**International Law Commission**
**Study Group on Fragmentation**
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# FRAGMENTATION OF INTERNATIONAL LAW:

## Topic (a): The function and scope of the *lex specialis* rule and the question of 'self-contained regimes': An outline

## 1. Introduction: fragmentation and normative conflicts

The study on "fragmentation of international law" by the International Law Commission focuses on normative conflicts that illustrate the expanding scope of international law but may challenge the coherence of the international legal system. The issue has arisen owing to the emergence of a number of closely integrated sets of rules of international law pertaining to particular subject-areas such as human rights, the environment, trade, international crimes, and so on. Such sets often combine specific primary rules (rules laying down particular rights and obligations) with specific secondary rules (rules about rule-creation and change, responsibility and dispute settlement) that claim autonomy from principles of general international law. This autonomy has sometimes led to conflicts between such specialised sets of rules and the general law as well as between different sets of specialised rules. Analytically, it is possible to distinguish between three types of normative conflict, namely:

1) between general law and a particular, unorthodox interpretation of general law;
2) between general law and a particular rule that claims to exist as an exception to it, and
3) between two types of special law.

Fragmentation appears differently in each of such three types of conflict. While the first type is really about the effects of differing legal interpretations in a complex institutional environment, and therefore falls strictly speaking outside the frame of the ILC study, the latter two denote genuine types of conflict where the law itself (in contrast to some putative interpretation of it) appears differently depending on which normative framework is used to examine it. Each of the three types of conflict is illustrated briefly below.

### 1.1. *Fragmentation through conflicting interpretations of general law*

In the *Tadic* case in 1999, the Appeals Chamber of the International Criminal Tribunal of Former Yugoslavia (ICTY) considered the responsibility of Serbia-Montenegro over the acts of Bosnian Serb militia in the conflict in the Former Yugoslavia. For this purpose it examined the jurisprudence of the International Court of Justice in the *Nicaragua* case of 1986. In that latter case, the United States had not been held responsible for the acts of the Nicaraguan *contras* merely on account of organising, financing, training and equipping them. Such involvement failed to meet with the test of "effective control". The ICTY, for its part, concluded that the "effective control" test set too high a threshold for holding an outside power responsible for the

domestic unrest. It was sufficient that the power have "a role in organising, coordinating, or planning the military actions of the military group", that is to say that it exercise "overall control" over them.[1]

The contrast between *Nicaragua* and *Tadic may be seen as* an example of a normative conflict between an earlier and a later interpretation of a rule of general international law.[2] *Tadic* does not suggest "overall control" to exist alongside the earlier "effective control" test either as an exception to the general law or as a special (local) regime governing the Yugoslavian conflict. It seeks to *replace* the rule laid down in *Nicaragua*.

The point is not to take a stand in favour of either *Tadic* or *Nicaragua*, only to illustrate the type of normative conflict where two institutions faced with similar facts interpret the law in differing ways. This is a common occurrence in any legal system. But its consequences for the international legal system which lacks a proper institutional hierarchy might seem particularly problematic. Imagine, for example, a case where two institutions interpret the general (and largely uncodified) law concerning title to territory differently. For one institution , State A has validly acquired title to a piece of territory that another institution regards as part of State B. In the absence of a superior institution that could decide such conflict. States A and B could not undertake official acts with regard to the territory in question with confidence that those acts would be given legal effect by outside powers. Similar problems would emerge in regard to any conflicting interpretations concerning a general law providing legal status.

Conflicting interpretations create two types of problem. First, they diminish legal security. Legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly. Second, it puts legal subjects in an unequal position vis-à-vis each other. The rights enjoyed by a subject depend on which jurisdiction is seized to enforce them. Most domestic laws deal with these problems through the instrumentality of the appeal. An authority (usually a court) at a higher hierarchical level will provide a formally authoritative ruling. Such hierarchy does not exist in international law. Conflicts between interpretations of the general law by different institutions cannot be submitted to some higher-level institution. To the extent that such conflicts emerge, and are considered a problem (which need not always be the case), they can only be dealt with either by legislative or administrative means. Either States adopt a *new law* that settles the conflict. Or then the institutions will seek to co-ordinate their jurisprudence in the future.

