

# Treaty, Custom and the Cross-fertilization of International Law

By Philippe Sands<sup>1</sup>

## I. INTRODUCTION

¶1 The title of this timely and innovative new journal raises basic questions about the connection between human rights norms and development norms. What is their hierarchical relationship? How does the content of one inform that of the other, if at all? Is the international legal order a "bric-a-brac" or a "system"? Is it an aggregate of disparate elements haphazardly brought together or a systematically organized and coherent structure?<sup>2</sup> If the latter, what organizing techniques, if any, exist to assure hierarchy?

¶2 In this Article, I set out some introductory thoughts on the relationship between and the hierarchy among different norms of international law. To be clear, the subject of relationship and hierarchy has several aspects. One is the general relationship between different sources of legal obligation, in particular between treaty and custom. A second is the relationship between different subject matter areas of international law: For example, which prevails in a conflict between treaty norms of the law of development and the law of human rights, or between the law of international trade and the law of the environment? A third aspect merges the first two: What is the relationship between a treaty norm arising in one area of international law and a customary norm arising in another? In this paper, I focus on the third issue, which has received surprisingly little attention, while touching also on the first aspect.

¶3 The relationship between treaty and custom—particularly across subject matter areas—may appear rather esoteric. In fact, it is a problematic subject that arises with increasing frequency. The world of international law is, in institutional terms at least, significantly transformed from that of a generation ago in at least two ways. First, there are more international "legislatures"—formal international institutions, conferences of the parties established by treaties, and so on—which are adopting ever

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1. Reader in International Law at the University of London, School of Oriental and African Studies; Global Professor of Law, New York University School of Law.

2. See Jean Combacau, *Le Droit International: Bric-à-brac ou Système?*, ARCHIVES DE PHILOSOPHIE DU DROIT 85 (1986) (arguing that international law is an organized system).

more norms across an ever broader range of subject matters. Second, there are more international adjudicatory bodies in place, which are being asked to resolve more international disputes. These two factors combine to establish the conditions under which potential conflicts between norms will arise and require adjudication.

¶4 An important area in which this has been occurring is with respect to the relationship between international free trade rules and international environmental protection laws. For example, the decision adopted on January 5, 1998 by the Appellate Body of the World Trade Organization in the case of *EC Measures Concerning Meat and Meat Products (Hormones)* ("Beef Hormones decision")<sup>3</sup> is the most recent of a string of GATT and WTO decisions in which the relationship between trade and environmental norms have been considered. The case arose when the United States and Canada challenged an EC prohibition against imports of meat and meat products derived from cattle to which natural or synthetic hormones had been administered to promote growth. The European Communities sought to justify its ban *inter alia* by relying on the Precautionary Principle, which it considered to have the status of a general rule of customary international law and to not be overridden by Article 5.1 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.<sup>4</sup> For its part, the United States denied that the Precautionary Principle was a generally accepted principle of customary international law or that the principle could "create a risk assessment requirement where there [was] none."<sup>5</sup> Canada denied that the principle was yet part of public international law. It viewed "the precautionary approach or concept as an *emerging* principle of international law . . . within the meaning of Article 38(1) of the Statute of the International Court of Justice" that could not in any way justify the EC's actions.<sup>6</sup>

¶5 The Appellate Body ruled that it did not need "to take a position on the important but abstract question" of the status of the principle in general or customary international law.<sup>7</sup> It concluded, in agreement with the Panel from which appeal had been made that the Precautionary Principle did not override the provisions of Articles 5.1 and 5.2 of the SPS Agreement.<sup>8</sup> Its reasoning had four elements, the last of which was most relevant to this paper: "[T]he precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the

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3. Report of the Appellate Body on EC Measures Concerning Meat and Meat Products (Hormones), 1998 WL 25520 (W.T.O.) (visited Apr. 30, 1998) <<http://www.wto.org/wto/dispute/distab.htm>> [hereinafter Hormones].

4. See *id.*, para. 16; Agreement on the Application of Sanitary and Phytosanitary Measures [hereinafter SPS Agreement], in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 69 (1994). Article 5.1 of the SPS Agreement provides that: "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations." SPS Agreement, *supra*, art. 5.1.

5. See Hormones, *supra* note 3, para. 43.

6. *Id.*, para. 60.

7. *Id.*, para. 123.

8. See *id.*, para 125.

normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement.<sup>9</sup> If the Appellate Body had concluded that the Precautionary Principle was a generally applicable rule of customary international law with a generally understood and applied meaning would it—or could it—have read it into the text of Article 5.1 and applied it with practical consequences? Although the Appellate Body refers to customary principles of treaty interpretation, it does not refer to Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties.<sup>10</sup> This requires that "other relevant rules of international law" must be taken into account in the interpretation of a treaty text.<sup>11</sup> It appears to be the only tool available under international law to construct a general international law by reconciling norms arising in treaty and custom across different subject matter areas. Article 31(3)(c) is of interest for these reasons, and because it is so rarely invoked.

¶6 Article 31(3)(c) has a potentially generic application, which could encompass the relationships between other areas and other norms, including human rights and development, trade and labor, and even the law of the sea and human rights. In addressing the relationship between treaty and custom in a cross-sectoral context and the proper approach to 31(3)(c), I will not dwell on the substantive contents of the norms arising in various sectors, or address their substantive interrelationship. For the purposes of this paper I assume, for example, that there exists a law of development,<sup>12</sup> and that its norms can, in principle, modify the application of human rights norms,<sup>13</sup> just as they can and do modify the application of environmental norms, whether by legislation or judicial activity.<sup>14</sup>

9. *Id.*, para. 124. The first three elements were: (1) The principle had not been written into the SPS Agreement to justify measures otherwise inconsistent with obligations under the Agreement; (2) the principle was reflected in Art. 5.7 of the SPS Agreement—the terms of which did not exhaust its relevance—as well as the preamble and Article 3.3, and that "these recognize the right of WTO Members to establish their own appropriate level of sanitary protection which level may be higher (i.e. more cautious) than that implied in existing international standards, guidelines and recommendations;" and (3) "a panel charged with determining" whether "sufficient scientific evidence" existed to warrant "a particular SPS measure" should "bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible . . . damage to human health are concerned. *Id.*, para. 124.

10. *Id.*, para. 124.

11. Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 (1969).

12. For a persuasive argument for a law of development, see Georges Abi-Saab, *Cours general de droit international public*, 207 RECUEIL DES COURS 9, 454 (1987-V).

13. A recent article in the *Financial Times* describing the Malaysian government's ban on academic publications painted a negative picture of the country's smog problem on the grounds that this would dissuade visitors, provoking the question of whether development objectives might be argued to modify the content or application of free speech rights. See James Kynge, *Malaysia Gags Research Reports on Smog*, FIN. TIMES, Nov. 7, 1997, at 4.

