

Chapter 2

The Coherent Fragmentation of International Economic Law: Lessons from the Transpacific Partnership Agreement

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Abstract Rather than just focusing on one narrow component of the TPP, this chapter takes a macro perspective. It first seeks to measure the TPP's contribution to the IELO—whether it really does add to the field and then, critically, whether the character and components of the TPP really do undermine the IELO. In other words, whether the TPP has much to contribute to the debate about the perception that the IELO is fragmented. The chapter finds that the TPP does not really contribute much new to the IEL, for what is new in the TPP is weak, and what is strong is not new. The chapter then conclude by applying the lessons from that analysis to uncover insights about the wider issue of the fragmentation of first the international economic legal order and then the international legal order in general. The chapter finds that while there are many parts to the international economic order, at a conceptual level it remains coherent. This may be styled coherent fragmentation. Extrapolating it is possible to then consider the wider international legal order similarly fragmented in a coherent manner.

Keywords Fragmentation • International • Economic • Law • TPP • Trade

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1 Introduction

There has been much fanfare over the completion and signing of the latest “mega FTA”,¹ the Transpacific Partnership Agreement (the “TPP”).² The TPP has been hailed as “a once-in-a-lifetime agreement, and a once-in-a-lifetime moment of decision.”³ The Australian Prime Minister Malcolm Turnbull hailed it as a “gigantic foundation stone” for Australia?⁴ Now that it has been freed from its highly secret negotiations, trade scholars and practitioners can turn their minds to analysing the Agreement—looking for unique aspects, assessing its likely effectiveness, and considering its impact on other parts of the international economic legal order (“IELO”). Some of those scholars will hail and celebrate while others will criticise and attack the claimed innovations and novelties within the TPP. Some will claim that this latest mega FTA is just another nail in the coffin of multilateralism or even worse of the entire IELO.

Rather than just focusing on one narrow component of the TPP, this chapter will instead take a macro perspective. It will seek to measure the TPP’s contribution to the IELO—whether it really does add to the field and then, critically, whether the character and components of the TPP really do undermine the IELO. In other words, whether the TPP has much to contribute to the debate about the perception that the IELO is fragmented. The chapter will then conclude by applying the lessons from that analysis to uncover insights about the wider issue of the fragmentation of the international legal order.

2 Caveat

Since shortly after the release of the final agreed text of the TPP there has been a flurry of excitement among trade law scholars. Who can blame them given the glacial pace of development at the WTO over the last twenty years. Just within the first six months after that signing in New Zealand,⁵ there have been many conferences focusing on the TPP. For example, the Asia WTO Research Network and the Global Economic Law Network at the University of Melbourne hosted global

¹I will use the term ‘mega FTA’ for these sorts of large regional trade agreements (“RTA”s). Otherwise the term RTA will be used to refer to the non-customs union agreements covered by Article XXIV of the GATT and Article V of the GATS.

²Full text of the TPP can be found at the USTR website available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

³Canadian Prime Minister Harper, see www.wsj.com/articles/canada-pm-harper-heralds-tpp-trade-deal-1444059948.

⁴See www.abc.net.au/news/2015-10-06/pacific-nation-ministers-negotiators-lock-in-tpp-trade-deal/6829368.

⁵To see the signing of the TPP visit www.mfat.govt.nz/en/media-and-resources/news/trans-pacific-partnership-signing/.

conferences devoted to trying to understand this new agreement and its place within the IELO.⁶ The goal of these and other conferences on the TPP was that after the conferences those in attendance would feel that they understood the TPP better having been exposed to in-depth analyses of the many different parts of the TPP. But, there is a “chicken and egg” problem at the core of this effort to understand the TPP (and other newly signed or enacted regimes). This is because those trying to get a grasp of the overall character of the TPP in these early days face a substantial challenge having little with which to work except the bare text and their own knowledge of the field and its contexts. Indeed, this chapter faces this problem in the extreme, as it was presented at both the AWRN and the Melbourne conferences in an early attempt to weigh the TPP for originality/novelty and hence to consider its relation to the idea of a fragmented IELO.⁷ Indeed, even after hearing paper presentations at such conferences, TPP scholars, including the author, are still largely working in isolation and in the dark, for many of the papers were very specialised or were just initial thoughts based on hurried analyses of the texts and are often not available, being held close to the authors until they feel more confident about their findings! Furthermore, all those analyses were carried out without the benefit of reading each other’s analyses. Compounding these challenges is the fact that conducting such research on the TPP at such an early point in its development necessarily means doing so without seeing any implementing legislations, or observing the TPP in practice or without having had a chance to learn from the inevitable jurisprudence that will be developed by the dispute settlement system (“DSS”). Finally, such scholarship is taking place even though it is far from clear that the TPP (or any successor/replacement agreement without the US) will receive the required ratifications for it to come into force—undermining a commitment to the research by many who would otherwise have provided valuable insights.

Thus, all who attempt such a preliminary analysis are undertaking a task rife with difficulty and risk. But, the analyses must start somewhere, there must be material for those civil servants implementing the treaty if it enters into force. Critically, there must also be some research building blocks for those that conduct the later research to build on—even if later their efforts undermine or even demolish the edifices created early on: in this chapter and in the other works presented at this early stage in the life of the TPP. Accordingly, this chapter, as complete as it is for the moment, later must necessarily have its TPP analysis modified based upon the presentations of new analyses and insights over the first few years of the life of the TPP (assuming it or a successor agreement does come into existence following the necessary ratifications). So—the reader is asked to give the TPP analysis in this chapter some latitude.

But, as will be clear from the analysis in this chapter, the valuable exploration of fragmentation here is more resilient and will endure even beyond subsequent TPP

⁶See www.awrn.asia/news_inner.php?id=14 and http://law.unimelb.edu.au/events/detail?event_id=6117.

⁷Early versions of this work were also presented in earlier forms at the law faculties of Instituto Tecnológico Autónomo de México (ITAM) in February 2016 in Mexico City and of O.P. Jindal Global University in March 2016 in India.

scholarship or even if the TPP were not to come into force. The above is another way of saying—the TPP remarks below are necessarily impressionistic and preliminary—but hopefully still of value in the future, even as the fundamental development of the idea of fragmentation endures.

