Beyond Dispute:
International Judicial Institutions as Lawmakers

Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law

By Thomas Kleinlein[*]

A. Introduction

In the framework of this project, both the WTO dispute settlement system and international investment tribunals are portrayed as core actors in judicial lawmaking.[1] By weaving international trade law and investment law on the roughly timbered looms of imperfect treaty law, they have proven to be successful creators of the fabrics of a world trade order and of investment protection standards, respectively. Such effective lawmaking, on the part of particular "regimes," has the potential to increase the fragmentation of international law.[2] Consequently, international judicial institutions are not only spotted as originators of fragmentation, but—as interpreters of international law—also as addressees of strategies in response presented in the 2006 Report of the ILC Study Group on Fragmentation.[3] It is the Study Group's comforting message that a considerable part of the difficulties arising from the diversification and expansion of international law can be overcome by recourse to a "coherent legal-professional technique."[4] The Fragmentation Report highlights that conflict resolution and interpretation cannot be distinguished: "[w]hether there is a conflict and what can be done with prima facie conflicts depends on the way the relevant rules are interpreted."[5]

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[1] Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, 12 GERMAN LAW JOURNAL (GLJ) 1111 (2011); Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GLJ 1083 (2011).

[2] Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GLJ 989, 996–997 (2011).

[3] Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International* Law, 13 April 2006, UN Doc. A/CN.4/L.682, finalized by Martti Koskenniemi.

[4] ILC, Fragmentation Report (note 3), para. 487.

[5] *Id.,* para. 412.

According to the Report, coherence can be established by interpreting legal norms with due regard to their normative environment.

Yet, partially due to its deliberate focus on the substantive problems of fragmentation,[6] the Report of the Study Group does not address some fundamental concerns, both institutional and methodological: institutionally, it is important to know which actors on the international plane are in a legitimate position to perform the interpretive task of normative integration.[7] Whilst the Report refers to interpretation in the business of diplomacy and in third-party adjudication,[8] it does not broach the issue of whether diplomatic forums or specialized judicial institutions are best suited to resolve conflicts between different functional regimes in international law. Methodologically, the Report of the Study Group does not give clear guidelines on how the resolution of normative conflicts works in legal practice,[9] in particular with regard to conflicts between different social values and policy goals pursued in different legal regimes ("trade-off problems"). "Harmonization" as such is neither a specific legal technique nor a primary tool.[10] Both the institutional and the methodological issues are of particular relevance against the background of generally rather vaguely defined treaty provisions dealing with trade-offs,[11] and in view of the ILC's generally shared analysis that the whole complex of inter-regime relations can at present be considered a "legal black hole."[12]

Given the central function of interpretation as a response to fragmentation and the relative absence of normative guidance at regime interfaces, lawmaking by adjudicatory

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[6] *Id.*, para. 13.

[7] For a critique that the ILC Study Group Report is essentially silent on questions relating directly to the fragmentation of international authority, and for an exploration of the correlation between norm fragmentation and authority fragmentation, *see* 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 (LOY. U. CHI. INT'L L. REV.) 173, 175 (2008); *see further* Erich Vranes, *Völkerrechtsdogmatik als „self-contained discipline"? Eine kritische Analyse des ILC Report on Fragmentation of International Law*, 65 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 87, 90 (2010).

[8] ILC, Fragmentation Report (note 3), paras 37, 43.

[9] *Id.*, para. 419: "None of this predetermines what it means to 'confront' a norm with another or how they might enter into 'concurrence.' These matters must be left to the interpreter to decide in view of the situation."; for a critique of this lacuna, *see* Vranes (note 7), 87.

[10] Nele Matz-Lück, *Harmonization, Systemic Integration, and 'Mutual Supportiveness' as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation*, 17 FINNISH YEARBOOK OF INTERNATIONAL LAW (FYIL) 39, 45 (2006).

[11] Michael Ioannidis, *A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, 12 GLJ 1175, 1189 (2011) – referring to Art. XX GATT.