14. For references to the principle of common but differentiated responsibility, see Convention on Biological Diversity, June 5, 1992, pmbl., 31 I.L.M. 822; *id.*, arts. 20(2), (4), at 830-31; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 5.1, 26 I.L.M. 154 [hereinafter Montreal Protocol]; United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 [hereinafter Framework Convention]; and Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, pmbl., 26 I.L.M. 1529 (1987) [hereinafter Ozone Convention]. This is supported by the numerous references in the 1993 Vienna Declaration and Program of Action adopted by the World Conference on Human Rights. See, e.g., Vienna

¶7 The article begins by setting out the background, namely the proliferation of norms of international law across various subject matter areas, the enhanced role of international adjudication, and the problems, which may arise from legislative and adjudicatory fragmentation. Section II addresses the interpretative mechanism of Article 31(3)(c) of the 1969 Vienna Convention, apparently the only tool available to assist in resolving cross-sectoral conflicts between treaty and custom.<sup>15</sup> Section III considers how the application of Article 31(3)(c) might be further developed and operationalized. The paper concludes with an assessment of the implications for the relationship between human rights and development norms.

#### II. By Way of Background: Legislative and Adjudicatory Fragmentation

¶8 The world of international law is invariably presented as one in which the various substantive subject matters areas exist in quasi-hermetical isolation: human rights, the *jus in bello*, environmental protection, trade, development assistance, intellectual property, and others, are taught and treated as discrete areas, subject to their own norms and institutional structures.<sup>16</sup> The separate subject matter areas are treated as a part of general international law, but often presented as organically disconnected from each other. The whole is made up of a collection of fragmentary parts, the implication being that the different parts only seldom, if ever, connect.

¶9 This is an understandable approach. It is familiar to domestic lawyers. In international law, it is rooted in the traditional approach which distinguished—rather simplistically it now seems with hindsight—between the *Law of Peace* and the *Law of War*, as Oppenheim's early editions were entitled. As the law in general and the law of peace in particular developed ever more rapidly, the tendency towards substantive compartmentalization was strengthened.<sup>17</sup> Compartmentalization reinforces an image of structure and coherence, suggesting that norms are developed and applied in a coordinated and systematic manner. If the individual subject matter areas—the parts—are internally coherent and ordered, then it must follow that the collective subject matter—the sum of the parts—is also coherent and ordered.

¶10 This image is premised on two assumptions. The first is that the different subject matter areas are self-contained and only infrequently connect. The second is that when they do connect, there exist relational tools

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Declaration and Program of Action, para. 10, U.N. Doc. A/CONF.157/24 (1993), *reprinted in* 1 Int'l Hum. Rts. Rep. 240 (1993) ("The World Conference reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights. ").

15. I do not propose here to address the related issue of how treaties may crystallize into customary norms, which is fully analyzed in Eduardo Jiménez de Aréchega, *International Law in the Past Third of a Century*, 159 HAGUE RECUEIL DES COURS 1 (1978-I).

16. See, e.g., Framework Convention, *supra* note 14, art. 4(7), at 858 ("The extent to which developing country Parties will effectively implement their commitments . . . will depend upon the effective implementation by developed country Parties of their commitments related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties."); see also Ozone Convention, *supra* note 14, at 1529-40.

17. See generally D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 17 (1991).

and mechanisms to establish primacy, and to avoid or resolve conflict. In my view both assumptions are false, and increasingly so. Norms arising in different subject matter areas can and do touch. They co-mingle and compete. These apparently distinct subject matter areas do not exist in a state of isolation. Human rights and development are and must be connected, and this journal will hopefully assist in contributing to a greater understanding of the connections. Indeed, interconnection between different subjects—for example, trade and environment, human rights and environment, trade and human rights and development assistance and human rights—is increasingly common in international legislative efforts.

¶11 By way of illustration, it is useful to compare international instruments adopted in the 1950s and 1960s with those adopted more recently. By this means, it is possible to chart the steady, but by no means universal move towards interconnection. Early instruments which spring to mind include the original 1947 GATT,<sup>18</sup> the constituent instruments of the Bretton Woods institutions (IBRD, IFC, IMF)<sup>19</sup> and the regional and global human rights instruments of the 1950s and 1960s—for example, the 1950 European Convention on Human Rights<sup>20</sup> and the 1966 International Covenants on Civil and Political Rights<sup>21</sup> and Economic and Social Rights.<sup>22</sup> What is striking about these texts is the extent to which they generally exclude reference to other subject areas of international law. With limited exception, however, no reference to environment or human rights is to be found in the constituent instruments of the multilateral development banks, or to environmental protection or considerations of economic development in the human rights instruments, or to anything other than rudimentary references to social and environmental matters in the trade instruments. Each purports to create a more or less self-contained regime, institutionally and substantively, barely referring to the societal objectives aimed at in these other instruments.

¶12 The situation is different today. In the environmental field, for example, global agreements now routinely link the environmental commitments of developing countries to the provision of financial assistance by the developed countries.<sup>23</sup> They frequently invoke trade and intellectual property rules to achieve environmental objectives.<sup>24</sup> In the field of

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18. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

19. Articles of Agreement of the International Finance Corporation, May 25, 1955, 7 U.S.T. 2197, T.I.A.S. No. 3620, 264 U.N.T.S. 117; Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134.

20. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, 213 U.N.T.S. 221.

21. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

22. International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 195.

23. See, e.g., Framework Convention, art. 4(3), *supra* note 14, at 855 (discussing commitment of developed countries to grant technical and financial assistance to the developing countries).

24. See generally Montreal Protocol, *supra* note 14 (establishing obligations to reduce the production of chemicals that deplete the ozone layer).

development assistance, the European Bank for Reconstruction and Development, established in 1990, is required by its constituent instrument to take into account "principles of multi-party democracy" and "to promote in the full range of its activities environmentally sound and sustainable development."<sup>25</sup> Such linkages—between environment and development and between development assistance and social and political standards—would have been almost unthinkable just a short time ago, and has led to a radical transformation of the operating practices of bodies such as the World Bank.<sup>26</sup> Or compare the preamble to the 1994 Agreement establishing the World Trade Organization with that of the 1947 instrument. The former commits parties to expanding the production of and trade in services while "seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic commitment."<sup>27</sup> The latter is silent on this point.<sup>28</sup> Similar tendencies are evident at the regional level, with the incorporation of references to environmental protection and fundamental human rights in the amendment of the 1957 Treaty Establishing the European Economic Community,<sup>29</sup> the reference to environmental requirements in various other regional human rights instruments,<sup>30</sup> and the emergence of regional free trade agreements with safeguards for environmental and labor standards.<sup>31</sup>

¶13 These trends have been confirmed by a series of major UN conferences held in the 1990s on various themes: environment and development, human rights, and population.<sup>32</sup> The 1992 UN Conference on Environment and Development committed the international community to the objective of achieving sustainable development, requiring the integration

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25. Agreement Establishing the European Bank for Reconstruction and Development, arts. 1, 2(1)(vii), arts. 1, 2(1)(vii), 29 I.L.M. 1077.

