Chapter 13
Managing the Fragmentation of International Climate Law

Harro van Asselt

Abstract This chapter focuses on the fragmentation of international law related to climate change and the interactions between the relevant legal regimes. It examines various management strategies with a view to enhancing synergies and mitigating conflicts between climate-related international legal regimes. The chapter starts with an overview of the ongoing debate on the fragmentation of international law. It then identifies the features of international climate lawmaking and implementation that constrain the usefulness of well-known legal techniques for avoiding and resolving conflicts. The chapter moves on to show how institutional cooperation between political bodies and bureaucracies may lead to enhanced coherence between the climate change regime and other legal regimes, while arguing that such a strategy will also encounter specific concerns related to their legitimacy. The chapter concludes by highlighting the need to apply various strategies for managing the fragmentation of international climate law, and identifies areas for further inquiry in this regard.

13.1 Introduction

This chapter examines the international legal response to climate change by placing the United Nations climate regime in the context of the broader international regulatory environment. It aims to highlight the fragmented international legal order that is

Harro van Asselt is a postdoctoral research fellow at the Stockholm Environment Institute. He is also a visiting research associate with the Environmental Change Institute at the University of Oxford and a visiting researcher with the Institute for Environmental Studies at VU University Amsterdam. The author would like to acknowledge funding from the European Commission (Intra-European Fellowship, CLIMATEGOV; contract 253090).

H. van Asselt (✉)
Stockholm Environment Institute, Kräftriket 2b, SE 106 91 Stockholm, Sweden
e-mail: harro.vanasselt@sei-international.org

E.J. Hollo et al. (eds.), *Climate Change and the Law*, Ius Gentium: Comparative Perspectives on Law and Justice 21, DOI 10.1007/978-94-007-5440-9_13,

relevant for addressing climate change, and to suggest ways of managing interactions between the relevant international legal regimes. Building on the emerging body of literature on the fragmentation of international law, it discusses the opportunities for, as well as the limitations of, addressing the relationship between different areas of international law related to climate change through specific legal and institutional strategies.

The chapter proceeds from the assumption that it is not possible to find a single, comprehensive legal response to the problem of climate change. The rationale lies in the very nature of the problem – climate change can be conceived as a 'wicked problem' *par excellence*.[1] This means, among others, that there is no exclusive definition of what the problem is. Is the climate change problem, for instance, essentially about reducing greenhouse gas emissions, or phasing out fossil fuels, or is the problem more profound than that: Is it about the insistence on economic growth?[2] Similarly, there is no simple 'solution' to the climate change problem, as 'solving' the climate change challenge will depend on how one defines the problem in the first place. Any proposed solution will thus be influenced by one's value judgement; actors promoting diverging values and ideologies are likely to advocate different responses to the climate change problem. Moreover, solutions to wicked problems like climate change may well have ripple effects, potentially causing new problems in their wake. Climate change is also characterized by specific traits that make it a 'super' wicked problem.[3] First, the causes and impacts of, and responses to climate change cut across all sectors of the society. Various human activities and societal sectors contribute to the growing concentrations of greenhouse gases in the atmosphere. At the same time, the same activities and sectors may also be affected by the impacts of climate change. Second, climate change requires an urgent response if the goal is to avoid large-scale, irreversible impacts.[4] Third, responding to climate change is complicated by the fact that international and national decision-makers cannot fully control the choices of actors that are relevant for addressing climate change.[5] Fourth, climate change is a transboundary problem, and may indeed be "the greatest collective action problem the international community has yet faced."[6] This enhances tensions between countries, especially because those who are in the

[1] Horst W.J. Rittel and Melvin M. Webber, "Dilemmas in a General Theory of Planning", 4 *Policy Sciences* (1973), 155, at 160–169.

[2] For an excellent discussion of different framings of the climate change problem, see Mike Hulme, *Why We Disagree about Climate Change: Understanding Controversy, Inaction and Opportunity* (Cambridge, UK: Cambridge University Press, 2009).

[3] Kelly Levin et al., "Playing It Forward: Path Dependency, Progressive Incrementalism, and the 'Super Wicked' Problem of Global Climate Change", paper presented at the International Studies Association Convention, Geneva, 28 February–3 March 2007, at 4–9; Richard J. Lazarus, "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future", 94 *Cornell Law Review* (2009), 1153, at 1159–1183.

[4] Levin et al., "Playing It Forward", supra, note 3, at 8–9.

[5] Ibid., at 9.

[6] Daniel H. Cole, "Climate Change and Collective Action", 61 *Current Legal Problems* (2008), 229, at 232.

best position to take action have little incentive to do so.[7] Fifth, climate change has an undeniable intertemporal dimension: to mitigate impacts in the future, action now is needed.[8] Finally, the problem is characterized by various levels of scientific uncertainty, including uncertainty regarding the future development of greenhouse gas emissions as well as the impacts (and associated costs) of climate change in the long term.

By its nature, the climate change problem thus covers a broad range of narrowly defined issue areas, and its resolution inevitably requires a variety of responses. The implication at the international level is that issues relevant for the climate change problem are governed by a multitude of legal regimes with overlapping jurisdictions.[9] For instance, the simple facts that some greenhouse gases are also ozone depleting substances, and that the substitutes for some of these substances are in turn greenhouse gases, inevitably means that the international legal regime for ozone layer depletion, notably the Vienna Convention for the Protection of the Ozone Layer[10] and its Montreal Protocol,[11] is relevant for tackling climate change.[12] Similarly, because of the intricate connections between climate change mitigation and adaptation on the one hand, and biodiversity loss on the other, international biodiversity law, particularly the Convention on Biological Diversity (CBD)[13] may affect the response to climate change, and may itself be affected by climate policies.[14]

---

[7] Levin et al., "Playing It Forward", supra, note 3, at 9.

[8] Lazarus, "Super Wicked Problems and Climate Change", supra, note 3, at 1174–1176.

[9] I adopt the definition proposed by Margaret Young (which is in turn adapted from the consensus regime definition proposed by Stephen Krasner): "regimes are sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumption and biases." Margaret A. Young, "Introduction: The Productive Friction Between Regimes", in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), 1, at 11. See also Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables", in Stephen D. Krasner (ed.), *International Regimes* (Ithaca: Cornell University Press, 1983), 1, at 2.

[10] Convention on the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1987), 1529.

[11] Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987), 1550.

[12] Sebastian Oberthür, Claire Dupont and Yasuko Matsumoto, "Managing Policy Contradictions Between the Montreal and Kyoto Protocols: The Case of Fluorinated Greenhouse Gases", in Sebastian Oberthür and Olav Schram Stokke (eds), *Managing Institutional Complexity: Regime Interplay and Global Environmental Change* (Cambridge: The MIT Press, 2011), 115.

[13] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 34 *International Legal Materials* (1992), 822.

[14] See, for instance, Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Berlin: Springer, 2003); Imke Sagemüller, "Forest Sinks under the United Nations Framework Convention on Climate Change and the Kyoto Protocol: Opportunity or Risk for Biodiversity?", 31 *Columbia Journal of Environmental Law* (2006), 189; Harro van Asselt, "Integrating Biodiversity in the Climate Regime's Forest Rules: Options and Tradeoffs in Greening REDD Design", 20 *Review of European Community and International Environmental Law* (2011), 139; Harro van Asselt, "Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes", 44 *New York University Journal of International Law and Politics* (2012, forthcoming).

Climate change and climate policy are also closely connected with economic activities, such as international trade and investment. Therefore, international economic law, including the law of the World Trade Organization (WTO), is of importance in the response to climate change.[15] Furthermore, international climate law may interact with other areas of international law, including the law of the sea,[16] human rights law,[17] and the law on transboundary air pollution.[18]

In other words, international law on climate change is characterized by a certain degree of fragmentation. The phenomenon of regulatory fragmentation is clearly not limited to the issue of climate change. Indeed, over the past decade, fragmentation of international law has moved from the periphery to the centre of international legal debate. The increasing specialization of international law had already been noted by early observers in the 1980s,[19] but discussions on the subject intensified at the turn of the millennium, when fragmentation was included in the work program of the International Law Commission (ILC).[20] The ILC released its report on fragmentation in 2006, providing an impressive overview of the various questions

[15] See, for instance, Ludivine Tamiotti et al., Trade and Climate Change: A Report by the United Nations Environment Programme and the World Trade Organization (Geneva: WTO Secretariat, 2009); Tracey Epps and Andrew Green, *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change* (Cheltenham: Edward Elgar, 2010); Fariborz Zelli and Harro van Asselt, "The Overlap Between the UN Climate Regime and the World Trade Organization: Lessons for post-2012 Climate Governance", in Frank Biermann, Philipp Pattberg and Fariborz Zelli (eds), *Global Climate Governance Beyond 2012: Architecture, Agency and Adaptation* (Cambridge: Cambridge University Press, 2010), 79.

[16] See, for instance, Karen N. Scott, "The Day After Tomorrow: Ocean CO2 Sequestration and the Future of Climate Change", 18 *Georgetown International Environmental Law Review* (2005), 57; Meinhard Doelle, "Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention", 37 *Ocean Development and International Law* (2006), 319.

[17] Stephen Humphreys (ed.), *Human Rights and Climate Change* (UK: Cambridge University Press, 2009); Edward Cameron, "Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach", 38 *Georgia Journal of International and Comparative Law* (2010), 673; Ole W. Pedersen, "The Janus-Head of Human Rights and Climate Change: Adaptation and Mitigation", 80 *Nordic Journal of International Law* (2011), 403.