[12] ILC, Fragmentation Report (note 3), para. 493.

bodies is of particular relevance here. Conceptually, this judicial lawmaking function is based on the fact that decisions of international courts and tribunals figure as arguments and influence the law through their impact in the legal discourse.[13] Basically, precedents—even if they are not formally binding—redistribute argumentative burdens in legal discourse.[14] In view of governance deficiencies with regard to trade-off problems and inter-regime relations, the triggering function of precedents, the discursive exercise of authority by judicial institutions, and hence, judicial lawmaking, may be particularly effective in this important area of international law.

At the same time, the relative absence of norms and established practice as to trade-off problems and inter-regime relations calls into question whether leaving the development of the law to judicial institutions does not strain their efficiency and legitimacy. Both the potential lawmaking effect and the legitimacy of judicial pronouncements depend on their rationality and methodological soundness. If their methods of interpretation are irreproducible, their pronouncements cannot easily be transferred to different contexts or be generalized, and their relevance for the creation of legal normativity in discursive practices would be limited accordingly. Against this background, a discussion has been launched on judicial balancing and the principle of proportionality as a potential approach to "defragmentation."[15]

The present contribution analyzes the potential and the limits of balancing and proportionality analysis as a response to fragmentation. For this purpose, the contribution will first explore the fragmentation of international law and the role of lawmaking judicial institutions (B.). Subsequently, it will expound proportionality analysis as a doctrinal framework, retrace its workings at the interfaces of international trade and investment law as important examples for efficient sub-systems of international law, and explore how balancing can work as a general technique of systemic interpretation (C.). Furthermore, the contribution will analyze balancing as a tool that may contribute to the legitimacy of judicial lawmaking and discuss whether balancing procedures may be a recommendable strategy for courts to rationalize—and thereby legitimatize—their lawmaking activities in the fragmented international legal system (D.). This discussion will come to the conclusion that the legitimizing potential of this methodology is limited. However, it is suggested that international judicial institutions should take the opportunity—as they have already done on some rare occasions—to accommodate legitimacy concerns by introducing formal principles into the equation. These principles should reflect considerations of an adequate

[13] Von Bogdandy & Venzke (note 2), 990–993.

[14] Von Bogdandy & Venzke (note 2), 991; Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, 12 GLJ 1005, 1015–1016 (2011).

[15] Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 483 (2009).

allocation of authority both between international judicial institutions and the domestic level of governance and amongst different international regimes. Insofar as these principles are reflective of institutional sensitivity, they will probably be met with approval. They could establish arguments which may then work as precedents in legal discourse on the allocation of authority in international law. What seems to be paradoxical at first sight may thus go together: judicial restraint may be an instrument of judicial lawmaking (E.).

B. Diversification and Expansion of International Law and the Role of Specialized Judicial Institutions

The term fragmentation describes the diversification and expansion of international law: specialized lawmaking and institution-building tend to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law.[16] One of the pivotal points of the debate on this phenomenon is the multiplication or "proliferation" of international courts and tribunals.[17] Although the reasons for the fragmentation of international law are diverse, it can be seen in the general context of "functional differentiation": different parts of the global society are increasingly specialized and autonomous.[18] Correspondingly, in international law, issue areas such as human rights law, trade law, investment law, and environmental law form different regimes of relative autonomy and have an increasing impact on domestic legal systems. Since functional differentiation does not cut the linkages that exist between certain issue areas, such as trade and human rights, decisions taken within the framework of a particular regime often have a cross-sectional impact. Accordingly, functional differentiation amplifies the potential for substantial norm conflicts in international law and for conflicting interpretations.

In order to grasp fragmentation as a legal phenomenon, a broad notion of what constitutes a conflict is required. According to the ILC Study Group, conflict exists not merely when a party to two treaties can comply with one rule only by thereby failing to comply with another, but also when a treaty frustrates the goals of another treaty without strict incompatibility between their provisions.[19] Thus understood, fragmentation affects both

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[16] ILC, Fragmentation Report (note 3), para. 8.

[17] *See*, *e.g.*, *Symposium: The Proliferation of International Tribunals: Piecing together the Puzzle*, 31 NEW YORK JOURNAL OF INTERNATIONAL LAW AND POLITICS 679 (1999).

[18] ILC, Fragmentation Report (note 3), para. 7.