26. See generally IBRAHIM F. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* (1991) (discussing the Bank's role in political and social issues, environmental protection, and human rights).

27. Agreement Establishing the World Trade Organization, *in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1144 (1994) (visited 15 July, 1998) <<http://www.wto.org/goods/spsagr.htm>> [hereinafter Final Act].

28. *Supra* note 18.

29. In relation to the development of environmental provisions, see Title VII, *in* Treaty Establishing the European Community, Mar. 25, 1957, 298 U.N.T.S. 267, arts. 130r, 130s, 130t, *as amended by* Single European Act, Feb. 17, 1986, art. 25, 25 I.L.M. 506, 515; *id.* arts. 2, 3, 130r, 130s, 130t, *as amended by* E.C. Treaty, Maastricht version, [1992] 1 C.M.L.R. 573 (1990); in relation to human rights protections, see *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* (Hr. St. J. MacDonald et al. eds., 1993).

30. See Charter of the Organization of American States, 1948, art. 94, 33 I.L.M. 981 (1994); African Charter on Human and Peoples' Rights, June 27, 1981, art. 24, 21 I.L.M. 58 (1982); Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, art. 11, Nov. 22, 1969, 9 I.L.M. 673 (1970).

31. See North American Free Trade Agreement, Dec. 8, 1992, 32 I.L.M. 289 (1993).

32. The conferences include the the 9<sup>th</sup> Session of the United Nations Conference on Trade and Development (1996), World Summit for Social Development (Copenhagen, 1995), International Conference on Population and Development (Cairo, 1994), Global Conference on Sustainable Development of Small Island Developing States (Barbados, 1994), and the Earth Summit (1992).

of "all environmental, social and economic factors."<sup>33</sup> The consequences for international law are significant, and I have written elsewhere of the emergence of "international law in the field of sustainable development," describing it as "a broad umbrella accommodating the specialized fields of international law which aim to promote economic development, environmental protection and respect for civil and political rights."<sup>34</sup>

¶14 The approach reflected in these more recent international legislative efforts, including others subsequent to UNCED, indicates that the international community is on its way to recognizing more clearly in its legislative efforts the interconnections which exist between the different domains of international law. I turn now to consider the issue from the perspective of international adjudication, a second transformative factor.

#### A. International Adjudication

¶15 There has been a marked increase in recent years in the number of international judicial and quasi-judicial institutions. Some of the more notable institutions include the new Dispute Settlement Understanding of the World Trade Organization,<sup>35</sup> the World Bank Inspection Panel,<sup>36</sup> the International Tribunal for the Law of the Sea,<sup>37</sup> and the Implementation Committee established under the Non-Compliance Procedure of the Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>38</sup> There has also been a sharp increase in the amount of international litigation—for example, at the International Center for the Settlement for Investment Disputes and before various human rights bodies, both regional and global. The International Court of Justice has its fullest docket ever, as the WTO dispute settlement bodies have been presented with more than 100 cases in just three years.<sup>39</sup> It is

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33. U.N. Conference on Environment and Development: Agenda 21, para. 10.3, U.N. Doc. A/CONF.151/4 (1992) [hereinafter Agenda 21].

34. Philippe Sands, *International Law in the Field of Sustainable Development*, 1994 BRITISH YEARBOOK OF INTERNATIONAL LAW 303; *accord id.* at 338-39, 378-81 (explaining principle of integration); Philippe Sands, *International Law in the Field of Sustainable Development: Integrating Development, Environment and Human Rights*, in INTERNATIONAL LAW AS A LANGUAGE FOR INTERNATIONAL RELATIONS 493-502 (1995) (discussing the place of sustainable development in international law).

35. For the enabling language in the Final Act, see *supra* note 27, art. 2, para. 3, at 1145.

36. For a description of the purpose and structure of the World Bank Inspection Panel, see International Bank for Reconstruction and Development, Inspection Panel Opening Procedures, including Executive Directors' Resolution and Explaining Memorandum of the General Counsel, 34 I.L.M. 503 (1995).

37. For an explanation of the mechanisms for dispute resolution related to the United Nations Law of the Sea, see United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 186, 21 I.L.M. 1261, 1307-8 (1982).

38. For an explanation of the procedures dealing with non-compliance, see *supra* note 24, art. 8, at 1556.

39. See generally *Overview of the State-of-play of WTO Disputes* (visited July 17, 1998) <<http://www.wto.org/wto/dispute/bulletin.htm>> (listing the cases taken up by the WTO Panel between April and November 1998 and the degree to which the decisions of the Panel have been implemented).

noteworthy that with the exception of the ICS these fora were established to address sectoral matters—trade, development assistance, oceans, environment, investment protection, and human rights. Now all are increasingly called upon to address cross-cutting issues of general international law—extraterritoriality, reservations to treaties, recognition of governments and states, and so on. Each is now increasingly called upon to apply norms arising from different subject matter areas.

¶16 The potential for customary norms to influence treaty interpretation and application thus arises with increasing frequency as the fields of international law proliferate, the norms within those fields multiply, and the tendency towards specialization is heightened. What are these bodies to do in the face of the traditional principle, which provides that there is no hierarchy between the norms of international law—"indifférenciation hiérarchique des normes"<sup>40</sup>—in the face of interconnection?

¶17 Examples of interconnection abound in recent case law. Let us return to the example of contact and conflict in the field of trade and environment. The potential problem arose clearly in the 1991 GATT tuna/dolphin dispute between Mexico and the United States.<sup>41</sup> At the instigation of Mexico, a Panel ruled that U.S. import restrictions on tuna caught by Mexican fishing vessels in a manner alleged by the U.S. to be inconsistent with U.S. dolphin conservation laws violated the GATT.<sup>42</sup> The Panel had been called upon by the U.S. to interpret Article XX (b) and (g) of the GATT in a liberal and extensive manner.<sup>43</sup> These provisions allow exceptions to the GATT free trade rules on the grounds that the measures are, respectively, necessary to protect "animal or plant life" or are related "to the conservation of exhaustible natural resources."<sup>44</sup> The Panel ruled that Article XX (b) did not apply to measures necessary to protect animal or plant life outside the jurisdiction of the contracting party taking the measures.<sup>45</sup> Similarly, the Panel ruled that Article XX (g) did not permit the U.S. to apply measures "extrajurisdictionally."<sup>46</sup> The U.S. measures were not based on an international environmental agreement or customary environmental law, so the Panel was not called upon to construe Article XX in the context of other relevant rules of international law. But if there had been other rules of customary international law allowing—or perhaps requiring—the U.S. to take dolphin conservation measures, how ought the Panel to have approached an apparent conflict between GATT law and a customary norm of conservation law?