3 Fragmentation

Despite the above caveat about the TPP analysis, the author does feel strongly that the TPP analysis below, supported by reference to the provisions within the TPP, is correct: that the TPP is “Much of a Muchness”.⁸ Or put into contemporary terms is simply the latest reboot of the usual regional trade agreement (“RTA”), indeed an RTA version 7.0 (or as was suggested at an earlier presentation of this work—Version 1.7, a qualitative difference and quite a trenchant comment on the development of RTAs over the decades). In other words, not all that new or original and hence does not undermine the coherence of international economic law (“IEL”), even as it may contribute to a “physical” fragmentation of IEL.

The TPP is not the first RTA to be attacked as undermining the coherence of IEL—of contributing to its fragmentation. Indeed, this author has made such claims before in an earlier work.⁹ But that article, written over ten years ago, and while arguably correct in its prediction as to RTA resource diversion from multilateral efforts, may have been too pessimistic as to the eventual impact of the proliferation of RTAs on IEL’s coherence. While those ten years have indeed seen the WTO fail to conclude the Doha Round (perhaps in part due to the resource diversion caused by RTAs), the substantive incoherence or fragmentation that the large number of RTAs was to have wrought on the system does not appear to have taken place. In part, as discussed below, this may be due to the “sameness” of the many RTAs, their practice and their jurisprudence. But is this new mega FTA different? Will it, to mix metaphors, be the final RTA that broke the “camel back” of the IELO, pushing it over the edge into uncontrollable incoherence and complete fragmentation? This chapter will suggest that the answer to these mixed-metaphor questions is by-and-large “no”.

This chapter will argue, at an essential level, that the TPP is not all that new and that despite the many bells and whistles and slightly unusual parts, it is just another RTA, albeit a bit bigger and perchance in some small ways a little newer and a little innovative. Furthermore, following this approach suggests critical insights about the fragmentation of IEL: whether IEL is actually truly fragmented. Furthermore, if the

⁸This old phrase means ‘Similar - difficult to distinguish.’ (see www.phrases.org.uk/meanings/251550.html).

⁹Colin B. Picker, ‘Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat’, (2005) 26 U. Pa. J. Int’l Econ. L. 267.

approach is extended even further, it is possible to discern insights about the fragmentation of public international law (“PIL”).

The discussion above may suggest that the analysis in this chapter will start at a “local” level (from the small RTA and TPP contribution to fragmentation) and then work up through the issue of coherence and fragmentation first at the IEL field level and then at the entire PIL level. But, when considering fragmentation there is in fact great value in first presenting a discussion of fragmentation of PIL, and then IEL and then the TPP—in other words starting at the macro and moving to the micro. For the concept first needs to be explored and explained before reviewing the TPP for its contribution to fragmentation, after which the idea can be extrapolated back up through and applied to IEL and then to PIL.

3.1 *Fragmentation of Public International Law*

Modern (western) international law was born in the 16–17th century, but it is only from the 19th century that we start to see modern international regimes (e.g. the Universal Postal Union in 1874).¹⁰ The First World War spawned even more (e.g. the League of Nations and the Permanent Court of International Justice), but it is in the post Second World War that we have seen the dramatic expansion of PIL, especially in the growth of international governmental organizations (“IGO”s) and regimes (e.g., the UN, GATT, IMF, etc.). This has continued unabated in recent times,¹¹ especially after the Cold War new regimes have proliferated (e.g. the new Arms Trade Treaty, as of 24 December 2014).¹² Today there are over a 500,000 treaties¹³ and more than 100 IGOs.¹⁴

This growth of international regimes has many causes. It is a consequence of the successful expansion of international law into new fields and its attempt to deal with new challenges—resulting in the birth of numerous fields and institutions. But, it

¹⁰Treaty of Bern (9 Oct, 1874), establishing the International Postal Union. See http://avalon.law.yale.edu/19th_century/usmu010.asp.

¹¹See generally, Tomer Broude, ‘Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law’, (2013) 27 Temp. Int’l & Comp. L.J. 279.

¹²Tomer Broude, ‘Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law’, (2013) 27 Temp. Int’l & Comp. L.J. 281. See also www.thearmstradetreaty.org/index.php/en/.

¹³See *Rep. of the Study Grp. of the Int’l Law Comm’n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th Sess., May 1–June 9, July 3–Aug. 11 2006, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected, U.N. Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) (hereinafter ILC Report) at para 8, Treaty of Bern (9 Oct, 1874), establishing the International Postal Union. See http://avalon.law.yale.edu/19th_century/usmu010.asp.

¹⁴See <http://libguides.northwestern.edu/c.php?g=114980&p=749189>.

may also be a by-product of the immaturity of international law—a legal system that lacks clear hierarchies of norms and structures, radically different than most domestic legal systems. The International Court of Justice is hardly the equivalent of most nation's supreme or highest court. Nor is the United Nations General Assembly really like a nation's parliament. Similarly, the Security Council is a long way from being like a state's executive. Another way to think about or explain this proliferation is that it reflects global legal pluralism. Finally, there might be value in considering whether the proliferation is both natural and inevitable, like the Second Law of Thermodynamics, with ever increasing entropy.

This explosion of regimes has led to what has been characterised as the fragmentation of international law—"the emergence of specialized and... autonomous rules..., legal institutions and spheres of legal practice."¹⁵ This issue has been taken very seriously by scholars and officials and has eventually made its way onto the workload of the UN's International Law Commission ("ILC"), eventually being the subject of a report. In that report the ILC notes that fragmentation, "the emergence of specialized and... autonomous rules..., legal institutions and spheres of legal practice[]", has created an international law that "once appeared to be governed by 'general international law' [and] has [now] become the field of operation for... specialist [regimes]—each possessing their own principles and institutions." And the report further notes that "such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law."¹⁶ In other words that international law is fragmented.

Some have characterised the problem as more about diversity than a breakdown in international law—a diversity reflecting the development of the international law.¹⁷ Some, including the ILC Report, have also suggested that the issue is as much about the failure to resolve the proliferation of international law as we do domestically through conflicts of laws approaches. Thus, we have simply to figure out the appropriate principles and establish some hierarchies and the issue will go away.¹⁸ Another positive or possibly non-negative (neutral?) approach might be that it is appropriate that each regime should have different rules and organizations—they reflect the different needs of what are dramatically different fields.¹⁹ Finally, another argument that the fragmentation is natural and not necessarily negative is that the existence of this anarchic international legal order reflects and protects state sovereignty. The structures, after all, are those agreed to by states.

But, it is probably not wrong to believe that there is discomfort, if not more extreme feelings, among practitioners, officials and scholars that work in

¹⁵ILC Report at para 8.

¹⁶Para 8, ILC Report.