[18] See, for instance, Erika Rosenthal and Robert Watson 2011, "Multilateral Efforts to Reduce Black Carbon Emissions: A Lifeline for the Warming Arctic?", 20 *Review of European Community and International Environmental Law* (2011), 3.

[19] See notably Bruno Simma, "Self-Contained Regimes", 16 *Netherlands Yearbook of International Law* (1985), 845.

[20] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN. Doc. A/CN.4/L.682, 13 April 2006, para. 729; On the fragmentation of international law see, for instance, Martti Koskenniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", 15 *Leiden Journal of International Law* (2002), 553; Matthew Craven, "Unity, Diversity and the Fragmentation of International Law", 14 *The Finnish Yearbook of International Law* (2003), 3; Gerhard Hafner, "Pros and Cons Ensuring From Fragmentation of International Law", 25 *Michigan Journal of International Law* (2004), 849; Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands", 25 *Michigan Journal of International Law* (2004), 903; Eyal Benvenisti and George W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of

raised by the increasing specialization and diversification of international law.[21] The report shows how conflicts may arise between special and general international law, as well as between different branches of international law, and reviews various legal techniques for avoiding and resolving conflicts of norms and regimes.[22]

The ILC report points to possible tensions between different branches of international law, and recommends that "increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions."[23] However, only a handful of the studies responding to this call have focused on international environmental law.[24] This is surprising, as the proliferation of international legal instruments is one of the key features of the development of international environmental law over the past decades. In 1993, Edith Brown Weiss already discussed the possible consequences of "treaty congestion" in international environmental law, identifying "operational inefficiency" as a key concern.[25] While the multiplication of international environmental agreements has certainly not been ignored in the period since, and has received particular attention in the context of discussions on reforming international environmental governance,[26]

International Law", 60 *Stanford Law Review* (2007), 595; Alexandra Khrebtukova, "A Call to Freedom: Towards a Philosophy of International Law in an Era of Fragmentation", 4 *Journal of International Law and International Relations* (2008), 51; Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012).

[21] ILC, Fragmentation of International Law, supra, note 20.

[22] Ibid.

[23] Ibid., para. 493.

[24] Exceptions include Harro van Asselt, Francesco Sindico and Michael A. Mehling, "Global Climate Change and the Fragmentation of International Law", 30 *Law & Policy* (2008), 423; Harro Van Asselt, "Legal and Political Approaches in Interplay Management: Dealing with the Fragmentation of Global Climate Governance", in Sebastian Oberthür and Olav Schram Stokke (eds), *Managing Institutional Complexity: Regime Interplay and Global Environmental Change* (Cambridge: The MIT Press, 2011), 59; Margaret A. Young, "Climate Change Law and Regime Interaction", 4 *Carbon and Climate Law Review* (2011), 147; Margaret A. Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge: Cambridge University Press, 2011); Cinnamon Piñon Carlane, "Good Climate Governance: Only a Fragmented System of International Law Away?", 30 *Law &Policy* (2008), 450; Karen N. Scott, "International Environmental Governance: Managing Fragmentation Through Institutional Connection", 12 *Melbourne Journal of International Law* (2011), 177.

[25] Edith Brown-Weiss, "International Environmental Law: Contemporary Issues and the Emergence of a New Order", 81 *Georgetown Law Journal* (1993), 675, at 697–702. See also Bethany Lukitsch Hicks, "Treaty Congestion In International Environmental Law: The Need For Greater International Coordination, Comment", 32 *University of Richmond Law Review* (1999), 1643; Donald K. Anton, "Treaty Congestion' in Contemporary International Environmental Law", in Shawkat Alam et al. (eds), *Routledge Handbook of International Environmental Law* (London: Routledge, 2012, forthcoming).

[26] See, for instance, Steinar Andresen, "Global Environmental Governance: UN Fragmentation and Co-ordination", in Olav Schram Stokke and Øystein B. Thommessen (eds), *Yearbook of International Co-operation on Environment and Development 2001/2002* (London: Earthscan, 2001), 19; Steven Bernstein and Maria Ivanova, "Institutional Fragmentation and Normative Compromise in Global Environmental Governance: What Prospects for Re-embedding?", in Steven Bernstein and Louis W. Pauly (eds), *Global Liberalism and Political Order: Towards a New Grand Compromise?* (Albany: State University of New York Press, 2007), 161.

only limited attention has been paid to (the effectiveness of) strategies for managing the fragmentation of international environmental law.[27]

Against this backdrop, this chapter aims to provide insights into strategies for managing fragmentation international climate change law by examining the potential of legal and institutional strategies with a view to enhancing synergy and mitigating conflict between various legal regimes. The chapter is structured as follows: Section 13.2 provides an introduction to the debate on the fragmentation of international law. Section 13.3 identifies opportunities for, and limitations of, well-known legal techniques for avoiding and resolving inter-regime conflicts. Section 13.4 then moves on to show how institutional cooperation between treaty bodies created under different legal regimes may lead to greater coherence between the climate change regime and other international legal regimes. It argues, however, that such a strategy also raises concerns, especially regarding its legitimacy. Section 13.5 provides concluding remarks, and identifies areas for further research.

13.2 The Fragmentation of International Law

13.2.1 What Is 'Fragmentation'?

'Fragmentation' means different things to different people. Indeed, the very use of the term has been the subject of a vigorous debate among international lawyers.[28] The discussions in the ILC and its 2006 report sparked a debate in international legal circles about the state of international law and governance, and about the potential threats and opportunities posed by the phenomenon of fragmentation.

The main reason why the term 'fragmentation' has caused so much controversy is its purported negative bias. Koskenniemi and Leino were among the first to point at a possible political agenda behind the use of the notion by several judges from the International Court of Justice (ICJ) at the turn of this century. They argued that the judges' "postmodern anxieties" concerning the unity of international law could be best explained as an attempt to raise the profile of the ICJ on the international plane at a time when an increasing number of other judicial bodies might undermine its relevance.[29] Likewise, the fears that some authors have expressed about the growing specialization in international law have been explained as a counter-reaction of general international lawyers afraid of becoming irrelevant within

[27] Notable exceptions are Wolfrum and Matz, *Conflicts in International Environmental Law*, supra, note 14, at 119–209; W. Bradnee Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements* (Tokyo: United Nations University Press, 2008); Young, *Trading Fish, Saving Fish*, supra, note 24.

[28] The term also has also led to discussions in the international relations literature. See Frank Biermann et al., "The Fragmentation of Global Governance Architectures: A Framework for Analysis", 9 *Global Environmental Politics* (2009), 14, at 16–17.

[29] Koskenniemi and Leino, "Fragmentation of International Law?", supra, note 20, at 576–577.

their profession.[30] Yet, other terms such as 'diversity', 'pluralism', and 'polycentricity' have a positive subtext that would make them equally suitable to defend a certain position.[31] For the purposes of this chapter, the term 'fragmentation' refers to a landscape where various international legal instruments are overlapping in terms of substantive issue coverage. This definition is intended to be value-neutral, and is primarily aimed at describing the state of international law relevant for addressing climate change.

To further clarify some of the conceptual confusion, two typologies of 'fragmentation' can be distinguished. A first distinction can be made between *substantive* and *institutional* fragmentation. The ILC made this distinction when it decided not to examine "the competence of various institutions applying international legal rules and their hierarchical relations *inter se*" (i.e. institutional fragmentation), but instead focused on "the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and from the general law" (i.e. substantive fragmentation).[32] Although the ILC study introduced this clear demarcation between substantive and institutional fragmentation, the two types are in fact inter-related. Abi-Saab describes this as a "law of legal physics": "To each level of normative density, there corresponds a level of institutional density necessary to sustain the norms."[33] This relation can also be seen in practice. For instance, the *Swordfish* dispute between the European Union and Chile is mostly seen as an example of institutional fragmentation, as the case was brought before the WTO dispute settlement mechanism and the International Tribunal for the Law of the Sea (ITLOS) simultaneously.[34] However, both dispute settlement mechanisms are inherently connected to substantive bodies of law, namely the various WTO Agreements and the United Nations Convention on the Law of the Sea (UNCLOS).[35]

---

[30] Mario Prost, "All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation", 17 *Finnish Yearbook of International Law* (2006), 131, at 158.

[31] Anne-Charlotte Martineau, "The Rhetoric of Fragmentation: Fear and Faith in International Law", 22 *Leiden Journal of International Law* (2009), 1, at 27. For instance, "diversity" was contrasted with "cacophony" in a special issue of the Michigan Journal of International Law focusing on the advantages and drawbacks of the fragmentation of international law. See, for example, Bruno Simma, "Fragmentation in a Positive Light", 25 *Michigan Journal of International Law* (2004), 845, at 845. Pluralism is generally seen as a benign development by legal pluralists. See, for instance, Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law", 25 *Michigan Journal of International Law* (2004), 999. For a recent discussion of polycentricity in a positive light, see Elinor Ostrom, "Polycentric Systems for Coping with Collective Action and Global Environmental Change", 20 *Global Environmental Change* (2010), 550.

[32] ILC, Fragmentation of International Law, supra, note 20, para. 13.

[33] Georges Abi-Saab, "Fragmentation or Unification: Some Concluding Remarks", 31 *New York University Journal of International Law and Politics (*1999), 919, at 925.

[34] For a discussion of the case, see Marcos A. Orellana, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO", 71 *Nordic Journal of International Law* (2002), 55.

