Introduction

Fragmentation and coherence in international trade regulation: analysis and conceptual foundations

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KEY MESSAGES

- Fragmentation in international law is due to the specificity of the international order: there is no sovereign entity to govern but there are dynamics of cooperation and coordination between states and private actors, creating diverse regimes and poles of governance, of law, legal standards and jurisdiction. These dynamics are accelerating in times of globalisation with regulatory challenges reaching beyond territorial boundaries.
- Fragmentation of law and different regimes can be both useful and detrimental, depending upon specific regulatory constellations. Efforts to create greater coherence are required where fragmentation impairs the effectiveness, efficiency and legitimacy of law and the operation of the basic principles and values at stake.
- The process of moving from fragmentation to coherence implies neither centralisation nor uniformity. Different regimes need different concepts of governance. The traditional national state and related constitutional model of governance do not address the specificities of the post-national constellation.
- The research projects of Phase I of the NCCR did not set out from an agreed and shared regulatory theory. They pursued the goal of contributing to the debate on the basis of their own ideas and different methodologies in economics, international relations and law.
- Challenges and phenomena in international economic law are beyond the reach of the old nation state concept. The analysis of WTO jurisprudence shows that existing rules of treaty interpretation and coordination are not able to bring about

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coherence to a sufficient degree. New models provide useful guidance with a view to creating coherence, moving from contractual to constitutional structures in international law.

- The model of multilayered governance offers an appropriate framework. Combining positivist traditions of legal theory and principle theory, it expands the process of constitutionalisation of international law to the overall legal order, defining the operation of different layers of governance horizontally and vertically. The nation state remains of key importance, but assumes the role of an intermediary and no longer that of an exclusive power.

A. The challenges of fragmentation

International trade in goods and services pertains to most internationalised areas of human activity. Specialisation, division of labour and long-standing policies of trade liberalisation since the end of World War II enhanced trade flows and interdependence of nations in an unprecedented manner. Globalisation reached a new generation. Due to new technologies allowing worldwide communication and transport, transnational markets and international relations have progressed dramatically over recent decades, demanding regulation beyond national borders.[1] As a corollary, trade regulation spearheaded new developments in international law and moved centre stage. The General Agreement on Tariffs and Trade (GATT) and, subsequently, the World Trade Organization (WTO) developed a sophisticated body of trade rules amounting to some 42,000 pages of law, comprising agreements and schedules of commitments of more than 150 members. In addition, numerous bilateral and regional trade agreements have emerged, creating an additional layer of preferential rules in addition to the principles and rules of the WTO. Domestic trade policy and law add to the panoply of sources and considerations to be taken into account. In Europe, regionalisation entered a period of supranational legal integration, building a new constitutional order, primarily in trade, before turning to include other policy areas. The European experience demonstrates that enhanced integration through trade liberalisation and non-discrimination, in the long run, needs to go hand in hand with integration of other policy areas under a common umbrella. In global relations, this is part of a larger challenge facing international law and relations.

1 A. von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15(5) *European Journal of International Law* 885, at 888.

The unprecedented development of international trade regulation takes place formally within the body of international law, in particular treaty law. It shares the traits of contractual arrangements, entered into by sovereign nations. Rules and principles are specifically aimed at trade liberalisation and trade regulation. They follow the traditions of functionalism inherent to international law and specialised international organisations. They do not encompass per se other public policy areas, such as defence, health, natural resources, education, culture or related areas of international law, such as the law of the sea, investment protection, and the protection of human rights or of the environment. International agreements, including those pertaining to trade, live parallel lives. They follow their own rules, jurisdictions and dispute settlement mechanisms to the extent they are available at all.

As a result, the body of law is highly fragmented in line with the contractual nature of international law. All too often, coordination and coherence have to be based upon the application of exceptions. Such fragmentation raises practical problems of coordinating different policy areas horizontally in international law and in domestic law. It raises problems of vertical coordination in fine-tuning the relations of international and domestic law. It calls for practical coordination between the multilateral framework and preferential agreements. Principally, it raises problems of coordination with other international regimes.

