following language:

The result of a nation being a beneficiary of an MFN clause is that the nation can comb all the treaties and all of the actual treatment of the granting nation, to see if some obligation or real treatment is more favorable than that granted to it, in which case the beneficiary can argue that such better treatment is owed to it.¹⁷

Consider the case of Bilateral Investment Treaties (BITs) and the MFN obligation in the General Agreement on Trade in Services (GATS). Is it not possible for a WTO Member to invoke the provisions of a third-party BIT, under Article II of the GATS, in a case where the investment of a service supplier of a WTO Member has been expropriated?¹⁸ In exercising its jurisdiction to examine such a claim under Article II of the GATS, would it not be necessary for the panel to decide on whether the standards under the non-WTO rules, for example those set out in an obligation to compensate in the

16. *Conflict of Norms*, *supra* note 2 at 455–456.

17. John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge: MIT Press, 1989) at 136.

18. Assuming the Member concerned had not taken the necessary exception under Article II, or included the necessary limitations in its GATS Schedule(s).

event of expropriation, had been followed? If the panel were to find that those standards had not been followed, could there not, provided of course that all of the other elements of the claim were met, be a finding by a WTO panel that a Member had failed to accord treatment in accordance with Article II of the GATS *by virtue of its failure to accord compensation in accordance with a BIT*? If and when the Member had brought itself into conformity with Article II of the GATS by compensating the affected service supplier in accordance with the BIT, would it not be correct to say that WTO Members may effectively bring claims under certain non-covered agreements, and that WTO panels have the jurisdiction to rule on such claims?

Now step back and consider whether the claims in *Conflict of Norms* are really that adventurous.

PART III

Pauwelyn's second claim is that WTO panels can apply general principles of international law where the WTO Agreement is silent, for example on burden of proof and the treatment of municipal law in dispute settlement proceedings.

The principle can be formulated in different ways. One way is to say that "for those areas on which the treaty remains silent, other norms of international law (in particular, general international law) continue to apply".¹⁹ Another is to say that "in case [the treaty in question] has not regulated the issue differently or 'contracted out' of pre-existing law—the rules of general international law regulating the issue continue to apply."²⁰ Another classic formulation of the rule is found in the *Georges Pinson* case: "Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way".²¹ In the WTO context, the Panel in *India-Autos* has noted that, "it is certainly true that certain widely recognized principles of international law have been found to be applicable in WTO dispute settlement, particularly concerning fundamental procedural matters."²²

It is certainly true, as the book sets out at length, that where a treaty "contracts out" of an otherwise applicable rule, the other rule is no longer applicable. That is elementary. *Conflict of Norms* does *not* argue that all rules of general international law are applicable in WTO dispute settlement in the sense of *overriding* the WTO Agreement. Rather, the argument is that, recognizing that there may be many issues on which the WTO Agreement *does*

19. *Conflict of Norms*, *supra* note 2 at 202.

20. *Ibid.* at 205.

21. *Georges Pinson* case, Franco-Mexican Commission (Verjil, President), AD 1927-8, No. 292 at para. 50, cited in *Ibid.* at 205.

22. *India—Measures Affecting the Automotive Sector* (2002), WTO Doc. WT/DS146/R and Corr.1, WTO Doc. WT/DS175/R and Corr.1 at para. 7.57 (Panel Report and Report of the Appellate Body), online: WTO <http://docs-online.wto.org/gen_search/asp>.

indeed contract out of otherwise applicable rules of international law, in those cases (and there may only be few) where the WTO Agreement has *not* contracted out of otherwise applicable general international law, in particular where the WTO Agreement is silent on the question at issue, general international law continues to apply, and must be applied by a panel.

Arguments will arise in respect of whether the WTO Agreement has contracted out of this or that particular rule. For example, some have taken issue with Pauwelyn's argument that WTO Members did not contract out of the rule set forth in Article 30 of the *Vienna Convention on the Law of Treaties*²³ (see below). However, *Conflict of Norms* generally has very little to say about *which* rules of general international law continue to apply in WTO law on the grounds that they have not been contracted out of. Rather, it only advances the conceptual framework that *if* those rules have not been contracted out of, *then* they continue to apply. Is this claim a radical one? Would anyone attempt to argue, for example, that if the WTO Agreement is silent on an issue like burden of proof, a WTO panel should ignore well-established principles of general international law regulating the issue and simply invent their own rule instead?

PART IV

Pauwelyn's third claim is that WTO panels should interpret the WTO Agreement in light of and so as to avoid conflict with any relevant rules of international law *only if* those other rules of international law *are binding on all WTO Members* or *only if* those other rules of international law, if they are not binding on all WTO Members, reflect the "common intentions" of all WTO Members.

The first element of this claim—that the other rules of international law be binding on all WTO Members—reflects the most cautious and conservative of all possible meanings to be given to the term "applicable in the relations between the parties" in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*.

The second element of the rule—that a WTO panel may also take other rules of international law into account for the purpose of interpreting the terms of the WTO Agreement if those rules reflect the "common intentions" of all WTO Members—reflects the most cautious and conservative interpretation possible of the WTO Appellate Body decisions in which certain instruments or groups of international instruments not binding on all (or even many) WTO Members were taken into account to interpret the

23. 23 May 1969, 1155 U.N.T.S. 331, [1980] C.T.S. 37.

terms of the WTO Agreement (*e.g. Shrimp/Turtle*,²⁴ *FSC*²⁵).

