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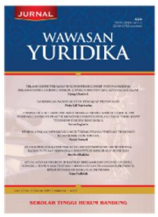

The International Law Fragmentation: Legal Consequences and Solutions

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Abstract

The development of International Law that is taking place today has led to fragmentation. As a result, conflicts of norms arise from international treaties generated by each regime. This study aims to examine how conflict of norms can take place in a fragmented international law system and how to resolve it. It is normative legal research, used secondary data in the form of primary legal materials, secondary legal, and tertiary. The data collection technique uses library reserach, then analyze qualitatively. The results indicate that the absence of an authorized institution to create International Law causes conflict of norms International Law. The ways to resolve conflict of norms include not applying one of the conflicting norms; considering one of the conflicting norms is illegal; taking into consideration one of the conflicting norms is still valid but not illegal; and the two conflicting norms are considered to have the same position.

A. INTRODUCTION

Over the past few decades, international law has undergone rapid development, not only related to the subject of regulation, but also to the substance (scope), principles, norms, and even legal institutions.[1] This development gives rise to a phenomenon known as "fragmentation of international law". In consonance with the *International Law Commission* (ILC), fragmentation of international law is a specialization of study that produces new norms, new legal principles, and even further, they have their own special courts within the framework of dispute resolution that may arise in relation to the specific regime.[2] The increase of specialized studies such as international trade law, space law,

[1] Anne Peters, "The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization," *International Journal of Constitutional Law* 15, No. 3 (2017): 671-704 https://doi.org/10.1093/icon/mox056, p. 673.

[2] Pemmaraju Sreenivasa Rao, "Multiple International Judicial Forums: A Refection of the Growing Strength of International Law or its Fragmentation?", *Michigan Journal of International Law* 25, No. 4 (2004): 927-961, p. 930.

air law, international humanitarian law, international environmental law, energy law, technology law, and many more new fields of study in the realm of international law has made international law one of the most dynamic and widely discussed fields of study by scholars around the world.[3] Further, the latest study by Gathii states that geographic and ideological aspects are also become key factors in the evolution of international legal fragmentation.[4]

The fragmentation of international law has logical consequences, both positive and negative. The positive consequence is that the relations between countries based on international agreements become closer. In addition, countries in the world also intensify their promotion of international legal rules, advance values that are important for creating a fair and civilized international society, and facilitate cooperation among countries. On the other sides, the fragmentation of international law also brings negative consequences that require effective solutions. The absence of an authority coordinating the formation of international legal norms on one side, and the rapid development of new norms produced by the fragmented international legal regimes on the other side, allow for the occurrence of norm conflicts in international law.

One of the most phenomenal examples of conflict of norm as an outcome of the emergence of fragmentation within international law is the norm conflict that occurs between the *General Agreement on Tariffs and Trade/World Trade Organization* (GATT/WTO) regime and the rules of general international law.[5] The GATT/WTO has its own specific rules regarding the implementation of the GATT/WTO agreements by its members, as well as special rules related to the interpretation of the GATT/WTO agreements, regardless of the rules in the 1969 Vienna Convention on the Law of Treaties. In addition, concerning the settlement of disputes within the GATT/WTO, this regime has its own dispute settlement body (DSB) that

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3 Eyal Benvenisti dan George W Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law," *Stanford Law Review* 60, No. 2 (2007): 595-631, p. 602–603.

4 James Thuo Gathii, "The Promise of International Law: A Third Word View", *American University of International Law Review* 36, Issue 3 (2021): 377-477, p. 380.

5 Lorand Bartels, "The Separation of Powers in the WTO: How to Avoid Judicial Activism," *The International and Comparative Law Quarterly* 53, No. 4 (2004): 861-890, p. 870. Read more James Cameron and Kevin R. Gray, "Principles of International Law in The WTO Dispute Settlement Body," *International and Comparative Law Quarterly* 50, No. 2 (2001): 248-298, https://doi.org/10.1093/iclq/50.2.248.

specifically deals with international trade relations issues, where the judges in the DSB WTO tend to adopt an Anglo-American interpretation method, which emphasizes "historical record" research rather than the interpretation approach applied by judges at the international court of justice.