¹⁷Bruno Simma, 'Fragmentation in a Positive Light', (2003–2004) 25 Mich. J. Int'l L. 845.

¹⁸ILC report, para 18 et seq.

¹⁹Indeed, one sees the same thing in domestic law—we do not expect labour and family law to share concepts, approaches or even courts.

international, transnational and comparative law that, while that fragmentation is now “normalised” and perhaps “legally managed”,²⁰ the proliferation is not necessarily a positive feature of the modern international legal order and that it causes more problems than benefits.

3.2 *IEL and Fragmentation*

IEL is essentially a product of the post Second World War period, and particularly of the post-Cold War period. IEL has been well defined:

as the international law regulating trans-border transactions in goods, services, currency, investment, and intellectual property [excluding] from the [definition] issues of private international law, as well as of economic warfare.²¹

It would not be an exaggeration to claim that IEL is the most dynamic and pervasive field within international law with the best record of implementation and compliance of all PIL fields. But, like PIL in general, there has been a worrisome proliferation of IEL, especially in the last twenty years.

Today there are over 400 regional trade agreements (“RTA”s) in force and more than 2500 bilateral investment treaties (“BIT”s).²² There are numerous IEL organizations and tribunals.²³ Furthermore, another type of proliferation that must be taken into account in a field such as IEL with its excellent record of participation, compliance and implementation is that almost every country in the world has its own implementation/interpretation of IEL obligations. Furthermore, every country has its own domestic laws and regulations that relate to or impact on IEL’s operation and development. Finally, given the penetration of field throughout academia there are today a very large number of intangible different approaches, theoretical understandings and expectations of IEL which themselves then add an additional set of layers on top of the physical proliferation of IEL.

One could thus argue that IEL is fragmented—indeed exceptionally fragmented, with its fragmentation a significant issue given the global reach and depth of IEL. The causes of that proliferation are likely similar to that of PIL’s proliferation, albeit with some different additional factors. Thus, IEL’s fragmentation can also be “blamed” on its success as the adoption of IEL principles and obligations has spread all across the world—with each adoption by the different states, institutions and

²⁰Tomer Brode, ‘Keep Calm and Carry On: Martti Koskeniemi and the Fragmentation of International Law’, (2013) 27 Temp. Int’l & Comp. L.J. 280.

²¹Detlev F Vagts, ‘International Economic Law and the American Journal of International Law’ (2006) 100 American Journal of International Law 769 (citations omitted).

²²See <http://investmentpolicyhub.unctad.org/IIA>.

²³They include all the World Bank institutions and related or similar entities (e.g. Asia Development Bank), the many RTA secretariats and their dispute resolution bodies, the many investment arbitration bodies, and so on.

regimes being slightly different. The numerous implementations all necessarily being imperfect (or different) and hence introducing small, and sometimes large, changes that in aggregate result in numerous versions and approaches of what may have originally appeared to be a cohesive and consistent and logical IEL rule or regime.

Like the causes of fragmentation of PIL, IEL too has grown as a result of the expansion of IEL into new fields, dealing with new challenges. This has been stimulated in the post-Cold War in particular for IEL as economic interactions and consequent IEL-type agreements increase in times of peace. Also, as is the case with PIL, the proliferation of IEL is a reflection of its relative immaturity and especially the continuing failure since 1995 of multilateral approaches, such as the Doha Round and the Multilateral Agreement on Investment, both of which provide clearer hierarchies and control consequently reigning in unchecked diversification. Finally, like PIL, this fragmentation may also be both natural and inevitable (again—the Second Law of Thermodynamics metaphor).

Perhaps more so than is the case today in PIL, this proliferation is viewed negatively within the IELO. In particular there are concerns that it is undermining the development and coherence of IEL as a field—with no shortage of metaphors that try to capture the chaos, from noodle bowls to spaghetti bowls and so on.²⁴ Also there is a perceived circularity in that the proliferation which is claimed to undermine multilateralism then supposedly encourages further bilateral or regional forms of IEL which itself then further fragments IEL which then continues to undermine multilateral approaches and so on. And for a field so tied to notions of economic efficiency, there is a concern that the current fragmentation is highly inefficient and undermines economic progress across a whole range of areas. Finally, because IEL is almost uniquely a “live” and strong field, the proliferation and potential incoherence of IEL will increasingly lead to different understandings or even misunderstandings which will themselves lead to conflict—and once again with a circularity that will feed back into the increasing fragmentation of the field as multilateralism is undermined by those conflicts and misunderstandings.

With the above as background this chapter will now turn to consider whether the issue of proliferation leading to fragmentation in IEL and PIL can be enlightened by viewing the recently completed and widely hailed, if unlikely to come into force, Trans Pacific Partnership.

²⁴E.g., Jagdish Bhagwati, *A Stream of Windows: Unsettling Reflections on Trade, Immigration, and Democracy* (1998) 290–91 (discussing his ‘spaghetti bowl’ theory concerning ever-complex rules of origins emanating from RTAs and the negative consequences for government and private industry).

4 The TPP

4.1 *The Character of the TPP*

The TPP is likely the most important large regional trade agreement in decades. I will describe it even though it has been described many times before, for how it is described, which parts are highlighted, can be a window into the analysis proffered in a paper. As an initial matter, the TPP's membership is quite diverse, including a mix of western and non-western states, developing and developed states, market and non-market states, and large and small states.²⁵ Such a mix should already be a red flag with respect to the TPP being innovative, suggesting it unlikely that truly novel issues will have been resolved and incorporated into the agreement. While described as a regional trade agreement, that term when used to describe the TPP, which encompasses a major part of the globe, is a little bit of a stretch, for the TPP covers almost one complete hemisphere of the Earth. And, most pertinently, if thinking of it as an Asia-Pacific region it critically does not include Russia or China, two of the most powerful states in the region.²⁶

There is a great deal in the TPP—it is a very long agreement including thirty chapters, alongside many annexes and side agreements. It is the end product of years of intense negotiation. Though, while the TPP was signed in 2015 in New Zealand, it is not yet in force. Indeed, the TPP may not even come into force if the United States does not ratify it.²⁷ Conceivably by the time this piece is published we will know for sure, but the 2016 U.S. election rhetoric alongside the final result of the election makes ratification look unlikely. But, for the purposes of this chapter's thesis it matters little if it does not come into force for even if the TPP is not enacted it would still reflect the prevailing and acceptable compromises of so many significant trade participants and as such is a worthy example when considering the idea of fragmentation of IEL.