[35] Tomer 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", 6 *Loyola University Chicago International Law Review* (2008), 173, at 182–183.

Second, the fragmentation of international law may refer to the relationship between different interpretations of general international law, the relation between general international law and specialized regimes, or the relations among two or more overlapping specialized regimes.[36] An example of the first type is the *Tadić* case, in which the International Criminal Tribunal for the Former Yugoslavia came to a different judgment about the criterion applicable to assess when an armed military group can be said to be acting on behalf of a foreign power than the earlier decision by the ICJ in the *Nicaragua* case.[37] Under the second category, scholars have discussed, for instance, how the general law on state responsibility relates to non-compliance mechanisms used in international environmental law or other more specialized regimes that may conflict with, or complement the general rules.[38] The third type of fragmentation is exemplified by the various trade and environment disputes before the WTO dispute settlement body, and forms the focus of this chapter.

13.2.2 The Promises and Pitfalls of Fragmentation

While the very notion of 'fragmentation' may thus reveal assumptions about its consequences, the positive and negative implications of fragmentation have been discussed extensively in the literature. This section draws in particular on the claims about the promises and pitfalls of fragmentation that have been raised in the international law literature, although it will also refer to other studies that have discussed the advantages and drawbacks of fragmentation in the specific context of global climate governance.[39]

An ILC feasibility study on the fragmentation of international law conducted in 2000 indicated that the issue was one that should be looked at in terms mainly of "risks", "threats", or other negative connotations. In particular, it argued that fragmentation can be seen as detrimental, since "[d]oubts could be raised as to whether international law will be able to achieve one of its primary objectives, dispute avoidance and the stabilisation of international relations and, thus, achieve its genuine function of law. The credibility, reliability and, consequently, authority of international law would be impaired."[40] This rather general statement can be split up in various arguments against fragmentation.

One argument is that the growing body of international legal rules threatens the unity and coherence of international law, as various specialized rules are created

[36] ILC, Fragmentation of International Law, supra, note 20, para. 47.

[37] Prosecutor v. Dusko Tadic, Judgment, 15 July 1999, Case No. IT-94-1-A, A.Ch.

[38] Martti Koskenniemi, "Breach of Treaty or Non-Compliance: Reflections on the Enforcement of the Montreal Protocol", 3 *Yearbook of International Environmental Law* (1992), 123.

[39] See, for instance, Biermann et al., "The Fragmentation of Global Governance Architectures", supra, note 28; Robert O. Keohane and David G. Victor, "The Regime Complex for Climate Change", 9 *Perspectives on Politics* (2011), 7.

[40] Gerhard Hafner, "Risks Ensuing from Fragmentation of International Law", Official Records of the General Assembly, 55th session, Supplement No. 10 (A/55/10, 2000), Annex, 143 at 147.

which allow international judicial institutions to reach diverging decisions, in other words, the institutional fragmentation referred to above.[41] For instance, a dispute between Ireland and the United Kingdom regarding the construction of a plant reprocessing nuclear fuel led to three different legal procedures, all based on a different body of substantive law.[42]Another important drawback is that the fragmentation of international law can be used by a handful of powerful States to their advantage. These States can opt for a mechanism that best serves their interests, and can create new agreements if the old ones no longer serve their interests.[43] With regard to dispute settlement, this may lead to 'forum shopping': countries are likely to choose the forum that is most likely to deliver a positive outcome. This explains why in the *Swordfish* dispute, the EU initiated proceedings at the WTO, arguing that Chile had restricted the movement of goods. Conversely Chile, the state taking conservation measures with respect to swordfish, brought its case before ITLOS, alleging that the EU had violated the law of the sea.

Finally, a fragmented international legal system could lead to (some degree of) prioritization of certain fields of international law over others, for example, the dominance of international economic law over international environmental law or – less likely – vice versa.[44] Indeed, such prioritization may be inevitable, as "each legal regime will naturally assert itself as the proper forum in which to address the situation, claiming superior status for its particular descriptions and concerns."[45] Regimes, as Koskenniemi describes it, thus have a "structural bias" in favour of themselves.[46] This structural bias becomes important when one regime can be considered 'stronger' than others, because of the involvement of more powerful States, or because of stronger mechanisms to ensure compliance. This fear is often raised in the context of the trade and environment debate, where the WTO's dispute settlement system is considered to be stronger than the non-compliance mechanisms of most multilateral environmental agreements.[47]

---

[41] Pierre-Marie Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", 31 *New York University Journal of International Law and Politics* (1999), 791; Benedict Kingsbury, "Is the Proliferation of International Courts and Tribunals a Systemic Problem?", 31 *New York University Journal of International Law and Politics* (1999), 679.

[42] ILC, Fragmentation of International Law, supra, note 20, paras. 10 and 439–442.

[43] Benvenisti and Downs, "The Empire's New Clothes", supra, note 20, at 628.

[44] Craven, "Unity, Diversity and the Fragmentation of International Law", supra, note 20, at 5; ILC, *Fragmentation of International Law*, supra, note 20, para. 493.

[45] Khrebtukova, "A Call to Freedom", supra, note 20, at 56.

[46] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument,* 2nd ed. (Cambridge: Cambridge University Press, 2005), at 600–615. See also Martti Koskenniemi, "Hegemonic Regimes", in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), 305.

[47] For a comparison of the dispute settlement mechanisms of the WTO and multilateral environmental agreements, see Alexandra González-Calatayud and Gabrielle Marceau, "The Relationship between the Dispute-Settlement Mechanisms of MEAs and those of the WTO", 11 *Review of European Community and International Environmental Law* (2002), 275.

While plenty of arguments thus draw attention to the negative effects of fragmentation, the literature shows that it may also entail numerous advantages. Indeed, after initial fears were expressed about the phenomenon, international legal scholars quickly realized that fragmentation might also have positive effects. First, fragmentation is viewed as a positive indicator of increased diversity in legal norms and the expansion of international law to previously unregulated fields.[48] Over time, international law has come to cover important new issue areas of international relations such as international commerce, human rights, and the environment. As Koskenniemi and Leino aptly put it: "Special regimes and new organs are parts of an attempt to advance beyond the political present that in one way or another has been revealed unsatisfactory."[49] However, while the expansion to new areas could in principle be seen as a positive development, this does not necessarily mean that "more (international) law equals better (international) law."[50]

The increased specialization in international law is also arguably a way of accommodating diverging interests of States. As a result, governments view specialized regimes as better serving their interests and thus have stronger incentives to comply. As Hafner argues, a "less-than-global approach seems particularly necessary when different States clearly hold different beliefs about what basic values should be preserved by international regulation."[51] This argument has been reiterated in the context of international climate policy, where several observers have called for a 'minilateral' approach towards international decision-making on climate change.[52] Furthermore, some commentators have posited that fragmentation would not endanger the coherence of the wider body of international law, as it would lead to the global diffusion of the "best ideas".[53] Similarly, it has been argued that regulatory competition may allow for the development of different solutions in different regulatory contexts, of which the most effective will "survive" and be diffused to other regulatory contexts.[54]

In summary, while the use – or non-use – of the term 'fragmentation' may serve particular agendas, my modest claim is that it provides an accurate description of the current state of international affairs, where the emergence of different social rationalities at the global level has led to multiple international agreements that overlap in terms of their subject matter. Whether the phenomenon is beneficial or

[48] Anja Lindroos and Michael Mehling, "Dispelling the Chimera of 'Self-Contained Regimes': International Law and the WTO", 16 *European Journal of International Law* (2005), 857, at 859.

[49] Koskenniemi and Leino, "Fragmentation of International Law?", supra, note 20, at 578.

[50] Benvenisti and Downs, "The Empire's New Clothes", supra, note 20, at 602.

[51] Hafner, "Pros and Cons Ensuing from Fragmentation of International Law", supra, note 20, at 859.

[52] Moisés Naím, "Minilateralism. The Magic Number to Get Real International Action", *Foreign Policy* (2009), 135.

[53] Jonathan Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals", 31 *New York University Journal of International Law and Politics* (1999), 697, at 700.

[54] Biermann et al., "The Fragmentation of Global Governance Architectures", supra, note 28, at 27.

malign is mainly in the eye of the beholder, and further depends on whether the term is used to describe the relationship between different specialized regimes or the relationship between such regimes and general international law. This chapter argues that the consequences of fragmentation do not necessarily depend on the existence of various overlapping agreements *per se*, but rather on how their interrelationships are managed. To this end, the following sections provide an overview of the opportunities for, and limitations of, different legal and political strategies for managing the fragmentation of international climate change law.

13.3 Managing Fragmentation Through Legal Techniques

An international lawyer's intuitive reaction to managing fragmentation is probably to resort to the rules provided by international law for dealing with norm conflicts. Indeed, the ILC report offers international lawyers a toolbox to address many of the challenges arising from the fragmentation of international law.[55] These tools include conflict avoidance techniques, such as treaty interpretation, as well as rules for deciding which treaty will prevail in case of a conflict, such as the maxims of *lex posterior* (i.e. the later treaty prevails) and *lex specialis* (i.e. the more specific treaty prevails). It is not my intention to review these various techniques here.[56] Instead, I will highlight some of the opportunities they provide for managing the fragmentation of international climate change law, as well as their inherent limitations.