Some studies on the fragmentation of international law have been conducted by scholars. Asselt examined the fragmentation in international environmental law, namely the potential conflict of norms in the climate change and biodiversity regimes. The study discussed the techniques offered by international law to evade conflict of norms and how to resolve conflicts if they occur.[6] In the other hand, Deplano's research examines the fragmentation and constitutionalization of international law through a theoretical investigation of the nature and structure of international law in order to decide whether a constitutional interpretation of international law can overcome the problem of coherence of conflicting international legal provisions and thus restore the consequences of the fragmentation process of international law.[7] The latest research comes from Rachovitsa who examines the fragmentation of international law, especially in human rights law, caused by geographical differences.[8]

Taking into account the above phenomenon, this research aims to examine in depth the nature of conflict of norms that occur as an outcome of fragmentation in international law and its alternative solutions.

B. RESEARCH METHODS

It is a normative legal research. This research uses the case approach and the legislation one. The data used are secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials consist of all regulations related to the fragmentation of international law; secondary legal materials consist of literature (journals, textbooks) related to the research topic; and tertiary legal materials consist of dictionaries. Data were obtained through

6 Harro van Asselt, "Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity regimes," *Journal of International Law and Politics* 44 (2012): 1205–1278, p. 1210.

7 Rossana Deplano, "Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry," *European Journal of Legal Studies* 6, No. 1 (2013): 67–89, p. 70.

8 Adamantia Rachovitsa, "On the New Judicial Animals: The Curious Case of an African Court with Material Jurisdiction of a Global Scope", *Human Rights Law Review* 19, Issue 2 (2019): 255–289, https://doi.org/10.1093/hrlr/ngz010, p. 256.

literature study. Data validation techniques use the source criticism method, while data analysis techniques use the legal interpretation method.

C. RESULTS AND DISCUSSIONS

1. Fragmentation in International Law

The term "fragmentation" of international law was coined firstly by Wilfred Jenks in 1953 in his article "The Conflict of Law-Making Treaties" published in the British Year Book of International Law Volume 30. Jenks explained that fragmentation of international law occurred for two reasons. First, as of the vacuum of a legislative body at the international scale, as explained below.

> *"…law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law."*[9]

Second, fragmentation of law that causes normative conflicts in international law is caused by the numerous revisions in the international legal instruments themselves. Regarding to this, Jenks emphasizes that:

> "…*one of the most serious sources of conflict between law-making treaties is the important development of the law governing the revision of multilateral and defining the legal effects of revision*."[10]

The International Law Commission (hereinafter referred to as ILC) in its final report in 2006 described the sympthon of fragmentation of international law as follows:

> *"… the fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" and even such exotic and highly specialized knowledge areas as "investment law" or "international refugee law" etc. (each possessing their own principles and institutions). The problem, as lawyers have seen it, is that such specialized law making and institution building tends to take place with the relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the*

[9] C. Wilfried Jenks, "The Conflict of Law-Making Treaties," *British Yearbook of International Law* 30 (1953): 401–453, p. 405.

[10] *Ibid.*

loss of an overall perspective of the law."[11]

According to the ILC, fragmentation in international law occurs due to the specialization of studies that generate new norms and institutions within international law itself along with the evolution of the times. The examples of fragmentation of international law include the development of studies on international trade law, human rights law, international environmental law, international maritime law, European law, and so on. The development of these specific studies shows that as a result of the development of the times that generate the working of fragmentation of international law, certain sub-systems are being formed where these sub-systems are part and recognized as part of the whole system of international law. In some literature, these sub-systems have different terms such as "*specialist system*",[12] "*functionally defined issues-areas*",[13] "*sub-system*",[14] "*meta-system*"[15] and finally formed a "*regime*".[16] Each of these sub-systems has its own sector-specific international law, law-maker, and law-enforcement mechanism (including within them also create and control mechanisms) as stated by Pauwelyn.[17]

The emergence of international law fragmentation has inevitable logical consequences. Each new regime (an institutionalized sub-system) that is formed has extensive autonomy. In fact, to assert their autonomy, it often takes place that the new regime has no relation to the international law that was formed earlier. The new regime provides all the instruments to meet their own needs. Therefore, the relationship between the two

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11 Martti Koskenniemi, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law," Report of the Study Group of the International Law Commission, 2006. UN Doc. A/CN.4/L.682 (April 13, 2006), p. 11.

12 This terminology is used by Joyner and Roscini in their article: Daniel H. Joyner and Marco Roscini, "A Contribution to Fragmentation Theory in International Law," in *Non-Proliferation Law As A Special Rezime* (Cambridge: Cambridge University Press, 2012): 1-14, p. 10.

