Asselt's views of the kyoto protocol

Asselt's Article

This paper aims to build upon the article by Asselt (xxxx) by re-examining this example of fragmentation from an updated perspective. Asselt's article principally discusses the Kyoto protocol, however this is to be replaced by the recently adopted Paris agreement which is expected to come into force in 2020 (Wilder, 2016) and is not considered in Asselt's article. This dissertation will therefore consider the impact of the modified provisions on the conflicts between the UNFCCC and CBD and will then go on to consider possible methods to address these. Differences in how the conflict would traditionally be addressed legally i. e. via the Vienna Convention and via scientific means will be considered in an attempt to inform possible solutions to the problem of fragmentation.

Introduction

In order to explore this specific topic it is first necessary to discuss the topic of fragmentation more generally, to do this certain questions need to be answered, namely: how did the phenomenon of 'fragmentation' come about? What is fragmentation? What effects does it have? And how does it display itself in Environmental law? Each of these questions will be answered in turn.

The Emergence of Fragmentation in International Law

Wilfred Jenks was one of the first to highlight the issue of the 'fragmentation' of international law as early 1953, stating that " In the absence of a world legislature with a general mandate, law making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some

respects analogous to those of separate systems of municipal law". Fragmentation is synonymous to the development of the international legal system, which has developed considerably in the post-war era with the formulation of the United Nations, of which nearly 200 nations are now members. Furthermore post-Cold War has seen an enormous expansion and transformation of the international judicial system, with the number of judicial bodies almost doubling, coupled with an equally remarkable expansion and transformation of the nature and competence of these international judicial organs. This means that it is meeting increased concern over recent years, including by bodies such as the International Law Commission. Recently the ILC has focused on this subject through its 'Comission on the Fragmentation of International Law[A1]' considering the issue to have attained significance through its proliferation. At its fifty-second session in 2000, the International Law Commission decided to include the topic " Risks ensuing from the fragmentation of international law" into its long-term programme of work. In the following year, the General Assembly requested the Commission to give further consideration to the topics in that long-term programme. At its fifty-fourth session in 2002 the Commission decided to include the topic, renamed " Fragmentation of international law: difficulties arising from the diversification and expansion of international law", in its current work programme and to establish a Study Group. The Study Group adopted a number of recommendations on topics to be dealt with and requested its then Chairman, Mr. Bruno Simma to prepare a study on the " Function and scope of the lex specialis rule and the question of 'self-contained regimes'". At its fifty-fifth session in 2003, the Commission appointed Mr. Martti Koskenniemi as Chairman of the Study Group. The

Group also set a tentative schedule for its work, distributed the studies decided in the previous year among its members and decided upon a methodology to be adopted for that work.[A2]

Fragmentation as a Phenomenon

According to some, Fragmentation is a term used to describe the inadequacy of certain corrective procedures in addressing an ever more congested body of international law.

This is partly due to the emergence of a large number of international regulations over such a short period of time. These regulations now relate to an increasing number of interrelated subject areas and specialisations. According to Koskenniemi (2006) 'what once appeared to be governed by " general international law" has now become the field of operation for such specialist systems as " trade law", " human rights law" and " environmental law"'. Most international treaties exist parallel to one another and are further developed without the benefit of consideration being given to potential conflicts with other agreements either during their negotiation or at a later stage of their existence, this has had the effect of, in some circumstances, creating a somewhat disharmonious medley of instruments, rife with overlapping and conflicting legal mandates (Hafner, 2004; Scott, 2011). Essentially he is saying that the lack of a general legislative body has resulted in a decentralised system, with the possibility of conflict between treaty regimes. Much of the literature dealing with fragmentation of general international law focuses primarily on the effect of fragmentation on international judicial institutions and dispute settlement bodies, and the

contribution, as a result of multiplication of these institutions, to fragmentation. However in this subject area the term conflict can be interpreted differently by different authors, with some arguing for a 'narrow' definition and others for a 'wider' definition. This means that there are different types of conflict that can occur, Jenks and a number of other legal scholars endorsed the narrow definition, stating that " 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" although Jenks also acknowledged that the narrow definition might not cover all divergences and inconsistencies between treaties. The narrow position is evermore being challenged by critics who argue that this position is limited in that it does not include (among others) incompatibilities between obligations or permissions for example. Erich Vranes argues for a wider definition stating that if one of the norms is " necessarily or potentially violated" this should also be included, however some critics further assert that these 'wider definitions' do not sufficiently cover all of the various incompatibilities that can occur between fragmented regimes. This has led some authors to consider fragmentation to also include elements of 'policy conflict', the International Law Commission's (ILC) definition of which is given 'as a situation where two rules or principles suggest different ways of dealing with a problem' and may be considered more appropriate, Asselt states further that this is provided that these 'different ways of dealing with a problem' are contradictory rather than complimentary as will be discussed an overlap in regime coverage may not necessarily produce negative outcomes.

