The TPP: “Much of a Muchness” or RTA Version 7.0

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I. Caveat

There has been much fanfare over the completion and signing of the latest “mega FTA”\(^1\), the Transpacific Partnership (“TPP”). The TPP has been hailed as “a once-in-a-lifetime agreement, and a once-in-a-lifetime moment of decision.”\(^2\) Once released from the tightly secret negotiations, trade scholars and practitioners can now turn their minds to analysing the Agreement – looking for unique aspects, assessing its likely effectiveness, considering its impact on other parts of the international economic legal order (“IELO”), and so on.\(^3\) Indeed, the Asia WTO Research Network and the Global Economic Law Network at the University of Melbourne are hosting global conference devoted to such considerations.\(^4\) Perhaps after the conferences those in attendance will feel they understand the TPP better having been exposed to in depth analysis of the many different parts of the TPP. But, for those trying to get a grasp of the overall character of the TPP in these early days, even before attending such conference, we are faced with a substantial challenge: we have little with which to work except the bare text and our knowledge of the field and its contexts. Indeed, this paper, to be presented at both the AWRN and the Melbourne conferences is an attempt to weigh the TPP for originality/novelty and hence to consider its relation to the idea of a fragmented TPP faces this problem in the extreme.

In addition to the explosion of scholarship and analysis in this immediate post-signing period, we can expect that scholars will likely pick over the details for years to come – exploring the most minor aspects in detail. In contrast, this paper will look at the TPP as a whole. Doing so right at the start of the TPP is a risky enterprise – for we have not seen the implementing legislations, the TPP in practice or had a chance to learn from the inevitable jurisprudence developed by the dispute resolution process – and at this stage of this paper’s development, not had a chance to hear from fellow researchers what they have discovered or discerned about the TPP. Thus, all who attempt such a preliminary analysis are undertaking a task rife with risk. But, the analysis must start somewhere, there must be material for those that conduct the later research to build on – even if their efforts demolish the edifices created here and in the other works presented at this early stage in the life of the TPP. Thus, this paper, as complete as it is, must necessarily be altered based upon the presentations of new analyses and insights at the two conferences and may in later years need further modification! So – the reader is asked to give this early version of the paper some latitude, recognizing that it

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\(^1\) I will use the term “mega FTA” for these sorts of large RTAs. Otherwise the term RTA will be used to the refer to the non-customs union agreements covered by Article XXIV of the GATT.
will undergo some changes in the immediate period falling the AWRN and Melbourne conferences. Nonetheless, the author does feel strongly that the essential thesis, supported by the provisions within the TPP, is correct – that the TPP is “Much of a Muchness”\(^5\) or simply the latest reboot of the typical regional trade agreement (“RTA”) (indeed, RTA version 7.0), i.e. not all that new or original and hence does not undermine the coherence of international economic law (“IEL”), even as it may contribute to a “physical” fragmentation of IEL. The above is another way of saying – the remarks below are necessarily impressionistic and preliminary – but hopefully still of value.

II. Introduction

The TPP is not the first RTA to be attacked as undermining the coherence of IEL – of contributing to its fragmentation.\(^6\) Indeed, this author has done so himself in earlier works.\(^7\) But that article written over ten years ago while arguably correct in its prediction as to resource diversion may have been too pessimistic as to the eventual impact on IEL’s coherence as a result of the proliferation of RTAs. While those ten years have indeed seen the WTO fail to conclude the Doha Round, the substantive incoherence or fragmentation that the large number of RTAs was to have wrought on the system does not seem to have happened. In part, as discussed below, this may be due to the “sameness” of the many RTAs, their practice and their jurisprudence. But is this new mega FTA different? Will it be the one to push IEL over the edge into uncontrollable incoherence and complete fragmentation?

This paper will argue essentially that the TPP is not all that new and that despite the many bells and whistles and slightly unusual parts, it is just another RTA, albeit a bit bigger and perhaps in some small ways a little newer. Furthermore, following this line of reasoning can lead to other interesting conclusions. For example, not just whether the TPP contributes to the fragmentation of IEL, but whether IEL is actually truly fragmented and when viewed from even further above, whether public international law (PIL”) as a whole is also fragmented.