¶18 A second but less widely commented upon area of potential conflict is human rights and environment. Indeed, an increasing number of environmentally related cases are being prosecuted before the European

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40. This phrase could be translated as the "hierarchical non-differentiation of norms." Combacau, *supra* note 2, at 102.

41. See General Agreements on Tariffs and Trade, Dispute Settlement Panel on United States Restrictions of Imports of Tuna, 33 I.L.M. 839 (1994).

42. *Id.* at 850.

43. *Id.*

44. GATT, *supra* note 18.

45. See *supra* note 41, at 896.

46. See *supra* note 41, at 893-94.

Court of Human Rights. A notable example is the case that led to the Court's 1994 Judgment in *Lopez Ostra v Spain*,<sup>47</sup> in which the Court ruled that Article 8 of the European Convention on Human Rights, which establishes the right to privacy, should be construed to establish for individuals certain guarantees against environmental pollution.<sup>48</sup> In the course of its judgment the Court addressed a range of environmental issues, including the threshold at which significant environmental damage might be said to occur, *locus standi* for bringing environmental claims, and the valuation of environmental damage.<sup>49</sup> But at no point did the Court refer to standards, customary or otherwise, which might be gleaned from international environmental law.<sup>50</sup> In a subsequent judgment, *Balmer-Schafroth and Others v Switzerland*,<sup>51</sup> a majority composed of twelve judges ruled that Article 6 of the Convention (establishing the right to a fair hearing by a Tribunal) did not provide local residents with the right of access to administrative or judicial remedies in Switzerland to challenge the extension of an operating license for a nuclear power plant.<sup>52</sup> Eight dissenters, however, condemned the fact that the majority had ignored "the whole trend of international institutions and public international law towards protecting persons and heritage."<sup>53</sup> Indeed, the minority expressed support for an interpretation which would have caused "international law for the protection of the individual to progress in this field by reinforcing the precautionary principle,"<sup>54</sup> the implication being that the Precautionary Principle already had a status in international law.

¶19 These cases illustrate the potential interrelationship among different areas of international law, and the practical consequences of applying or ignoring other developments. The 1991 GATT panel decision indicates a desire to maintain GATT rules within a self-contained framework, not drawing upon or otherwise being inspired by outside sources. Both European Court judgments illustrate an approach, which ignores developments outside the field of European human rights law, although with different results. The three cases indicate the need to address more formally the interrelationship between norms of treaty and custom, which arise in different subject matter areas.

## II. ARTICLE 31(3)(C) OF THE 1969 VIENNA CONVENTION

¶20 The 1969 Vienna Convention on the Law of Treaties establishes a scheme governing the interrelationship between various, but by no means all, rules of international law depending upon their origin. In particular, it addresses three relationships: between two or more treaties relating to the same subject matter; between a treaty and a rule of *jus cogens*; and between a

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47. 20 E.H.R.R. 277 (1995).

48. *See id.* at 277.

49. *See id.* at 277-78.

50. *See id.*

51. *Balmer Scafroth et al. v. Switzerland*, 25 E.H.R.R. 598 (1998).

52. *See id.* at 598-99.

53. *Id.*

54. *Id.* at 621.

treaty and other relevant rules of international law, including customary norms which do not have the status of *jus cogens*. It does not address the relationship between two or more norms of customary law. Beyond this scheme, the International Court, in the *Nicaragua* case, has confirmed that essentially the same rules can coexist as customary and conventional law. This ruling has potentially far-reaching implications for, *inter alia*, the prospects for connection and conflict between treaty and custom across subject matter areas.<sup>55</sup>

¶21 The relationship between two or more treaties is governed by Article 30 of the 1969 Vienna Convention, which is entitled "Application of successive treaties relating to the same subject matter."<sup>56</sup> Article 30 establishes reasonably clear provisions that are used more or less mechanically to determine which treaty obligation is to apply when two or more treaties adopted at different times but relating to the same subject matter are in conflict. Assuming that the two agreements do address the same subject matter, and that the parties to the earlier treaty are also parties to the later treaty, then only those provisions of the earlier treaty which are compatible with the later treaty will apply.<sup>57</sup> But when one state is not a party to the later treaty, then it is the earlier treaty, which will govern their relations.<sup>58</sup>

¶22 It is important to point out that this is a rule of application, which imposes hierarchy. By way of example, in the case of a conflict between a treaty obligation establishing a prohibition on restrictions on trade (for example, the GATT/WTO) and a treaty obligation establishing certain restrictions on trade (for example, trade restrictions established by the 1989 Basel Convention on Transboundary Movement of Hazardous Wastes<sup>59</sup>), then the latter—the 1989 Convention—will prevail. But when both are parties to the former and only one is party to the latter, then the former will apply, as a matter of treaty law. Of course, the Vienna Convention does not define the words "same subject matter," which presumably will be left to the parties to a dispute to fight over. But, if the *Beef Hormones* case<sup>60</sup> be taken as an example, a treaty norm obligation to apply the Precautionary Principle would clearly relate to the same subject matter—risk assessment—as Article 5.1 of the SPS Agreement. If the treaty norm is later in time and binding *qua* treaty law it could override Article 5.1 of the SPS Agreement. Presumably, when two treaty rules do not address the same subject matter, no dispute is likely to arise regarding which prevails.

¶23 The relationship between treaty and a customary norm of *jus cogens* is governed by Article 53 of the Vienna Convention. This Article provides that a treaty will be void if at the time of its conclusion, it conflicts with a

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55. See *Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. U.S.), 1986 I.C.J. 14 (June 27).

56. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 8 I.L.M. 679 (1969).

57. See *id.*, arts. 30(3), 4(a).

58. *Id.*, art. 30(4)(b).

59. Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, Mar. 22, 1989, 28 I.L.M.657 (1989).

60. See *supra* note 3.

peremptory norm of general international law.<sup>61</sup>

¶24 Altogether less straightforward to resolve is the third relationship addressed by the 1969 Vienna Convention: that between a treaty obligation and an obligation arising under customary law relating to the same subject matter. The Vienna Convention includes no rule of application of customary norms in relation to a particular treaty. Rather, this interaction is to be dealt with as a matter of interpretation under Articles 31 and 32 of the Vienna Convention. According to Article 31(1), a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to [its] terms . . . in their context and in the light of its object and purpose." Article 31(2) provides guidance as to contextual material. Article 31(3) then provides that there shall be taken into account, together with the context, subsequent agreement regarding interpretation, subsequent practice and—in its paragraph (c)—"any relevant rules of international law applicable in the relations between the parties." The formulation is broad enough to include customary rules. Article 32 provides for recourse to supplementary means of interpretation.

