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The fragmented disciplines of international economic law after the global financial and economic crisis: an introduction

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I. Introduction

This book explores the theme of fragmentation within the discipline of international economic law. More specifically, it focuses on the fragmented nature of international economic law at a period of time of particular interest; that is, as the world emerged more fully from the 2008 global financial crisis, the subsequent great recession and the European sovereign debt crisis which began in early 2010.

The book acknowledges the contemporary theoretical debate today in the field of international economic law which is concerned with how different norms (e.g. deriving separately from trade law and environmental law, or trade law and investment rules or the rules of monetary cooperation) relate to each other within the larger discipline of international economic regulation. Perhaps deriving from earlier concern among public international lawyers about the multiplication of international tribunals, this practical problem which the theoretical debate seeks to address is often characterized in terms of '*norm fragmentation*', however elastic that characterization has proved to be. There is a corresponding concern in this debate with how different norms are addressed within different institutional arrangements or sites of authority – the so-called problem of '*authority fragmentation*'.[1] Viewed from the

[1] See e.g. 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law 2006', adopted by the ILC at Its Fifty-eighth session, A/61/10 (2006), para. 51; *Yearbook of the International Law Commission* (2006), vol. II, pt 2; 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* (Oxford: Hart, 2008), 99.

perspective of trade lawyers, there is also an overlapping concern with how individual disciplines such as trade law should take on board environmental and other rules, and often this has been referred to as the 'trade and . . .' debate or, simply, the trade 'linkages problem'.[2] Finally, there are some very interesting proposals today about how the difficulties caused by diffuse institutions within international economic law may be handled or addressed.[3]

While such 'fragmentation' is the focus of the present volume, its theme or the tale we wish to tell in this book is more reserved, and more discrete than the theoretical debate(s) described above would suggest. The key aim of the present volume is to study actual fragmentation at this particular moment without having too many preconceptions about what we are likely to find. We have chosen this path not only because it is useful to take stock of the underlying factual realities of the theoretical debate but also because we do not believe a mature intellectual consensus has yet emerged from such theoretical debate. In short, this collection seeks to present a wide-ranging and complex picture of the fragmentation of the discipline (and its sub-disciplines) during an important period of economic uncertainty.

[2] See e.g. T. Broude, 'Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration', *Loyola Univ. Chicago Int'l L. Rev.* 12(5) (2009), available at http://ssrn.com/abstract=1249432

[3] Examples of suggestions in this regard include the proposal to seek greater convergence in the substantive norms to be applied in different fora or within different international economic institutions. These may occur either within the same field or sub-discipline, or across different fields or the different sub-disciplines of international economic law. For an example of the former, see Broude, 'Fragmentation(s)', 105; C. L. Lim and H. Gao, 'Competing WTO and RTA Jurisdictional Claims', in T. Broude, A. Porges and M. Bush (eds.), *The Politics of International Economic Law* (Cambridge University Press, 2010), 282. For an example of the latter, see the debate on the application (or misapplication, that being part of the debate) of trade law conceptions of non-discrimination by investment treaty tribunals – i.e. in search of a 'cohesive international economic law': R. P. Alford, 'The Convergence of International Trade and Investment Arbitration', *Santa Clara JIL* 12(35) (2013), 44; R. Howse and E. Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz', 20 (2009) EJIL, 1087, 1094; J. Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents: A Rejoinder to Robert Howse and Efraim Chalamish', 20 (2009), EJIL, 1095; and Jürgen Kurtz's seminal article 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents', 20 (2009), EJIL 749. The political science literature on complex regimes is relevant to this latter debate. See e.g. the discussion of complex regimes, and of overlapping and nested regimes, in Karen J. Alter and Sophie Meunier, 'The Politics of International Regime Complexity' 7 (2009) *Perspectives on Politics* 13, 15.

The next two sections explain these twin themes of the collection – 'fragmentation' and 'uncertainty' – and how we view their correlation in marking out the bounds of our current enterprise.