13.3.1 Opportunities

13.3.1.1 Harmonious Treaty Interpretation

Treaty interpretation as a technique of avoiding a conflict between different climate-related treaties has been discussed in detail in the literature.[57] The ILC deemed Article 31.3(c) of the Vienna Convention on the Law of Treaties[58] a particularly promising avenue for avoiding conflicts,[59] and the provision has been the subject of

[55] ILC, Fragmentation of International Law, supra, note 20, para. 492.

[56] See, for instance, Joost Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law* (Cambridge: Cambridge University Press, 2003); Christina Voigt, *Sustainable Development as a Principle of International Law. Resolving Conflicts between Climate Measures and WTO Law* (Leiden: Brill, 2008).

[57] See notably Voigt, ibid., at 265–292.

[58] Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 8 *International Legal Materials* (1989), 679.

[59] ILC, Fragmentation of International Law, supra, note 20, paras. 410–480.

an increasing number of analyses.[60] Article 31.3(c) provides that in the interpretation of treaties, "[t]here shall be taken into account, together with the context: … any relevant rules of international law applicable in the relations between the parties."[61] Like the other interpretation rules laid down in the Vienna Convention on the Law of Treaties, the provision is regarded to have the status of customary international law.[62] Moreover, to some authors, the interpretative guidance contained in this provision amounts to a "principle of systemic integration" that forms "a constitutional norm within the international legal system,"[63] or a "principle of mutual supportiveness."[64] Although there is a certain harmonizing appeal to the provision, no such principle has yet been explicitly recognized under general international law, and it still lacks an authoritative formulation.[65] Still, the notion finds some support in rules of treaty interpretation and also past case law, including decisions by the WTO dispute settlement system.[66] For instance, in the well-known *US-Shrimp* dispute, the WTO Appellate Body referred to the provision, indicating that it sought additional interpretive guidance from the general principles of international law.[67]

---

[60] Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law", 1 *Yale Human Rights and Development Law Journal* (1998), 85; Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", 54 *International and Comparative Law Quarterly* (2005), 279; Duncan French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules", 55 *International Comparative Law Quarterly* (2006), 281; Broude, "Principles of Normative Integration and the Allocation of International Authority", supra, note 35; Anja Lindroos and Michael Mehling, "From Autonomy to Integration? International Law, Free Trade and the Environment", 77 *Nordic Journal of International Law* (2008), 253; Panos Merkouris, "Article 31(3)(c) of the VCLT and the Principle of Systemic Integration" (PhD thesis on file at the Queen Mary University of London, College of Law), 2010, available at: https://qmro.qmul.ac.uk/jspui/bitstream/123456789/477/1/MERKOURISArticle%2031(3)(c)2010.pdf (last accessed on 14 February 2012); Riccardo Pavoni, "Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?", 21 *European Journal of International Law* (2010), 649; Mélanie Samson, "High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties", 24 *Leiden Journal of International Law* (2011), 701.

[61] Vienna Convention on the Law of Treaties, supra, note 58, Art. 31.3(c).

[62] Merkouris, "Article 31(3)(c) of the VCLT and the Principle of Systemic Integration", supra, note 60, at 8.

[63] McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", supra, note 60, at 280.

[64] Pavoni, "Mutual Supportiveness as a Principle of Interpretation and Law-Making", supra, note 60, at 678.

[65] Lindroos and Mehling, "From Autonomy to Integration?", supra, note 60, at 268.

[66] McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", supra, note 60, at 295–309. However, as Lindroos and Mehling observe, the case law is rather recent, and provides only a "weak basis for an actual principle of systemic integration". Lindroos and Mehling, "From Autonomy to Integration?", supra, note 60, at 268.

[67] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WTO Doc. WT/DS58/AB/R, 6 November 1998, para. 158.

The principle of systemic integration has been invoked as a possible tool to address (looming) conflicts between the UN climate regime and other legal regimes. For instance, in discussing a potential conflict between the Kyoto Protocol and biodiversity-related treaties, Pontecorvo argues that the principle confirms "a specific duty for Parties to interpret the provisions of the Kyoto Protocol relating to sinks potentially conflicting with pre-existing commitments under other treaties in such a way as to make them compatible with these commitments."[68] It has also been suggested that the climate treaties (and decisions adopted under them) could be of use in the interpretation of other ambiguous or indeterminate WTO norms in case of a climate-trade dispute.[69] For instance, the climate treaties – and in particular a possible future climate agreement – could inform the analysis of whether a climate-related trade measure is "*necessary* to protect human, animal or plant life or health"[70] or "*relating to* the conservation of exhaustible natural resources"[71] (emphasis added) under the general exceptions in Article XX of the General Agreement on Tariffs and Trade (GATT). A country adopting the measure could invoke the principle of systemic integration, and use its ratification of climate treaties in its defence of the non-commercial, environmental objectives of its measure. All other things being equal, participation in climate treaties would make the tests formulated in the exceptions of the GATT easier to meet.

It remains unclear whether Article 31.3(c) is indeed a "master-key"[72] in dealing with fragmentation. First, it remains unsettled what "taken into account" actually entails.[73] It is generally agreed that this phrase does not mean that the extraneous rules override the interpreted rules, but rather that their normative significance needs to be determined on a case-by-case basis.[74] So while the legal norms developed under the climate regime could inform a decision by the WTO dispute settlement bodies, they could not result in the setting aside of WTO norms.[75] Second, while the

[68] Concetta Maria Pontecorvo, "Interdependence between Global Environmental Regimes: The Kyoto Protocol on Climate Change and Forest Protection", 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1999), 709, at 741.

[69] Harro van Asselt, Francesco Sindico and Michael A. Mehling, "Global Climate Change and the Fragmentation of International Law", supra, note 24, at 435–436; Navraj Singh Ghaleigh and David Rossati, "The Spectre of Carbon Border-Adjustment Measures", 2 *Climate Law* (2011), 63, at 71–72.

[70] Art. XX(b) of the General Agreement on Tariffs and Trade, 15 April 1994, in force 1 January 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, 33 *International Legal Materials* (1994), 1153.

[71] Ibid., Art. XX(g).

[72] McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", supra, note 60, at 280–281.

[73] Sands, "Treaty, Custom and the Cross-fertilization of International Law", supra, note 60, at 103; ILC, Fragmentation of International Law, supra, note 20, para. 423.

[74] ILC, Fragmentation of International Law, supra, note 20, para. 473–474; Voigt, Sustainable Development as a Principle of International Law, supra, note 56, at 282.

[75] Voigt, Sustainable Development as a Principle of International Law, supra, note 56, at 284–286.

provision has been invoked by international adjudicatory bodies,[76] some bodies, including the dispute settlement mechanism of the WTO, have been rather reluctant to seek recourse to it,[77] and it is far from clear whether they would do so in the future. Most notably, in the *EC-Biotech Products* dispute, the WTO Panel rejected the argument to consider the Cartagena Protocol on Biosafety to the Convention on Biological Diversity[78] as one of the "relevant rules of international law" under Article 31.3(c), because the membership of the treaty was not identical to the WTO.[79] If this approach was adopted, this would significantly limit the scope of Article 31.3(c) for avoiding conflicts between international legal regimes related to climate change, as parallel memberships of multilateral treaties are rather limited.[80] Third, and more importantly, the extensive academic debate on systemic integration ignores the fact that other methods for interpreting treaties already provide ample opportunity to take into account other rules of international law, and that Article 31.3(c) of the VCLT has mainly "residual value."[81] For example, a teleological interpretation of the provisions of the WTO Agreements, taking into account their "context" and their "object and purpose" would already include the preambular language on the WTO's sustainable development objective,[82] and would likely allow for a balancing approach which would not be too different from the one envisaged under Article 31.3(c). Furthermore, treaty interpreters may adopt an "evolutionary approach" irrespective of their reference to Article 31.3(c) of the VCLT.[83]

The principle of systemic integration can thus be regarded as a strong integrative device in theory – but its theoretical strength is its weakness in judicial practice. Adjudicators will refrain from using it, as the resulting normative integration would also entail integration of authority – i.e. a direct influence on lawmaking.[84] As Broude explains, "to integrate (with) the norms of another system is to acknowledge the authority of that other system to produce pertinent norms" as well as "assert[ing]

[76] ILC, Fragmentation of International Law, supra, note 20, paras. 433–460.

[77] Lindroos and Mehling, "From Autonomy to Integration?", supra, note 60, at 270.

[78] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000), 1027.

[79] *European Community – Approval and Marketing of Biotech Products*, Reports of the Panel, WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006, at para. 7.71. (*Biotech*).

[80] For this reason, the Panel's approach has been criticized, for instance, by Margaret A. Young, "The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case", 56 *International and Comparative Law Quarterly* (2008), 907, at 914–918.

[81] Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: Oxford University Press, 2009), at 375; Samson, "High Hopes, Scant Resources", supra, note 60, at 711–712.

[82] Vienna Convention on the Law of Treaties, supra, note 58, at Art. 31.1. See also Miguel A. Elizande Carranza, "MEAs with Trade Measures and the WTO: Aiming toward Sustainable Development", 15 *Buffalo Environmental Law Journal* (2007), 43, at 86–91.

[83] Voigt, Sustainable Development as a Principle of International Law, supra, note 56, at 275–276.

[84] Broude, "Principles of Normative Integration and the Allocation of International Authority", supra, note 35, at 200.

authority over them."[85] It is this integration of authority that dispute settlement bodies seek to avoid by using 'weaker' forms of integration, such as Article 31.1 of the VCLT.[86] Similarly, while a possible "principle of mutual supportiveness" has much theoretical appeal as an interpretative device,[87] it cannot be automatically inferred that it would be used in practice.