[19] *Id.*, para. 24; for an approach to a categorization of different kinds of conflicts, *see* RÜDIGER WOLFRUM & NELE MATZ, CONFLICTS IN INTERNATIONAL ENVIRONMENTAL LAW 7 *et seq.* (2003); for the definition of conflicts of norms, *see also* Erich Vranes, *The Definition of 'Norm Conflict' in International Legal Theory*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 395 (2006); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); Carmen Thiele, *Fragmentierung des Völkerrechts als Herausforderung für die Staatengemeinschaft*, 46 ARCHIV DES VÖLKERRECHTS 1, 4 (2008); van Aaken (note 15), 486.

the international rule of law and the democratic legitimacy of international governance. With regard to the rule of law, constitutive elements like predictability, legal clarity and security, and equal treatment of legal subjects are at stake. Although a homogenous, hierarchical system of norms is realistically not available as a solution to the problem of coherence,[20] legal techniques that provide for coherence on an *ad hoc* basis may put things right. In this regard, the ILC report mainly relies on the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties (VCLT).[21] In particular, taking into account relevant "external" norms of international law beyond a specific sub-system (Article 31(3)(c) VCLT) may avoid conflicts from the outset. In case of a conflict, the techniques of *lex specialis* and *lex posterior*, *inter-se* agreements and the superior position given to peremptory norms and obligations *erga omnes* provide a basic professional toolbox that is able to respond to the most substantial fragmentation problems.[22] However, if coherence in the law depends on how the interpreter applies these techniques, legal security must wait for judicial pronouncements.

Coherence is a formal and abstract value[23] that for some time now has particularly concerned "generalist" international law scholars and practitioners in the name of the "unity" of international law.[24] Meanwhile, this debate on fragmentation has made international judges even more aware of the responsibility they bear for a coherent construction of international law.[25] And even if various international courts do disagree on a point of law, the ensuing judicial dialogue may possibly further development of the law.[26] Thus, for most commentators, "proliferation" of international judicial institutions is either an unavoidable minor problem in a rapidly transforming international system, or even a rather positive demonstration of the responsiveness of legal imagination to social change.[27] Fragmentation should, however, not be reduced to a technical problem of the

[20] ILC, Fragmentation Report (note 3), para. 493.

[21] Vienna Convention of the Law of Treaties, 23 May 1969, UNTS, vol. 1155, 331.

[22] ILC, Fragmentation Report (note 3), para. 492.

[23] *Id.*, para. 491.

[24] *Cf.* Tullio Treves, *Fragmentation of International Law: The Judicial Perspective*, 23 COMUNICAZIONI E STUDI 821, 831 (2007). *See*, *in particular*, the statement by Gilbert Guillaume, President of the International Court of Justice, *The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order*, SPEECH BY HIS EXCELLENCY JUDGE GILBERT GUILLAUME, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS, 27 October 2000, available at: http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1 (last visited on 18 October 2010).

[25] Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EJIL 265, 289 (2009).

[26] Bruno Simma, *Fragmentation in a Positive Light*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW (MJIL) 845, 846 (2004); Simma (note 25), 279.

[27] *Cf.* Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553, 575 (2002), with references.

missing substantive unity of international law.[28] This understanding would underplay the institutional dimension of fragmentation. If integrative solutions for norm and policy conflicts are to be found, the fundamental question arises of who is in the position to decide on how harmonization between different issue areas is to be reached.[29] The interdependence of policy fields requires an ongoing management in concurrent fields of jurisdiction.[30] For example, trade is not *just* about trade, but impacts other important policy fields like environmental protection or social security. Accordingly, trade actions or trade restrictions of states are not always primarily based on trade or economic considerations.[31]

Specialized international judicial institutions like the WTO Appellate Body pull the strings here: On the one hand, by focusing on efficiently developing the law of their legal sub-systems, they may contribute to the fragmentation of international law. On the other hand, by opening up the perspective and broadening the applicable law, they may exercise lawmaking authority beyond their own sub-system by mediating between different issue areas. However, as already indicated, it is doubtful whether international judicial institutions are the best-suited actors to decide on conflicts of tremendous importance. Obviously, structuring the relationship between different issue areas involves political choices. Thus, a proper account of fragmentation perceives international law not only as a legal system, but as a phenomenon of governance. From this angle, the appropriate normative standard to be applied is not only coherence, but also democratic legitimacy. The commitment of specialized regimes to certain policy goals entails a certain bias[32] and thus contravenes the impartiality and openness of their decision-making processes. It is for this reason that, for some authors, fragmentation is not so much a technical problem resulting from lack of coordination, but rather a hegemonic struggle, where each institution, though partial, tries to occupy the space of the whole.[33] By contrast, if democracy is to realize (individual and collective) self-determination, democratic processes must be impartial and open, thus covering all conceivable issue areas. Any predetermined