¶25 Article 31(3)(c) reflects a "principle of integration." It emphasizes both the "unity of international law" and the sense in which rules should not be considered in isolation of general international law.<sup>62</sup> On its face, Article 31(3)(c) appears straightforward. Its actual meaning in practice, however, is difficult to know since it appears to have been expressly relied upon only very occasionally in judicial practice. It also seems to have attracted little academic comment. There appears to be a general reluctance to refer to Article 31(3)(c).

¶26A trawl through the International Law Reports indicates that only the European Court of Human Rights<sup>63</sup> and the U.S.-Iran Claims Tribunal (in a dissent)<sup>64</sup> seem to have expressly invoked Article 31(3)(c). Earlier, in 1971, the International Court confirmed that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation,"<sup>65</sup> but it did not refer to 31(3)(c),

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61. See 1 OPPENHEIM'S INTERNATIONAL LAW 7 (Robert Jennings & Arthur Watts eds., 9<sup>th</sup> ed. 1992) ("Rules of *jus cogens*, or peremptory norms of general international law have been defined in Article 53 of the Vienna Convention of the Law of Treaties 1969 as norms, "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; and Article 64 contemplates the emergence of new rules of *jus cogens* in the future.") (footnote omitted).

62. *Accord* JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 177 (2d ed. 1995).

63. See *Golder v. United Kingdom*, 57 I.L.R. 201, 217-18 (Eur. Ct. H.R., 1975) (supporting the conclusion that the principle of international law forbidding the denial of justice must be read into Article 6(1) of the European Convention on Human Rights).

64. See 75 I.L.R. 176, 188, 194 (Iran-U.S. Claims Trib. 1984) (asserting that in applying 31(3)(c) the term "national" is to be construed in accordance with "the applicable rule of international law of dominant and effective nationality"); see also *Esfahanian v. Bank Tejarat*, 72 I.L.R. 478, 483 (Iran-U.S. Claims Trib. 1983) (relying on Article 31(3)(c) to interpret "national"); *Grimm v. Iran*, 71 I.L.R. 650, 655 (Iran-U.S. Claims Trib. 1983) (relying on Article 31(3)(c) to find that rules of international law support the proposition that the term "property rights" in Article II (1) of the 1981 Iran-US Claims Settlement Declaration includes a widow's right to financial support).

65. *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 31.*

which at that time was not in force. In that case, the Court ruled that the interpretation of the Covenant of the League of Nations and the institutions it established could not remain unaffected by the subsequent development of the law, including the Charter of the United Nations and customary law.<sup>66</sup> The formulation adopted by the International Court provides for the integration of subsequent developments in the interpretation of a treaty. But it did not indicate precisely what the relationship might be, and that case essentially concerned institutional norms, rather than substantive norms.

¶27 More recently the Institut de Droit International, a private association of international lawyers, has attempted to identify a general rule on the relationship between treaty and custom which suggests a limited role for the latter. The Institut reasonably concluded that "[t]reaty and custom form distinct, interrelated sources of international law," and that a "norm deriving from one of these two sources may have an impact upon the content and interpretation of norms deriving from the other source."<sup>67</sup> The Institut did not specify, however, what that "impact" might be. The Institut did go on to conclude, however, that:

"There is no *a priori* hierarchy between treaty and custom as sources of international. However, in the application of international law, relevant norms deriving from a treaty will prevail between the parties over norms deriving from customary law."<sup>68</sup>

This is a controversial conclusion. It indicates that where treaty and custom—even later custom—cannot be reconciled, treaty will prevail. The hierarchy may not be *a priori*, but it exists nevertheless in concrete instances of application. And it exists unambiguously: treaty *will* prevail.

¶28 The reluctance to refer to Article 31(3)(c) seems endemic, even when clear opportunities present themselves. The 1991 GATT Panel dealing with the Mexico/U.S. dispute over tuna felt no need to refer to international law outside the GATT.<sup>69</sup> In 1994, another GATT Panel addressed essentially the same facts, this time in the context of a ban on imports into the United States of Mexican tuna from third parties, including the European Community.<sup>70</sup> This time, the parties before the Panel based their interpretation of Article XX (g) of the GATT in part on external norms. In the readings, reference was made to the conservation rules established by, *inter alia*, the 1982 UN Convention on the Law of the Sea,<sup>71</sup> the 1966 Inter-American Tropical Tuna Convention,<sup>72</sup> and the 1973 Convention on International Trade in Endangered Species.<sup>73</sup> The Panel thought it necessary to determine whether such treaties were relevant to the interpretation of the GATT. It concluded that they were

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66. *See id.*

67. Resolution on Problems arising from a Succession of Codification Conventions on a Particular Subject, Conclusion 10, reprinted in 66 ANNUAIRE I.D.I. 435, 441 (1996-II).

68. *Id.*, concl. 11., at 441.

69. *See* Dispute Settlement Panel on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1623 (1991).

70. *See* Dispute Settlement Panel on United States Restrictions on Imports of Tuna, *supra* note 41, at 839.

71. *See id.* at 862.

72. *See id.* at 846.

73. *See id.* at 853.

not. To reach that conclusion the Panel referred to Article 31(3)(a) and (b) of the 1969 Vienna Convention, but it conspicuously did not refer to 31(3)(c).<sup>74</sup> The failure to do so was surprising, since, on its face, that provision appears to be the one most pertinent to the matter before the Panel. The approach reflects the deep reluctance of two Panel members who were trade diplomats, not general international lawyers, to draw upon extra-GATT law. They were apparently fearful that placing reliance upon 31(3)(c) would open up the self-contained GATT system to the nefarious influence of external sources, including the environment, labor, and perhaps ultimately human rights. This debate persists.<sup>75</sup>

¶29 The 1994 Panel decision was one of the last under the old regime. Under the new WTO system, there appears to be a greater willingness to apply and interpret GATT/WTO rules in their broader international legal context. This is certainly true for the Appellate Body, which is emerging, as an international tribunal of great significance for the development of general international law, not just trade law. In its very first decision, also concerning the interpretation of Article XX (g) of the GATT, the Appellate Body found that the Panel Report had failed to apply the basic principles of interpretation reflected in the general rule of interpretation found in Article 31(1) of the 1969 Vienna Convention.<sup>76</sup> According to the Appellate Body, this rule had attained the status of a rule of customary or general international law. The Appellate Body was to apply it by reason of Article 3(2) of the WTO Dispute Settlement Understanding ("DSU"),<sup>77</sup> a provision which reflected "a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law."<sup>78</sup> Although the Appellate Body did not invoke Article 31(3)(c)—it was not called upon to do so—there can be little doubt that this *dicta* indicates a step in that direction.