So—what does the TPP appear to do? What is its character? For sure it deepens liberalization and adds sectors, includes dispute settlement and even investor-state dispute resolution procedures. It will reduce classic trade barriers. It has been noted that “[e]ventually, on average, approximately 99% of.... TPP partner country tariff lines will be duty-free”.²⁸ There will be significant market access in agricultural,

²⁵The members of the TPP are/were Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

²⁶Lending support to those that would say the TPP is more about geopolitics than about IEL.

²⁷See TPP Article 30.5. At a minimum for the TPP to enter into force it needs the signatories of six of the original twelve signatories so long as those six constitute at least 85% of the combined GNP of the original twelve TPP signatories. This requirement therefore requires both Japan and the US to have ratified the treaty for that threshold to be reached.

²⁸Congressional Research Service: The Trans-Pacific Partnership (TPP): In Brief (R44278, 8 Jan 2016) at 4.

automotive and textile sectors.²⁹ Advances in trade facilitation/customs, including “commitments on efficient release of goods, handling of express shipments, electronic processing of customs documentation, and inspections based on risk-management techniques, as well as enhanced transparency (see Footnote 29).” Also, it includes commitments that would prohibit countries from blocking cross-border flows of data over the Internet.³⁰ Government Procurement provisions are included, bringing more countries into alignment with government procurement limitations (such as Australia—until just before the completion of the TPP Australia had not been a participant in the Government Procurement Agreement of the WTO³¹). Of course, it would not be a trade agreement with the US if there were not intellectual property protection provisions—despite the continuing concerns as to whether intellectual property really should be included in trade agreements. And again reflecting the US style trade agreements, the TPP includes labour and environment commitments. The TPP also includes sections and provisions on currency manipulation, regulatory coherence, anti-bribery, TBT and SPS provisions, rules of origin harmonization, services and SOEs. It is truly a broad agreement. Though just how new and/or deep is discussed below and is of critical relevance to whether the TPP contributes to the fragmentation of the IELO.

4.2 *The TPP’s Assault on the Coherence of IEL*

The TPP appears to be truly a “mega FTA”. It covers so many sectors and countries—encompasses a great deal of the economy of the world. As a mega FTA its presence is even greater than the usual RTA, which means that its deeper liberalization may be thought to cause further cleavage among the world of RTAs. As such, maybe it could be said to further fragment IEL for if the TPP enters into force IEL will include yet more rules for different industries and goods. Furthermore, some countries will have new obligations—but only towards TPP members. Keeping track of the spaghetti or noodle bowl of regulations, obligations, commitments and so on will be even tougher than before the TPP. In this sense it could be argued that the TPP has contributed to the fragmentation of IEL.

But, is the simple existence of hundreds, thousands, perhaps even tens or hundreds of thousands of new rules and regulations such a problem in today’s complex mega-data driven world? It seems unlikely. It is true that the new provisions add complexity for those engaged in trade and investment, but is its complexity beyond what a sophisticated computer program can handle? Again—it seems unlikely.

²⁹Congressional Research Service: The Trans-Pacific Partnership (TPP): In Brief (R44278, 8 Jan 2016) at 6.

³⁰Congressional Research Service: The Trans-Pacific Partnership (TPP): In Brief (R44278, 8 Jan 2016) at 6–7.

³¹See <http://dfat.gov.au/international-relations/international-organisations/wto/Pages/wto-agreement-on-government-procurement.aspx>.

So, if not, then why worry about it? Because of concerns about coherence. Coherence being defined to be: “logical interconnection; overall sense or understandability; congruity; consistency”.³² Maybe then the proliferation of fields, institutions, rules and approaches is only a problem when it undermines the *coherence* of the overall regime or legal order—and that is the problematic fragmentation about which there is so much concern. Coherence is thus the *Achilles Heel* of the proliferation of regimes within the IELO.

So, the question then is whether the TPP has undermined the coherence of IEL. That will have happened if yet more new approaches, especially ones inconsistent or at odds with existing approaches, were added to the field as result of the TPP’s addition to the IELO. As the earlier description of the components of the TPP shows there is no question that the TPP is both different and new. Though, as will be discussed below, The TPP may not include sufficient number of new or different approaches that are more than soft or hortatory. Consequently it may not substantially undermine the coherence of IEL.

Considering this issue with respect to the TPP and its relationship to the IELO may also suggest an answer to the same question, albeit more generalised, with respect to the other IEL regimes’ impacts on the IELO—the hundreds of RTAs, thousands of BITs, the IEL institutions and so on. Employing a form of double negative: are they also not sufficiently different enough to each other to undermine the coherence of IEL? Likely not. And then, perhaps this approach can be extrapolated out further to apply to the fragmentation of PIL.

But first—the TPP. Though, in a short work such as this, there is a limit to the critique that can be provided at a detailed level of an agreement the size of the TPP. But, many small examples alongside one more detailed example can begin to build a picture that permits us to discern what is the character of this TPP—and critically for this chapter, whether the TPP is sufficiently new and those new parts sufficiently strong to undermine the coherence of the IELO.

4.3 *The TPP’s “Newness” and the Strength of Any Such “Newness”*

Looking in detail throughout the Agreement, one can, of course, identify many interesting and possibly novel approaches, especially in response to the emergence of new “hot” fields. For example, Chap. 2’s inclusion of provisions on cryptography³³ and on “modern biotechnology”.³⁴ But when one delves down into the details of the TPP, at a technical or conceptual level, one finds that not all the novelty survives scrutiny. Indeed, under such an examination it appears that there are many aspects of the TPP that suggest

³²See www.dictionary.com/browse/coherence.

³³TPP Article 2.11.4.

³⁴TPP Article 2.29.

that it may not be sufficiently new, deep or strong enough to undermine the coherence of the IELO. Those traits include:

- (1) Application of existing “common” standards;
- (2) Use of soft and hortatory approaches;
- (3) Excessive levels of deference to the state members;
- (4) Insufficient use of the dispute settlement system;
- (5) That the “novel” parts are simply “repair jobs”;
- (6) The “repackaging” of prior concepts; and
- (7) The widespread use of carve outs and exceptions.

Each of these is briefly discussed below, though many of them are further explored in the one more detailed specific example from the TPP—the chapter on state owned enterprises (“SOE”).