13.3.1.2 Conflict Clauses

In case a conflict between two different treaties arises, the starting point for its resolution is to examine whether a treaty contains any conflict clauses.[88] The purpose of such clauses is to clarify the relationship between treaties, and to prevent contradictions.

The climate treaties contain several provisions that regulate their relationships with other multilateral agreements and international organizations. For instance, the United Nations Framework Convention on Climate Change (UNFCCC)[89] and the Kyoto Protocol[90] delimit their scope by only covering "greenhouse gases not controlled by the Montreal Protocol."[91] While this provision shows awareness of the linkages between the problems of – and solutions to – climate change and ozone layer depletion, it does not in itself prevent or resolve conflicts between them.[92] It can also be argued that the Kyoto Protocol's reference to "relevant international environmental agreements" in Article 2.1(a)(ii) constitutes a conflict clause, with a view to ensuring that parties to the Protocol do not implement climate policies that frustrate the objectives of other environmental treaties. The provision requires that in implementing and elaborating climate change policies and measures, developed countries take into account their commitments under "relevant international environmental agreements."[93] However, the provision is unclear about which commitments in other agreements it refers to, and also merely states that such commitments should be "taken into account" by parties.[94] It is thus difficult to see how this formulation

[85] Ibid., at 186–187.

[86] Ibid., at 187.

[87] Pavoni, "Mutual Supportiveness as a Principle of Interpretation and Law-Making", supra, note 60.

[88] Pauwelyn, *Conflict of Norms in Public International Law*, supra, note 56, at 328.

[89] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992), 849.

[90] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 10 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998), 22.

[91] See, for instance, UNFCCC, supra, note 89, Art. 4.1(a); Ibid., Art. 5.1.

[92] Sebastian Oberthür, "Linkages between the Montreal and Kyoto Protocols: Enhancing Synergies between Protecting the Ozone Layer and the Global Climate", 1 *International Environmental Agreements: Politics, Law and Economics* (2001), 357.

[93] Kyoto Protocol, supra, note 90, Art. 2.1(a)(ii).

[94] Pontecorvo, "Interdependence between Global Environmental Regimes", supra, note 65, at 739–740.

could be construed in such a way that it would subordinate the commitments in the Kyoto Protocol to other international environmental agreements.[95] Article 3.5 of the UNFCCC and Article 2.3 of the Kyoto Protocol could also be seen as conflict clauses with respect to the WTO agreements. Article 3.5 of the UNFCCC provides, *inter alia*, that "[m]easures taken to combat climate change, including unilateral ones, should not constitute a mans of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."[96] Under Article 2.3 of the Kyoto Protocol, developed countries must "strive to implement policies and measures… in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties…"[97] However, these provisions do not establish a clear hierarchy between the trade and climate change regimes, and do not – explicitly or implicitly – allow or prohibit climate-related trade measures.[98] In other words, they do not determine which treaty would prevail in case a conflict arises. Still, it is important to also note what the agreements do not explicitly state: they do not subordinate to the WTO Agreements, in contrast with, for instance, the Cartagena Protocol on Biosafety;[99] and they do not explicitly allow for trade measures against non-parties or non-compliers.[100] Furthermore, while not being explicit conflict clauses, the provisions may still provide interpretative guidance. For instance, it can be argued that Article 2.3 of the Kyoto Protocol directs Parties to adopt measures that minimize effects on international trade, except in cases where such effects are necessary to ensure the effectiveness of such measures.[101] Finally, the Kyoto Protocol contains a provision delimiting the scope of the climate treaties by delegating the negotiation of rules on emissions from international aviation and maritime transport to the International Civil Aviation Organization and the International Maritime Organization.[102]

---

[95] Frédéric Jacquemont and Alejandro Caparrós, "The Convention on Biological Diversity and the Climate Change Convention 10 Years After Rio: Towards a Synergy of the Two Regimes?", 11 *Review of European Community and International Environmental Law* (2002), 139, at 178.

[96] UNFCCC, supra, note 89, Art. 3.5.

[97] Kyoto Protocol, supra, note 90, Art. 2.3

[98] Voigt, *Sustainable Development as a Principle of International Law*, supra, note 56, at 299.

[99] Cartagena Protocol on Biosafety, supra, note 78, preamble (stating that "that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements"). For a discussion of the history of this clause, see Sabrina Safrin, "Treaties in Collision: The Biosafety Protocol and the World Trade Organization Agreements", 96 *American Journal of International Law* (2002), 606, at 614–618. .

[100] Olav Schram Stokke, "Trade Measures and Climate Compliance: Institutional Interplay Between WTO and the Marrakesh Accords", 4 *International Environmental Agreements: Politics, Law and Economics* (2004), 339, at 346.

[101] Voigt, *Sustainable Development as a Principle of International Law*, supra, note 56, at 298.

[102] Kyoto Protocol, supra, note 90, Art 2.2. See Sebastian Oberthür, "The Climate Change Regime: Interactions with ICAO, IMO, and the EU Burden-Sharing Agreement", in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance. Synergy and Conflict among International and EU Policies* (Cambridge: The MIT Press, 2006), 53, at 59–68.

Other climate-related treaties contain more clearly identifiable conflict clauses. For instance, the CBD gives priority to any existing agreement, "except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."[103] This clause arguably serves to limit climate change mitigation activities that would cause a serious damage or threat to biodiversity.[104] However, it applies only to treaties *existing* at the time of the CBD's adoption in 1992, and is thus not applicable to the Kyoto Protocol, adopted in 1997. Furthermore, the phrase "serious damage or threat to biological diversity" is nowhere defined or elaborated upon, meaning that the practical application of the clause remains uncertain. It is therefore "doubtful that this clause can prevent or solve conflicts."[105] Article 311.3 UNCLOS is also a provision that claims priority over any other international agreement incompatible with it.[106] Consequently, if, for example, certain forms of geological carbon storage were inconsistent with UNCLOS, but were endorsed under the UNFCCC umbrella, this clause could be called upon to argue that UNCLOS prevails over the climate treaty.

There are various difficulties with the use of conflict clauses: their wording is often unclear and open to diverging interpretations (e.g. what would establish "a serious damage or threat to biological diversity"?); they are not dynamic enough to reflect new developments (e.g. changes in scientific insights); it is not always clear when a treaty comes into existence;[107] and chances are that such clauses may never be applied "in the absence of a single, unifying dispute settlement system."[108] Nevertheless, from a legal perspective, they provide the primary means for addressing the relationship between treaties. An opportunity for managing fragmentation thus lies in their drafting. Whenever a new treaty or amendment is negotiated – either within the UNFCCC context or outside of it – conflict clauses could be drafted in a way that fully considers the implications for other treaties, and preferably in an unambiguous manner.[109] Hence, making a list of all international legal instruments that may have an impact on the treaty under negotiation is sensible.[110] Under such a "stop and think approach" the impacts of a new treaty or a treaty amendment would

[103] Convention on Biological Diversity, supra, note 13, Art. 22.1.

[104] Wolfrum and Matz, *Conflicts in International Environmental Law*, supra, note 14, at 124.

[105] Ibid., at 125; ILC, Fragmentation of International Law, supra, note 20, para. 280; Malgosia Fitzmaurice and Olefumi A. Elias, *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven Publishing, 2005), at 244–345.

[106] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982), 1261, Art. 311.3.

[107] E.W. Vierdag, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", 59 *British Yearbook of International Law* (1988), 75.

[108] Jacob Werksman, "Formal Linkages and Multilateral Environmental Agreements", 1999, available at: http://archive.unu.edu/inter-linkages/1999/docs/jake.PDF (last accessed on 14 February 2012).

[109] Wolfrum and Matz, *Conflicts in International Environmental Law*, supra, note 14, at 128.

[110] Wilfred Jenks, "The Conflict of Law-Making Treaties", 30 *British Yearbook of International Law* (1953), 401, at 452.

be carefully assessed, where appropriate, in cooperation with the relevant states, secretariats and international organizations.[111] This suggestion is certainly not new. In 1953, Jenks already noted the importance of consultations before and during the drafting of legal instruments.[112] However, there is as of yet still no standard procedure to assess the impacts of a new instrument on existing ones, or to consider how an instrument could contribute to the objectives of other treaties. An opportunity thus lies in introducing such a procedure in drafting new climate-related agreements.

13.3.2 Limitations

13.3.2.1 Definitions of 'Conflict'

Whether international law can play a role in resolving conflicts between the climate treaties and other agreements depends on whether a conflict – in the strict legal sense – actually exists. This may sound like a clear-cut exercise, but is everything but that. Indeed, the scholarly literature is divided on the issue, with some authors arguing for a 'narrow' definition, and others opting for a 'wide' definition.[113] The main challenge in defining conflicts is to capture the divergences between different legal regimes, while at the same time acknowledging that not all divergences need to be resolved through the establishment of a hierarchy between the relevant regimes.

According to the classical definition suggested by Jenks, a "conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties."[114] More recently, this test of 'impossible joint compliance' has become the subject of criticism.[115] In particular, critics argue that Jenks' focus on obligations only is too limited, and unjustifiably excludes incompatibilities between obligations and permissions. This would include cases of overlap in which a (future) climate change treaty permits a measure that restricts international trade, whilst a trade agreement contains a specific obligation not to restrict trade. Addressing this lacuna, Pauwelyn's treatise on the conflict of norms in international law includes a proposal to expand the definition to include conflicts involving permissive norms. Vranes similarly argues for a broader definition, which comprises "incompatibilities between permissions and obligations, permissions and prohibitions, and obligations and prohibitions," adding that there is a conflict if one of the norms "is necessarily or potentially violated."[116]

---

[111] Hicks, "Treaty Congestion in International Environmental Law", supra, note 25, at 1669–1673.