¶30 Subsequently, the WTO Appellate Body has considered the relevance of customary international law in other contexts. I have already mentioned the *Beef Hormones* decision.<sup>79</sup> In 1997, the Appellate Body addressed the issue of whether small developing countries could be represented by outside counsel in Appellate Body proceedings. The issue arose in the application brought by Ecuador, Guatemala, Honduras, Mexico, and the United States against the preferential market access given by

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74. See *id.* at 892.

75. See JAMES CAMERON, *Introduction in TRADE AND THE ENVIRONMENT: THE SEARCH FOR BALANCE* 16 (James Cameron et al. eds., 1994).

76. See WTO Report of the Appellate Body on United States Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603, 621 (1996) [hereinafter U.S. Standards for Gasoline].

77. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, in Final Act, *supra* note 4, at 1226. Article 3(2) provides: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." *Id.*, art. 3(2).

78. U.S. Standards for Gasoline, *supra* note 77, at 621.

79. See *supra* note 3.

the European Community to bananas from African, Caribbean and Pacific ("ACP") states.<sup>80</sup> One of the intervening ACP states, St. Lucia, sought to attend the Panel proceedings with two private lawyers on its delegation. The United States and others objected to this. Upholding the objections, the Panel decided to exclude those delegates who were not governmental employees. The Panel's decision was raised before the Appellate Body, provoking the question of "whether a state could have its case presented before a panel or the Appellate Body by private lawyers."<sup>81</sup> St. Lucia submitted that "as a matter of customary international law, no international organization ha[d] the right to interfere with a government's sovereign right to decide whom it may accredit as officials and members of its delegation, absent rules to the contrary."<sup>82</sup> In its argument, it referred expressly to Article 31(3)(c). St. Lucia noted that neither the DSU nor the *Working Procedures* deal with the issue of a sovereign state's entitlement to appoint its delegation and maintained that "to do so would go beyond the powers of a panel, the Appellate Body or the WTO under customary international law."<sup>83</sup> St. Lucia also observed that there was "no provision in the DSU or in the *Working Procedures* requiring governments to nominate only government employees as their counsel in WTO panel or Appellate Body proceedings."<sup>84</sup> St. Lucia's argument was supported by Canada and Jamaica, but opposed by the United States and others, essentially on the grounds that it was contrary to established practice and was not required by general international law.<sup>85</sup> The Appellate Body concluded that the WTO Agreement, the Dispute Settlement Understanding, and the Working Procedures were silent as to who could represent a government in making representations.<sup>86</sup> It did not invoke Article 31(3)(c), but it did refer to other relevant rules of international law. Reversing the issue and asking itself not what customary law permitted but what it did not prohibit, the Appellate Body concluded, "we can find nothing in . . . customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings."<sup>87</sup> The conclusion seems to have been motivated in part by the needs of developing countries: The Panel noted that "representation by counsel of a government's own choice may well be a matter of particular significance—especially for developing country Members—to enable them to participate fully in dispute settlement proceedings."<sup>88</sup> So here we may have an example of a development imperative (if not a norm)—the effective participation of developing countries in a universal system—being integrated into the trade

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80. See WTO Report of the Appellate Body on the European Communities Regime for the Importation, Sale, and Distribution of Bananas, 37 I.L.M. 243 (1998) <<http://www.wto.org/dispute.distab.htm>>.

81. *Id.*, para. 5.

82. *Id.*

83. *Id.*

84. *Id.*

85. See *id.*, paras. 6-8.

86. See *id.*, paras. 10-12.

87. *Id.*, para. 10.

88. *Id.*, para. 12.

system, albeit on a procedural matter.

¶31 These cases before the GATT and the WTO bodies—including the most recent decision of the *Beef Hormones* case—indicate a gradual warming to the possibility of pulling rules of general international law and customary law into the GATT/WTO system. Recognizing that the GATT/WTO rules form part of general international law is a necessary first step towards interpreting and applying those rules in conformity with norms arising outside the GATT/WTO context. But they also indicate a continuing reluctance to grasp Article 31(3)(c) and elaborate on its practical implications. A similar reluctance exists outside the WTO.

¶32 The International Court of Justice is also called upon to interpret and apply treaty rules arising in one area of the law by reference to customary norms arising in others. For example, in the 1995 proceedings leading to its Advisory Opinions on the Legality of the Use of Nuclear Weapons, the International Court of Justice was faced with a wide array of arguments as to the relationship between, on the one hand, the *jus in bello*,<sup>89</sup> and human rights and environmental obligations on the other. Under human rights norms the Court was clear on the right to life: An arbitrary deprivation of life "falls to be determined by the applicable *lex specialis*,<sup>90</sup> namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."<sup>91</sup> In other words, a clear hierarchy was established between the two fields, as the drafters of the human rights text had intended.

¶33 On environmental matters the Court was more opaque, perhaps because it did not have the benefit of clear legislative intent. It had been presented with sharply differing views on the applicability of environmental agreements in times of armed conflict. A number of non-nuclearized states argued that environmental agreements applied in times of armed conflict unless they expressly provided otherwise and were therefore relevant to the questions before the Court; others, mostly nuclearized states, took the opposite view and denied the relevance of such agreements.<sup>92</sup> The Court reformulated the issue: It was not whether environmental treaties did or did not apply during an armed conflict, but whether the obligations they imposed were intended to be obligations of "total restraint."<sup>93</sup> The Court found that they were not. In particular, they were not intended, "to deprive a State of the exercise of its right to self-defense under international law because of its obligations to protect the environment. Nevertheless, States must take environmental considerations into account when assessing what is necessary

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89. *Jus in bello* refers to the means and methods of conducting war. See J.W. Crawford, *The Law of Noncombatant Immunity and the targeting of National Electric Power Systems*, 21-Fall, FLETCHER F. OF WORLD AFF. 101,115 (1997).

90. This phrase refers to the Latin maxim, *lex specialis generalem deroga*, the principle that a special law prevails over the general. See J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 457 (9th ed. 1984)

91. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, para. 25, 35, I.L.M. 809 (1996).

92. See Philippe Sands, *Year in Review: International Court of Justice*, in 6 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 540-42 (1995).

