International Economic Law after the Global Crisis

A Tale of Fragmented Disciplines

EDITED BY
C. L. Lim and
Bryan Mercurio

CAMBRIDGE

INTERNATIONAL ECONOMIC LAW AFTER THE GLOBAL CRISIS

A Tale of Fragmented Disciplines

C. L. LIM
University of Hong Kong
BRYAN MERCURIO
Chinese University of Hong Kong

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107075696

First published 2015

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
International economic law after the global crisis : a tale of fragmented disciplines / edited by C. L. Lim, University of Hong Kong; Bryan Mercurio, Chinese University of Hong Kong
pages cm
"The collection began life partly as a collection of papers delivered during the second conference of the Asian International Economic Law Network (AIELN) . . . held at the University of Hong Kong during the summer of 2011"
ISBN 978-1-107-07569-6 (Hardback)
1. International finance–Law and legislation. 2. Foreign trade regulation. 3. Investments, Foreign–Law and legislation. 4. International economic relations. I. Lim, C. L., 1947– editor. II. Mercurio, Bryan, editor.
K4430.I58 2015
343'.03–dc23
2014030592

ISBN 978-1-107-07569-6 Hardback

INTERNATIONAL ECONOMIC LAW AFTER THE GLOBAL CRISIS

This collection explores the theme of fragmentation within international economic law as the world emerged from the 2008 global financial crisis, the subsequent recession and the European sovereign debt crisis which began in early 2010. The post-crisis 'moment' itself forms a contemporary backdrop to the book's focus on fragmentation as it traces the evolution of the international economic system from the original Bretton Woods design in the aftermath of the Second World War to the present time. The volume covers issues concerning monetary cooperation, trade and finance, trade and its linkages, international investment law, intellectual property protection and climate change. By connecting a broad, cross-disciplinary survey of international economic law with contemporary debate over international norm and authority fragmentation, the book demonstrates that ours has been essentially a fragmented and multi-focal system of international economic regulation.

C. L. LIM is an international lawyer and former trade negotiator. He is currently Professor of Law at the University of Hong Kong and chairs the East Asian International Economic Law and Policy Programme. He is also Visiting Professor at King's College London and a barrister.

BRYAN MERCURIO is Professor and Vice Chancellor's Outstanding Fellow of the Faculty of Law at the Chinese University of Hong Kong. He has also worked in government and private practice and has advised law firms, international organisations, NGOs and several governments on a wide range of international trade and investment matters.

TABLES

CONTRIBUTORS

DOUGLAS W. ARNER is a professor at the Faculty of Law of the University of Hong Kong.

EMILIOS AVGOULEAS is the inaugural holder of the International Banking Law and Finance Chair at the University of Edinburgh, the Head of the Commercial Law (subject area) Group in the Law School, and the Director of the Edinburgh LLM in International Banking Law and Finance.

LORAND BARTELS is a senior lecturer in law in the Faculty of Law and a fellow of Trinity Hall at the University of Cambridge.

TOMER BROUDE is the Sylvan M. Cohen Chair in Law and Vice Dean, Hebrew University of Jerusalem Faculty of Law and Department of International Relations.

ROSS P. BUCKLEY is the CIFR King & Wood Mallesons Chair of International Finance Law, and a Scientia professor, at UNSW Australia.

ELISABETTA CERVONE is Consulting Counsel at The World Bank, Finance and Markets Global Practice.

JULIEN CHAISSE is an associate professor at the Chinese University of Hong Kong, Faculty of Law.

ANDREW FILIS was a research fellow at Queen Mary University of London (Centre for Commercial Law Studies) (2012–14). Previously, as a policy official at the UK's Ministry of Justice (2004–11), he had been involved in a variety of civil and family justice policy related work.

AN HERTOGEN is a lecturer at the University of Auckland, Faculty of Law.

HOLGER HESTERMEYER is a référendaire at the Court of Justice of the European Union.

ANITA K. KRUG is an assistant professor at the University of Washington, School of Law.

RAFAEL LEAL-ARCAS is a reader in law at Queen Mary, University of London.

C. L. LIM is an international lawyer and former trade negotiator. He is currently Professor of Law at the University of Hong Kong and chairs the East Asian International Economic Law and Policy Programme. He is also Visiting Professor at King's College London and a barrister.

ANTOINE MARTIN is a recent Ph.D. graduate consultant specializing in international relations and policy affairs.

BRYAN MERCURIO is Professor and Vice Chancellor's Outstanding Fellow of the Faculty of Law at the Chinese University of Hong Kong.

ANDREW MITCHELL is Professor of Law at Melbourne Law School and Future Fellow of the Australian Research Council.

JAMES MUNRO is a doctoral (PhD) candidate at the University of Melbourne.

JUNJI NAKAGAWA is a professor of international economic law at the Institute of Social Science, University of Tokyo.

MARTINS PAPARINSKIS is a lecturer at University College London, Faculty of Laws.

SHIN-YI PENG is a professor of law at National Tsing Hua University currently serving as Commissioner of the National Communications Commission, the Executive Yuan, Taiwan.

JUAN IGNACIO STAMPALIJA is an assistant professor of law at the Universidad Austral School of Law in Buenos Aires, Argentina.

TANIA VOON is Professor of Law at Melbourne Law School and former legal officer in the Appellate Body Secretariat of the World Trade Organization.

ROLF H. WEBER is Professor of civil, commercial and European law at the University of Zurich, Switzerland, and a visiting professor at the University of Hong Kong.