4.3.1 Using Existing “Common” Standards

As an initial matter, many of the “new” rules simply try to ensure that in specific areas members would implement what many would consider to be the “rule of law” standards expected of modern countries. The competition law chapter’s provisions on transparency requirements and procedural fairness are two such examples where TPP members would be required to be brought up to international standards.³⁵ Similarly, in Chap. 26, on transparency and anti-corruption, we see that the provisions do not really add to the understandings and approaches that currently exist with respect to corruption of officials. Its main impact is in its application to those countries not yet participants in modern anti-corruption regimes, bringing them into what has become expected for modern economies.³⁶ Similarly, Chap. 19’s treatment of labour issues is not conceptually all that novel, for it seems to rely mostly on the ILO core principles (that most countries will already have signed onto).³⁷ Though it should be noted that Chap. 19 has a new wrinkle in that it specifically includes strong language that lack of resources is no excuse to the requirement that the labour laws are enforced.³⁸

Even in the new fields covered, such as in the supposedly novel Chap. 14 on E-Commerce, we find that the approaches are not really all that new, but rather appear to operate as efforts to apply existing standards which are themselves not

³⁵See, e.g., TPP Articles 16.2 and 16.7.

³⁶TPP Article 26.6.

³⁷TPP Articles 19.2 and 19.3 (and thereafter the reference back to these Articles which had themselves incorporated the ILO provisions).

³⁸TPP Article 19.5.2 (“If a Party fails to comply with an obligation under this Chapter, a decision made by that Party on the provision of enforcement resources shall not excuse that failure.”) Nonetheless this approach is weakened through provisions relating to prosecutorial discretion, though that discretion must only be exercised in good faith or for bona fide reasons. TPP Articles 19.2 and 19.3.

that new. For example, with respect to the national e-commerce legislation, TPP members “shall maintain a legal framework governing electronic transactions consistent with the principles of the UNCITRAL Model Law on Electronic Commerce 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts, done at New York November 23, 2005.”³⁹ While highly specific in identifying the common standards in some parts, at other times, such as with digital privacy, the TPP’s efforts to reach common standards proceeds without the TPP actually mandating the specific standards that should be followed.⁴⁰

4.3.2 Soft & Hortatory Approaches

Soft and hortatory approaches are not necessarily negative features of international law. Indeed, there is clearly a valuable role for soft law or hortatory approaches in regimes such as the TPP. This is especially so for those new areas of law or where the expectation is the law will eventually become hard but where there is not yet sufficient support or consensus for one particular approach. Also, soft or hortatory approaches tend not to pose coherence problems for their larger field or related fields of law, at least in the short to medium term as those soft or hortatory approaches may take time to mature into hard law, if indeed they ever do. But, the sort law or hortatory provisions in the TPP do not really contribute to the strength of any related novel parts of the TPP. Hence, with respect to an investigation into the novelty of the TPP, the more soft law or hortatory provisions there are then the more we might feel the TPP to be insufficiently new or strong in any new parts.

In fact, the TPP includes parts that at first glance may appear to be novel in the TPP but after deeper consideration end up looking like “soft law” or are simply hortatory. For example, “The Parties share the objective of the multilateral elimination of export subsidies for agricultural goods and shall work together to achieve an agreement in the WTO to eliminate those subsidies and prevent their reintroduction in any form.”⁴¹ Perhaps the best example of this soft or hortatory approach is Chap. 25 [10.1007/978-981-10-6731-0_25](#) on Regulatory Coherence.

³⁹TPP Chap. 14, Article 5.1.

⁴⁰TPP Article 14.8.2 (“each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies.”).

⁴¹TPP Article 2.23.

The provisions there are about as weak a part of an RTA as this author has ever seen.⁴² It has a litany of characteristics that make it weak: it employs “fluffy” words (such as “should aim”,⁴³ “shall endeavour”,⁴⁴ “should generally have,”⁴⁵ etc.); it is subservient to all other parts of the TPP⁴⁶; and most unfortunately it includes numerous instances that employ subjective standards.⁴⁷ Far from making progress in this issue, the Regulatory Coherence chapter is not only weak but it seems to compound a subjective approach to the issue, undermining the very progressive idea that there is an objective regulatory coherence which is suggested by inclusion of such a chapter.

4.3.3 Excessive Deference

Clearly international regimes must defer to states, both as a reflection of state sovereignty and of the positivist nature of international law. They also may defer to states because the regime incorporates subsidiarity principles that may be considered as more efficient, legitimate or effective.⁴⁸ But, there is a balance that must be struck between deference and effectiveness: ensuring that the deference is not so extreme as to effectively undermine the instrument’s purpose and the effectiveness does not detract from notions of state sovereignty.

The TPP, however, may have tipped the balance too far towards deference in many of its parts. For example, Chap. 20 on the Environment, which also appears to include lots of “fluffy” commitments and lots of general statements, also defers to the parties in critical respects. For example, it provides that the “Parties recognise the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or

⁴²For example, early on it affirms that, among other things, “each Party’s sovereign right to identify its regulatory priorities and establish and implement regulatory measures to address these priorities, at the levels that the Party considers appropriate” 25.2.2.b.

⁴³TPP Article 25.3.

⁴⁴TPP Article 25.4.1.

⁴⁵TPP Article 24.4.2.

⁴⁶TPP Article 25.10.

⁴⁷See, e.g., Article 25.5.6 (“Each Party should review, at intervals it deems appropriate, its covered regulatory measures to determine whether specific regulatory measures it has implemented should be modified, streamlined, expanded or repealed so as to make the Party’s regulatory regime more effective in achieving the Party’s policy objectives.”) and Article 25.5.7 (“Each Party should, in a manner it deems appropriate, and consistent with its laws and regulations, provide annual public notice of any covered regulatory measure that it reasonably expects its regulatory agencies to issue within the following 12-month period”).

⁴⁸As subsidiarity is explained at the EU website: “it is the principle whereby the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level”. See <http://eur-lex.europa.eu/summary/glossary/subsidiarity.html>.

modify its environmental laws and policies accordingly”.⁴⁹ This provision appears to be entirely too deferential to the TPP members.