III. Fragmentation

The above may suggest that the analysis will start from the small (RTA and TPP contribution to fragmentation) and then work up through the issue of coherence and fragmentation first at the IEL field level and then to the entire PIL. But, when considering fragmentation there is in fact great value in first considering fragmentation of PIL, and then IEL. For the concept first needs to be explored and explained before reviewing the TPP for its role in those

\(^5\) This old phrase means “Similar - difficult to distinguish.” (see http://www.phrases.org.uk/meanings/251550.html). The origin
\(^6\) cite
fragmentations or incoherence’s and then extrapolating the insights there back up through IEL and then to PIL.

Those with a good understanding of fragmentation may skip the next two subsections.

A. Fragmentation of Public International Law

Modern (western) international law was born in the 16-17th century, but its only from the 19th century that we start to see modern international regimes (e.g. the Universal Postal Union in 1874). The First World War spawned even more (e.g. League of Nations and PCIJ), but it is in the post Second World War that we have seen the dramatic expansion of PIL, especially in the growth of international governmental organizations (“IGO”s) (UN, etc.). This has continued unabated in recent times, and after the Cold War there are new regimes coming into existence all the time (e.g. the new Arms Trade Treaty, as of 24 December 2014). Today there are over a 100,000 treaties and 100s of IGOs. This proliferation of regimes has been characterised as resulting in a fragmented international law - “the emergence of specialized and . . . autonomous rules . . . , legal institutions and spheres of legal practice.”

This proliferation of regimes has many causes. It is a consequence of the successful expansion of international law into new fields and its attempt to deal with new challenges – resulting in the birth of numerous fields, regimes, and institutions. But, it may also be a by-product of the immaturity of international law – a legal system that lacks clear hierarchies - of norms and structures. The International Court of Justice is hardly the equivalent of most nation’s supreme or highest court. Nor is the United Nations General Assembly really like a nation’s parliament. Similarly, the Security Council is a long way from being like a state’s executive. Another way to think about or explain this proliferation is that it reflects global legal pluralism. Finally, might there be value in considering whether the proliferation is both natural and inevitable, like the Second Law of Thermodynamics? With ever increasing entropy?

If the only issue was proliferation it is not likely that it would an issue. Rather, it is more than just proliferation, but rather the international legal order is thought to have been made incoherent as a result of it – and has thus become fragmented. Indeed, the issue has been viewed as so problematic that the UN’s International Law Commission (“ILC”) has considered the issue. In its report it notes that fragmentation, “the emergence of specialized and . . . autonomous rules . . . , legal institutions and spheres of legal practice[]” has created

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8 cite
9 cite
10 See generally, Tomer
12 Provide citations
14 explain
an international law that “once appeared to be governed by ‘general international law’ has become the field of operation for . . . specialist [regimes] - each possessing their own principles and institutions.” And that “such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law.”15

Those negative views are not shared by everyone today. As an initial matter some have characterised the issue as being the failure to resolve the proliferation as we do conflicts of laws. Thus, we have simply to figure out the appropriate principles and perhaps establish some hierarchies and the issue will go away.16 Another positive or perhaps non-negative (neutral?) view is that it is appropriate that each regime should have different rules and organizations – they reflect the different needs of what are dramatically different fields. Indeed, one sees the same thing in domestic law – we do not expect labour and family law to share concepts, approaches or even courts. Finally, the existence of this anarchic international legal order reflects and protects state sovereignty. The structures are those agreed to by states. To make them more coherent and structured would be to impose that on states, likely without their consent.

But, it is probably not wrong to believe that the conventional wisdom among practitioners and scholars that work in international, transnational and comparative law is that, while “normalised” and perhaps “legally managed”,17 the proliferation is not necessarily a positive feature of the modern international legal order and or that it causes more problems than the benefits that may arise.18

**B. IEL and Fragmentation**

IEL is essentially a product of the post Second World War period, and especially of the post-Cold War period. IEL has been well defined “as the international law regulating trans-border transactions in goods, services, currency, investment, and intellectual property [excluding] from the [definition] issues of private international law, as well as of economic warfare.”19 Many consider IEL to be the most dynamic and pervasive field of law, with the best record of implementation and compliance of all PIL fields.20 But, like PIL in general, there has been a proliferation of IEL, and especially in the last twenty years.