The Impacts of Fragmentation

Hafner (2004) states that fragmentation may lead to the 'erosion' of general international law and its institutions, involving the loss of its 'credibility' and ultimately its 'authority'. Others make similar points, that such closed jurisdictions and institutions may contribute to a loss of 'perspective' on international law, lead to its 'uncertain' development and create a 'lack of synergy', with one author stating that with congestion comes 'collision', and often 'friction'. To others, fragmentation challenges international law's 'stability', 'consistency' and 'comprehensiveness'. It has been described as leading to 'inefficiencies' for example through the doubling of efforts, which can diminish the 'effectiveness' of international law because scarce financial, administrative or technical resources may be wasted. The effectiveness of international agreements can also be significantly hampered if conflicts between the agreements lead to uncertainties over their interpretation and, consequently, their implementation and overall application. To draw a few of these criticisms down into an example, The MOX Plant case could be said to demonstrate 'inefficiencies' and 'friction' where the regime under the United Nations Convention on the law of the Sea of 1982 conflicted with the system under EC law. From a substantive perspective it requires complex arguments about which regulation to apply, which may lead to more conflicts. This demonstrates the difficulties in providing an answer, the problems of coherence raised by the MOX plant case, for example, have not already been resolved in some juristic heaven so that the only task would be to try to find that pre-existing solution. However the impacts of fragmentation may be more prominent from a secondary law perspective. Major problems arise

when a state could resort to different mechanisms of enforcement in resolving one problem. Answers to legal questions become dependent on whom you ask, what rule-system is your focus on. States may resort to the mechanism that best suits their interests (though this can be views as good or bad). Furthermore the settlements are only reached in one system. This could undermine the tendency towards homogenous international law and engender additional uncertainty of standards to be applied to a given case. While some see the large problems mentioned such as an overarching loss of legal security others see a mere technical problem. Fragmentation is also viewn in a positive light, as an inevitable symptom of the international community's rapid response to a host of emerging and ever more complicated pressures. To this end its greater degree of specialisation may present more opportunities to accommodate the unique needs of certain situations, through for example dispute settlement mechanisms, and this may in turn enhance a state's likelihood of compliance. Overlaps also gives rise to the potential for improving synergy between obligations, making them more mutually supportive and enhancing their implementation (Scott, 2011). Though, according to others, fragmentation is not inherently negative and there are both positives and negative consequences that can be drawn from the phenomenon.

Fragmentation in Environmental Law

International environmental law is one of the fastest developing sub disciplines of international law, it serves to address all of the emerging global environmental challenges that are now being revealed according to modern science. Despite being less than 50 years old in 2017 (its basic framework

being established in 1972 with the adoption of the United Nations Stockholm Conference on the Human Environment) it has now proliferated into over 200 multilateral treaties associated with a host of emerging environmental issues. In fact to date the greatest number of environmental agreements/protocols/amendments have emerged between the years of 1990 and 1999, making them less than 27 years old (Kolari, 2002; Mitchell, 2016). Given its relative infancy and the remarkable speed of its development, the IEL sub-discipline is particularly prone to examples of fragmentation. IEL may be distinguishable, or even unique in its interaction with fragmentation compared to other sub-sects of international law for certain reasons. For example as a 'sub-species' and as a result of inter-disciplinary fragmentation IEL displays more examples of intra-disciplinary (or inter-sectoral) fragmentation. Intra-disciplinary fragmentation entails that each of the broader sub-disciplines of international law consist of various sectors. This manifestation of fragmentation is disciplinary-specific and essentially relates to fragmentation between the various sectors which form part of the IEL sub-discipline. IEL is further outstanding in that its nature has led to the proliferation of a number of soft law instruments and protocols, the more primary normative mechanisms of which include (among others): conventions, protocols, subsequent treaty institutions, competent authorities, rules, procedures and governance instruments. This means that it may better exhibit examples of fragmentation that fit into the 'wider' definitions discussed earlier, when compared to other forms of international law. However in the terms of these primary normative rules the more cumbersome, duplicative, conflict-ridden, and confusing the international environmental governance effort is. Collectively however these weaknesses

may also be referred to as 'governance inefficiencies', which, in the environmental context, may not be conducive to sustainability. A key concern in this regard may be associated with IEL's credibility, which fragmentation is likely to threaten. This is particularly concerning in the case of environmental law, because as Bailey (1999) states: [at the governmental level] environmental agreements are often already plagued with a number of credibility issues, including those related to its authority, such as those associated with a lack of enforceability. Thus any additional flaws in the credibility of environmental instruments created by fragmentation will only act to exacerbate this problem.

Managing fragmentation

Generally, both the doubling of efforts and conflicts between environmental agreements require a systematic approach to harmonization and coordination in order to provide for greater coherence and, accordingly, enhanced efficiency of international law. Ultimately, regardless of the position taken, fragmentation needs to be examined and managed, such that any negative effects can be minimised, and any positive maximised. But if fragmentation is in this regard a " natural" development (indeed, international law was always relatively " fragmented" due to the diversity of national legal systems that participated in it) then it is not obvious why the Commission should deal with it. There are good reasons for concerns. As the international legal system has developed so far, it has had little experience with fragmentation, and its rules have not evolved to deal with fragmentation in a satisfying way.[A3]

http://www. glogov. org/images/doc/WP30. pdf

It can be said that fragmentation " reflects the high political salience of environmental issues and their particular problem structure", and should be regarded as " a strength rather than a weakness of environmental co-operation"(Oberthür and Gehring 2004: 369). However, the multiplicity of institutional arrangements, and consequently the overlapping of regimes, could also pose a threat to the coherence of international environmental governance. In dealing with interactions, it is therefore important to aim at strengthening the overall coherence of international cooperation, by exploiting the synergies between different agreements, and minimising potential or actual conflicts.