II. 'Fragmentation' as the principal focus: revisiting the Bretton Woods system

At its core, this collection is an international economic law book focusing on *norm* fragmentation in a *historical* sense. We hope, though, that this is not to say that those who are merely interested in a snapshot of some very interesting issues and debates in the field during the current post-crisis phase will find the volume to be any less valuable. Discrete issues raised by the crisis – e.g. financial regulation,[4] and the regulation of credit rating agencies[5] – are dealt with in the present volume. So too are related or knock-on developments outside the fields of financial regulation. For example, increased trade competition post-crisis has led to disputes such as the dispute over China's currency policies and is therefore addressed in the present collection of chapters.[6] Nonetheless, the post-crisis 'moment' itself forms only the context and backdrop to our focus on fragmentation as we trace the evolution of the international economic system from its original Bretton Woods design in the aftermath of the Second World War to the present day.

In this volume we therefore refer to fragmentation in a more traditional way in which international economic lawyers have routinely viewed the issue – in a more historically sensitive manner than the theoretical debate (mentioned earlier) would suggest. We are interested in fragmentation in the specific context of the historical development of international economic law and regulation.

Our historical approach towards fragmentation in the international economic law field focuses not only on the conceptual, conflictual and institutional design puzzles with which the theoretical debate is most concerned. Instead, our approach revisits the way in which international economic regulation was designed to work in the aftermath of the Second World War. Going back to the early days of Bretton Woods,[7] the global

[4] See Chapter 4 in this volume.
[5] See Chapter 3 in this volume.
[6] See Chapter 6 in this volume.
[7] See F. D. Santos, *Humans on Earth: From Origins to Possible Futures* (Heidelberg: Springer, 2012), 209; A. F. Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press, 2008), 600.

system originally envisaged was preoccupied with reinvigorating trade flows. Great Britain, for example, needed an increase of 50 to 100 per cent in its exports to balance its post-war international accounts.[8] In the monetary field the concomitant concern was to have something as consistent as a pre-war gold standard in order to facilitate trade,[9] while at the same time maintaining closed capital accounts. Readers today are sometimes surprised to be reminded that this was the original role of the International Monetary Fund (IMF).

John Maynard Keynes originally proposed an international currency pegged against gold, and a clearing union or global central bank.[10] It was Harry Dexter White's efforts to achieve the control of the United States which saw the role of the US dollar replacing the gold standard instead.[11] Nonetheless, the dollar itself was pegged to gold, and but for a few currencies such as the Swiss franc which remained pegged to gold other currencies were to be pegged to the US dollar under the original (version of) Article IV of the IMF Articles of Agreement.[12] This became the so-called 'par value system' which lasted more or less as conceived from 1945 until 1971, and for a brief period there was an attempt to repair the fixed exchange rate system. But by 1973 major currencies were floating – a system which has lasted until now with the major currencies now in one form of 'dirty float' or another.[13] As we shall see in this volume, the system which resulted and its relation to trade has since come under public scrutiny in the aftermath of the 2008 crisis; in the form of allegations that China has been maintaining its currency at a substantively undervalued rate in order to improve its terms of trade.[14]

Bretton Woods was, in short, about *rebuilding trade*, *stabilizing currencies and post-war reconstruction* and within that compass a

[8] D. E. Moggridge, *Maynard Keynes: An Economist's Biography* (London: Routledge, 1992), 671.

[9] For the history of the gold standard from the 1870s, see P. Issard, *Globalisation and the International Financial System: What's Wrong and What Can Be Done?* (New York: Cambridge University Press, 2005), 14–27.

[10] Moggridge, *Maynard Keynes*, 672–3.

[11] Together with US control over the IMF and World Bank secured through the system of weighted voting ultimately adopted in respect of the governance of these key institutions of the Bretton Woods system. See Santos, *Humans on Earth*, 210. See further R. B. Craig, *The Harry Dexter White Spy Case* (Lawrence, KS: University Press of Kansas, 2004), 135, 149; R. Skidelsky, *John Maynard Keynes, Volume III: Fighting for Britain 1937–1946* (London: Macmillan, 2000), 233ff.

[12] Lowenfeld, *International Economic Law*, 598–9, 622–3.

[13] *Ibid.*, 624–7.