Today there are over 400 regional trade agreements (“RTA”s) in force and more than 2500 bilateral investment treaties (“BIT”s).21 There are numerous IEL organizations and

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15 Para 8, ILC Report
17 Broude at 280.
18 cite
20 cite
21 cite
Furthermore, another type of proliferation that must be taken into account in a field such as IEL with its excellent record of participation, compliance and implementation is that every country has its own implementation/interpretation of IEL obligations. Every country has its own domestic laws and regulations that relate to or impact on IEL’s operation and development. Finally, there are many different approaches, theoretical understandings and expectations of IEL which themselves then contribute to the proliferation of IEL.

One could thus argue that IEL is fragmented – indeed exceptionally fragmented, with its fragmentation even more of an issue given the global reach of IEL. Well, if it is, then the causes are likely similar to that of PIL in general, albeit with some additional factors. Thus, IEL’s fragmentation is a consequence of the successful adoption of IEL principles and obligations all across the world – with each adoption by states, institutions and regimes, alongside numerous implementations all being imperfect and hence introducing small, and sometimes large, changes that in aggregate result in numerous versions and approaches of what may have originally appeared to be a cohesive and consistent and logical IEL rule or regime.

Like the causes of fragmentation of PIL, IEL too has expanded as a result of expansion of IEL into new fields, dealing with new challenges. This has been encouraged in particular for IEL as in times of peace economic interactions and consequent IEL-type agreements increase. Also, like the case with PIL the proliferation of IEL is a reflection of its relative immaturity and especially the continuing failure since 1995 of multilateral approaches with their consequently clearer hierarchies and control. Finally, like PIL, this fragmentation may also be both natural and inevitable – following some legal equivalent of the Second Law of Thermodynamics!23

This proliferation is, perhaps more so than is the case today in PIL, viewed negatively. In particular there are concerns that it is undermining the development and coherence of IEL as a field.24 Also that there is a circularity in that the proliferation which undermines multilateralism then encourages further bilateral or regional forms of IEL further fragmenting IEL which then continues to undermine multilateral approaches. And for a field so tied to notions of economic efficiency, there is concern that the current fragmentation is highly inefficient and undermines economic progress across a whole range of areas.25 Finally, because IEL is almost uniquely a “live” and strong field, the proliferation and potential incoherence of the IEL will increasingly lead to different understandings or even misunderstandings which will themselves lead to conflict – and once again with a circularity will feed back into the increasing fragmentation of the field as multilateralism is undermined by those conflicts and misunderstandings.

22 Cite and examples
23 cite
24 cite
25 cite
With this as a background this paper will turn to consider whether the issue of proliferation leading to fragmentation can be enlightened by viewing the recently completed and widely hailed Trans Pacific Partnership.

IV. The TPP

A. The Character of the TPP

The TPP is perhaps the most important large regional trade agreement in decades.\(^{26}\) I will describe it even though others do so, for how it is described, which parts are highlighted, can be a window into the analysis proffered in a paper.

As an initial matter, its membership is quite idiosyncratic, including a mix of western and non-western states, developing and developed states, market and non-market states, and large and small states.\(^ {27}\) Such a mix should already be a red flag, suggesting it unlikely that truly novel issues will have been resolved and incorporated into the agreement. While described as a regional trade agreement, that term when used to describe the TPP as encompassing a region is a little bit of a stretch, for it covers almost one complete hemisphere of the Earth. And most specifically if thinking of it as an Asia-Pacific region – it does not include Russia or China.

There is a great deal in the TPP – it is a very long agreement with many annexes and side agreements. It is the end product of years of intense negotiation. But, while the TPP was signed last year in New Zealand, it is not yet in force. Indeed, the TPP may not even come into force, though no doubt by the time this piece is published we will know for sure.\(^ {28}\) But, it matters not if it is enacted for the purpose of this paper’s thesis for even if the TPP is not enacted it would still reflect the prevailing and acceptable compromises of so many significant trade participants and as such is a worthy example when considering the idea of fragmentation of IEL.

So – what does the TPP appear to do, what is its character? For sure it deepens liberalization and adds sectors, includes dispute settlement - including investor-state dispute procedures. It has been noted that “Eventually, on average, approximately 99% of . . . .TPP partner country tariff lines will be duty-free”.\(^ {29}\) There will be significant market access in agricultural, automotive and textile sectors.\(^ {30}\) Advances in trade facilitation/customs, including “commitments on efficient release of goods, handling of express shipments, electronic processing of customs documentation, and inspections based on risk-management techniques,

\(^ {26}\) Check!