93. *Supra* note 92, para. 30.

and proportionate in pursuit of legitimate military objectives.<sup>194</sup>

¶34 The second sentence draws upon the Court's earlier finding that customary law prohibits transboundary environmental harm, indicating a willingness to accept a degree of cross-fertilization. The Court's approach is equivocal, side-stepping the arguments put to it, but reaching a conclusion that environmental agreements are relevant (without indicating the legal basis for that view), but not (necessarily) dispositive. They form part of the considerations, which are to be taken account of in carrying out military activities, but they do not affect the right of self-defense. This latter point takes the Court on to tricky terrain, the relationship between the *jus in bello*<sup>95</sup> and the *jus ad bellum*.<sup>96</sup> The equivocation reflected in its approach to environmental arguments is heightened in respect of this later point. Having found that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, the Court then found that it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful "in an extreme circumstance of self-defense, in which the very survival of a State would be at stake."<sup>97</sup> The language suggests an indication of a hierarchy, without expressly so stating, in a manner which is open to criticism.

¶35 Subsequently, in the *Case Concerning the Gabčíkovo-Nagymaros Project*<sup>98</sup> the Court was called upon to interpret a 1977 Treaty between Hungary and Czechoslovakia, which provided for the construction of two jointly constructed, owned, and operated barrages along the Danube. The case raised the issue of the relationship between treaty and custom within the field of environmental protection, but across time. The 1977 Treaty required the parties to ensure that the quality of the waters of the Danube should not be impaired,<sup>99</sup> and that the parties should "ensure compliance with the obligations for the protection of nature."<sup>100</sup> In the proceedings before the Court the parties expressed differing views regarding the relationship between the obligations arising under these two provisions and environmental obligations subsequently arising under the relevant international law, including customary norms. According to Slovakia, "[a]ny rules of general international environmental law that developed subsequent to the conclusion of the 1977 Treaty and that were both (a) more specific than and (b) inconsistent with the provisions of the Treaty could only displace those provisions if it were established that both parties to the Treaty . . . so intended."<sup>101</sup> For Hungary "[a]s new environmental norms emerged, whether

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94. *Id.*

95. *Supra* note 90.

96. *Jus ad bellum* refers to the rules pertaining to the legality of the use of force. See J.W. Crawford, *The Law of Noncombatant Immunity and the targeting of National Electric Power Systems*, 21-Fall, FLETCHER F. OF WORLD AFF. 101,115 (1997).

97. *Supra* note 92, para. 105(2)E.

98. Judgment in *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Czech and Slovak Federal Republic), 37 I.L.M. 162 (1997).

99. See *id.*, art. 15.

100. *Id.* art. 19.

101. See Counter-Memorial of the Slovak Republic (Hungary v. Slovakia), 1 I.C.J. Pleading 279 (Dec. 5, 1994).

through treaty or custom, they became applicable either directly as *lex posterior* or indirectly through the interpretation or application of Articles 15 and 19.<sup>102</sup> The Court's approach is equivocal. At one point it appears to take the view that new norms (conventional or customary) could be incorporated into the 1977 Treaty only by agreement of the parties.<sup>103</sup> Later in the judgment, however, the Court expresses the view that in looking to the Project's future "current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing and thus necessarily evolving obligation on the parties to maintain the quality of the waters of the Danube and to protect nature."<sup>104</sup> The Court is thus torn between the competing interests of legal certainty and environmental protection, necessarily in conflict where norms arise and evolve rapidly and significantly in their content, even within a single field of international law.

¶36 Three conclusions can be drawn from these various cases. First and foremost, they indicate that the issue of the relationship between treaty and custom—both across and within different subject matter areas—is very much alive in a real and practical sense. Clearly, these are not abstract or hypothetical issues. Next, they suggest that international adjudicatory bodies are aware of these interrelationships, but that they tend to deal with them on an *ad hoc* basis and without express reference to Article 31(3)(c). The European Court on Human Rights evidently wants to integrate environmental norms into the human rights domain, but, so far at least, is unwilling to draw expressly from the body of rules emergent in that field. The Appellate Body of the World Trade Organization is equally willing to identify and apply customary norms of a procedural or participatory nature, but falls short of feeling able to or desirous of expressing views on the existence of customary substantive norms and their application. For example, in relation to the Precautionary Principle, the Appellate Body noted the failure of the International Court in the *Gabcikovo-Nagymaros* case to identify the Precautionary Principle as a recently developed norm of environmental protection, possibly an early sign of judicial deference to perceived institutional hierarchies. For its part, the International Court has recognized the importance of integrating subsequent norms of environmental law into the measures taken to implement treaty obligation, but has provided less than clear guidance as to how it is to be achieved. And third, these cases suggest that it would be timely to revisit Article 31(3)(c) to explore how it can and should be applied, and whether it needs further legislative or judicial development. It is to this aspect that I now turn.

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102. ICJ, Verbatim Record, CR 97/12, 10 April 1997, p. 69 (Professor Sands)

103. See Judgment in Case Concerning the Gabcikovo-Nagymaros Project, *supra* note 99, at 196 ("newly developed norms of environmental law are relevant for the implementation of the Treaty and the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20").

104. *Id.*, para. 140.

## III. A WAY FORWARD: OPERATIONALIZING 31(3)(C)

¶37 In the *Gabcikovo-Nagymaros* case, Judge Weeramantry noted the capacity of Article 31(3)(c) to address relations between treaty and custom and stated that it "scarcely covers this aspect with the degree of clarity requisite to so important a matter."<sup>105</sup> How might 31(3)(c) be developed into an operationally useful tool? A distinction needs to be made regarding the relationship between an earlier customary norm and a subsequent treaty norm, on the one hand, and an earlier treaty norm and a subsequent customary norm, on the other. On the first point, no real issue arises, since states must be considered free to adopt a conventional rule, which departs from a pre-existing customary norm. Our focus must therefore be on how 31(3)(c) governs the second situation.

¶38 The language of 31(3)(c) establishes a number of parameters. The first point is that for a customary norm to be taken into account in interpreting a treaty, it must be "relevant" and it must be "applicable." "Relevance" refers to subject matter: It should be related in some way to the treaty norm being interpreted. "Applicability" refers to legal character: It must be legally binding (other than *qua* treaty) upon the parties disputing the interpretation to be given to a particular treaty. As the *Beef Hormones* case shows, this means that even before its effect on a particular treaty can be decided, an adjudicatory body will have to take a view as to the legal status of an alleged customary norm on the parties. Proving the existence of custom is notoriously difficult, and in many cases, an Article 31(3)(c) argument will fall at this first hurdle. An interesting aspect of the *Beef Hormones* case is that the Appellate Body, having decided that it did not need to rule on whether the Precautionary Principle was a rule of general customary international law, nevertheless concluded that the Precautionary Principle "finds reflection in . . . [and] has been incorporated into, *inter alia*, Article 5.7 of the SPS Agreement."<sup>106</sup> The Appellate Body appears, therefore, not to be interpreting the Precautionary Principle into the SPS Agreement, but concluding that its drafters intended to integrate the principle into the text. This conclusion could be stated more firmly save for the fact that the Appellate Body rejected the arguments of the United States and Canada that precaution existed as a principle at all, preferring to treat it as an approach or a concept.