PREFACE

In this collection, we set out to provide a reliable guide and analyses of key, contemporary issues in international economic law. The period following the global financial crisis, and thereafter the global economic crisis marked by the great recession and the European debt crisis, seemed an especially good time to revisit the broader manner in which the post-Second World War Bretton Woods system has evolved, and to ask whether current institutions and arrangements are adequate to the task of handling the kinds of issues which we have included in this survey. Our aim has therefore been to provide a snapshot of the field during the years following the global financial crisis of 2008.

Although we believe this single volume will be a useful complement in the university classroom, our aim is to appeal not only to academics, scholars and university students but also to lawyers, diplomats and policy-makers.

The book began life partly as a collection of papers delivered during the second conference of the Asian International Economic Law Network (AIELN). AIELN, which is spearheaded by Junji Nakagawa of the University of Tokyo, is a regional sub-group of the Society of International Economic Law (SIEL), and is therefore open to those who are members of SIEL. The conference – dubbed 'AIELN II' – was hosted by Doug Arner and C. L. Lim of the University of Hong Kong, and Bryan Mercurio of the Chinese University of Hong Kong and held at the University of Hong Kong during the summer of 2011 following a world-wide call for papers. Colleagues came from afar – London, Oxford, Washington, DC and Zurich, among other places, in addition to AIELN's lively membership of Asian, Australian and New Zealand scholars. The 2011 conference focused on the emerging issues that the international economic system confronts today, ranging from the adequacy of financial regulation systems to the regulation of credit rating agencies, cross-border cooperation in securities regulation, investment in agricultural land abroad and the expropriation of intellectual property rights.

This collection is not, however, a mere reproduction of the proceedings of that conference. Following a post-conference assessment, we selected a core of papers while identifying what we thought of as gaps and other new issues which were quickly emerging, but which had not been discussed during those proceedings: for example, the Chinese currency policies which continued to be an issue throughout 2011, and the European Emissions Trading Scheme, which was extended in January 2012 to airlines worldwide, having an impact on air traffic (or transport) rights within the EU. The European Debt Crisis unfolded with the focus on Greece and the capabilities of the EU in taking collective action. In light of these developments, we sent out further invitations to other international experts in an effort to provide as richly textured a snapshot of current issues scattered across the whole landscape of international economic regulation as possible.

When we turned our focus to how common issues were conceived, conceptualized and regulated we found a variety of ways by which this was done by what remains, essentially, a fragmented and multi-focal system of international economic regulation. At the same time, the world trading system continues to fragment and regionalize, in turn causing ever newer forms of regulatory systemic friction particularly at a time when regional trade agreements continue to venture far beyond regulatory concerns in Geneva. And so this volume is intended as a survey of a broad range of legal and regulatory instruments, indeed a range of legal regimes, by organizing our inquiry around some of the most salient and pressing economic, legal and regulatory issues of the day, issues which acknowledge the existence of a globalized economy against the backdrop of imperfect global economic design.

So this is not a study of the various crises as such, but does involve some questions of what they might mean for the international economic order. By and large, we have focused upon two important aspects of what theses crises do not mean – they do not or do not yet mean any great structural change in the way the global economy continues to be designed and regulated, and they do not mean that other real challenges will not continue to emerge from all sides, often unrelated to the crises but in a way which seems very much related to economic globalization.

By way of a caveat, comprehensiveness is impossible. Choices had to be and were made. In general, however, we have tended to venture into areas which are important but have to date been under-explored in the literature, particularly in light of our principal focus on the still fragmented – and fragmenting – nature of global economic regulation.

Towards the end of the volume, we felt we knew more about what this means, and we have tried to spell out some of that understanding in our conclusion.

Our greatest debt is to our contributors who were sheer joy to work with, and to Finola O'Sullivan and Kim Hughes at Cambridge University Press who have been such magnificent and rigorous supporters of the project. We thank the University of Hong Kong, not least for providing generous financial support through its Strategic Research Themes funding programme and a venue for the AIELN II Conference, AIELN's Steering Committee of committed scholars, the Chinese University of Hong Kong, and our fellow co-organizer at HKU, Professor Douglas Arner to whom we attribute much of the success of that conference. Similarly, we are indebted to Ms Flora Leung at HKU for her consummate skills as conference administrator. Mr Kalana Senaratne, currently a doctoral student at the University of Hong Kong, and Ms Jackie Cheng, a JD student at the Chinese University of Hong Kong, provided invaluable editing assistance. Finally, C. L. Lim would like to record his appreciation to the HKU–KCL Fellowship and HKU Sabbatical Leave Schemes for funding support, to HKU law school for six months' leave, and to King's College London and the World Trade Organization's Visiting Scholar-in-Residence Programme for offering such conducive working environments during the preparation of this volume.

C. L. Lim and Bryan Mercurio

University of Hong Kong and the Chinese University of Hong Kong

Hong Kong SAR

CONTENTS

1

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

C. L. LIM AND BRYAN MERCURIO

I. Introduction

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

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

[1] See e.g. 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law 2006', adopted by the ILC at Its Fifty-eighth session, A/61/10 (2006), para. 51; *Yearbook of the International Law Commission* (2006), vol. II, pt 2; T. Broude, 'Fragmentation(s) of International Law: On Normative Integration as Authority Allocation', in T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law* (Oxford: Hart, 2008), 99.

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

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

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

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

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

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

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

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

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

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