WTO law constitutes only one of many international regimes. All these regimes exist in what is commonly termed a 'normative jungle'.[2] They remain essentially without proper coordination. There is no common institutional mechanism that can bring about coherence in their negotiation, application and/or interpretation, even though they all operate within the general international law system. National constitutional legal systems provide such an all-encompassing institutional framework that also safeguards the fundamental values of society. Globalisation assails these systems; they remain only one factor in today's complicated regulatory network. The challenge today is to find coherent regulatory solutions of good sustainable governance in a multilayered governmental environment. These solutions have to take account of economic and political realities. Coherence can only be achieved if trade regulation is tailored to the political and social constellations in which it is to be applied. Strengthened cooperation and coordination among players and regimes,

2 A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74 *Nordic Journal of International Law* 27.

which may simultaneously compete for regulatory authority,[3] can play an important role here.

WTO rules increasingly impinge upon other areas of law and policy, including environmental protection, agricultural and regional policies, labour standards, investment, human rights and culture. By the same token, international rules such as those relating to human rights or environmental protection can have a chilling effect on trade, particularly when trade barriers are used as a 'stick' to induce a certain type of behaviour.[4] Additionally, trade impediments can be the inevitable corollary of state policies aimed at attaining non-economic objectives.[5] In the realm of trade regulation, the phenomenon of fragmentation (with a potentially negative connotation) is articulated mainly through two different strands which affect each other and interact in manifold ways: first, fragmentation is the result of collisions or horizontal overlaps among regimes of sometimes equal force in terms of membership, such as the United Nations (UN), United Nations Environment Programme (UNEP) or the human rights special regimes. Collisions of this type also include conflicts between the canons agreed multilaterally within the WTO and the rules that emerge at the periphery by means of manifold preferential trade agreements (PTAs). The proliferation of such agreements creates political and economic tensions, further compounding fragmentation within the multilateral trading system. Fragmentation can also occur vertically in the form of collisions among different levels of governance. Here, one would also be bound to include soft-law norms, typically adopted by non-state actors.

Horizontal fragmentation implies the risk of clashes between diverse and competing ethical rationales, goals and norms. Here, a simple conflict of rules could imply a deep conflict of differing ethical backgrounds and values. If the systems promote a specific issue or value, the system that 'wins' the conflict is doing so at the expense of the others' objectives (e.g. conflicting norms of the trade and environment regimes). Which

3 J. Trachtman, *The Economic Structure of International Law* (Harvard University Press, 2008), p. 206.

4 P. Delimatsis, *International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity* (Oxford University Press, 2007); also J. Trachtman, 'Institutional Linkage: Transcending "Trade and . . . "' (2002) 96(1) *American Journal of International Law* 77.

5 P. Delimatsis, 'Determining the Necessity of Domestic Regulations in Services – The Best is Yet to Come' (2008) 19(2) *European Journal of International Law* 365.

criteria for conflict resolution should be applied in those cases?[6] Which regime should prevail? Who should decide? A similar, but subtly different situation occurs with regard to *vertical* fragmentation. Diverse layers of governance likewise comprise competing ethical rationales in terms of cultural, traditional and societal backgrounds. This is why a conflict of law and principles can also be laden with deep value conflicts, as, for example, when a societal conviction rejects aspects of conflicting trade law obligations for market access, as was the case in *EC – Hormones*. This may lead to frictions between international governance and its societal basis.[7]

The question arises as to what extent the WTO needs to take into account other regimes (horizontally), or (vertically) at which governance level authority should be allocated. Which perspective should prevail? Under what circumstances should, for instance, WTO panels defer to national preferences in a WTO context?