13 Joost Pauwelyn, "Fragmentation of International Law," Max Planck Encyclopedia of Public International Law, t.t., http://www.mpepil.com, accessed date 29 December 2022.

14 Isabelle Van Damme, "Systemic Integration of International Law: Views from the ILC, the WTO CTE, and UNESCO," in John Mcmanus (Ed), *Fragmentation: Diversification and Expansion of International Law, Proceedings of the 34th Annual Conference of the Canadian Council on International Law* (Canadian Council on International Law, Ottawa, 2006), p. 61. Joost Pauwelyn also uses the term "sub-system" for a branch of International Law that examines more specific issues. See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, 1 ed. (Cambridge University Press, 2003), https://doi.org/10.1017/CBO9780511494550, p. 9.

15 *Ibid*.

16 Pauwelyn, "Fragmentation of International Law." *op.cit*.

17 Pauwelyn, *Conflict of Norms in Public International Law. op.cit.*

is no longer complementary, but rather substitutional. Furthermore, in addition to having their own procedures and control mechanisms to ensure the functioning of the norms they have created, the new regime also has its own sanctions as an accountability mechanism.[18]

Another consequence is in terms of institutionalization. This new regime creates new judicial institutions which some international law scholars are worried that these new institutions are inconsistent with international jurisprudence. The emergence of regional human rights courts, for example, the *International Tribunal on the Law of the Sea* (ITLOS), WTO Panels, and special courts that are *quasi-judicial* (arbitration courts)[19] feared conducting the interpretation of international law in different way from conducted by International Court of Justice (ICJ). However, on the other hand, one of the functions of the International Court of Justice is to ensure the unity of interpretation of international law as a whole. In addition, the interpretation conducted by International Court of Justice is the most binding legal interpretation for the subjects of international law.[20]

In order to ensure that the norms created by an international legal sub-system and its institutions can coexist harmoniously with each other, respect for each of them is necessary.[21] However, in practice, it often takes place that one norm conflicts with another norm or that one institution conflicts with another institution in two or more different areas of international law.[22]

In light of the definition of fragmentation in the frame of international law, it can be said that fragmentation of international law is a dynamic process that will continue to evolve along with the

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[18] Piere-Marie Dupuy, "A Doctrinal Debate in the Globalization Era: On the 'Fragmentation' of International Law," *European Journal of Legal Studies* 1, No. 1 (2007), p. 26.

[19] Gilbert Guillaume, "The Future of International Judicial Institutions," *International and Comparative Law Quarterly* 44, No. 4 (1995): 848–862, https://doi.org/10.1093/iclqaj/44.4.848, p. 848.

[20] Niels Petersen, "The International Court of Justice and the Judicial Politics of Identifying Customary International Law", *The European Journal of International Law*, Vol. 28, No. 2 (2017): 357-385, p. 357.

[21] Pieter Jan Kuijper, "Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO," Report, ICTSD issue paper (Geneva: International Centre for Trade and Sustainable Development: Amsterdam Center for International Law (ACIL), 2010), p. 10. https://hdl.handle.net/11245/1.334550.

[22] D. Lefkowitz, "H.L.A. Hart: Social Rules, Officials, and International Law" in D. Lefkowitz, *Philosophy and International Law: A Critical Introduction* (Cambridge: Cambridge University Press, 2020), p. 20

evolution of international law studies.[23] So far, the evolution of international law studies progressively has contributed significantly to the process of fragmentation of international law itself.

2. The Character of Conflict of Norm in International Law

a. Norm definition

Before discussing the conflict of norms, the definition and concept of norms will be discussed first. According to Law Dictionary, the definition of norms can mean two things: first, norms are: "*a non-stated set of guidelines which specify normal behavior in a social context. Social control and order are prevalent due to the pressure exerted on an individual to conform to the social norm, one which is expected from all members of a community from each other;*" second, norms can also mean: "*a set of standard rules and laws laid down by the legal system, religions or persons of social authority which judges the appropriateness or inappropriateness of an individual's actions.*"[24]

The term "norm" in this study refers to norms in the sense of "legally binding norms", and not norms in soft law that are more of a "morally binding norms".[25] The existence of soft law as a source of law in international law is still a matter of debate among scholars regarding whether it is legally binding or not. Some scholars argue that soft law has a normative value even if it is not legally binding, while others argue that soft law contains a "pre-normative value" and is actually not law, but the function of soft law is very pivotal in the interpretation of an international convention so that it becomes significant also in resolving norm conflicts.[26]

b. Types and functions of norms in International Law

In general, international law has divided norm into four types.[27] *First*, command norms. These norms impose an obligation (of a positive nature) on states to

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[23] Ewelina Cała-Wacinkiewicz, "International Law-Between Division (Fragmentation) and Unity (Constitutionalisation): Law of Divisions or Law Beyond Boundaries?," *US-China Law Review* 12, No. 10 (2015), https://doi.org/10.17265/1548-6605/2015.10.002, p. 771.