Another important example relates to the treatment of *Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources* in Chap. 29. This is an example of an issue novel for RTAs being raised, only to remove the issue from the international plane down to the domestic, by providing that: “Subject to each Party’s international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.”⁵⁰ Similarly, with respect to the novel provisions concerning modern biotechnology, repeatedly the provisions are consistently weakened by the reiteration of the phrase “subject to its laws, regulations and policies”.⁵¹

4.3.4 Not Subject to the TPP’s Dispute Settlement System

Like most other modern RTAs, the TPP has a strong DSS (though as is discussed in the next subsection it too is not novel, but rather seems to be more of an updated and “repaired” version of the DSSs found in modern RTAs). But, there are many, perhaps too many parts of the TPP not subject to the TPP’s DSS. Furthermore, it seems that those parts not subject to the DSS are often the parts which really are novel for RTAs. For example, the weak Chap. 25 on regulatory coherence is enfeebled even further as it is also not subject to the DSS!⁵² Similarly, Chap. 16 on competition also does not provide recourse to the DSS.⁵³

But, sometimes even when provisions are subject to the DSS, there are dispute settlement exceptions and carve-outs that undermine the DSS’s effectiveness. For example, while providing that disputes arising from obligations in Chap. 20 on the environment can be litigated at the TPP’s DSS⁵⁴ there are obstacles to its use, such as requiring a lengthy consultation process, and only permitting use of the DSS by a

⁴⁹TPP Article 20.3.2.

⁵⁰TPP Article 29.8. As an aside, was not the TPP meant to have been a “stitch up” by big business? And yet this provision may not work to the interests of big business—unless they manage to protect their interests through controlling the countries within which indigenous knowledge is found—leaving unrepresented indigenous people at the mercy of the ruling elites within their own countries. If that is what will happen then this is indeed a victory for business. Regardless of that pessimistic and perhaps paranoid perspective, the subjectivity of the provision does still leave the field somewhat unresolved and likely anarchic, which may not be in the best interests of anyone in the long run.

⁵¹See, e.g., throughout the many provisions found in TPP Article 2.29 ‘Trade of Products of Modern Biotechnology’.

⁵²TPP Article 25.11.

⁵³TPP Article 16.9.

⁵⁴TPP Article 20.23.

state if that state has “clean hands”—i.e. if its own use of similar environmental regulations or similar ones is not in violation of the TPP.⁵⁵

4.3.5 Novelty Is Simply “Repair Jobs”

Not surprisingly, when a new RTA is created it provides an opportunity to include approaches and to apply lessons learned from the experiences (especially of mistakes) of other RTAs. Such corrections do not typically add new conceptual approaches, for they usually are procedural or if substantive are typically still part of the prior approaches’ theoretical and operational constructs. Because such “repair jobs” are not then new at a conceptual level they should not be considered new when considering the impact of the TPP on the coherence of the IELO.

Such repairs are present throughout the TPP. For example, they are easily visible in Chap. 28 on Dispute Settlement. While its elements are largely also found in other RTAs and are now considered the norm, the TPP’s DSS does add some new approaches, though they seem for the most part to have been created to simply correct what were perceived weaknesses or failings of the WTO’s Dispute Settlement Understanding and of some of the more vigorous FTAs, especially the NAFTA’s dispute settlement system. Some of the improvements include improved rules governing the creation, management and role of rosters,⁵⁶ rules on public documents and hearings (the presumption being open to the public),⁵⁷ reference to limited and temporary monetary damages,⁵⁸ and so on.

4.3.6 Repackaging of Prior Concepts

Finally, while some aspects of the TPP may appear novel, upon more careful consideration it is possible to see that for some of those so-called novel components the underlying concept is not new, but simply a modified form of an older concept or an older concept appearing in a different setting. For example, with respect to the provisions on localization of computing resources in Chap. 14, while it is a novel

⁵⁵TPP Article 20.23.3 (“Before a Party initiates dispute settlement under this Agreement for a matter arising under Article 20.3.4 or Article 20.3.6 (General Commitments), that Party shall consider whether it maintains environmental laws that are substantially equivalent in scope to the environmental laws that would be the subject of the dispute.”).

⁵⁶TPP Article 28.10.3.

⁵⁷TPP Article 28.12.1.

⁵⁸TPP Article 28.19.3.

application to a modern issue, that state parties cannot force localization of servers,⁵⁹ the underlying concept is akin to a prohibition of domestic content requirements—itsself nothing conceptually new.

4.3.7 Carve Outs

Multilateral agreements are not easy to negotiate, especially across such a diverse collection of states as were involved in the formation of the TPP. In other fields of international law disagreements might be managed through states making “reservations” to parts of the concluded treaty.⁶⁰ In IEL there is less use of reservations and instead IEL tends to utilize other approaches, such as: general and specific exceptions; side letters setting out further levels of understanding; and otherwise using the schedule of concessions to permit states the flexibility they need in signing up for such a treaty while balancing domestic concerns. Thus, the large number of side agreements, special annexes and detailed schedules in the TPP are not an indictment of the TPP, rather they are typical for such an instrument. Similarly, the TPP’s use of general and specific exceptions are also just part of the usual makeup of an IEL treaty. But, to the extent one argues that an agreement is novel, one needs to carefully examine whether these exceptions, schedules and side agreements do not in fact nullify the impact or relevance of the claimed innovations. Indeed, to a significant extent one can see heavy use of these devices with respect to much that is new in the TPP.

For example, just focusing on the cutting edge Chap. 14 on Electronic Commerce we see significant numbers of such carve outs and exceptions. In the area of non-discrimination of digital products, there are carve outs for government procurement,⁶¹ broadcasting (screen limits)⁶² and IP violations.⁶³ Similarly, the provisions on free flow of business e-information permits blockage for public policy reasons so long as it is not a disguised barrier to trade.⁶⁴ The novel provisions protecting against source code disclosure “as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory” are undermined by the provision’s non-application to the vaguely worded “critical infrastructure” and are otherwise only applicable to mass market products.⁶⁵

⁵⁹TPP Article 14.13.

⁶⁰Subject to the international law rules on reservations. See Vienna Convention on the Law of Treaties (23 May 1969), Articles 19–23.

⁶¹TPP Article 14.2.3.

⁶²TPP Article 14.4.4.

⁶³TPP Article 14.4.2.

⁶⁴TPP Article 14.11.3.

⁶⁵TPP Articles 14.17.1 and 14.17.2.

Thus, even when stretching the coverage of RTAs into these modern challenges the TPP may not, in the end, be all that novel or where it is truly novel—not all that strong.

4.4 The Example of the SOE Chapter

An in depth consideration of one of the TPP's chapters may help to further illustrate some of the issues raised above. This illustration may be even more powerful if the chapter selected is one that many had thought would include some of the more novel aspects of the TPP. The inclusion of strong provisions on SOEs was much anticipated. It was also the part that many believed would make China's participation in the TPP impossible. But upon closer inspection it is both technically weak and not overly new from a conceptual standpoint. In addition, it should pose no insurmountable obstacle to China's participation in the TPP were it interested and were it ever to be offered such an opportunity.