[112] Jenks, "The Conflict of Law-Making Treaties", supra, note 110, at 452.

[113] For an overview of the debate, see Erich Vranes, *Trade and the Environment. Fundamental Issues in International and WTO Law* (Oxford: Oxford University Press, 2009), at 10–38.

[114] Jenks, "The Conflict of Law-Making Treaties", supra, note 102, at 426.

[115] Pauwelyn, *Conflict of Norms in Public International Law,* supra, note 56, at 166–175 and Vranes, *Trade and the Environment*, supra, note 113, at 19–21.

[116] Vranes, *Trade and the Environment*, supra, note 113, at 38.

Jenks already acknowledged that his narrow definition might not cover all the divergences and inconsistencies between treaties that may have negative effects.[117] While the wider definitions proposed by Pauwelyn and Vranes ensure that certain obvious conflicts are not "defined away,"[118] even their construction of conflict may be insufficient to cover the various kinds of incompatibilities that may arise in international climate law (and, arguably, in international law more broadly). In this regard, Wolfrum and Matz identify several categories of conflicts in international environmental law that fall outside the aforementioned definitions.[119] These include, in the first place, conflicts between agreements resulting from their different objectives (e.g. trade liberalization versus environmental protection). The broader categorization also includes conflicts arising from the incorporation of different principles and approaches (e.g. a precautionary approach versus cost-effectiveness). Differing objectives and principles, however, do not necessarily need to lead to conflicts between two treaties, especially where they are phrased in unclear terms. It is especially in the instances where States have a wide margin of discretion that there may be a conflict in the implementation phase of the agreements.[120] In the case of international law on climate change, this is evidenced by the triggering of conflicts through decisions of treaty bodies, as will be discussed below.

It can thus be established that even wide legal definitions of 'conflict' seem to be insufficient to cover all potential climate-related conflicts. But here it should be asked: insufficient for what purpose? This is perhaps the most crucial question regarding the definition of conflicts, and it is emerging as a focus in the debate on the fragmentation of international law.[121] In this regard, it is useful to cite one of Vranes' main objections to a narrow definition: "The problematic consequence … is that conflicts maxims such as the *lex posterior* principle cannot come into play …."[122] In other words, it is important to establish that there is a conflict if one wishes to decide which norm prevails. But this is based on an assumption that one of the norms *should* prevail, or that the existence of a conflict in a particular situation is undesirable. Such an assumption can be explained through the 'structural bias' of a specific regime: from a climate change perspective, climate-related norms should trump trade norms. From the trade perspective, trade norms should naturally prevail.[123] This assumption can be questioned if it is accepted that two legal regimes can pursue a similar objective, such as the pursuit of sustainable

[117] Jenks, "The Conflict of Law-Making Treaties", supra, note 110, at 426.

[118] Vranes, *Trade and the Environment*, supra, note 113, at 20.

[119] Wolfrum and Matz, *Conflicts in International Environmental Law*, supra, note 14, at 7–13.

[120] Ibid., at 11.

[121] In dealing with regime interactions, Dunoff highlights the lack of a "redemptive narrative". With this, he refers to the lack of overarching guidance that could help lawyers in deciding how to integrate regimes. See, Jeffrey Dunoff, "A New Approach to Regime Interaction", in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), 136, at 155.

[122] Vranes, *Trade and the Environment*, supra, note 113, at 19.

[123] Khrebtukova, "A Call to Freedom", supra, note 20, at 63.

development,[124] or if one seeks to identify an otherwise overarching 'narrative' that reconciles two regimes.[125] In other words, is it really desirable that a hierarchy between norms be established? This seems to be purpose of most conflict resolution techniques discussed by the ILC, such as the *lex specialis* and *lex posterior* rules, and conflict clauses. However, if one accepts that the climate regime and related regimes are actually pursuing common goals, this quest for normative hierarchy becomes rather futile.

13.3.2.2 Treaty Body Decisions

The climate regime, like many other international environmental regimes, is characterized by a form of lawmaking that departs from the traditional idea of treaty-based lawmaking. Lawmaking does not stop when the treaty text is agreed upon, but continues through the decision-making bodies constituted by those treaties, such as the Conference of the Parties (COP) established under the UNFCCC. The consequence of this innovative form of international lawmaking is that interactions between international legal regimes could well be 'triggered' by a decision by a treaty body rather than the treaty itself. In fact, the impacts of rule-development on forest carbon sinks under the Kyoto Protocol on issues discussed under the CBD shows that the potentially conflicting interaction has its origins in the decisions made by the UNFCCC COP,[126] as it is those decisions that allow for the implementation of Clean Development Mechanism projects that might result in adverse impacts on biodiversity.[127] Yet the debate on the fragmentation of international law is primarily concerned with conflicts stemming from treaties as such. This is in line with the aforementioned discussions on conflicts in international law, which have tended to focus primarily on treaties as the source of conflict. For instance, the classic definition by Jenks states that a "conflict in the strict sense of direct incompatibility arises only where a party to the two *treaties* cannot simultaneously comply with its obligations under *both treaties*" (emphasis added).[128] In addition, various legal techniques to avoid or resolve conflicts are based on, or linked to, the law of *treaties*.

---

[124] For instance, Voigt argues that sustainable development is enshrined in both the climate change and trade regimes. Voigt, *Sustainable Development as a Principle of International Law*, supra, note 56, at 89–144. Koskenniemi refers to sustainable development as one of the "regime hybrids… through which the experts representing the respective regimes may wage their struggle for influence". See Koskenniemi, "Hegemonic Regimes", supra, note 46, at 319–320.

[125] Dunoff, "A New Approach to Regime Interaction", supra, note 121. Koskenniemi is critical whether such a narrative in fact can be construed, citing the example of the legal scholarship on constitutionalization and global administrative law. Koskenniemi, "Hegemonic Regimes", supra, note 46, at 320–321.

[126] Van Asselt, "Managing the Fragmentation of International Environmental Law", supra, note 14.

[127] Van Asselt, "Integrating Biodiversity in the Climate Regime's Forest Rules: Options and Tradeoffs in Greening REDD Design", supra, note 14, at 141–143.

[128] Jenks, "The Conflict of Law-Making Treaties", supra, note 110, at 426.

This means that the question of how to deal with cases where the texts of two treaties are perfectly compatible, but subsequent rule-development under one of the treaties leads to a conflict has thus far been largely ignored.

Whether such situations are captured by the ongoing fragmentation debate depends on the legal status assigned to the decisions of the treaty bodies of international environmental agreements. In other words, to what extent do the decisions adopted by these bodies constitute international lawmaking in a traditional sense?[129] There is no straightforward answer, but it has been argued that while COP decisions are not devoid of normative substance, their legal force is intrinsically connected to the treaty obligation upon which they are based. As Wiersema concludes: "consensus-based COP activity … cannot be seen as giving rise to stand-alone legal or even political obligations" and COP decisions "hold little meaning but for their connection to the treaty."[130] However, even if it can be successfully argued that there are intricate linkages between COP decisions and underlying treaty provisions, this does not mean that the decisions themselves are covered by the law of treaties.[131]

The increasing relevance of decisions by treaty bodies in international environmental lawmaking hence limits the usefulness of the conventional conflict resolution techniques. This does not mean that any conflicts arising from such decisions cannot be dealt with, but rather points to the need to think about alternative means to manage them.

13.4 Managing Fragmentation Through Institutional Cooperation

While legal techniques hold some potential to manage the fragmentation of international climate change law, particularly in the case of normative conflicts, their limitations are also clear. This realization has directed attention towards less formal approaches to managing fragmentation. In particular, the question has been raised

[129] See, generally, Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", 94 *American Journal of International Law* (2000), 623; Jutta Brunnée, "COPing with Consent: Law Making under Multilateral Environmental Agreements", 15 *Leiden Journal of International Law* (2002), 1; Annecoos Wiersema, "The New International Law-makers? Conferences of the Parties to Multilateral Environmental Agreements", 31 *Michigan Journal of International Law* (2009), 231.

[130] Wiersema, "The New International Law-makers?", supra, note 129, at 245. See also Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties*, supra, note 105, at 262 (referring to the Kyoto Protocol provisions on flexible mechanisms as "enabling clauses" for subsequent decisions by the treaty bodies); and Brunnée, "COPing with Consent", supra, note 129, at 24 (referring to "enabling provisions").

[131] Wiersema, "The New International Law-makers?", supra, note 129, at 247.

to what extent treaty bodies, such as COPs and secretariats, could enhance coherence between different legal regimes. Again, I do not seek to provide an exhaustive overview of options for institutional cooperation, but rather focus on the most pertinent opportunities and limitations of this particular management strategy.