[24] The Law Dictionary, "Fragmentation Defenition & Legal Meaning", http://thelawdictionary.org/fragmentation/. Accessed date 13 November 2022.

[25] Jutta Brunnee, Stephen J Toope, "Norm Robustness and Contestation in International Law: Self-Defense against Nonstate Actors", *Journal of Global Security Studies* 4, Issue 1 (2019), p. 75.

[26] Prosper Weil, "Towards Relative Normativity in International Law?," *American Journal of International Law* 77, No. 3 (1983), https://doi.org/10.2307/2201073, p. 413. Read also: Demin A. V., "Soft law Concept in Globalized World: Issues and Prospects, *Pravo Zhurnal Vysshey Shkoly Ekonomiki* 4, (2018), p. 51.

[27] Jure Vidmar, "Norm Conflicts and Hierarchy in International Law: Towards a Vertical Legal System", in Erika De Wet and Jure Vidmar (Eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press), pp. 158-159.

do something. These norms are marked by the use of words such as "must do" or "shall". These norms are also called "prescriptive norms". An instance of a command norm is contained in Article 10 (3) of the *General Agreement on Tariffs and Trade* (GATT) and Article 3 of the *General Agreement on Trade in Services* (GATS). *Second*, prohibition norms. These norms impose an obligation (of a negative nature) on states not to do something. Words commonly used include: "must not do" or "shall not". These norms are often also called "prohibitive norms". Articles 1, 2, 3 of the GATT are some examples of prohibition norms. *Third*, exemption norms. These norms give states the right not to do something. The word commonly used is "need not do". Examples are Articles 24, 21 of the GATT and Article 24 of the GATS. *Fourth*, permission norms. These norms give states the right to do something. International agreements often use the word "may do". These norms are also called "permissive norms". For instance, Article 24 of the GATT explicitly permits WTO parties to create regional free trade agreements that are exclusions to the most-favoured nation (MFN) principle. In addition, some rules in Annex 1A of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS) also contain exemption norms. The norms in the *Agreement on Preshipment Inspection* explicitly allow the state parties to take precautionary actions that restrict commerce.

Norms can be general or individual. A norm is general if it regulates behavior that is general. For example, the norm that regulates the principle of most-favoured nation in the WTO. A norm is individual if it applies to a specific situation that has been determined, such as the norm that regulates the construction of a dam (private).

The obligations imposed by a norm may be conditional or unconditional. An example of a conditional obligation is Article 20 (b) of the GATT, which states that certain measures are required to protect health. This obligation is conditional because it only applies if WTO members decide to use their right to implement particular commerce limitations for the purpose of protecting health. An example of an unconditional obligation is Article 3 (4) of the GATT, which is the obligation to refrain from discriminatory actions.

c. The standard way of interacting norms

In general, there are two ways how a norm interacts with other norms, namely:

(1) by accumulation;[28] and (2) by conflict.[29] Two norms are said to be cumulative if both can be applied or implemented simultaneously without any contradiction in any situation. Conversely, two norms are said to be conflicting if both cannot be implemented simultaneously in any situation.

1) Accumulation

A norm can accumulate with another norm in two different methods. *First*, by adding rights or obligations to the available rights or obligations (without conflicting each other), and thus forming a complementary relationship.[30] *Second*, by confirming the existing rights or obligations without adding or subtracting them.[31]

Two norms are cumulative in the first sense (complementary) when they are norms that have different subject matters. For example, Article 4 of the Dispute Settlement Understanding (DSU), which is a norm on consultations, and Article 1 of the GATT, which contains the principle of most-favoured-nations (non-discrimination principle), which do not overlap in terms of *ratione materiae*.[32] Furthermore, two norms can be complementary when the two norms have different parties (no overlap in terms of *ratione personae*.[33] For instance, State C and State D are parties to agreement X, while State A and State B are parties to agreement Y.