\(^ {27}\) The members of the TPP are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

\(^ {28}\) Requires ratification by all 12 TPP countries within 2 years of signing for the agreement to enter into force, or, after 2 years, requires ratification of 6 countries accounting for 85% of TPP GDP, a condition that would require both U.S. and Japanese participation.

\(^ {29}\) Cite – check Peter’s docs

\(^ {30}\) cite
as well as enhanced transparency.”

Also, it includes commitments that would prohibit countries from blocking cross-border flows of data over the Internet. Government Procurement provisions are included, bringing more countries into alignment with government procurement limitations (such as Australia – not previously a participant in the GPA of the WTO). Of course, it would not be a trade agreement with the US if there were not intellectual protection provisions. And again – the US style trade agreements that include Labour and Environment commitments are included. The TPP also includes sections and provisions on currency manipulation, regulatory coherence, anti-bribery, TBT and SPS provisions, rules of origin harmonization, services and SOEs. It is truly a broad agreement, though just how new and/or deep is discussed below.

B. The TPP’s assault on the coherence of IEL

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

But, is the simple existence of hundreds, thousands, perhaps even tens or hundreds of thousands of new rules and regulations such a problem in today’s complex mega data driven world? Perhaps not. It is true that the new provisions add complexity for those engaged in trade and investment, but is it complexity beyond what a computer program can handle? So why worry about it? Well, perhaps this proliferation is only a problem when it undermines the coherence of a legal order, system or field – and that is the problematic fragmentation about which there is so much concern. Coherence is thus the issue. Coherence being defined to be: “logical interconnection; overall sense or understandability; congruity; consistency”. So, the question then is whether the TPP has undermined the coherence of IEL.

The coherence of IEL would be undermined if yet more approaches, especially ones inconsistent or at odds with existing approaches, were added to the field. As the above description of the components of the TPP show there is no question that the TPP is both different and new. Though as will be discussed below there are some serious concerns as to whether it is contains sufficient number of new or different approaches as to substantially undermine the coherence of IEL. I.e. whether it is new or different enough.

31 Cite – Peter’s docs
32 Cite to existing systems that manage complex Rules of Origins etc
33 cite
Answering this question for the TPP may also suggest an answer to the same question, but generalised as to the other parts of IEL – the hundreds of RTAs, thousands of BITs, the IEL institutions and so on – are they also sufficiently different enough to each other to undermine the coherence of IEL? But first – the TPP. Though, in a short paper such as this, there is a limit to the critique of an agreement the size of the TPP that can be provided at a detailed level. But, many small examples can begin to build a picture that permits us to feel what is the character of this TPP – and critically for this paper, whether the TPP is sufficiently new or strong to undermine the coherence of the IEL order. Therefore, below a few short examples of the issues that raise concerns about the novelty of the TPP will be provided.

When examined it appears that there are many aspects of the TPP that suggests that it may not be sufficiently new or deep enough to undermine the coherence of IEL. As an initial matter, some of the parts that may appear to be novel in the TPP look like what we call “soft law”.\(^{34}\) Repeatedly the Agreement speaks in hortatory style, for example “The Parties share the objective of the multilateral elimination of export subsidies for agricultural goods and shall work together to achieve an agreement in the WTO to eliminate those subsidies and prevent their reintroduction in any form.”\(^{35}\) Or don’t really impose any obligations, for example the provisions concerning modern biotechnology.\(^{36}\) Perhaps the worst is Chapter 25 on Regulatory Coherence. The provisions there are about as weak a part of an RTA as this author has ever seen.\(^{37}\) Not only does it employ “fluffy” words (such as “should aim”\(^{38}\), “shall endeavour”\(^{39}\), “should generally have”\(^{40}\) etc.), includes numerous instances of subjective standards,\(^{41}\) is subservient to all other parts of the TPP,\(^{42}\) and finally - it is not even subject to the DSU!\(^{43}\)

Another characteristic present that undermines the novelty of the TPP is that many of the “new” rules simply try to ensure all members are at what many of us would consider to be the “rule of law” standards expected of modern countries. For example, the transparency requirements or the procedural fairness requirements in the sections on competition law.\(^{44}\) Or attempt to reach common standards (e.g. in digital privacy\(^{45}\)) without mandating what that standard is to be. Similarly, in Chapter 26 Transparency and Anti-Corruption we see that the