¶39 It is only after the existence, relevance, and applicability of a customary norm has been recognized by an adjudicatory body that its precise impact upon the interpretation of a treaty comes to be determined in application of Article 31(3)(c). Two points must be considered at this stage. The first is that a customary norm is to be interpreted into a conventional norm, not applied instead of it, as is the case for Article 30 and successive treaties. In other words, under 31(3)(c), the treaty being interpreted retains a primary role. The customary norm has a secondary role, in the sense that

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105. *Id.* at 22 (separate opinion).

106. Judgment in Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Czech and Slovak Federal Republic), 37 I.L.M. 162 (1997); *accord* SPS Agreement, *supra* note 4, para. 124, 253(c).

there can be no question of the customary norm displacing the treaty norm, either partly or wholly.<sup>107</sup> The second point is that the customary norm. "shall be taken into account"<sup>108</sup> This means that in interpreting the customary norm an adjudicatory body is not entitled to exercise discretion. It must "take account" of the customary norm. International law does not provide a general definition of the term "take account". The precise wording described above indicates a range of different approaches and results. Ordinary usage suggests that the formulation is stronger than "take into consideration" but weaker than "apply." Beyond this, what might it mean, and when could it be said that an international tribunal has failed to properly apply 31(3)(c)? This question is perhaps best illustrated by an example.

¶40 The 1989 Basel Convention<sup>109</sup> seeks to establish a global regime for the control of international trade in hazardous wastes. By June 1998, it had 121 state parties.<sup>110</sup> The Convention sought to attain its general waste minimization objectives by regulating transboundary movements of hazardous and other wastes pursuant to a system of "prior informed consent" of such movements between the relevant states.<sup>111</sup> The Convention did not ban outright such movements. It required parties to prohibit exports to and imports from non-parties, however.<sup>112</sup> This was intended to create incentives to bring non-parties into the Convention. This requirement is *prima facie* incompatible with GATT/WTO rules.

¶41 Assume that a non-party to the Basel Convention, the United States, wishes to export a hazardous waste shipment to another state which is a party, and both states are parties to the WTO/GATT rules which would permit such a shipment. For these purposes, we can assume that the GATT/WTO rules pre-date the Basel Convention rules. In application of Article 4(5), the shipment is refused. If the United States was to challenge the matter before a WTO panel, that panel would no doubt be faced with the argument that the prohibition could be justified under the GATT Article XX (b) exception. To rely on such an exemption, the "importing" state would have to satisfy the panel that the measure was "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade" and that it was necessary to protect human, animal or plant life or health.<sup>113</sup> In interpreting Article XX (b), the "importing" state might wish to argue that the Article 4(5) Basel Convention prohibition reflected customary law. In support of that view, it could point to the following factors:

- (1) There are now 117 parties to the Basel Convention, broadly representative of the range of interests in the international

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107. See *supra* note 56, art. 31(3)

108. *Id.*

109. See *supra* note 59.

110. See *Ratifications* (visited July 17, 1998) <<http://www.unep.ch/basel/index.html>>.

111. Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, *supra* note 54, art. 4(2)(f).

112. See *id.* at art. 4(5).

113. GATT, *supra* note 18, art. XX, at 262.

community;<sup>114</sup>

(2) The international community has recognized the legitimacy of trade restrictions, including restrictions imposed on third states, to achieve environmental objectives in a number of multilateral environmental agreements which have broad support and in respect to which no GATT or WTO challenge has yet been mounted,<sup>115</sup>

(3) All OECD members, including non-parties to the Basel Convention such as the United States, have recognized the legitimate interests of developing countries and their right to exclude imports of hazardous and other wastes;

(4) The approach of the Basel Convention was endorsed without dissent at UNCED;<sup>116</sup> and

(5) The WTO Appellate Body has stated that "the General Agreement is not to be read in clinical isolation from public international law."<sup>117</sup>

A strong argument therefore could be made that the Article 4(5) ban reflects a customary rule, is relevant, and is applicable. What process of reasoning might a WTO panel apply in taking account of the rules? In these circumstances, I suggest that the right approach is to apply a presumption that the WTO system (indeed the rules of any primarily self-contained system of rules) is to be interpreted consistently with general international law, and that the customary rule is to apply unless it can be shown that such an application would undermine the object and purpose of the WTO system. The burden should therefore be on the party opposing the interpretation compatible with the customary rule to explain why it should not be applied.

¶42 This approach is broadly consistent with that of many municipal courts which, in interpreting domestic legislation, assume that the municipal legislature adopts laws intended to be consistent with international

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114. See *supra* note 112.

115. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, Verification Annex, pt. VI(B), para. 3, pt. VII(C), paras. 31-32, pt. VIII(C), paras. 26-27, 32 I.L.M. 804, 854, 859-60, 862 (1993); Montreal Protocol, *supra* note 14, art 4.

116. See Agenda 21, *supra* note 33, para. 20/7(b)-(d).

117. U.S. Standards for Gasoline, *supra* note 77, at 621.

obligations.<sup>118</sup> It is also broadly consistent with recent international judicial practice. And it is an approach that would tend to unify rather than fragment the international legal order.

¶43 This reasoning indicates why I am not satisfied with the views of some members of the Institut de Droit International, who assert that "relevant norms deriving from a treaty will prevail between the parties over norms deriving from customary law." It assumes conflict when conciliation could be achieved. Similarly, Judge Weeramantry's view should not preclude the possibility that in future clear and authoritative guidance might be given indicating the relationship between treaty and later custom. Article 31(3)(c) provides the basic tool. There is no reason why "the degree of clarity requisite to so important a matter" cannot be judicially provided.

#### IV. CONCLUSIONS

¶44 There is no doubt that major challenges are posed for international law by normative competition: the emergence of new norms *within* particular subject matter areas, as well as the application of norms *across* the different subject matter areas of international law. These tendencies are not necessarily new, but they are becoming ever more apparent; the body of international norms continues to expand—regionally and globally—and as ever more judicial and quasi-judicial bodies are faced with an increasing case-load requiring international law to be interpreted and applied in its general context. The purpose of this paper has been to show how this might be achieved, and how some greater degree of fragmentation might be avoided. It proposes focusing on Article 31(3)(c) as an available tool. Short of the International Law Commission providing greater clarity on its utilization—an unlikely prospect in the short term—it will be for judicial and quasi-judicial bodies to take the lead. I have sought to indicate how they might do so.

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118. See, e.g., *Salomon v. Commissioners of Customs and Excise*, 2 Q.B. 116, 141 (C.A. 1967), reprinted in 41 I.L.R. 1, 3 (ruling that, in the interests of international comity, the Customs and Excise Act of 1952 must conform to the European Convention on the Valuation of Goods for Customs Purposes).