### 1.2. *Fragmentation through the emergence of special law as exception to the general law*

A different case is one where an institution makes a decision that deviates from how situations of a similar type have been decided in the past because the new case is held to come not under the general rule but under an *exception* to it. This may be illustrated by the treatment of reservations by human rights organs. In the 1988 *Belilos* case the European Court of Human Rights viewed a declaration made by Switzerland in its instrument of ratification as in fact a

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[1] See *Prosecutor v. Dusko Tadic*, Judgement, Case No. IT-94-1-A (15 July 1999), p. 49-50.

[2] This need not be the only – nor indeed the correct – interpretation of the contrast between the two cases. As some commentators have suggested, the cases can also be distinguished from each other on the basis of their facts. In this case, there would be no normative conflict. Whichever view seems more well-founded, however, the point of principle remains, namely that it cannot be excluded that two tribunals faced with similar facts may interpret the applicable law differently.

reservation, struck it down as incompatible with the object and purpose of the Convention, and held Switzerland bound by the Convention "irrespective of the validity of the declaration".[3] In subsequent cases, the European Court has pointed out that the normal rules on reservations to treaties do not as such apply to human rights law. In the Court's view:

> "[s]uch a fundamental difference in the role and purpose of the respective tribunals [i.e. of the ICJ and the ECHR], coupled with the existence of a practice of unconditional acceptance […] provides a compelling basis for distinguishing Convention practice from that of the International Court". [4]

Again, the point is neither to endorse nor to criticise the European Court of Human Rights but to point to a phenomenon which, whatever one may think about it, has to do with the emergence of exceptions or patterns of exception in regard to some subject-matter, that deviate from the general law and that are justified because of the special properties of that subject-matter.

Exceptions are a standard legislative technique to deal with complex subjects. Sometimes exceptions may become institutionalised as clusters of rules that claim to exist as "self-contained regimes" alongside the general law (cf. Section 3 below) . In the above quoted cases the European Court of Human Rights suggest precisely that "human rights" is subject to be understood in terms of a self-contained regime of reservations. Other subjects that in some respect claim self-containedness include for example trade law, humanitarian law, environmental law, and diplomatic law.

### 1.3. *Fragmentation as differentiation between types of special law*

Finally, a third case is a conflict between different types of special law. This may be illustrated by reference to debates on trade and environment. In the *Beef Hormones* case, the Appeals Body of the World Trade Organization (WTO) considered the status of the so-called "precautionary principle" under the WTO covered treaties. It concluded that whatever the status of that principle "under international environmental law", it had not become binding for the WTO.[5] This approach suggests that "environmental law" and "trade law" might be governed by different principles. Which rule to apply would the depend how a case would be qualified in this regard. This might seem problematic as denominations such as "trade law" or "environmental law" have no clear boundaries. For example, maritime transport of oil links to both trade and environment. Should the obligations of a ship owner in regard to the technical particularities of a ship, for instance, be determined by reference to what is reasonable from the perspective of oil transport considered as a commercial activity or as an environmentally dangerous activity? The responses are bound to vary depending on which one chooses as the relevant frame of legal interpretation.

### 1.4. Traditional techniques of conflict-resolution

Legal rules always appear in clusters, referring to each other in a number of ways. The view of international law as a "system" gives expression to the ubiquity of such references and the need of making them in some organised way. One way to organise such relationships is to conceive them in terms relations between what is "general" to what appears "particular".

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[3] Belilos v. Switzerland, 29 April 1988, 1988 ECHR A/No. 132, para 60.
[4] Loizidou v. Turkey, Preliminary Objections, 23 March 1995, ECHR A/No. 310, para 67.
[5] WT/DS26/AB/R (13 February 1998), at para 125.

The question of how to deal with specialised sets of rules in their relationship to general law and to each other is usually dealt with by two sets of doctrines: the interpretative maxim *lex specialis derogat lex generali* and the doctrine of self-contained regimes. In the following two sections certain introductory points will be made about the two.