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[28] *See id.*, 578; Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Protection*, 17 FYIL 91, 94 (2006); *see also* van Aaken (note 15), 485.

[29] *Cf.* Matz-Lück (note 10), 42.

[30] Robert Howse & Kalypso Nicolaidis, *Democracy without Sovereignty: The Global Vocation of Political Ethics*, in: THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY. ESSAYS IN HONOUR OF PROFESSOR RUTH LAPIDOTH, 163, 182 (Tomer Broude & Yuval Shany eds, 2008).

[31] Gabrielle Marceau, *Fragmentation in International Law: The Relationship between WTO Law and General International Law - a Few Comments from a WTO Perspective*, 17 FYIL 5, 6 (2006).

[32] On 'structural bias', *see* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT. REISSUE WITH A NEW EPILOGUE 600–615 (2005).

[33] Martti Koskenniemi, *What is international law for?*, in: INTERNATIONAL LAW, 32, 52 (Malcolm D. Evans ed., 2010); Matthew Craven, *Unity, Diversity and the Fragmentation of International Law*, 14 FYIL 3, 11 (2003).

bias contradicts the idea of self-determination.[34] A functionally fragmented international judiciary threatens to weaken democratic generality in the further development of the legal order.[35] Therefore, leaving policy conflicts between different regimes to lawmaking by specialized judicial institutions is problematic from the perspective of democratic legitimacy.

In the face of these legitimacy concerns, the language of "defragmentation" is misleading, since "defragmentation" has a technical, neutral connotation. Most commonly, it is used with regard to the hard drive of computers. Defragmenting a hard drive just makes a computer work more efficiently. Resolving policy-conflicts in fragmented international law, by contrast, is definitely not an issue of efficiency only, but depends on substantive value choices. Thus, we must not construe the issue as an expression of modesty if "defragmentation" is introduced as a new paradigm of inclusive international adjudication by judicial institutions like the WTO panels and Appellate Body, instead of "constitutionalization."[36] Rather, we must face a real dilemma: the activities of international judicial institutions raise concerns of democratic legitimacy both when contributing to fragmentation and when undertaking to "defragment" international law.

C. Proportionality Analysis as a Doctrinal Framework

I. Proportionality Analysis as a Balancing Process

This dilemma could be mitigated if necessary choices between different rationales in the course of "defragmentation" were at least made in a conscious and transparent manner.[37] Potentially, the balancing of different policy goals partially embodied in different regimes but cross-sectionally recognized can be rationalized on the basis of the clear analytical framework provided by proportionality analysis. The spread of the doctrine of

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[34] CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG: LEGITIMATION UND DOGMATIK IM NATIONALEN UND INTERNATIONALEN RECHTSVERGLEICH 50-51 (2005); Jürgen Bast, *Das Demokratiedefizit fragmentierter Internationalisierung*, in: DEMOKRATIE IN DER WELTGESELLSCHAFT. SOZIALE WELT - SONDERBAND 18, 185, 188 (Hauke Brunkhorst ed., 2009).

[35] Von Bogdandy & Venzke (note 2), 996–997.

[36] *See* Ernst-Ulrich Petersmann, *De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement*, 6 LOY. U. CHI. INT'L L. REV. 209 (2008).