Both horizontal and vertical lines of fragmentation carry the potential for conflicts of jurisdiction, when specialised regimes include autonomous dispute settlement and law enforcement mechanisms. For instance, the complexity of the relationship between environmental and trade rules was highlighted in the *Chile – Swordfish* case. The case, which related to a controversy between the EU and Chile over swordfish fisheries in the South Pacific and landing of swordfish in Chilean ports, was brought before both the International Tribunal for the Law of the Sea and the WTO.[8]

Overlapping legal regimes provoke legal uncertainty regarding the competences of dispute settlement bodies, mainly when adjudication in each case could occur under different regimes pursuing different objectives. Practice has shown that opposing parties have the possibility to call upon different dispute settlement organs or choose a competent body according to their interests (forum shopping) horizontally (under different regimes),[9] carrying the risk of differing legal

6 J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003).

7 G. Teubner, 'Societal Constitutionalism: Alternatives to State Centered Constitutional Theory?', in C. Joerges, I.-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004), pp. 3–28.

8 The parties to the dispute later agreed to suspend proceedings in both courts.

9 G. Hafner, 'Risks Ensuing from Fragmentation of International Law', in *Official Records of the General Assembly, Fifty-fifth Session*, Supplement No. 10 (A/55/10), Annex, pp. 143–150, at p. 148 (available at: http://untreaty.un.org/ilc/reports/2000/repfra.htm).

outcomes.[10] Vertically, national courts may defy or fail to comply with international decisions. States may ultimately be called upon to comply with one system and at the same time violate the other, or vice versa,[11] a situation which not only compromises legal security, but also the effectiveness, efficiency and, indeed, survival of the 'losing' system.

Against this backdrop, the present volume is a first attempt to examine fragmentation in international trade regulation across a wide array of different regulatory fields and specialised trade regimes. The twelve individual projects (IPs) supported and funded by the National Centre of Competence in Research (NCCR) of the Swiss National Research Foundation, hosted at the World Trade Institute of the University of Bern, Switzerland, and which are discussed and summarised in this volume share the common trait of exploring fragmentation and seeking greater coherence in their respective fields. In doing so, researchers in the first phase of the project (2005–2009) faced a number of challenges. Firstly, the debate on fragmentation and coherence is controversial. There is no uniform and accepted doctrine which could be applied and pursued across the board. Secondly, the debate is mainly prominent in law, and less so in international relations or in economics. At the outset, a working hypothesis was agreed that, for our purposes, coherence does not necessarily strive for, nor amount to harmonisation, uniformity or centralisation. Rather, coherence entails multilateral, regional and unilateral regulations alike which would allow for tensions and competition between different and competing policy goals and rule-making fora. The fundamental challenge is thus a matter of defining suitable relationships between different regulatory areas and levels in a rational manner, combining them with adequate procedures and institutional mechanisms to facilitate interaction and efficient governance, while enhancing predictability and legal certainty.

Rational relationships need to be developed among different regulatory areas and regimes at the international level, but also between different layers of governance. Taking into account theoretical insights from the disciplines of law, economics and political science, the purpose of the NCCR has been to develop innovative, concrete policy

10 See for examples, M. 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, United Nations, International Law Commission, A/CN.4/L.682, para. 10.

11 Hafner, above n 9, p. 147.

recommendations that reflect a better balance between economic and other regulatory objectives in a series of fields where international trade rules interact with other types of rules and thus elucidate the current '*dialogue de sourds*' that exists among several issue-areas affecting trade. In this respect, we found in several instances that, for want of anything better, fragmentation in the sense of regulatory decentralisation may entail inherently coherent solutions that ultimately lead to more efficient regulation of trade issues. Thus, in certain areas of trade regulation, such as services, allocation of regulatory authority at the regional level may prove to generate outcomes superior to those produced to date at the WTO level. Thus, instead of any one-size-fits-all recommendations, this volume takes a careful look at the peculiarities of the regulated areas without any pre-existing bias against fragmentation per se.