13.4.1 Opportunities

13.4.1.1 Bureaucracies

Bureaucracies, such as the UNFCCC Secretariat, are important actors in international environmental – and climate change – governance, yet they have largely flown under the radar of analysts. They can be regarded as key actors 'behind the scenes' in managing the fragmentation of international climate law. However, although their influence on the individual regimes they are tied with is becoming clearer,[132] their role in managing the relationships between different regimes remains underresearched.[133]

Whether there is a mandate for secretariats to engage in institutional cooperation is not the same question as whether these secretariats have the legal capacity to enter into external cooperation agreements in the first place. The latter question has been examined in-depth by Churchill and Ulfstein, who conclude that the institutions of multilateral environmental agreements "have implied powers to act on the external plane, including the capacity to enter into treaties when necessary to carry out their functions."[134] Specifically with respect to secretariats, Chambers argues that while the legal personality of secretariats may not be entirely clear, their power "would certainly include entering into agreements of collaboration with other [multilateral environmental agreements] where there is a clear overlap or interest."[135]

In terms of mandates, liaising with other secretariats is generally one of the tasks assigned to the secretariats of environmental treaties. This is the case, for instance, for the climate secretariat,[136] the ozone secretariat,[137] and the biodiversity

[132] On the role and influence of bureaucracies in global environmental governance, see the contributions in Frank Biermann and Bernd Siebenhüner (eds), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (Cambridge: The MIT Press, 2009).

[133] There are some notable exceptions, such as Sikina Jinnah, "Overlap Management in the World Trade Organization: Secretariat Influence on Trade-Environment Politics", 10 *Global Environmental Politics* (2010), 64; Sikina Jinnah, "Marketing Linkages: Secretariat Governance of the Climate-Biodiversity Interface", 11 *Global Environmental Politics* (2011), 23.

[134] Churchill and Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements", supra, note 129, at 649.

[135] Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements*, supra, note 27, at 66.

[136] UNFCCC, supra, note 89, Art. 8.2(e); Kyoto Protocol, supra, note 90, Art. 14.2.

[137] Vienna Convention for the Protection of the Ozone Layer, supra, note 10, Art. 7.1(e).

secretariat.[138] Although cooperation is not explicitly included in the mandate of the WTO Secretariat, it has become active in enhancing the transparency of the WTO's activities related to climate change,[139] for instance, through the organization of side-events at COPs and the publication of reports on the linkages between trade and climate change.[140]

Institutional cooperation between the climate secretariat and other bureaucracies has remained largely limited to observership, mutual attendance at meetings, scientific cooperation, and information exchange. An interesting development in this regard has been the formation of the Joint Liaison Group, which comprises the secretariats of the CBD and the UNFCCC, subsequently also joined by the secretariat of the UN Convention to Combat Desertification (the third 'Rio Convention').[141] The mandate of the Joint Liaison Group is to "enhance coordination between the three conventions, including the exchange of relevant information" and "[t]o explore options for further cooperation between the three conventions, including the possibility of a joint work plan and/or a workshop."[142] By the end of 2011, the Joint Liaison Group had convened ten times, focusing on crosscutting issues such as research and monitoring, information exchange, technology transfer, capacity building, financial resources, education and public awareness, and adaptation to climate change. Its activities primarily consist of information exchange and coordination between the administrative bodies of the different regimes.[143] In 2004, the three secretariats drafted a joint paper identifying options for enhanced cooperation. Whereas some of the options identified in the paper (for instance, joint workshops or the sharing of information among secretariat staff) are relatively easy to implement, others (such as the harmonization of reporting) require much more preparation and consensus.[144]

There may be opportunities for enhancing the role of the secretariats in promoting synergies between different environmental regimes. For instance, the tool of memoranda of cooperation – widely used, for instance, by the biodiversity secretariat – has rarely been used by the climate secretariat. Such written agreements could formalize existing informal practices, thereby keeping the relationship with other regimes permanently on the agenda. However, it can be questioned

[138] Convention on Biological Diversity, supra, note 13, Art. 24.1(d).

[139] Jinnah, "Overlap Management in the World Trade Organization", supra, note 133, at 68.

[140] Tamiotti et al., *Trade and Climate Change,* supra, note 15.

[141] United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Paris, Particularly in Africa, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994), 1328.

[142] Report of the Subsidiary Body on Scientific and Technological Advice on the Second Part of Its Fourteenth Session, Bonn, 24–27 July 2001. U.N. Doc. FCCC/SBSTA/2001/2, 18 September 2011, para. 42(d).

[143] Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements*, supra, note 27, at 69.

[144] Options for Enhanced Cooperation Among the Three Rio Conventions, U.N. Doc. UNEP/CBD/SBSTTA/10/INF/9 Annex, 15 December 2004.

whether formalizing cooperation *per se* would result in synergies at the operational level. Indeed, one of the advantages of the secretariats' activities is that they avoid the cumbersome political decision-making processes of the COPs, and thereby provide a valuable informal and flexible way of integrating environmental regimes.

13.4.1.2 Decision-Making Bodies

While the bureaucracies of environmental treaties thus may play an important role in raising awareness of interactions and their consequences, they do not have any decision-making competencies. Nevertheless, also the decision-making bodies in environmental treaties are often guided to cooperate with other bodies. In this regard, the decision-making bodies of the climate regime are mandated to "[s]eek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies."[145] Other environmental conventions contain similar instructions. The Vienna Convention on Ozone Layer Depletion directs its parties (and parties to subsequent protocols adopted under the treaty) to cooperate with competent international bodies.[146] Likewise, the CBD COP is mandated to "[c]ontact, through the Secretariat, the executive bodies of conventions dealing with matters covered by [the CBD] with a view to establishing appropriate forms of cooperation with them."[147] This has formed the basis for the cooperation between the biodiversity secretariat and other secretariats mentioned above. Also in the area of the international trade regulation, the Agreement Establishing the WTO provides that the "General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO."[148] It thus seems clear that there is ample scope for decision-making bodies to cooperate with each other.

Not every decision-making body is equally active, however. In particular, the UNFCCC COP has been rather silent about its relationships with other international conventions. There has been only one COP decision on cooperation, which generally affirms the need for enhanced cooperation "with the aim of ensuring the environmental integrity of the [Rio Conventions] and promoting synergies under the common objective of sustainable development, in order to avoid duplication of efforts, strengthen joint efforts and use available resources more efficiently."[149]

In contrast, decision-making bodies of other international environmental regimes have sought to manage the overlap with the climate regime. For instance, the CBD

[145] UNFCCC, supra, note 89, Art. 7.2(l); Kyoto Protocol, supra, note 90, Art. 13.4(i).

[146] Vienna Convention on the Protection of the Ozone Layer, supra, note 10, Art. 2.2(d).

[147] Convention on Biological Diversity 2004, supra, note 13, Art. 23.4(h).

[148] Art. V.1 of the Agreement Establishing the World Trade Organization, 15 April 1994, in force 1 January 1995, 33 *International Legal Materials* (1994), 1144.

[149] Decision 13/CP.8, Cooperation with Other Conventions, U.N. Doc. FCCC/CP/2002/7/Add.1, 28 March 2003, preamble.

COP has adopted a wide range of decisions related to climate change and biodiversity, which have been instrumental in highlighting biodiversity concerns in UNFCCC decisions,[150] although they have not necessarily lead to stronger references to biodiversity protection in the climate regime's decisions. The parties to the Montreal Protocol have also been engaged in activities closely related to the climate regime, most notably by adopting a decision in 2007 that significantly accelerated the phasing out of the consumption and production of hydrochlorofluorocarbons, a potent greenhouse gas that also served as substitute for ozone depleting substances.[151] A similar decision to limit the use of another substitute with global warming potential, hydrofluorocarbons, has been proposed by some parties to the Montreal Protocol, but is still opposed by others.[152]

While institutional cooperation on climate-related overlaps between regimes thus mainly takes place unilaterally – initiated mainly by several proactive decision-making bodies outside the UNFCCC – enhanced cooperation could take place in a "more ambitious form of comprising joint planning of programmes or even the coordination of substantive decision-making or implementation activities."[153] There are examples of such enhanced cooperation in international environmental law, for instance, in biodiversity protection, fisheries management and chemical substances.[154] In the case of chemicals, it was even possible to hold a joint session of the decision-making bodies of three different multilateral environmental agreements. Although extending this type of institutional cooperation to the climate regime may sound attractive in theory, there are limitations to what is possible and desirable, as will be discussed in the next section.

13.4.2 Limitations

13.4.2.1 Unclear Mandates

Although institutional cooperation to manage linkages between the climate regime and other legal regimes is intensifying, the effects are as of yet uncertain. While institutional cooperation can create mutual awareness between regimes, and build capacity at various levels, it is often also plagued by rhetoric about the 'mutual supportiveness' of different treaties, and devoid of practical suggestions. Part of the

[150] Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge: Cambridge University Press, 2004), at 523–524.

[151] Decision XIX/6, Adjustments to the Montreal Protocol with Regard to Annex C, Group I, Substances (Hydrochlorofluorocarbons), U.N. Doc. UNEP/OzL.Pro.19/7, 21 September 2007.

[152] Oberthür, Dupont and Matsumoto, "Managing Policy Contradictions Between the Montreal and Kyoto Protocols", supra, note 12, at 128–129.

[153] Olav Schram Stokke, "The Interplay of International Regimes: Putting Effectiveness Theory to Work?" Fridtjof Nansen Institute (FNI) Report 10/2001, 2001, available at: http://www.fni.no/doc&pdf/FNI-R1401.pdf (last accessed on 2 March 2012), at 12.

[154] Scott, "International Environmental Governance", supra, note 24, at 202–208.

reason for this is that institutional cooperation is challenging because of unclear or restricted mandates.