At the technical level, the TPP's SOE regime is weakened right from the start by its definition and thresholds—a form of exception or carve out. For example, the definition of an SOE is that it must be at least fifty percent owned or controlled by the government or must have the government appoint the majority of the board.⁶⁶ But these thresholds fail to take into account the many other lower levels of ownership or board appointment that can actually be structured so as to retain governmental control. Similarly, there are threshold revenues that an SOE must reach before the provisions apply—a very problematic provision given the many “imaginative” accounting techniques that could be employed alongside transfer pricing manipulations resulting in transfers between related entities that may not appear as revenue.

The SOE chapter also appears to provide commitments that would otherwise be already handled under the usual national treatment or most favoured nation provisions that the member states would have committed to in other agreements.⁶⁷ And yet, there are parts of the chapter that seem to relax these traditional demands with respect to SOEs. Thus, for example, the TPP seems to permit SOEs the right to sell at different prices or conditions and even lets them refuse to sell⁶⁸—which on first

⁶⁶TPP Article 17.1.

⁶⁷See, e.g., TPP Article 17.4.1.

⁶⁸TPP Article 17.4.3.

glance looks like authorized violations of MFN and national treatment. This could be a significant loophole in the SOE provisions. As noted above, the annexes and side agreements create further carve outs, and so one needs to check the Annexes to see which enterprises are not included.⁶⁹ Though even before looking in detail at the Annexes it should be noted that SOEs owned by sub-federal entities (“Sub-Central State-Owned Enterprises and Designated Monopoly”) are largely carved out from the Chapter’s obligations.⁷⁰ Will this apply to entities whose ownership is transferred from the central government to a sub-federal government when the TPP comes into force? Indeed, SOEs were originally thought to be of great relevance to Malaysia and Singapore, and yet the Annexes to Chap. 17 may undermine the hoped for benefits with respect to their SOEs.⁷¹ There are, of course many other worrisome exceptions and carve out within the chapter on SOEs,⁷² but the above examples clearly show the chapter’s extensive number of exceptions and carve outs.

With respect to dispute settlement, even though as a formal matter disputes associated with the SOE chapter can be brought under the provisions of the TPP’s DSS there are some substantial obstacles and challenges for those disputes. For example, there will be proof/evidentiary issues as there is a requirement to show that any harm claimed in a dispute was *because of* prohibited support or activities, as there is an “adverse effects” requirement⁷³ or a “cause injury” standard.⁷⁴ And then there are further provisions that provide exceptions or carve out to those injury standards!⁷⁵ Finally, many of the provisions are quite complex and at times too vague.⁷⁶ This may be a litigator’s dream!

Another issue, noted here briefly, is that the transparency provisions in the SOE Chapter will be quite burdensome, and it is unclear if they must be publically available or simply provided to the other parties (it does not say that they must be public).⁷⁷ The above are just some of the criticisms of the “new” SOE provisions,

⁶⁹TPP Article 17.9 authorizes the Annex exemptions. See, e.g., Annex IV, Schedule of Australia (concerning Australian centrally owned enterprises and preferential purchases from indigenous Australians).

⁷⁰See the list of non-applications to Annex 17D.

⁷¹See Chap. 17, Annex 17-E and 17-F.

⁷²See, e.g., TPP Article 17.4.1(a) [providing an exception for SOE governmental benefits “to fulfil any terms of its public service mandate”, though it must still not receive benefits not otherwise available. See TPP Article 17.4.1(c) (ii)].

⁷³TPP Article 17.6.1.

⁷⁴TPP Article 17.6.3.

⁷⁵See TPP Article 17.6.4 (“A service supplied by a state-owned enterprise of a Party within that Party’s territory shall be deemed to not cause adverse effects.”). Though note the footnote to that provision that partially offsets the exception. TPP Article 17.6.4 n. 21 (“For greater certainty, this paragraph shall not be construed to apply to a service that is itself a form of non-commercial assistance”).

⁷⁶TPP Articles 17.7 and 17.8.

⁷⁷Article 17.10.

though no doubt there will be plenty of scholarship that just focuses on them and will eventually reveal even greater problems. Though possibly some of the scholarship will find otherwise. Finally, even if we consider the SOE provisions to be a major leap forward in the curtailment of those sorts of non-competitive enterprises, one could argue that it is still not a move forward at a conceptual level. After all, one might argue that SOEs are by their very nature exceptions to the liberal economic approach that permeates the modern IEL order. While not the same, the very early concerns about State Trading Enterprises in the GATT⁷⁸ shows that the same sorts of concerns were present right from the start of the modern IEL era following Bretton Woods.

5 Conclusion

In the TPP I do see many novel approaches and coverage, though just not enough or not strong enough to warrant an argument that the TPP challenges the coherence of IEL. Further, a defensible extrapolation of this finding provides interesting insights into the issue of fragmentation of the IEL and even of PIL. Each of these issues, novelty and fragmentation, are concluded separately below.

5.1 *Insights on the Question of the Novelty of the TPP*

In light of the above it appears that while there are some novel elements within the TPP, and some deeper levels of liberalisation, the TPP may not be very different, at a conceptual level, than previous RTAs. This is not a surprise, for it was hard enough for the diverse participants to reach agreement on the eventual text.⁷⁹ Adding radical or even substantially new approaches would have made it impossible for all to sign, let alone to ratify. And even with what was eventually agreed, ratification by some of the critical parties is far from assured.

Furthermore, with respect to the TPP (and indeed all other RTAs) there are further reasons to expect the agreement would not be radically different to the prevailing conceptual order within IEL. As an initial matter, the TPP Preamble unambiguously notes that the Agreement will “BUILD on their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization.”⁸⁰ This is further reinforced, as is the case with all other RTAs, in Chapter One where it is explicitly conceded that the TPP is created “consistent with

⁷⁸GATT Article XVII, present in the GATT 1947.

⁷⁹The TPP took seven years to negotiate.

⁸⁰TPP Preamble.

Article XXIV of GATT 1994 and Article V of GATS”.⁸¹ Furthermore, the TPP explicitly acknowledges that it will not interfere with participating states’ existing WTO or other obligations.⁸² The Agreement also posits that it will interfere to a minimal extent with the internal workings of the parties, for as noted in the Preamble, participating states:

RECOGNISE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.⁸³

Given these constraints, which reflect the political, legal and other limitations facing the negotiators, it is no surprise that the TPP did not depart substantially from pre-existing approaches and concepts.