## 2. The function and scope of the *lex specialis* rule and the question of 'self-contained regimes': conceptual preliminaries

### 2. 1.The nature of the *lex specialis* rule

There are two ways in which law takes account of the relationship of a particular rule to general rule (often termed a principle or a standard). A particular rule may be considered an *application* of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an *exception* to the general rule. In this case, the particular derogates from the general rule. The maxim *lex specialis derogat lex generali* is usually dealt with as a conflict rule. However, it need not be limited to conflict. In the *Neumann* case, the European Court of Human Rights observed that the provision on compensation in case of unlawful arrest in Article 5(5) was not *lex specialis* in relation to the general rule on compensation in Article 50. The former did not set aside the latter but was to be "taken into account" when applying the latter.[6]

In both cases – that is, either as an application of or an exception to the general law – the point of the *lex specialis* rule is to indicate which rule should be applied. In both cases, the special, as it were, steps in to replace the general.

### 2.2. The acceptance and rationale of the *lex specialis* rule

The idea that special overrides general has a long pedigree in international jurisprudence. Its rationale is well expressed already by Grotius:

> "*What rules ought to be observed in such cases* [i.e. where parts of a document are in conflict]. Among agreements which are equal…that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general."[7]

This passage refers to two reasons for why the *lex specialis* rule is so widely accepted. A special rule is more to the point ("approaches more nearly to the subject in hand") than a general one and it regulates the matter more effectively ("are ordinarily more effective") than general rules do. This could also be expressed by saying that special rules are better able to take account of particular circumstances. The need to comply with them is felt more acutely than is the case with general rules. They have greater clarity and definiteness and are thus often felt "harder" or more "binding" than general rules which may stay in the background and be applied only rarely.

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[6] *Neumann*, ECHR 1974 A No. 17 (1974) p. 13 (para 29).
[7] Hugo Grotius, *De Jure belli ac pacis. Libri Tres*, Book II Sect. XXIX.

It is therefore no wonder that legal literature generally accepts the *lex specialis* as a valid general principle of law [8]or, as Schwarzenberger suggests, as a shorthand for conclusions drawn from general techniques of legal reasoning. However, even as there is no significant opposition to the principle, commentary is also unanimous that its role is limited and difficult to compress into a definite directive. It is one factor among others in treaty interpretation (including those mentioned in articles 30 and 31 of the Vienna Convention on the Law of Treaties as well as the principle of *lex posteriori*).

2.3. The relational character of the general / special distinction

One of the difficulties in the *lex specialis* rule follows from the relative unclarity of the distinction between "general" and "special". For every general rule is particular, too, in the sense that it deals with some particular substance. For example, the Convention on Anti-Personnel Landmines (Ottawa Treaty) sets up general law on the use of landmines. Yet this is also a "special" aspect of the general rules of humanitarian law. On the other hand, all special law is general as it is a characteristic of rules that they apply to a class "generally". Every rule may be expressed in the following format: "for every x, it is true that the obligation y applies". No rule applies to a single case. Even where the occasions for the application of a rule are few, in order for the standard to be a *rule* (instead of an *order* to somebody) it must be generally defined. This is reflected in the distinction made by many domestic laws between laws and acts, or *loi* and *acte*, *Gesetz* and *Massnahme.*

Generality and speciality are thus relational. A rule is never "general" or "special" in the abstract but in relation to some other rule. This relationality functions in two registers. A rule may be general or special in regard to its *subject-matter* or in regard to the *number of actors* whose behaviour is regulated by it. Thus, the use of anti-personnel mines is a *special subject* within the *general subject* of humanitarian law. The distinction between general and local custom, again, provides an example of the register of number of actors covered. The registers may overlap. Thus, there may be a rule that is general in subject-matter (such as a good neighbourliness treaty) but valid for only in a special relationship between a limited number (two) of States.

It follows that no rule can be determined as general or special in the abstract, without regard to the situation in which its application is sought. Thus, a rule may be applicable as general law in some respect (for instance, as a general rule concerning the application of the GATT treaty in regard to developing States) while it may appear as a particular rule in other respects (e.g. a deviation from the general GATT standard).