Secretariats initiating cooperation with other bodies usually act upon a decision by the COP, thereby interpreting the mandate provided in such a decision. While it may seem "commonsensical that a secretariat would not engage in activities against the will of its member states,"[155] it is actually not always clear what this 'will of the parties' is. In other words, secretariats do not always have a clear legal authority regarding the extent of institutional cooperation.[156] This may either constrain or enable them. Parties often tend to interpret the secretariats' mandates restrictively, and secretariats will need to walk on eggshells when engaging in activities with other international actors. This is especially the case for the UNFCCC Secretariat, which has been said to be "living in a straitjacket" imposed by the parties.[157] However, other secretariats have taken a more proactive stance by adopting a wide interpretation of their mandate. The CBD secretariat, for instance, has made use of the limited space provided to it by the COP, partly due to a very active Executive Secretary.[158]

Cooperation between secretariats is even more difficult if their respective mandates differ in their scope. For instance, at its fifth meeting, the Joint Liaison Group argued for consistent guidance from the various COPs, indicating that it can only facilitate, but not guarantee such consistency.[159] Furthermore, at its ninth meeting, the Group noted that "there remains a disconnect between the roles and mandates given to the [Joint Liaison Group] by each convention with this disconnect resulting in limitations when considering the implementation of the requested activities."[160] Because of these limitations, the Joint Liaison Group acts primarily as a forum to facilitate information exchange, and to encourage harmonizing implementation of the Rio Conventions at the national level.[161]

13.4.2.2 Overstepping Regime Boundaries

The mandate for cooperation – and how it is interpreted – will, for an important part, depend on parties' willingness to construct linkages with other regimes. This brings

[155] Chambers, Interlinkages and the Effectiveness of Multilateral Environmental Agreements, supra, note 27, at 66.

[156] Ibid., at 70–71.

[157] Per-Olof Busch, "The Climate Secretariat: Making a Living in a Straitjacket", in Frank Biermann and Bernd Siebenhüner (eds), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (Cambridge: The MIT Press, 2009), 225, at 225.

[158] Jinnah, "Marketing Linkages: Secretariat Governance of the Climate-Biodiversity Interface", supra, note 133.

[159] Report of the Fifth Meeting of the Joint Liaison Group. U.N. Doc. FCCC/SBSTA/2004/INF.9, 15 June 2004, para. 4(l).

[160] Report of the Meeting of the Joint Liaison Group of the Convention on Biological Diversity, the United Nations Convention to Combat Desertification, and the United Nations Framework Convention on Climate Change (New York, 14 May 2009), para. 11.

[161] Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements*, supra, note 27, at 69.

us to one of the core challenges to enhancing institutional cooperation: the risk that states "may be unwillingly drawn into regimes that they are not party to or affiliated with, and implicitly become subject to obligations under those regimes, by virtue of cooperative arrangement."[162] It can be assumed that any effort by actors in one regime to influence the normative development in another will likely be limited by the extent to which memberships are congruent. For instance, while the United States is a party to the UNFCCC, it has not ratified the CBD. A broad mandate for the climate regime's treaty or administrative bodies to cooperate with the CBD could lead to the perception that state sovereignty is eroded by "importing" concepts or rules from the CBD.[163] Party submissions to the UNFCCC seem to confirm that this perception exists. Responding to the work of the Joint Liaison Group in 2004, the United States noted that the Rio Conventions "have a distinct legal character, mandate and membership."[164] Australia even argued that "[t]he CBD and the UNCCD do not have a legitimate role in greenhouse mitigation, which is clearly the work of the UNFCCC."[165] But even when membership is largely overlapping, there may be resistance to the idea of cooperation between bureaucracies. For instance, with respect to the WTO secretariat's role in managing the climate-trade overlap, Cossy and Marceau note that "the competences of the secretariats are limited (they do not normally include decision-making) and underlain by their obligation to remain neutral vis-à-vis the membership."[166]

More generally, cooperation between institutional arrangements of two different regimes gives rise to concerns about legitimacy and accountability.[167] If one adopts a more traditional legal perspective emphasizing the importance of state consent (and state sovereignty) in international lawmaking, it is difficult to see where the legitimacy of enhanced institutional cooperation comes from, particularly in the case of incongruent memberships. These concerns relate back to the 'structural bias' of each regime.[168] Can cooperation really take place in a fashion that gives equal weight to the norms of each regime? This may not be the case when 'stronger' and 'weaker' regimes are concerned. This could result in the prioritization of one regime over another, meaning that cooperation "may become dominated by procedures, principles and concepts that are prevalent within one regime at the expense of [others]."[169] Another matter is whether the norms of each regime *should* be given

[162] Scott, "International Environmental Governance", supra, note 24, at 212.

[163] Wolfrum and Matz, *Conflicts in International Environmental Law*, supra, note 14, at 163.

[164] Views on the Paper on Options for Enhanced Cooperation Among the Three Rio Conventions, Submissions from Parties, U.N. Doc. FCCC/SBSTA/2006/MISC.4, 23 March 2006, at 16.

[165] Ibid., at 5.

[166] Mireille Cossy and Gabrielle Marceau, "Institutional Challenges to Enhance Policy Co-ordination – How WTO Rules Could be Utilised to Meet Climate Objectives?", in Thomas Cottier, Olga Nartova and Sadeq Z. Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge University Press, 2009), 371, at 376.

[167] Scott, "International Environmental Governance", supra, note 24, at 211–215; Young, *Trading Fish, Saving Fish*, supra, note 24, at 281–287

[168] Koskenniemi, *From Apology to Utopia,* supra, note 46, at 600–615.

[169] Scott, "International Environmental Governance", supra, note 24, at 213.

equal weight. Young argues convincingly that bodies seeking to cooperate with other regimes should "scrutinise and review the 'sources' of external regimes."[170] Only in this way, she posits, can institutional cooperation be made accountable, and can the risk of 'managerialism' be avoided.

13.5 Concluding Remarks

The 'wicked' nature of the climate problem means that it is difficult, if not impossible, to govern the problem through a single legal regime. The argument here is that any effective response to the climate change problem will need to take into account the potential of other regimes to either mitigate or exacerbate the problem, while at the same time also considering the impacts of the climate regime on other legal regimes. International climate change law is thus inevitably fragmented. However, the consequence of such fragmentation does not have to be regulatory chaos, or the prioritization of one policy field over another – as has been feared by international lawyers participating in the general debate on the fragmentation of international law. Crucially, the implications of the fragmentation of international climate law depend on how it is *managed*.

With this in mind, this chapter has sought to illustrate the potential of well-known legal techniques to manage interactions between different international legal regimes. It has also addressed several less-well studied forms of institutional cooperation. With respect to legal techniques this chapter argued, first, that pursuing harmonious treaty interpretation, whereby treaty interpreters take into account extraneous rules, could avoid conflicts between climate-related treaties. It questioned, however, whether this necessarily needed to take place through a principle of 'systemic integration' or 'mutual supportiveness', which some scholars have suggested is embodied in Article 31.3(c) of the VCLT. Second, it indicated that in the course of international climate lawmaking, negotiators could take a step back, carefully considering the implications of the negotiations for other regimes and drafting provisions to regulate their inter-relationships. The chapter then moved on to point out that many of the tensions involving the climate regime cannot be adequately be captured by traditional legal definitions of conflict thereby limiting the usefulness of many techniques discussed in detail by the ILC. Furthermore, it questioned whether applying such techniques – leading to a normative hierarchy – is in fact desirable at all.

This chapter argued that informal institutional cooperation can complement the formal legal techniques for managing the fragmentation of international climate law. It showed how various secretariats as well as decision-making bodies in climate-related regimes have started to address overlapping issues, with a view to

[170] Young, *Trading Fish, Saving Fish*, supra, note 24, at 277.

avoiding conflicts and maximizing synergies. However, it is clear that there are also limitations as to what can be achieved through such means. Secretariats' mandates are not always clearly defined, and to avoid a rebuke by parties, secretariats will tend to stay away from intruding too much into the decision-making process through external cooperation with other institutions. This question is linked with more general concerns about the legitimacy and accountability of institutional cooperation. These concerns are to some extent based on traditional notions of state consent, but they point to the real risk that actors in one regime are sidelined through the use of norms borrowed from another.

Although this chapter has given a first indication of how the fragmentation of international climate law could be managed, further research into the (im)possibilities of other strategies could complement the existing body of knowledge. First, the focus of this chapter has been on the international level. It should, however, be clear that managing the relationship between different regimes, to an important extent, takes place at the national or subnational level – i.e. in the implementation phase of international agreements. While the coordination and integration of policies and laws has been the subject to attention of lawyers and political scientists at the domestic level, further research could shed light into the way in which such coordination could strengthen the coherence of international law. Vice versa, there has been little research on how cooperation at the international level could strengthen coherence in the implementation phase. Second, and related to the first point, there has been scant attention to the role of non-state actors, such as environmental organizations, the private sector, or public-private partnerships, in improving mutual coherence between different regimes. A third point relates to the legal form of international climate governance. While international legal instruments, including the climate treaties, other environmental treaties, and international trade law, still play a key role in steering behaviour, climate governance is characterized by the emergence of a wide array of non-state initiatives, and initiatives that could be rather regarded as soft law. The point here is that the role of legal techniques for managing the fragmentation of international climate law may further diminish if the role of international law in addressing climate change itself is further reduced. Indeed, the Vienna Convention on the Law of Treaties or conflict resolution principles such as *lex specialis* will not be applicable in case of interactions between hard law and soft law, since there will not be any norm conflict in the strict legal sense. The relationship between hard and soft law related to climate change, and the management of their relationship is therefore another appropriate area for further inquiry.