Another way to understand why the TPP might not be so different is that one could view its provisions both as attempts to correct past mistakes that arose from RTAs and as attempts to codify the practice and jurisprudence that has developed from the collective IELO’s past twenty years’ experience. For example, Chap. 29—Exceptions and General provisions has an Article that clearly is a response to the controversial use of the Hong Kong-Australia BIT by Phillip Morris seeking to overturn Australia’s plain packaging of tobacco laws.⁸⁴

But then, perhaps we should not be too surprised by the lack of novelty in the TPP. After all, it is just another RTA, albeit a bigger more modern one—but still just an RTA. When we look at other RTAs we should then have anticipated the TPP’s “sameness” because when examined closely, we find substantial congruence and similarity across the many RTAs. They all now seem to include: Article I, II and III type trade obligations; national treatment and MFN; safeguards; phase-ins and exceptions for developing countries when they are included; little agricultural liberalization; investor protections; SPS/TBT type provisions; and strong dispute settlement procedures. Furthermore, at deeper conceptual levels, the fields, agreements and organizations of IEL include (at sufficient levels) common core approaches: state sovereignty (even in the ISDS context); strong positivism (treaty based agreements with little to no customary PIL); significant, if not dominant, liberal market economic theoretical bases; and, as the list will already have suggested, all are firmly anchored within PIL.

A final reason that one should have expected the TPP not to be too different from other RTAs is that it was likely negotiated and drafted by substantially the same group of IEL experts that are involved in most of the other major IEL agreements. It is, after all, a small world of people involved in IEL. The same government and industry participants are involved across most of the IELO’s developments.

⁸¹TPP Article 1.1.1.

⁸²TPP Articles 1.1.1. and 1.1.2.

⁸³TPP Preamble.

⁸⁴TPP Article 29.5.

They share, borrow and modify concepts from other parts of the IELO, and they even refer to and use the jurisprudence that flows from the dispute settlement “cases” of the many BITs, RTAs and WTO panel and AB decisions. These participants are all generally heavily influenced by each other and in turn by the same sources of influence, and as such share broadly similar outlooks or have developed approaches to bridge the gaps and divisions—and use those same approaches across the development of most new IEL devices. This is not to say that there are not differences—for there are, but when one sees a completed instrument, especially a multilateral one like the TPP, it is likely that any differences and their associated issues were not included, instead being left for another time and another international instrument. Thus, failed efforts to include new approaches in international instruments perhaps best reflects those differences or truly novel approaches, but then those failed efforts do not become part of the IELO.

Given the above—that the TPP is broadly similar and related to current and previous IEL devices, one could defensibly argue that the TPP is a successor IEL agreement to the WTO, the other mega FTAs and the other influential RTAs. We could thus say that the GATT 1947 was IEL Agreement 1.0, US-Israel FTA was Agreement 2.0, CUSFTA was 3.0, and so on until we get to the TPP which may be RTA 7.0.⁸⁵ Though, it was suggested that because the “operating system” of each may not have changed all that much since 1947 (or even 1995—the year of the birth of the WTO), that the series should be numbered 1.0, 1.1, 1.2, and then culminate with the TPP at 1.7. In other words, regardless of which series is employed, each new version of RTAs includes a few new “bells and whistles”, possibly a cleaner looking interface—but, to stretch the metaphor further, perhaps not worth the bandwidth it took to download it. Maybe things were fine before, and while the new look and applications are impressive, they are for the most part not necessarily needed. And so this chapter has moved from the medieval description of the TPP as “much of a muchness” to a modern description of the TPP as “IEL version 7.0” or even “IEL version 1.7”.

5.2 *Insights on Fragmentation of IEL and PIL*

What then does this lack of novelty say about the TPP’s contribution to the fragmentation of the IELO? Indeed, what does the sameness of the RTAs (and perhaps BITS as well⁸⁶) say about IEL’s fragmentation as a whole? And then what relevance might those insights on fragmentation of IEL have for our understanding of the fragmentation of PIL?

⁸⁵I concede my examples are US-centric, but the metaphor is similar when other major economies and their RTAs are used instead.

⁸⁶I have not really touched on the many different BITs, though I believe they too are all substantially similar, with the little novelty that shows up not really a challenge to the usual approaches and the fundamental concepts involved—but the treatment (including support) for this assertion is for another paper.

As an initial matter, this chapter's quick and dirty review of the TPP suggests the TPP may not contribute all that much to the IELO that is new and not much that is strong if new. In other words, it does not undermine the coherence of the IELO. If this very new RTA does not do so, then it is a fair extrapolation that other such RTAs also do not undermine the coherence of the IELO. A similar argument, albeit not made here, could be made about the many BITs. The IELO thus is substantially coherent. Yet, what about the very large number of IEL agreements and provisions? And the fact that there is no clear hierarchy or centralising control over them all? It appears quite anarchic—imaginably even fragmented. But when the concept of coherence is thrown into the analysis a different picture or possibly a more fine grained picture emerges of an IELO with significant coherence, broadly sharing the same concepts and approaches, and even jurisprudence and personnel. The IELO ends up looking like a highly fragmented legal order containing consistent and mutually understandable and related sets of autonomous regimes. Might we better describe then the IELO as a field that is “technically” or “physically” fragmented but at the same time that fragmentation is coherent—a “coherent fragmentation”.

An additional question is then whether this insight has any applicability to PIL, with its numerous fields, regimes and institutions, all which might themselves have countless subparts (as is the case with IEL). Applying this idea of “coherent fragmentation” to PIL could support those already searching for commonality of concepts across PIL as one approach to better understanding the issue of fragmentation and PIL. I suspect that most PIL scholars could readily agree on the many different fundamental concepts that exist across all areas of PIL. Indeed, the ability of international tribunals to hear disputes from across the vast field of PIL suggests that there is indeed fundamental coherence across PIL. True, PIL (and IEL) looks messy, but that may only be an aesthetic issue. At a necessarily deeper level, the fragmentation may not actually exist, rather it may only be skin deep. Just as IELO was described as being physically or technically fragmented, but not coherently fragmented, perhaps PIL could be described as being aesthetically fragmented, but with an inner coherence. Such a conclusion, though too hastily reached here, should provide some small solace to those concerned with the fragmentation of PIL.⁸⁷ Regardless, the idea of fragmentation is deepened by these insights, through the introduction of physical, technical, aesthetic, and coherent fragmentation, with only the last being of fundamental importance.

⁸⁷Greater solace would only be provided by a deeper and longer treatment of this issue.

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