The chapters of this volume essentially confirm this view. They share the goals of improving horizontal or vertical policy coordination. They do not present a uniform theory or perception of fragmentation and coherence in international economics, international relations and law. They deal with the problem of fragmentation and coherence in their own ways, addressing the topic directly or indirectly. Different traits can be identified. The process of constitutionalisation of international law studied in IP 1 seeks to bring about a better framework, allowing for enhanced coherence by leaving traditional contractual relations behind. Its analytical and normative aspirations are tested against the insights of political science which explores the relationship of nations and international organisations and its decision-making processes within the framework of the principal–agent theory in IP 2. Efforts to improve coordination of the multilateral framework and regional or preferential trade agreements were at the heart of research in IP 3, culminating in proposals for long-term multilateralisation of preferential agreements. The coordination of trade and human rights in IP 4 essentially reflects a constitutionalist approach in the area of human rights as well as fundamental principles of non-discrimination. Research on agriculture in IP 5 focuses on coordinating different horizontal policy goals, including access to food, and dealing with imbalances between developing and developed countries caused by persistent protectionism. Research on trade and energy within IP 6 squares two hitherto separate horizontal policy areas and explores the changes required in WTO law in order to bring about more efficient and sustainable energy production. IP 7 interfaces trade and culture, in particular the impact of and on new media. It is here that doubts as to greater coherence loom large. The work of IP 8 focused on several areas of

multilateral and preferential regulation of services. Work on services suggests that fragmentation of regulating services, understood as decentralisation of decision-making, may lead to higher levels of liberalisation and increased global welfare. At the same time, multilateral shaping of rules and principles appears to be the best policy choice. IP 9 builds upon the theory of multilayered governance in addressing biotechnology. It is an example as to how centralisation and decentralisation within a particular topic need to be combined with a view to achieving optimal results. IP 10 addresses selected topics on financial regulation and trade, identifying the beneficial effects of decentralisation of regulatory authority in the field with manifold organisations regulating sometimes overlapping areas. This chapter concludes with a brief review of the current credit crunch and the needs to address contagion and to further financial development are identified as the biggest challenges to international financial regulation. IP 11 tackled selected issues in trade and investment, including problems relating to sovereign wealth funds and the challenges of reverse investment flows, while identifying a creeping trend towards regulating investment flows beyond the national level. Finally, IP 12 addresses, from an economic perspective, production and trade in commodities in selected African countries. It sets out policies which may bring greater benefits to the countries concerned, albeit without addressing the problem specifically in terms of fragmentation and coherence.

Overall, the first phase of the project is characterised by a bottom-up and inductive approach to the problem of fragmentation and coherence. Important and interesting proposals are put forward for achieving a reasonable relationship between different horizontal policy goals, and shaping relations between the international system and domestic polities. Concrete legal text amending extant WTO provisions or proposing new ones is proposed in several chapters. Additionally, a doctrine of multilayered governance is gradually emerging within the NCCR project and will be discussed below. The results achieved reflect the challenges facing a research community which is still geared towards individual research and agendas, and has not yet adopted a proper interdisciplinary approach which is keen to absorb, and learn from, research results produced in related areas. The lack of a common understanding and methodology in law, international relations and economics was apparent during the first phase of the project. The challenges of fragmentation thus not only relate to substance, but equally to a widely fragmented culture in the scientific community. The main, long-term benefit of the NCCR project perhaps consists of bringing about a new generation of researchers who were

trained and are willing, within the enduring constraints of a conservative and highly fragmented academic establishment, to interact with other disciplines and work towards common and shared goals.[12] The task still lies ahead. With this in mind, we turn to the foundations and expound the theories of fragmentation and coherence in international law, in particular trade regulation, and in legal and constitutional theory. We hope that insights achieved so far may offer further guidance in further work on the topic during the second and third phases of the NCCR project and stimulate similar research worldwide.