[14] See Chapter 6 in this volume.

more-or-less coherent system developed which parceled out these functions among the separate Bretton Woods institutions, the essential architecture of which remains with us, roughly speaking, in the form today of the World Bank Group and the regional development banks, the IMF and regional international financial institutions, and the World Trade Organization (WTO). To us, that architecture remains at the *core* of global economic regulation notwithstanding the increased shift in elite decision-making before the crisis towards the various 'Gs' and, after the 2008 crisis, towards the central role of the G20 as the premiere forum for global economic governance.[15]

As international economic lawyers know, this Bretton Woods 'system' evolved over several decades during the second half of the twentieth century, and in many ways is unrecognizable today from what had been envisaged during the post-war years. *These changes, and others, have given rise to what we see now as a fragmented discipline of international economic law* – a system whereby trade, investment, monetary and exchange rate cooperation, financial regulation, intellectual property (IP) protection, the regulation of trade in goods and the trade in services, and international development law have evolved away from an initially coherent Bretton Woods design. This, in turn, *produced a multiplicity of norms which are not always easy bedfellows, a plurality of international institutions*, and in some cases global norms of a different kind altogether – namely, certain norms which are characterized by the total absence of formal institutional anchorage. It is in this way that normative and institutional differences have come to matter and that is the way we have *situated* the theoretical debate about norm and authority fragmentation – i.e. by situating the theoretical debate as only a discrete sub-issue within our broader and more historically inclined field of investigation.

For our part, it is the growth of this vast discipline and its systematization which has become our principal concern.

III. The post-crisis theme

Four aspects of the post-crisis theme of this collection deserve further explanation.

[15] Giovanni Grevi, 'The G20: Panacea or Window Dressing?', FRIDE Policy Brief, 2 September 2010. For background, see further J. F. Linn and C. I. Bradford Jr., 'Summit Reform: Towards an L-20', in J. F. Linn and C. I. Bradford Jr. (eds.), *Global Governance Reform: Breaking the Stalemate* (Washington, DC: Brookings, 2007), 77.

One of the popular questions which arose after the crisis was: *first*, whether there would be a grand redesigning of the system itself, and to this extent the 'post-crisis' theme in this volume is of direct relevance and salience to an investigation of disciplinary fragmentation from a historical, evolutionary perspective. That connection has shaped our study of the aftermath of the crisis; in light of expectations in certain quarters that 2008 could have led to calls for the redesigning of the international financial system and even global economic regulation more broadly.[16]

So to this extent *the post-crisis theme* is relevant to the investigation of the fragmentation of the discipline from a historical, evolutionary perspective. We cannot of course ignore the larger aspects of the crisis, which at the time of writing continues to capture public attention. The global financial crisis could become one of the defining moments of the discipline. It is already one of the defining moments of the twenty-first century, together with the September 11 terrorist attacks in the United States. But while we had embarked upon this project with an acute awareness of that fact, we *cannot* make the claim that 2008 and its aftermath was necessarily a pivotal moment *for the discipline of international economic law*. This is our *second point*. Instead, for us, capturing the state of international economic law at this time became an essential part of discovering the answer to that question. There is every suggestion that short of discrete and specific reforms affecting the international financial and banking sector – especially in achieving financial stability in light of the consistent limitations of financial regulation[17] – and the emergence of the G20 as, in the words of Ross Buckley (Chapter 5 in this volume), the 'high table of economic governance' globally, there has been little structural or substantive change in the methods of international economic regulation.

Much of the rest of the field of international economic law did not undergo any significant change, structural or otherwise. Aside from an impetus towards reform in the regulation of global finance and some evidence of increased trade friction owing to pressures caused by the Great Recession, *it is fragmentation which remains a persistent feature of international economic law*.

[16] See e.g. D. W. Arner and R. P. Buckley, 'Redesigning the Architecture of the Global Financial System', *Melbourne JIL*, 11 (2010), 185.

[17] J. Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (4th edn, 3 vols., Oxford: Hart, 2010), vol. III, 448ff.

We therefore make no deeper claim about the moment itself, nor do we claim that this is a moment in which a fragmented discipline becomes coherent. The present collection of chapters suggests that the opposite is just as likely to be true. Thus, state-to-state cooperation, particularly to achieve coherence and convergence in norms, has received a significant amount of attention in this volume.[18]

Putting aside the question of a grand redesigning of the global economic system, a *third* issue emerging from the 2008 global financial crisis and 2010 European debt crisis is *geopolitical* in nature. Many now believe that 2008 accelerated the so-called BRIC nations' (Brazil, Russia, India and China) – and particularly China's – reach in international economic affairs.[19] There is a sense that in light of the origins of the crisis in the United States and the subsequent European debt crisis, greater attention should now be paid to the role of Asia – and not least, East Asia – in the global economy. To be sure, the 'Rise of the Rest' as Fareed Zakaria who coined the phrase calls it, has been a pre-crisis phenomenon but there is also a sense that the United States' economic troubles have accentuated a global economic shift.[20] A question then arises about the likely repercussions, if any, on international economic regulation.[21] Underlying such questions is a longer-standing question about the extent to which China has been integrated into the global economy through its 2001 accession to the World Trade Organization.[22]

[18] See Chapters 7 and 12 in this volume.