2.4. "In regard to the same subject-matter"

Another difficulty in regard to the application of the *lex specialis* rule has to do with making the comparison. When do two rules relate to the "same subject-matter"?[9] A treaty concerning the carriage of oil by sea, for instance, may be defined as a treaty dealing with the commercial relations, law of the sea and environmental protection. Thus, for instance, the application of a

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[8] "The principle is, in truth, a general principle of law recognized in all legal systems, and it was cited as an example of such in the drafting of Article 38 of the Statute of the Permanent Court of International Justice. It follows that if the *lex specialis* contains dispute settlement provisions applicable to its content, the *lex specialis* prevails over any dispute settlement provision in the *lex generalis*.", ITLOS, *Southern Bluefin Tuna* case, (27 August 1999), para 123.
[9] This is usefully discussed in Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius 1986) p. 370-2.

bilateral arbitration treaty limited to "environmental matters" to a dispute over such carriage would depend on how the substance matter of such carriage is defined. Because there are no definite rules on the classification and description of particular situations, it is often possible to avoid the appearance of conflict by distinguishing the new case from the former in relation to its subject-matter.

### 2.5. The operation of the *lex specialis*

Examined from the perspective of general law, any particular rules may to relate to it in three distinct ways:

1) the *lex specialis* is expressly authorized by the relevant general law (either as a specific application of or exception to it);
2) the *lex specialis* is expressly prohibited by the relevant general law;
3) the relevant general law remains silent on the question.

In most cases, general international law does not, on the face of it, provide either for a specific authorization or a prohibition of the creation of special law on the same subject-matter. Thus, it remains a question of the interpretation of the relevant general law as well as the specific rule as to which it provides.

#### 2.5.1. *Lex specialis* as an elaboration or application of general law in a particular situation

This is a relatively simple case. Most of general international is *jus dispositivum* so that parties are entitled to establish specific rights or obligations to govern their behaviour.: "it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties". [10] This was the situation in the *Right of Passage* case. After having determined that the relevant practice had been accepted by both States (India and Britain/Portugal), established a limited right of transit passage, it concluded that it did not need to investigate what the content of general principles of law or custom on this matter was: "Such a particular practice must prevail over any general rules".[11]

A slightly different type of a situation existed in the *Legality of Threat or Use of Nuclear Weapons* case in which the ICJ discussed the relationship between Article 4 of the International Covenant on Civil and Political Rights and the laws applicable in armed conflict. Article 4 established the right not arbitrarily to be deprived of one's life. This right, the Court pointed out, applies also in hostilities. It then went on to say: "The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[12]

#### 2.5.2. *Lex specialis* as an *exception* to the general law

A general type of *lex specialis*, constituting an exception to legal normality are the laws of war. It seems clear that, at least in the absence of evidence to the contrary, the laws of war must be regarded as *leges speciales* in relation to – and thus override – rules laying out the peace-time norms relating to the same subjects. [13]

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[10] ICJ, *North Sea Continental Shelf* cases, Reports 1969, p. 42, para 72.
[11] ICJ, *Right of Passage* Case, Reports 1960 p. 44.
[12] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Reports 1996 p. 13-14 (mimeo) para 25.
[13] C.W. Jenks, The Conflict of Law-Making Treaties, XXX BYIL (1953), 446.

There are also many types of treaty-based *leges speciales*. One example are the rules on derogation from human rights in situations of national emergency. A classical example of a non-treaty-based *lex specialis* used to be the long-standing practice of the Nordic Countries to use a four-mile limit to measurement of the outer boundary of their territorial sea which was an accepted deviation from the generally applicable three-mile rule. Other local exceptions to general law, created by way of historic right, have also been frequent.

2.5.3. Prohibited *lex specialis*

There may also be situations where the general law specifically prohibits a deviation. Such prohibition need not necessarily have the character of *jus cogens*. There may be other types of general law – such as human rights treaties – that may not permit the parties to derogate from them through the adoption of *legel speciales.* In this case, however, only derogation to the detriment of the beneficiaries would seem precluded.