However, two norms can complement each other as well even if they regulate the same content and the parties are the same.[34] This situation can occur in cases where one norm "adds" rights or obligations to another norm without conflicting with each other. For example, one norm regulates the trade of goods and another norm regulates the trade of services. Both regulate trade, but one adds rights or obligations to the other without reducing them among them. Accumulation can also occur, for example in cases where there is a norm that regulates that when sailing on the high seas, a ship is prohibited from dumping oil, and another

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28 Joost Pauwelyn, *Op.Cit*., pp. 161-166.

29 Valentin Jeutner, "Rebutting Four Arguments in Favour of Resolving Ius Cogens Norm Conflicts by Means of Proportionality Tests", *Nordic Journal of International Law* 89, Issue 3-4 (2020), p. 455.

30 Lan Cao, "International Law Norm" in Lan Cao, Culture in Law and Development: *Nurturing Positive Change* (Oxford: Oxford University Press, 2016), p. 270.

31 Valentin Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (Oxford: Oxford University Press, 2017), p. 20.

32 Joost Pauwelyn, *op.cit*., p. 163.

33 William Thomas Worster, "Competition and Comity in the Fragmentation of International Law", *Brooklyn Journal of International Law* 34, Issue 1 (2009), pp. 124-125.

34 Niels ten Oever, "Norm conflict in the governance of transnational and distributed infrastructures: the case of internt routing", *Globalizations* (2021): 184-200, https://doi.org/10.1080/14747731.2021.1953221, p. 191.

norm that regulates that when sailing on the high seas, a ship must emit a certain signal. In both cases, it appears that the first norm (trade of goods or prohibition of dumping oil) does not reduce the second norm (trade of services or obligation to emit a certain signal), and vice versa. In this case, the application of one norm does not cause a violation of the application of another norm. These two norms are called cumulative and must be complied with simultaneously. In this case, international law is cumulative law.

Next, two norms can be cumulative when one norm "affirms" another norm.[35] Article 3.2 of the DSU affirms the general rule of international law that preceded it by declaring that all WTO agreements must be interpreted in accordance with the "customs used by public international law in interpretation".[36] Another example is the WTO norm that affirms that the GATT 1994 is a combination of the GATT 1947;[37] and the norm that affirms that the TRIPs Agreement is a combination of and part of the WIPO (World Intellectual Property Organization) agreement.[38] In addition, a norm that explicitly concludes another norm without replacing it with a new norm, then it accumulates with the terminated norm. More specifically, the application of the termination norm means the end of the first norm so that the two norms will never apply at the same time and therefore will never conflict with each other.

Furthermore, two cumulative norms can occur when one norm establishes a general rule (general norm), while the other norm explicitly regulates the exceptions from the general norm.[39] An example is Article XX GATT, which provides exceptions to Article III GATT. At a glance, it seems that these two norms are contradictory (there is a norm conflict). However, based on the rule of effective treaty interpretation, the norm that contains the general provision cannot be applied to the norm that explicitly contains the

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35 Seyed-Ali Sadat-Akhavi, *Methods of resolving conflicts between treaties*, Graduate Institute of International Studies 3 (Leiden: Brill - Nijhoff, 2003), p. 5.

36 Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?," *American Journal of International Law* 95, No. 3 (2001), https://doi.org/10.2307/2668492, p. 536.

37 Claude Chase, "Norm Conflict Between WTO Covered Agreements-Real, Apparent or Avoided?," *The International and Comparative Law Quarterly* 61, No. 4 (2012), p. 793.

38 Laurence L. Helfer, "Regime Shifting: The TRIPs Agreement and The New Dynamics of International Intellectual Property Lawmaking," *The Yale Journal of International Law* 29, Iss. 1 (2004), p. 18.

39 Erich Vranes, "The Definition of 'Norm Conflict' in International Law and Legal Theory," *European Journal of International Law* 17, No. 2 (2006): 395–418, https://doi.org/10.1093/ejil/chl002, pp. 401-403.

exception. This is because, in essence, the norm that contains the exception is considered as "conditional rights" that are excluded from the norm that is general (contains general provision). As a result, because these two norms have different scopes of application, they can be applied in all conditions in close proximity. In each situation, only one of the two norms applies. However, the same does not apply if the norm that contains the exception does not explicitly state that it is a norm that is excluded from the general norm. This situation causes a conflict between the two norms because the general norm still applies to the norm that regulates the exception. The norm conflict that occurs here is between the obligations arising from the general norm on one hand, and the existence of an exception on the other hand.