[37] *Cf.* Andreas Paulus, *International Adjudication*, in: THE PHILOSOPHY OF INTERNATIONAL LAW, 207, 209 (Samantha Besson & John Tasioulas eds, 2010). For a taxonomy of trade-off devices, including proportionality, balancing tests, and cost-benefit analysis, *see* JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 221 *et seq.* (2008).

proportionality all over the world[38] has received considerable attention in legal scholarship. One focus of the academic debate is the (ir)rationality of balancing processes, and the relationship between judges and the political branches of government. Remarkably, despite the relative deficits of international law as a legal system, international lawyers seem to be more optimistic than constitutional lawyers with regard to the rationalization potential of proportionality balancing.[39]

Proportionality balancing is an "analytical structure"[40] employed by judges to deal with tensions between two values or interests. In domestic public law, proportionality analysis is a device of individual rights adjudication. It is a common instrument to mediate the conflict between private autonomy and the public good.[41] Additionally, it is a tool to resolve disputes which involve a conflict between two claims of rights. Proportionality analysis is less developed as an instrument for reviewing the exercise of competences. However, traces of a "federal dimension" of proportionality can be found both in Article 5 paragraph 4 of the Treaty on European Union and in U.S. case law concerning the "Interstate Commerce Clause" (Art. 1, Sec. 8 of the U.S. Constitution).[42] With regard to the fragmentation of international law, the decisive question is whether both substantive and institutional questions can be adequately framed by recourse to proportionality analysis.

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[38] Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VIRGINIA JOURNAL OF INTERNATIONAL LAW (VJIL) 985 (2009); DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004).

[39] *See* van Aaken (note 15), 502. However, for the impression that most German scholars strongly defend the rationality of balancing, *see* JULIANO ZAIDEN BENVINDO, ON THE LIMITS OF CONSTITUTIONAL ADJUDICATION: DECONSTRUCTING BALANCING AND JUDICIAL ACTIVISM 136 (2010).

[40] Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 574, 579 (2004).

[41] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 98 (2008).

[42] *Southern Pacific Co. v. Arizona ex. rel. Sullivan*, 325 U.S. 761, 768 (1945); *see* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, DUKE LAW JOURNAL 569, 580 (1987); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see* Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA LAW REVIEW 789, 851 (2007); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 678 (1981); *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); critically: *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 254 (1987); Scalia, J., concurring in part and dissenting in part; *United Haulers Association v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1797, 1799 (2007); Scalia, J., concurring. Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law in Comparative Perspective*, 42 TEXAS INTERNATIONAL LAW JOURNAL 371, 404 (2007). The German Federal Constitutional Court leaves no room for proportionality in the area of federal relations (BVerfGE 81, 310, 338 - *Kalkar II*; but *see also* BVerfGE 106, 62, 164 - *Altenpflegegesetz*, where the examination, despite its intensity, only loosely resembles a classical proportionality test.). However, it explicitly acknowledged proportionality as a standard of review in the relations between the EU and its member states (BVerfGE 89, 155, 212 - *Maastricht*).

A prevalent model distinguishes three steps of a proportionality inquiry, or sub-principles of the principle of proportionality: suitability, necessity, and proportionality in a narrow sense (*stricto sensu*).[43] First, in order to be proportional, a state measure must be appropriate or helpful to achieve the desired (and legitimate) end. This presupposes that there is a causal relationship between the objective and the measure. Second, the measure must be necessary to achieve this end—it must be the least restrictive and least burdensome amongst equally effective alternatives. Finally, the measure must not impose a burden on the individual that is excessive or disproportionate in relation to the objective. Whereas the whole proportionality analysis can be understood as a balancing framework, this last step is also known as "balancing in the strict sense."

Arguably, the application of a proportionality analysis depends on the norm structure of the two values to be balanced. The norms which embody these values must be principles, as opposed to strict rules, because the legal technique of balancing and the principle of proportionality are related to specific characteristics of legal principles as optimization requirements.[44] According to Ronald Dworkin, principles do not set out legal consequences that follow automatically when the conditions provided are met, whereas rules are applicable in an all-or-nothing fashion. Principles state reasons that argue in one direction, but they do not necessitate a particular decision. They have a dimension of weight or importance. Consequently, whilst one rule cannot be applicable if two rules conflict, intersecting principles lead to a conflict which must be resolved by taking into account the relative weight of each.[45] For Robert Alexy, setting off from Dworkin's considerations, the decisive point in distinguishing rules from principles is that principles are "optimization requirements." They require that something should be realized to the greatest possible extent, given the legal and factual possibilities. Rules, on the contrary, are always either fulfilled or not. Accordingly, Alexy distinguishes rules and principles on the basis of the different way in which a conflict of rules is solved and competing principles

[43] With 'legitimate ends' as a first step, the analysis involves four steps, *cf.* Stone Sweet & Mathews (note 41), 75.