B. Fragmentation in international law

International law consists of diverse polycentric legal systems eclipsing the former Westphalian system of nation states.[13] The post-war propensity towards accelerated cooperation has led to intensive inter-state treaty-making and the emergence of autonomous legal orders beyond the nation state model. The phenomenon is not limited to international trade. Issues such as terrorism, international crime, migration and poverty, or environmental threats can no longer be dealt with at the national level alone.[14] The state's task of governance has become intrinsically linked to a multi-power-driven complex of global action and specialised regimes.[15]

From the point of view of international norms and regulation, the dynamics of legal subsystems lead not only to diverse issue-oriented and specialised regimes of *substantive* norms, but also to fragmented authority at different levels of governance.[16] In the first case, this creates the

12 See T. Cottier, 'Challenges Ahead in International Economic Law' (2009) 12(1) *Journal of International Economic Law* 3.

13 S.-D. Krasner, 'Compromising Westphalia', in D. Held and A. McGrew (eds.), *The Global Transformations Reader. An Introduction to the Globalization Debate*, 3rd edition (Cambridge University Press, 2002), pp. 124 *et seq.*

14 J. Pauwelyn, *Fragmentation of International Law*, Max Planck Encyclopedia of Public International Law (Oxford University Press, 2008), available at: www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e1406, para. 10.

15 J. Whitman, *The Limits of Global Governance* (Routledge, 2005), p. 17; U. Beck, 'What is Globalization?', in D. Held and A. McGrew (eds.), *The Global Transformations Reader. An Introduction to the Globalization Debate*, 3rd edn (Cambridge University Press, 2002), pp. 99–103, at pp. 101 *et seq.*

16 T. Broude, 'Fragmentation(s) of International Law: On Normative Integration as Authority Allocation', in T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Publishing, 2008), pp. 99–120.

problem of choice of law among conflicting norms of equivalent status resulting from the myriad regimes.[17] In the latter case, fragmentation problems can be viewed as institutional challenges associated with the allocation of jurisdiction along horizontal, vertical and functional dimensions.[18]

While the diverse issue-oriented systems are integrated as regimes, they form a scattered landscape of law consisting of competing objectives and overlapping in scope. Typically, such regimes have their own preferred idiom, special ethos and structural bias.[19] There is no centralised power to coordinate the regimes and assure their legal and authoritative coherence.[20] The United Nations has not been able to assume this function successfully. In addition, the consensus-based post-war approach towards international relations suffers from a sort of sclerosis due to competition for influence in areas that may overlap. Each system seeks to be self-contained, which generates the tendency to steer clear of addressing possible conflicts with other regimes.[21] Reasons for this include the fear that integration of substantive norms from other regimes requires complex authority-integrating solutions, some of which may lead to a loss of authority.[22] The implementing organs of most of these regimes claim jurisdiction and legitimacy which is superior to other regimes[23] whenever jurisdictional conflict is nascent, thereby nourishing concerns about conflicting jurisprudence and forum shopping.[24] Thus, coordination of the regimes does not occur as naturally and is not as interest-driven

17 A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, at 1018.

18 Trachtman, above n 3.

19 M. Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20(1) *European Journal of International Law* 7, at 9.

20 B. Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 *New York University Journal of International Law and Politics* 679, at 681.

21 But see Art. 311 of the United Nations Convention on the Law of the Sea.

22 Broude, above n 16.

23 R. Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law – The Early Years of WTO Jurisprudence', in J. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (Oxford University Press, 2000), pp. 35–69.

24 N. Matz-Lück, 'Promoting the Unity of International Law: Standard-Setting by International Tribunals', in D. König, P.-T. Stoll, V. Röben and N. Matz-Lück (eds.), *International Law Today: New Challenges and the Need for Reform?* (Berlin: Springer, 2008), pp. 99–212, at p. 102.