Finally, two norms can be said to be cumulative when one norm regulates something different from another norm (for example, by imposing different obligations on safeguard measures), but one of the two norms explicitly refers to the other norm. In such a condition, the obligations arising from both norms must be applied cumulatively. An example is the norm in Article 1 and Article 11.1 (a)[40] of the *Agreement on Safeguards* which explicitly refers to the circumstances for putting on safeguard measures in Article XIX of GATT,[41] including the requirement for "unforeseen developments". Although the requirement for "unforeseen developments" available in Article XIX of GATT is not explicitly stated in Article 1 and Article 11.1 (a) of the Agreement on Safeguards, it does not mean that the requirement does not apply. The WTO Appellate Body (appellate body) handling the case between South Korea-Argentina related to safeguard measures, has confirmed the application of this "unforeseen development" requirement.[42]

2) The standard way of conflicting norms

Before discussing further when and under what circumstances two norms can cause conflict, it is urgent to first discuss the terminology, definition, and scope of conflict of conflict.

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[40] Article 11.1(a) of the Agreement on Safeguards stated:
"*A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement*."

[41] Article XIX GATT is a norm that regulates various emergency actions that may be taken by a country that imports certain products.

[42] World Trade Organization, *Korea-Defenitive Safeguard Measure on Imports of Certain Dairy Products*, https://www.wto.org/english/tratop_e/dispu_e/98abr.pdf, accessed 1 November 2022.

Some terminologies about the concept of norm conflict are: "*incompatibility of norms*",[43] "*inconsistency of norms*",[44] "*antinomie*",[45] "*divergence*",[46] "*contradictory of norm*", "*breach of norm*", and "*conflict of norm*".[47] Although there is no uniform received terminology by academician in the world, some of them still try to provide a definition of this concept of norm conflict. This is because, in reality, norm conflicts often arise as a result of the vacuum of an international legislative institution that has the competence to draft international agreements. Some scholars provide definitions in a broad scope, while not a few scholars provide definitions in a narrow and strict scope.

Wolfram Karl gave a definition with a limited scope on the conflict of norms, by stating that:

> "…*conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.*"[48]

Next, Jenks concluded that:

> "…*a conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible.*"[49]

Wolfram Karl gave a narrow definition of the conflict of norms, by stating that:

> "…*there is a conflict between treaties when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously.*"[50]

Meanwhile, some scholars who provide a definition of norm conflict with a broader scope, among others, Lauterpacht using the term "inconsistency", which then this term was adopted in Article 20 of the *Covenant of the League of Nations*. He explained that:

> "…*not only patent inconsistency appearing on the face of the treaty . . . but also what may be called potential or latent inconsistency… [such treaties] may become inconsistent and therefore abrogated, as soon as it becomes clear that their continued validity or operation is incompatible with the negative or positive obligations of the*

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43 Roberto Ago, "Special Rapporteur: The Internationally Wrongful Act of the State, Source of International Responsibility.," Fifth Report on State Responsibility, Document A/CN.4/291 and add 1 and 2.

44 Hersch Lauterpacht, "The Covenant as 'the Higher Law," *British Yearbook of International Law* 17 (1936), p. 58.

45 Chaim Perelman, "Antinomies," in *Les Antinomies en Droit, Essai de Synthese* (Paris: E. Bruyland, 1965), p. 399.

46 Capotorti, "Interferences dans l'ordre juridique interne entre la Convention et d'autres accords internationaux," in *Les Droits de l'homme en Droit Interne et en Droit International* (Brussels: Presses Universitaires de Bruxelles, 1968), pp. 123–124.

47 Jenks, "The Conflict of Law-Making Treaties."; Sir Humphrey Waldock, "Second Report on the Law of Treaties, Special Rapporteur," *Yearbook of The International Law Commission* 2 (1963): 38-39. (Doc. A/CN.4/1556 and Add. 1-3); Pauwelyn, *Conflict of Norms in Public International Law*.

48 Wilfred Jenks, *ibid*.

49 *Ibid*., p. 451.

50 Wolfram Karl, "Conflicts Between Treaties," in *Encyclopedia of public international law: Vol. IV.* (Amsterdam: North-Holland, 1984), p. 468.