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34 Cite and describe
35 TPP Chapter 2.23
36 TPP Chapter 2.29
37 For example, early on it affirms that, among other things, “each Party’s sovereign right to identify its regulatory priorities and establish and implement regulatory measures to address these priorities, at the levels that the Party considers appropriate” 25.2.2.b
38 TPP Chapter 25.3
39 TPP Chapter 25 Article 4.1
40 TPP Chapter 24 Article 4.2
41 See, e.g., Chapter 25 Article 5.6 (“Each Party should review, at intervals it deems appropriate, its covered regulatory measures to determine whether specific regulatory measures it has implemented should be modified, streamlined, expanded or repealed so as to make the Party’s regulatory regime more effective in achieving the Party’s policy objectives.”) and Chapter 25 Article 5.7 (“Each Party should, in a manner it deems appropriate, and consistent with its laws and regulations, provide annual public notice of any covered regulatory measure that it reasonably expects its regulatory agencies to issue within the following 12-month period”)
42 TPP Chapter 25 Article 10
43 TPP Chapter 25 Article 11
44 See, e.g., TPP Chapter 16 Articles 2 and 7
45 TPP Chapter 14 Article 8.1
provisions do not really add to the understandings and approaches that currently exist with respect to corruption of officials. Its main impact is in its application to those countries not yet participants. Though the urging that the TPP parties should work to ensure their own officials are not taking bribes is helpful, though not necessarily new. It is also undermined by the somewhat soft language employed (e.g., “shall endeavour”). Another problem are the parts not subject to the DSU, such as Chapter 25 discussed above. For example, Chapter 16 is not subject to the DSU.

There is no question that the Agreement reflects current “hot” issues – e.g. the discussion of cryptography at 2.11(4) of Chapter 2. Or 2.29 on “modern biotechnology”. But again, when one delves down into the details – at a technical or conceptual level we find that not all the novelty survives. Similarly, the treatment of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources in Chapter 29, article 8 is an example of an issue novel for RTAs being raised, only to remove it from coverage due to its contentiousness. The treatment appears to be strong, but all it does is remove the issue from the international plane down to the domestic, by providing that: “Subject to each Party's international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.”

Perhaps the biggest single issue where novelty was expected and may not have materialised is the treatment of SOEs in the TPP. This was the much heralded section on SOEs, the part that supposedly would make China’s participation impossible, is both technically weak and conceptually problematic. At the technical level, the regime is weakened by such rules as the definition of SOE. It requires 50% owned or controlled or appointment of a majority of the board by the government. These thresholds fail to take into account the many other lower apparent levels of ownership or board appointment that can actually result in governmental control. Similarly, there are threshold revenues that an SOE must reach before the provisions apply – a very problematic provision given accounting techniques and transfers between related entities that may not appear as revenue.

There are other worrisome parts of the chapter on SOEs. For example, section 17.4(1)(a) refers to an exception for SOE benefits “except to fulfil any terms of its public service mandate”, though it must still not receive benefits not otherwise available (per 17.4(1)(c)(ii)). There will be proof issues when it comes to dispute settlement – to show that any harm was because of prohibited support or activities, as there is an “adverse effects” requirement (see, e.g. 17.6(1)) or “cause injury” (e.g. 17.6(3)), and then what does 17.6(4) mean (“A service supplied by a state-owned enterprise of a Party within that Party’s territory shall be