[44] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66 (2002). For the purpose of this contribution, it will not be necessary to consider whether the distinction between rules and principles is dichotomous and whether principles are correctly qualified as optimization requirements only. For a discussion, *see* András Jakab, *Prinzipien*, 37 RECHTSTHEORIE 49, 54 (2006); MARTIN BOROWSKI, GRUNDRECHTE ALS PRINZIPIEN 105 *et seq.* (2007); Ralf Poscher, *Insights, Errors and Self-misconceptions of the Theory of Principles,* 22 RATIO JURIS 425, 433 (2009).

[45] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 *et seq.* (1977). Several criteria have been brought forward for the distinction between rules and principles. For the proposition that that rules prescribe specific acts, whereas principles prescribe highly unspecific actions, *see* Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE LAW JOURNAL 823, 838 (1972). According to him, the distinction is one of degree, which knows many borderline cases. *Cf. also* George C. Christie, *The Model of Principles*, DUKE LAW JOURNAL 649, 669 (1968); Graham Hughes, *Rules, Policy and Decision Making*, 77 YALE LAW JOURNAL 411, 419 (1968). Others qualify principles as reasons for the existence of certain rules which give meaning to a cluster of rules as tending towards the realization of a common objective: Neil MacCormick, *Principles of Law*, 19 JURIDICAL REVIEW 217, 222 (1974). For an overview, *see* HUMBERTO ÁVILA, THEORY OF LEGAL PRINCIPLES 8 *et seq.* (2007).

are reconciled.[46] In the words of Alexy, a principle posits an "ideal-ought." Its weight in concrete cases is determined by its background justification as it applies to the given context. It is trumped whenever some competing principle has greater weight in the case at hand. Rules, by contrast, are not necessarily set aside just because their background justifications do not hold up in the context of a particular case.[47] As Alexy shows, each of the three steps involved in a proportionality analysis is derived from the nature of principles as optimization requirements.[48]

II. Proportionality Analysis of Trade-off Problems in International Economic Law

Elements of proportionality analysis also figure prominently both in WTO law (1.) and in international investment law (2.). In both cases, trade values and investor rights, respectively, need to be balanced against non-economic policy considerations. Here, proportionality analysis may provide a doctrinal structure for an integrative handling of regime interfaces.

1. Proportionality in WTO Law

In WTO law, the general exceptions in Article XX GATT and Article XIV GATS are key instruments for reconciling free trade with other policies. They involve certain elements of necessity tests and proportionality analysis.[49] Both Article XX GATT and Article XIV GATS consist of a chapeau and individual paragraphs. While the individual paragraphs serve the purpose of assessing the measure as such, the chapeau relates to the application of the

[46] ALEXY (note 44), 48 *et seq.*

[47] *Id.*, 57 *et seq.* For Alexy's later distinction between commands to optimize and commands to be optimized, *see* Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, 16 RATIO JURIS 433 (2003).

[48] ALEXY (note 44), 66 *et seq.*

[49] Necessity tests can also be found in Arts VI (4), and (5), and XII (2)(d) GATS; 2 (2), (3), and (5) TBT, 2 (2), and 5 (6) SPS; and 8 (1) TRIPS and Art. XI (2)(b) and (c) GATT. Still, the WTO legal system does not contain a general proportionality requirement. *See* Jan Neumann & Elisabeth Türk, *Necessity Revisited: Proportionality in World Trade Organization Law after Korea - Beef, EC - Asbestos and EC - Sardines*, 37 JOURNAL OF WORLD TRADE (JWT) 199, 231 (2003). For details of the necessity test in the WTO jurisprudence, *see* Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 JOURNAL OF INTERNATIONAL ECONOMIC LAW (JIEL) 153 (2008); Stone Sweet & Mathews (note 41), 152–159; Andenas & Zleptnig (note 42), 408–416. However, *see also* Meinhard Hilf, *Power, Rules and Principles - Which Orientation for WTO/GATT Law?*, 4 JIEL 111, 120 (2001), who advocates a general principle of proportionality in WTO law, and ANDREW D. MITCHELL, LEGAL PRINCIPLES IN WTO DISPUTES 191 (2008), for whom proportionality is an "overarching" principle.