Conflict of Norms squarely rejects, among other things, any notion that WTO panels should interpret the WTO Agreement in light of and so as to avoid conflicts with other rules of international law binding only on, or reflecting the common intentions of, a wide sub-set, possibly a very wide sub-set, of the Membership.

There are a number of other ways in which Pauwelyn's discussion of treaty interpretation as a means of importing other rules of international law into WTO dispute settlement reflects a cautious and conservative approach. In his own words, "the role of non-WTO rules in the interpretation of WTO covered agreements must be rather limited".²⁶

PART V

Pauwelyn's fourth claim is that in the event of a conflict between the WTO Agreement and another rule of international law (whether treaty or customary), a WTO panel could in some cases resolve the conflict in favour of the *non*-WTO rule.

There are reasons to be skeptical about the existence of any actual conflicts between the WTO Agreement and legal norms in other areas of international law, in particular any conflicts between the WTO Agreement and international human rights law or international environmental law. First, it is important to appreciate that "[t]he treaty text is not the haphazard product of a casual get-together of diplomats but the product of experts and lawyers."²⁷ While it is certainly possible to theorize that there could or even should be conflicts,²⁸ the reality is that States simply would not, and do not, conclude instruments in the field of international human rights and environmental protection that conflict with their WTO obligations. Second, no panel in the fifty year history of GATT/WTO dispute settlement has ever, to my knowledge, been faced with such a conflict. It should be noted that *Conflict of Norms* itself "does not go into specific cases of interplay or conflict between WTO rules and other rules of international law."²⁹ That is, *Conflict*

24. See *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report), online: WTO <http://docs-online.wto.org/gen_search/asp>. See also *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 by Malaysia* (2001), WTO Doc. WT/DS58/RW (Article 21.5 Panel Report), as upheld by the Appellate Body Report, online: WTO <http://docs-online.wto.org/gen_search/asp>.

25. *United States—Tax Treatment for "Foreign Sales Corporations"* (2000), WTO Doc. WT/DS108/AB/R (Appellate Body Report), online: WTO <http://docs-online.wto.org/gen_search/asp>.

26. *Conflict of Norms*, *supra* note 2 at 272 [emphasis omitted].

27. Leo Gross, *Essays on International Law and Organization*, Vol. I (New York: Transnational Publishers, Inc., 1984) at 424.

28. For some good theorizing of why conflicts should arise and be a problem, see *Conflict of Norms*, *supra* note 2 at Chapter 1.

29. *Ibid.* at 3.

of *Norms* does not offer any actual examples of any actual conflicts between the WTO Agreement and any other rule of international law.

Assuming there are some conflicts to begin with, Pauwelyn's claim is once again a very cautious and conservative one. What *Conflict of Norms* says is that a WTO panel could only resolve the conflict in favour of the non-WTO rule when *both* of the parties to the dispute, not simply the defendant, are also States party to the other treaty (or where both have agreed to the customary rule). Thus, this defence is only available in the limited situation where a WTO Member invokes WTO dispute settlement procedures to challenge a measure that *it has already agreed to*.³⁰ Is this central claim, the scope of which is even further limited by a range of other conditions set out in *Conflict of Norms* that are too detailed and technical to review here, really an adventurous, far-reaching one?

PART VI

The central claims advanced in *Conflict of Norms* can be summarized as follows:

	Non-WTO law binding on all WTO Members or reflecting the common intention, understanding or agreement of all WTO Members	Non-WTO law binding on both disputing parties (but not binding on or reflecting the "common intentions" of all WTO Members)	Non-WTO law binding on only one of the disputing parties (and not reflecting the "common intentions" of all WTO Members)
<i>Jurisdiction</i> (to examine claims of violation of these rules)	No	No	No
<i>Applicable law</i> (to fill gaps and silences in the WTO Agreement)	Yes	No ³¹	No
<i>Interpretation</i> (to be taken into account for the purposes of interpreting the WTO Agreement)	Yes	No	No
<i>Valid defense</i> (if non-WTO law conflicts with the WTO Agreement)	Yes	Yes	No

30. Here, a reference to Article 3.10 of the DSU, which provides that Members "will engage in these [WTO dispute settlement] procedures in good faith", seems appropriate.

31. This table is based upon a similar table included in *Conflict of Norms*, supra note 2 at 477. The entry in this box in the original table in *Conflict of Norms* reads "YES". I believe that may be a typographical error.

It is not possible to go any farther, in terms of intellectual rigour and depth of analysis, than *Conflict of Norms* does in terms of the argumentation advanced to support its claims. Most international trade lawyers who have little use for much of the scholarship that is now produced by many members of the academy³² will clearly be able to make much use of this book over the years to come. It will also, of course, be useful to other academics, and is mandatory reading for any graduate student writing about the subject matter.

I disagree with those who consider that *Conflict of Norms* goes too far and reflects the work of a maverick. Consider the number of times the term "No" appears above. *Conflict of Norms* presents, in my view, a series of cautious and conservative claims supported by a series of equally cautious and conservative (and at times brilliant) arguments. In my view, it is not clear that *Conflict of Norms* offers a complete account of how far we can actually go in importing public international law into WTO dispute settlement.

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32. This language is borrowed from Judge Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 Mich.L.Rev. 34 at 35.