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46 Cite and provide example
47 see TPP Chapter 26. Article 8
48 TPP Chapter 16 Article 9
49 TPP Chapter 29, article 8. As an aside, wasn’t the TPP meant to have been a stitch up by big business? And yet this provision may not work to the interests of big business – unless the control the countries within which indigenous knowledge is found. In which case, this is indeed a victory for business, though it does still leave the field somewhat unresolved and perhaps anarchic.
50 cite
51 TPP Chapter 17 Article 1.
deemed to not cause adverse effects.” - though note the footnote that helps only a little)? Similarly, sections 17.7 and 17.8 which attempt to show when there is adverse effect or injury are quite complex and at times too vague. This may be a litigator’s dream! Similarly, it seems that much of the commitment was not are already handled under prior national treatment or most favoured nation provisions that the member states would have committed to in other agreements. And yet, there are parts of the chapter that seem to relax these traditional demands with respect to SOEs. Thus, for example, the TPP seems to permit SOEs the right to sell at different prices or conditions and lets them refuse to sell – which on first glance suggests permissible violations of MFN and national treatment. This could be a significant loophole in the SOE provisions. As noted above, the annexes and side agreements create further carve outs, and so one needs to check the Annexes to see which enterprises are not included. Indeed, the SOEs owned by sub-federal entities (“Sub-Central State-Owned Enterprises and Designated Monopolies”) are largely carved out from the Chapter’s obligations! Will this apply to entities whose ownership is transferred from the central government to a sub-federal government? Indeed, the SOE’s were originally thought to be of great relevance to Malaysia and Singapore, and yet they both taken reservations to the SOE chapter which may undermine the hoped for benefits with respect to their SOEs. Another issue, noted here briefly, is that the transparency provisions in the SOE Chapter will be quite burdensome, and it is unclear if they must be publically available or simply provided to the other parties (it does not say that must be public). Both are available options. The above are just some of the criticisms of the “new” SOEs provision, though no doubt there will be plenty of scholarship that just focuses on them and will eventually reveal even greater problems. Though perhaps some of the scholarship will find them to otherwise.

Finally, even if we consider the SOE provisions to be a major leap forward in the curtailment of those sorts of non-competitive enterprises, one could argue that it is still not a move forward at a conceptual level. After all, one might argue that SOE’s are by their very nature exceptions to the liberal economic approach that permeates the modern IEL order. While not the same, the very early concerns about State Trading Enterprises in the GATT shows that the same sorts of concerns were present right from the start of the modern IEL era following Bretton Woods.

Another example to show the character of the TPP can be found in Chapter 20 on the Environment, which it seems, on a first review, to include lots of “fluffy” commitments and lots of general statements. For example, the understanding that “The Parties recognise the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws

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52 Cite and identify provision.
53 Chapter 17 Article 5(3)
54 Chapter 17, Article 9 authorizes the Annex exemptions. See, e.g., Annex IV, Schedule of Australia (re Australian centrally owned enterprises and preferential purchases from indigenous Australians); [add more examples]
55 See the list of non-applications to Annex 17D.
56 See Chapter 17, Annex 17-E and 17-F.
57 Chapter 17, Article 10
58 GATT Article XVII, present in the GATT 1947.
and policies accordingly.” Though, unlike many other environmental parts of RTAs, this TPP does provide the possibility of going to dispute settlement, though only after a lengthy consultation process, and only if petitioner has “clean hands” – i.e. has its own environmental regulations same or similar type in order.

Another example concerns Chapter 28 on Dispute Settlement which also seems for the most part not to be too novel. Its elements are largely also found in other RTAs and are now considered the norm. But, it does add some new approaches, though they seem for the most part to have been created to simply correct what were perceived weaknesses of the WTO’s DSU and the weaknesses of some of the more vigorous FTAs, especially the NAFTA’s DS. For example, such criteria include improved rules governing the creation, management and role of rosters, rules on public documents and hearings (the presumption being open to the public), reference to limited and temporary monetary, and so on. Essentially these provisions are responses to some of the more notable failings in prior RTA or the WTO’s DS systems (e.g. failure to appoint panellists in RTAs (especially the NAFTA), or insufficiently experienced panellists at WTO) or have been seen before.

The final example provided here concerns the supposedly novel Chapter 14 on E-Commerce. Yet, it may also not be that novel. According to Simon Lacey the TPP’s “ban on imposing customs duties on electronic transmissions including content transmitted electronically between a person of one Party and a person of another Party [...] will entrench established practice by TPP signatories . . .” Furthermore, in the area of non-discrimination of digital products, there are carve outs for government procurement, broadcasting (screen limits) and IP violations. Similarly, the provisions on free flow of business e-information permits blockage for public policy reasons so long as not disguised barrier. Similarly, with respect to the provisions on localization of computing resources, while it is a novel application to a modern issue, that state parties cannot force localization of servers, the underlying concept is akin to a prohibition of domestic content requirements - themselves nothing conceptually new. Finally, with respect to the national ecommerce legislation, members are to use current forms/standards: the UNCITRAL Model Law on Electronic Commerce (1996); or the UN