[19] Subsequently this appellation was taken to include South Africa – e.g. 'BRICS'. See further, 'The BRICS at the WTO Doha Development Round', Working Papers, North–South Institute, available at: www.nsi-ins.ca/equitable-growth/the-brics-at-the-wto-doha-development

[20] A recent collection of essays exploring this theme highlights the connection between concerns about the crisis and perceptions of a geopolitical shift: 'In fact, even as the carnage from the financial meltdown recedes, a chronic deficit problem remains . . . Not since Tsarist Russia has a great empire relied on so much borrowing abroad' (S. Clark and S. Hoque, 'Introduction', in S. Clark and S. Hoque (eds.), *Debating a Post-American World: What Lies Ahead* (Abingdon, Oxon.: Routledge, 2012), 4). Zakaria himself comments on the scenario after the 2008 crash, see 'Preface to the Paperback Edition', in Fareed Zakaria, *The Post-American World and the Rise of the Rest* (London: Penguin, 2009).

[21] On the shift of power at the WTO, see C. L. Lim, 'On Free Trade and the Post-American World', in Clark and Hoque, 230.

[22] See, e.g., D. M. Blumenthal, 'Applying GATT to Marketising Economies: The Dilemma of WTO Accession and Reform of China's State-Owned Enterprises (SOEs)', *Journal of International Economic Law* (1999), 113; J. Y. Qin, 'WTO Regulation of Subsidies to State-Owned Enterprises – A Critical Appraisal of the China Accession Protocol', *Journal of International Economic Law*, 7 (2004), 863; J. Chen, 'China, India and Developing Countries in the WTO: Towards a Proactive Strategy', in M. Sornarajah and J. Wang

Thus, a number of the chapters in this volume reflect an interest in China's recent policies, disputes, and treaty and other conduct.[23] Again, these chapters are not intended to make a deeper claim about the post-crisis state of international economic law but merely reflect the times we live in, witnessing an enlarged curiosity about how China – and indeed the other nations just mentioned – will 'behave' in the international economic system as rule-subjects and rule-makers.

Fourth, other new issues remain salient to an understanding of the development of international economic law. Unlike the Chinese currency or Greek bond issues which are related to the 2008 and 2010 crises,[24] climate change has been an independent issue standing at the forefront of public attention.[25] Likewise, the recent bilateral investment treaty (BIT) disputes over cigarette-packaging laws have prompted investigation of the intersection of the (fragmented) regimes of IP and investor/investment protection.[26] BITs continue to engage attention because of their impact on health and social policies. Other similar issues which stand more or less apart from the 2008/2010 crises include recent food price crises, beginning in 2008,[27] and one chapter in this volume deals with the intersection between agricultural shortage, the food price crisis and investment. Its subject is the relatively new phenomenon of foreign investment in agricultural land.[28]

Hence our focus on the persistence of fragmentation. To appreciate this persistence fully, it is necessary to consider the history of international economic law from the mid-twentieth century to the present time. The next section therefore takes this up.

IV. The evolution of the Bretton Woods system and the fragmentation of the discipline

At the risk of repeating what may be well known, it may be useful to recall some of the key features of the evolution of the Bretton Woods system, starting from the 1940s to the present time. Our aim in this

(eds.), *China, India and the International Economic Order* (Cambridge University Press, 2010), 53; H. Gao, 'Taming the Dragon: China's Experience in the WTO Dispute Settlement System', *Legal Issues of Economic Integration*, 34 (2007), 369; C. L. Lim and J. Wang, 'China and the Doha Development Agenda', *Journal of World Trade*, 44 (2010), 1309.

[23] See Chapters 5, 6, 8, 9 and 14 in this volume.

[24] See Chapters 6 and 13 in this volume.