The general law would in most cases itself remain silent on the matter. Whether or not derogation by way of *leges speciales* is permited will remain a matter of interpretation. Concerns that may seem relevant then are at least the following: the normative status of the general law (is it *jus cogens*?), who the beneficiaries of the obligations are (prohibition to deviate from law benefiting third parties); and whether non-derogation may be otherwise inferred from the terms of the general rule (for instance its "integral nature or subsequent practice creating an expectation of non-derogation).

2.6. Conclusion: The omnipresence of "general law"

The maxim *lex specialis* refers to a normal aspect of the functioning of the law, understood as a legal system. It denotes the case where the law determines that a certain right or obligation is valid only in regard to a limited subject-matter or a limited set of legal subjects. There is, in this regard, no stark opposition between general law and special law. There are only laws that determine their sphere of validity either by reference to a relatively wide or a relatively narrow subject-matter or sphere of legal subjects.

All rules of international law are applicable against the background of more or less visible principles of general international law. No treaty, however special its subject-matter or limited the number of its parties, applies in a normative vacuum but refers back to a number of general, often unwritten principles of customary law concerning its entry into force and its interpretation and application. Moreover, this normative environment includes principles that determine the legal subjects, their basic rights and duties, and the forms through which those rights and duties are modified or extinguished. Principles such as "sovereignty", "non-intervention", "self-determination", "sovereign equality", "non-use of force", the prohibition of genocide", *audiatur et altera pars,* whatever their nature otherwise (for instance, some may be classifiable as *jus cogens* while others may not), all are part to this framework. It is not possible to list all of such "general international law".

It follows that the problem of the relationship between general law and particular rules is ubiquitous. One can always ask of a particular rule of international law how it relates to the normative environment around it. This may not always be visible. States sometimes create particular rights and obligations where there appears to be no general law on the matter at all. In

such cases, these rights and obligations do not seem, on the face of them, to have the character of *leges speciales*. They are not contrasted to anything more "general". The normative area "around" such rules remains a zone of no-law, just like the matter they now cover used to be before such new regulation entered into force.

The foregoing reflections suggest, however, that it might be more appropriate to take the view that there is no such zone of no-law at all, that the existence of such a zone is a legal or conceptual *impossibility*. At least two considerations seem to suggest this. One may, for instance, point to the fact that if a legal subject invokes something as his right, then the institution that is competent to decide on such claim is duty-bound to declare that either the claimant either *has* the right invoked or then he *does not have* it. *Tertium non datur*. Even in cases that initially appear to be governed by no law at all, there are always a residual principles such as, for instance, that "restrictions to sovereignty should not be presumed" (the *Lotus principle*) allowing competent institutions to proceed to a decisoon. Another way to reach this conclusion is by observing that no law – including international law – is merely an aggregate of positive rules, legislated by formal-legal acts. Law also contains general principles, presumptions, equitable considerations and other techniques that allow the delienation of the legal position of any legal subject at any particular moment. This is not a mechanic application of one metanorm (such as sovereignty, for instance) but a complex operation always based on a reasonable assessment of all the particulars of the case.

Such considerations suggest that whenever States agree on a specific rule by treaty on some matter, or otherwise assume an obligation or create a right, however general or specific, this takes place against the background of some general law and that the question is *always* at least latent: what if there is a *conflict* between what is provided by that general law and the particular rule that has been created. It is this eventuality that is dealt with by the maxim of *lex specialis* and the doctrine of self-contained regimes.

## 3. Self-contained regimes

### 3.1. Definition of 'self-contained regime'

A self-contained regime covers the case where a set of primary rules relating to a particular subject-matter is connected with a special set of secondary rules that claims priority to the secondary rules provided by general law. In a wide sense, secondary rules have to do with the creation and change of primary rules as well as reactions to breach and means of dispute settlement. Under this view, we are in the presence of a legal *system* (in contradistinction to a mere aggregate or individual primary rules) when there is a union of primary and secondary rules.[14] In its work on State responsibility, the ILC made (following Ago) a slightly narrower followed distinction between primary and secondary rules. For the Commission, "secondary rules" are those that lay down the consequences of breach of primary law.