59 Chapter 20, Article 3.2.
60 Chapter 20, Article 23.
61 Chapter 20, Article 23.3 (“Before a Party initiates dispute settlement under this Agreement for a matter arising under Article 20.3.4 or Article 20.3.6 (General Commitments), that Party shall consider whether it maintains environmental laws that are substantially equivalent in scope to the environmental laws that would be the subject of the dispute.”)
62 Compare Chapter 28 with [add]
63 TPP Chapter 28, Article 10.3.
64 TPP Chapter 28, Article12.1.
65 TPP Chapter 28, Article 19.3.
66 Cite (re Chapter 20 cases, e.g., Dairy)
67 cite
68 The monetary compensation was applied in an antidumping case involving Australian leather [check and cite]
69 cite
70 TPP Chapter 14, Article 2.3.
71 TPP Chapter 14, Article 4.4.
72 TPP Chapter 14, Article 4.2.
73 TPP Chapter 14, Article11.3.
74 TPP Chapter 14, Article 13.
Furthermore, this chapter also provides sufficient exceptions that where it is truly new, it is perhaps not as strong as it could be. For example, the provision protecting against source code disclosure “as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory” are undermined by this provision’s non-application to the vaguely worded “critical infrastructure” and otherwise are only applicable to mass market products. Thus, even when stretching the coverage of RTAs into these modern challenges the TPP may not, in the end, be all that novel or where it is truly novel – not all that strong.

I am prepared to accept that my analysis may be coloured by my preconceptions and that a paper stating the opposite could be constructed. Indeed, I do see many novel approaches and coverage, perhaps just not enough to warrant an argument that the TPP challenges the coherence of IEL.

V. Conclusion

A. The TPP as novel?

In light of the consideration of the text provided above it appears that while there are some new aspects, and some deeper levels of liberalisation, the TPP may not be so different, at a conceptual level, than previous RTAs. This is not a surprise, for it was hard enough to reach agreement on the eventual text. Adding radically or even substantially new approaches would have made it impossible for all to sign, let alone to ratify. And even with what has been agreed, ratification by some of the critical parties is not assured.

Furthermore, with respect to the TPP (and indeed all other RTAs) there are further reasons to expect the agreement will not be radically different to the prevailing conceptual order within IEL. As an initial matter, The TPP Preamble unambiguously notes the Agreement will “BUILD on their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization.” This is further reinforced, as is the case with all other RTAs, in Chapter One where it is explicitly conceded that the TPP is created “consistent with Article XXIV of GATT 1994 and Article V of GATS”. Furthermore, the

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75 TPP Chapter 14, Article 5.1.
76 Chapter 14, Articles 17.1 and 17.2.
77 Looking in detail throughout the Agreement, one can, of course, identify many interesting and perhaps novel approaches to longstanding issues in IEL. For example, Chapter 19 on Labour, while conceptually not all that novel, for it seems to rely mostly on the ILC core principles (that most countries will already have signed onto), does includes strong language that lack of resources is no excuse to the requirement that the labour laws are enforced (“If a Party fails to comply with an obligation under this Chapter, a decision made by that Party on the provision of enforcement resources shall not excuse that failure.”). TPP Chapter 19, Article 5.2. Though this is itself weakened through provisions relating to prosecutorial discretion, though that discretion must only be exercised in good faith or for bona fide reasons. Id.
78 The TPP took seven years to negotiate.
79 TPP Preamble.
80 TPP Chapter 1, Article 1.1.
TPP explicitly acknowledges it will not interfere with participating states’ existing WTO or other obligations.\(^{81}\) The Agreement also interferes to the minimal extent with the internal workings of the parties – as noted in the Preamble, participating states “RECOGNISE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.”\(^{82}\) Given these constraints, which reflect the political, legal and other limitations facing the negotiators, it is no surprise that the TPP did not depart substantially from pre-existing approaches and concepts.