Covenant."[51]

Next, Aufricht defines norm conflict as:

> *"…conflict between an earlier and a later treaty arises if both deal with the same subject matter in a different manner."*[52]

According to the definition of Sir Humphrey Waldock in setting up the concept of Article 20 of the Vienna Convention 1969, he declared that:

> "…*noting that the idea conveyed by that term [conflict] was that of a comparison between two treaties which revealed that their clauses, or some of them, could not be reconciled with one another*".[53]

Joost Pauwelyn has a more comprehensive definition of norm conflict. In brief, according to Pauwelyn, norm conflict occurs when:

> "…*two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other."*[54]

Pauwelyn uses the term "conflict of norms" as well as the term "breach" (violation). There are two situations in which an international legal norm violates (breaches) another international legal norm, namely: (1) a situation referred to as "inherent normative conflict" and (2) a situation referred to as "conflict in applicable law".

The first situation, "inherent normative conflict" is a situation where one of the two norms violates the other norm. In other words, one norm is "illegal" or considered as wrongful conduct according to the other norm. An example of this type of norm conflict is when there is one norm that contradicts another norm that contains *jus cogens.*[55] As an outcome, the norm that is illegal or contrary to the other norm is considered void. This is clearly regulated in Article 53 of the 1969 Vienna Convention on the Law of Treaties.[56]

The second situation, called "conflict in

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51 Lauterpacht, "The Covenant as 'the Higher Law'", *British Yearbook of International Law* 17 (1936), p. 58.

52 Hans Aufricht, "Supersession of Treaties in International Law," *Cornell Law Review* 37 (1952), p. 655-656.

53 Sir Humphrey Waldock, "Second Report on the Law of Treaties, Special Rapporteur." Available at: https://legal.un.org/ilc/documentation/english/a_cn4_167.pdf , accessed date 2 Agustus 2022.

54 Kamrul Hossain, "The Concept of Jus Cogens and the Obligation Under the U.N. Charter," *Santa Clara Journal of International Law* 3, No. 1 (2005), p. 72.

55 As stipulated in Article 53 of the Vienna Convention on the Law of Treaties 1969 concerning International Law of Treaties, *jus cogens* or *peremptory norm* is: "…*is a norm 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*." In other words, *jus cogens* is a set of rules in International Law that are "peremptory" (must be obeyed, decisive), from which there can be no exception in any condition, and it is the highest norm (hierarchically superior). For further explanation of jus cogens, see Hossain, "The Concept of Jus Cogens and the Obligation Under the U.N. Charter."

56 Article 53 of the Vienna Convention 1969 on the Law of Treaties states that:
"*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law…"*

applicable law", occurs when a state, before acting (in order to implement one of the norms), faces two conflicting norms and then decides to comply with the obligation or utilize the right based on one of the two norms, resulting in a violation of the other norm. If there is a state that implements a norm that is considered to violate another norm, then state responsibility will arise. In this case, state responsibility emerges because of an act of a state that is done in order to implement an illegal norm.

3. Resolution of Conflict of Norms in the Framework of International Law

In general, there are four methods to resolve norm conflicts. The four ways are: (1) one of the two conflicting norms does not apply; (2) one of the two conflicting norms is considered illegal; (3) one of the two conflicting norms remains valid (but not illegal); and (4) both conflicting norms are considered to have the same status. The first and second ways are ways to resolve norm conflicts that are "inherent normative conflict", while the third and fourth ways are used to resolve norm conflicts related to the application of law (applicable law).

The first solution, that if the two norms in conflicting, then one of the norms is declared invalid. The question that then arises is: "which norm is considered invalid?". The invalidity of one norm can be through invalidity (declared invalid) or termination (no longer valid). If one of the norms is declared invalid or no longer valid, then the violation of this norm will result in "state responsibility".

The second solution, namely that one norm is considered illegal from another norm. In this situation, the norm that is considered illegal is usually the norm that was created later than the norm that was present earlier. In other words, the norm that came later is considered illegal by the previous norm. The solution for this kind of norm conflict is grounded on the doctrine of state responsibility. In this matter, the state is obliged to stop the violations that may arise from this conflict by eliminating (setting aside) the norm that is considered illegal.

Unlike the first and second solutions, where the conflict of norms is resolved by terminating one of the norms, either by invalidity, termination, or illegality, for the third and fourth solutions which are ways of resolving the conflict of norms in their application, both norms will remain valid, and in this case, international law will apply the rule of "priority rules" to one of the

norms. In this case, both norms are taken into account valid and legal. The conflict is solved by favoring one of the both norms because that norm has been labeled as more prominent or more relevant or more expressive of the final intention of the parties than the other norm. The consequence is that only one norm applies to the specific situation at hand. However, the norm that does not apply (disapplied) is not declared as an invalid or illegal norm. This norm is only a rule that must give way to another norm in a certain situation. In a non-conflict situation, this norm remains valid.