It is not necessary to decide between these two meanings, the broader and the narrower. Both highlight the fact that legal rules appear in clusters that contain not only rules laying down substantive rights, duties and powers (primary rules) but also rules that have to do with the administration of primary rules (secondary rules). Such clusters may, freely following from

[14] See H.L.A. Hart, *The Concept of Law* (Oxford 1961).

international relations, termed *regimes*. A regime is a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches. When such a regime seeks precedence in regard to the general law, we have a "self-contained regime", a special case of *lex specialis*.

3.2. Acceptance and rationale of self-contained regimes

The Permanent Court of International Justice used the notion of self-containedness in its very first case, the S.S. Wimbledon in 1923 as follows:

> "Although the Kiel Canal, having been constructed by Germany in German territory, was, until 1919, an internal waterway of the State holding both banks, the Treaty [of Versailles] has taken care not to assimilate it to the other internal navigable waterways of the German Empire. A special section has been created at the end of the Part XII…and in this section rules exclusively designed for the Kiel Canal have been inserted; these rules differ on more than one point from those to which other internal navigable waterways of tghe Empire are subjected… The difference appears more specifically from the fact that the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways…is limited to the Allied and Associated Powers alone… The provisions of the Kiel Canal are therefore self-contained. The idea which underlies [them] is not to be sought by drawing an analogy from [provisions on other waterways] but rather by arguing *a contrario*, a method of argument which excludes them". [15]

In other words, the Court already in that early case recognised that a special set of rules and institutions may be created to deviate from the general law on a matter such as the uses of internal navigable waterways.

In the *Hostages* case in 1980, the Court identified diplomatic law as a self-contained regime precisely in this way. The rules of diplomatic law have been designed as an express deviation from the law of State responsibility inasmuch as those rules provide their own system for reacting to breaches:

> "The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse".[16]

The ILC Draft Articles on State Responsibility recognise the eventuality of self-contained regimes as follows:

Article 55

*Lex specialis*

[15] PCIJ, *Case of the SS Wimbledon*, Ser. A. No. 1 (1923) p. 23-4.
[16] ICJ, *Hostages* case, Reports 1980, p. 40, para 86.

"These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of international responsibility of a State are governed by special rules of international law."

In the Commentary, the Commission observes that the general rules concerning the legal consequences of a breach of international law are secondary to any particular rules that may have been agreed upon between the parties and that this is a reflection of the *lex specialis* principle. There is a very large number of self-contained regimes, specialised systems of reacting to breach that claim precedence to the rules of general international law. As is well-known, the European Community legal order excludes the use of countermeasures as between members of the European Union. Human rights law contains well-developed systems of reporting and individual complaints that claim priority to general rules of State responsibility. In environmental law, special "non-compliance mechanisms" have been constructed to set aside the rules of formal dispute settlement and countermeasures.

The rationale of self-contained regimes is the same as that of *lex specialis*. Such a regime takes better account of the particularities of the subject-matter to which it relates. Where the application of the general law concerning reactions to breaches (especially countermeasures) might be inappropriate or counterproductive, a self-contained regime such as, for instance, the system of *persona non grata* under diplomatic law, may be better suited to deal with such breaches. However, as the Commission observes, it is equally clear that if the general law has the character of *jus cogens*, then no derogation is permitted. In fact, the assumption seems to be that in order to justify a derogation, the special rules "have at least the same legal status as those expressed in this article".[17]

3.3. The relationship between self-contained regimes and general law

Yet, however, no legal regime is fully self-contained. Even in the case of well-developed self-contained regimes, general law has at least two types of function. First, it provides the normative background that comes in to fulfil aspects of its operation not specifically provided by it. In case of dissolution of a State party to a dispute within the WTO dispute settlement system, for instance, general rules of state succession will determine the fate of any claims reciprocally made by and as against the dissolved State. Second, the secondary rules of general law also come to operate if the special regime fails to function properly. In case a State party to an environmental treaty providing for a specific non-compliance mechanism fails to comply by its obligations in regard to that mechanism, the general rules of State responsibility become fully operative.

[17] ILC Report 2001, p. 357.