Another way to understand why the TPP might not be so different is that one could view its provisions as attempts to correct past mistakes that arose from RTAs, or as attempts to codify the practice and jurisprudence that has come out of the collective IELO’s past twenty years’ experience. For example, Chapter 29 – Exceptions and General provisions has an Article that clearly is a response to both to the controversial use of the Hong Kong-Australia BIT by Phillip Morris seeking to overturn Australia’s plain packaging of tobacco laws.\(^{83}\) But then, perhaps we should not be too surprised by the lack of novelty in the TPP. After all, it is just another RTA, albeit a big one, and more modern. When we look at other RTAs we should then have anticipated this conclusion. This is because when examined closely, we find substantial congruence and similarity across the many RTAs. They all seem to include: Article I, II and III type trade obligations; National Treatment and MFN; Safeguards; Phase in and exceptions for developing countries when they are included; little agricultural liberalization; SPS/TBT type provisions and in many they now include strong dispute settlement procedures. Furthermore, at deeper conceptual levels, the fields, agreements and organizations of IEL include (at sufficient levels): State sovereignty (even in the ISDS context); Positivism – treaty based agreements, little customary PIL; Significant, if not dominant, liberal market economic theoretical bases; and all are anchored within PIL.

A final reason that one should have expected the TPP not to be too different from other RTAs is that it was likely negotiated and drafted by substantially the same group of IEL experts that are involved in most of the other major IEL agreements. It is, after all, a small world of people involved in IEL. The same government and industry participants are involved across most of the IEL developments. They share, borrow and modify concepts from other parts of IEL, they even refer to the jurisprudence that flows from the DS cases of the many BITs, RTAs and WTO panel and AB decisions.\(^{84}\) They are all generally heavily influenced by each other and by the same sources of influence, and as such share broadly similar outlooks or have developed approaches to bridge the gaps and divisions – and use those same approaches across the development of most new IEL devices.

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81 TPP Chapter 1, Articles 1.1. and 1.2.
82 TPP Preamble.
83 TPP Chapter 29, Article 5.
84 Provide an example
Given the above – that the TPP is broadly similar and related to current and previous IEL devices, perhaps one can argue that the TPP is a successor IEL agreement to the WTO, the other mega FTAs and the other influential RTAs. We could thus say that the GATT 1947 was IEL Agreement 1.0, US-Israel FTA is Agreement 2.0, CUSFTA is 3.0, NAFTA is 4.0, WTO is 5.0 (and a major revision). And then the RTAs that started to include ISDS were 6.0 (like Australia-US FTA), and this is now 7.0. A few new bells and whistles, perhaps a cleaner looking interface – but perhaps not worth the bandwidth it took to download it. Perhaps things were fine before, and while the new look and applications are impressive, there are for the most part not necessarily needed. And so we move from the medieval description of the TPP as “much of a muchness” to the modern description of the TPP as IEL version 7.0.

B. Insights on Fragmentation of IEL and PIL

What then does this lack of novelty say about the TPP’s contribution to the fragmentation of IEL? Indeed, what does the sameness of the RTAs (and perhaps BITS as well85) say about IEL’s fragmentation as a whole? And then what relevance might those insights on fragmentation of IEL have to fragmentation of PIL?

As an initial matter, there seems to be a lot of coherence across all the regimes within the IELO. Even this paper’s quick and dirty review of the TPP suggests the TPP may not contribute all that much that is new (and strong) to the IELO. But there is no question that there are a significantly large number of IEL agreements and provisions. And there is no clear hierarchy or centralising control over them all. It appears quite anarchic – perhaps even fragmented. But then – when the concept of coherence in throw into the analysis a different picture or perhaps a more fine grained picture emerges of an IELO with significant coherence, broadly sharing the same concepts and approaches, and even jurisprudence and personnel. The IELO ends up looking like a highly fragmented legal order containing consistent and mutually understandable and related sets of autonomous regimes. Might we better describe then the IEL order as one with “coherent fragmentation”.

The question is then whether this insight has any applicability to PIL, with its numerous fields, regimes and institutions, all which might themselves have countless subparts (as is the case with IEL). Applying this idea of “coherent fragmentation” to PIL supports those already searching for commonality of concepts as related to finding better understandings of the issue of fragmentation and PIL. I suspect that most PIL scholars could readily agree on the many different fundamental concepts that exist across all areas of PIL. Indeed, the ability of international tribunals to hear disputes from across the vast field of PIL suggests that there is indeed fundamental coherence. True, PIL (and IEL) looks messy, but that may only be an aesthetic issue. At the necessarily deeper levels, the fragmentation does not exist, rather it is only skin deep. Such a conclusion should provide solace to those concerned with fragmentation.

85 though I concede I have not really touched on the many different BITs, though I believe they too are all substantially similar, with the little novelty that shows up not really a challenge to the usual approaches)