A very apt illustration of the resolution of this norm conflict is depicted by the World Trade Organization (WTO) Panel Report in the case of Indonesia-Automobile.[57] In the First WTO Panel Report, claims were filed against Indonesia, among others, for violating Article III of the GATT/WTO on national treatment (the principle of non-discrimination). In response to this report, Indonesia submitted a defense based on the special rights for developing countries based on the rules of the *WTO Agreement on Subsidies and Countervailing Measures* (SCM Agreement) which stated that developing countries were granted temporary permission to maintain certain subsidies. Based on this defense of Indonesia, the Panel stated that:

> "*In international law for a conflict to exist between two treaties, . . . [their] provisions must conflict, in the sense that the provisions must impose* ***mutually exclusive obligations****… Technically speaking, there is conflict when two (or more) treaty instruments contain obligations which cannot* ***be complied with simultaneously****."*[58]

From the statement, it can be inferred that the Panel only recognized the existence of a norm conflict in situations of "mutually exclusive obligations", thus excluding the probability of a conflict between norms of permits and obligations. The practical effect in this matter is that the Panel did not even assess whether the norm of permissions requested by Indonesia constituted a lex specialis that should apply. In other words, the terminology of conflict influenced the outcome of this dispute, so that the Panel refused to discuss the rights of developing countries such as Indonesia under the SCM Agreement, which should have been Indonesia's defense by using the basis of a

[57] World Trade Organization, *Indonesia Certain Measures Affecting the Automobile Industry*, https://www.wto.org/english/tratop_e/dispu_e/54r00.pdf, accessed date 29 December 2022.

[58] *Ibid.*

norm conflict as regulated in Annex 1 of the WTO Agreement,[59] which had a great potential to win.

The second case is the 1999 Panel Report for the Turkey-Textile case.[60] In this case, India challenged the quantitative restrictions put on by Turkey on Indian textiles and clothing after the building of a customs union between Turkey and the European Union. As a defense, Turkey argued that the quantitative restrictions applied did not violate the relevant provisions of the GATT/WTO and the *WTO Agreement on Textile and Clothing*.[61] The imposition of these quantitative restrictions was confirmed by Article XXIV of the GATT/WTO on regional trade agreements, which Turkey considered to be a rule of *lex specialis*.[62] Against this defense by Turkey, the Panel referred to Jenks' terminology of conflict of norm, which stated that:

> *"…there is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another."*[63]

Although this definition denies the existence of conflicts in such cases, the Panel proceeded to examine whether Article XXIV authorized actions that were "prohibited" by GATT and the *WTO Agreement on Textile and Clothing*.[64] After a deeply assessment of Article XXIV of GATT/WTO, it summed up that the rule of GATT/WTO did not permit deviations from the pertinent duties included in GATT/WTO and the *WTO Agreement on Textile and Clothing*.[65] It is clear that the Panel's approach was paradoxical: if the decision was really consistent with its definition of norm conflict, then there was

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59 Annex 1 of the WTO Agreement states that specific agreements such as the SCM Agreement have precedence over the GATT/WTO in terms of applicability.

60 World Trade Organization, *Turkey–Restrictions on Imports of Textile and Clothing Products,* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=64010&CurrentCatalogueIdIndex=0&FullTextHash=, accessed date 29 December 2022.

61 The relevant provisions are Article XI and XIII of GATT/WTO and Article 2.4 of the WTO Agreement on Textile and Clothing. Article XI of GATT/WTO prohibits quantitative restrictions; Article XIII of GATT/WTO requires the allocation of quotas in a non-discriminatory manner; Article 2.4 of the WTO Agreement on Textile and Clothing forbids new restrictions on textile trade.

62 World Trade Organization, *op.cit.,* paragraph 9.88.

63 *Ibid.,* paragraph 9.92

64 *Ibid.,* paragraph 9.95

65 *Ibid.,* paragraph 9.97–9.192, especially paragraph 9.188–9.189.

no neccesary to investigate whether there was an authorization that conflicted with the duties under GATT.

D. CONCLUSIONS

Normative conflicts in international law are an inevitable fact nowadays. One of the causes of normative conflicts is the lack of an competence institution to make international law. Nevertheless, normative conflicts can be overcome by certain methods that have also been applied in various cases in the scope of international law.

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