measure.[50] Both provisions may be seen as regulations by default which address the negative externalities of trade.[51] Legal and institutional arrangements of globalization like the WTO have privileged certain interests and values over others.[52] In particular, international trade law has not arrived at a "positive integration" which would complement trade liberalization. The open formulations chosen in the general exception clauses—including vague terms like "arbitrary," "necessary," or "relating to"—and the absence of clear definitions of non-trade values put enormous weight on the WTO dispute settlement.[53] It also displays the functional mission of the WTO to trade, which neglects its impact on other policy areas like distributive justice, environmental concerns, and the protection of human health and safety as an aspect of fragmentation. Within the individual paragraphs of Article XX GATT, there is a notable textual difference. In the case of lit. (a), (b), and (d), a measure must be "necessary" to protect a specific public policy objective, whereas in lit. (c), (e), and (g), it must be "related to" such an objective.[54] Basically, the term "related to" is more flexible textually than the necessity requirement.[55]

Until the *EC–Asbestos* and *Korea–Beef* decisions, the Appellate Body's jurisprudence was generally understood as requiring the domestic regulation to be the least GATT-inconsistent method reasonably available to achieve the desired goal. The classic statement of this test was articulated in the GATT panel report in *US–Section 337*.[56] The *EC–Asbestos* and *Korea–Beef* cases, however, introduced a certain element of balancing into Article XX GATT.[57] In *Korea–Beef*, the Appellate Body acknowledged that the term

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[50] Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, 20; Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, paras 115–116.

[51] Stone Sweet & Mathews (note 41), 153, referring to Art. XX GATT.

[52] According to Howse, the WTO privileges the interests and values of liberal trade over distributive justice, environmental concerns, and the protection of human health and safety. *See* Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law*, in THE EU, THE WTO, AND THE NAFTA, 35, 36 (Joseph H. H. Weiler ed., 2001).

[53] Piet Eeckhout, *The Scales of Trade - Reflections on the Growth and Functions of the WTO Adjudicative Branch*, 13 JIEL 3, 12 (2010). For a critique of the whole structure of the trade-and-debate, *see* Andrew T. F. Lang, *Reflecting on 'Linkage': Cognitive and Institutional Change in the International Trading System*, 70 THE MODERN LAW REVIEW 523 (2007).

[54] *See* Andenas & Zleptnig (note 42), 410. Measures under lit. (j) must be "essential" to the objective.

[55] *See* Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, 11 December 2000, para. 161, footnote 104.

[56] GATT Panel Report, *United States - Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345, para. 5.26.

[57] Neumann & Türk (note 49), 210. For a reconstruction of the Appellate Body's approach to Art. XX GATT as balancing of principles, *see* Anne-Charlotte Martineau, *La technique du balancement par l'Organe d'appel de*

"necessary" refers to "a range of degrees of necessity":[58] On the one hand, if a measure is indispensable, its necessity cannot be challenged. On the other hand, if other measures are reasonably available, and thus, the challenged measure is not indispensable, the latter can still be deemed "necessary."[59] To determine this, the WTO judiciary will apply a necessity test which amounts to a process of weighing and balancing a series of factors. Notably, the weighing and balancing does not take place after the necessity of the measure at issue has been established, but during the examination of the necessity of the measure.[60] In both cases, *Korea–Beef* and *EC–Asbestos*, the Appellate Body reiterated that WTO members had the right to determine for themselves the level of enforcement of their domestic laws.[61] Whilst the Appellate Body is said to repeat regulatory autonomy like a "mantra,"[62] some authors point to a logical contradiction at the heart of this reasoning. The argument goes that if WTO members have the right to determine the level of protection, there can be no weighing and balancing. The principle of regulatory autonomy would seem to mandate least-restrictive-measure tests and actually prohibit balancing.[63]

Yet, both *Korea–Beef* and *EC–Asbestos* can be understood as the Appellate Body trying to reconcile its new balancing test with the traditional least-restrictive-measure test.[64] The Appellate Body probably wanted to make clear that the "weighing and balancing" must not simply balance the level of protection against trade restriction.[65] In *EC–Asbestos*, the Appellate Body found that in light of the chosen level of protection, and noting that the protection of human life is vital and important to the highest degree, the remaining question was whether there was an alternative measure that would achieve the same end

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l'OMC (études de la justification dans les discours juridiques), 123 REVUE DU DROIT PUBLIC DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ETRANGER 991, 1005 (2007).