[25] See Chapters 18 and 19 in this volume.

[26] See Chapter 16 in this volume.

[27] V. Walt, 'The world's growing food-price crisis', *Time*, 27 February 2008; J. Blas, J. Farchy and C. Belton, 'Wheat soars on Russia ban', *Financial Times*, 6 August 2010.

[28] See Chapter 15 in this volume.

condensed account is to show how Bretton Woods had originally been viewed as an *integrated* or *cohesive* system of global economic regulation coming out of the ruins of the Second World War. In our view, a historical perspective provides a more acute appreciation of the struggle which is now required to make sense of the contemporary issues which the several authors in this volume have sought to address.

The following account describes exchange rate cooperation, sovereign lending and current account convertibility as key ideas which were originally meant to foster the re-liberalization of post-war trade. We then describe how the idea of closed capital accounts came to an end with the re-globalization of finance, paving the way for international banking and financial regulation. Having established this distinction between how global trade and finance were viewed originally, and how global finance re-emerged and was regulated because it then needed to be, we turn to trade – including trade in services – and then to investment, the growing sophistication of IP protection and the contemporary challenge of climate change. In between, we mention the tale of developmental concerns, and the concerns of developing nations within the confines of the disparate regimes for the regulation and protection of trade, investment and IP, and for building a climate change regime as an independent endeavour. Ours is a story about how global economic regulation emerged piecemeal, resulting in fragmented regimes which persist to the present day as new issues continue to emerge.

1. *Exchange rate cooperation: from par value to dirty float*

In relation to exchange rates, after the Second World War, the Bretton Woods design had resulted in a treaty-based institution which sought to police exchange rates and foster exchange rate cooperation between sovereign nations. The aim was to have orderly exchange rates for the trade-facilitative effect that would then ensue.[29] That aim is well captured still in Article I of the IMF Articles of Agreement. The aim, to be sure, was to give confidence to countries in order that they not devalue or adjust currencies in seeking to address maladjustments in their balance of payments. It has been observed that such practices were a contributory cause of the Second World War. Thus, the IMF was designed to provide two ways to deal with maladjustments – institutional, intergovernmental

[29] For the historical backdrop, see Lowenfeld, *International Economic Law*, 599–600.

assistance (1) in readjusting exchange rates, and (2) to address the causes/conditions of maladjustment. To that extent, the scheme of the IMF Articles (I and IV(4)(a) in particular) remain unchanged today.

Originally Article IV of the IMF Articles stated that each nation's currency shall be expressed in gold or in US dollars. This was the so-called 'par value' system. However, that system – originally contained in Article IV(3) – was changed entirely following the effort to amend the Articles, which culminated in the Jamaica amendments in 1976. The changes which have so altered the IMF's Articles occurred during the 1970s. The background to that, in very brief terms, was that the Vietnam war had proved costly for the United States, not least in light of that country's period of unprecedented fiscal expansion (improving social security, retirement plans, etc.). The end result was that the US government was spending more, it was importing more, and this in turn led to exchange instability. Some readers may recall the famous quote of Treasury Secretary John Connally, in 1971, that the US dollar is 'our currency, but your problem'. At that point, the decision had been taken to devalue the US dollar against gold, which had triggered a fundamental discussion. The USA ended its treaty obligation unilaterally in August 1971.[30] The United States could say the US dollar was still expressed in US dollars, and thus there was no legal violation of its obligation. However, other nations were faced with the problem that the reserve currency country, the United States, which had been the fundamental link in international monetary arrangements had ended its support of the global system. So other nations were faced with a difficulty, as a result of which the Group of Seven (G7) through the Smithsonian Agreement in December 1971 attempted to come up with a new level for US dollar to gold. This, had it succeeded, would have preserved the fixed exchange rate system but that last attempt was given up in June 1972. The 1976 Amendments to the IMF Articles of Agreement were the result.[31] This upheaval eventually led from a system of managed exchange rates and exchange rate adjustments to one of floating exchange rates. To that extent the original Bretton Woods design no longer reflects the contemporary system for monetary and exchange rate cooperation. Furthermore, the trade-facilitative function which the par value system had played was undermined by these changes. The manner in which the world trading regime (discussed further, below) and the IMF regime interact is complex. Put simply, the system was

[30] *Ibid.*, 624–5. [31] *Ibid.*, 625–33.