[58] Appellate Body Report, *Korea - Beef* (note 55), para. 161.

[59] *See also* Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, para. 210.

[60] *Cf.* Peter Van den Bossche, *Looking for Proportionality in WTO Law*, 35 LEGAL ISSUES OF ECONOMIC INTEGRATION 283, 289 (2008).

[61] Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, para. 168; Appellate Body Report, *Brazil - Retreaded Tyres* (note 59), para. 140.

[62] Joseph H. H. Weiler, *Comment: Brazil - Measures Affecting Imports of Retreaded Tyres (DS332): Prepared for the ALI Project on the Case Law of the WTO*, 8 WORLD TRADE REVIEW 137, 139 (2009).

[63] Donald H. Regan, *The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 WORLD TRADE REVIEW 347, 348 (2007); *cf.* Weiler (note 62), 139.

[64] Appellate Body Report, *Korea - Beef* (note 55), para. 166; Appellate Body Report, *EC - Asbestos* (note 61), para. 172.

[65] Neumann & Türk (note 49), 213.

and that was less restrictive of trade than a prohibition.[66] While the Appellate Body thus referred to a test that weighs and balances to some degree the value of the regulatory goal, the contribution of the measure to achieving the regulatory goal, the cost of the regulatory measure, and the cost to trading partners via the mechanism of a restriction to trade, it has never documented in an opinion its application of this type of test.[67] Thus, although some claim that the Appellate Body has introduced a proportionality test *stricto sensu* into the introductory clause of Article XX,[68] a close examination reveals that the Appellate Body did not really balance free trade with non-trade values, but rather considered the chapeau as a prohibition of the abuse of rights.[69] Intervention on the basis of real balancing can be limited to cases where the restrictive effects on trade are wholly disproportionate when weighed against the local benefit.[70] Nevertheless, certain doubts with regard to the coherence of the "necessity" jurisprudence remain.[71]

With regard to inter-regime relations, it is to be noted that, so far, the sensitivity of the Appellate Body to non-trade values has not been the result of their taking into account the normative demands of extra-regime treaties, neither in interpretation nor in application of the WTO agreements. Rather, the Appellate Body has used other treaties only as evidence on empirical questions.[72]

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[66] Appellate Body Report, *EC - Asbestos* (note 61), para. 172.

[67] Chad P. Bown & Joel P. Trachtman, *Brazil - Measures Affecting Imports of Retreaded Tyres: A Balancing Act*, 8 WORLD TRADE REVIEW 85, 88 (2008).

[68] Hilf (note 49), 121; Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EJIL 39, 68 (2001); Gabrielle Marceau & Joel P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36 JWT 811, 853 (2002); *see also* Martineau (note 57), 997 and *cf.* Neumann & Türk (note 49), 227, with further references in footnote 190.

[69] Axel Desmedt, *Proportionality in WTO Law*, 4 JIEL 441, 476 (2001); Neumann & Türk (note 49), 227, referring to Appellate Body Report, *US - Gasoline* (note 50), and Appellate Body Report, *US - Shrimp* (note 50), with further references in footnote 191.

[70] Eeckhout (note 53), 20.

[71] Weiler (note 62), 138.

[72] Donald H. Regan, *International Adjudication: A Response to Paulus - Courts, Custom, Treaties, Regimes, and the WTO*, in: THE PHILOSOPHY OF INTERNATIONAL LAW, 225, 239 (Samantha Besson & John Tasioulas eds, 2010), referring in particular to *US - Shrimp* and the notion of 'exhaustible natural resources'.

2. Proportionality in International Investment Law

International investment law is often perceived as a sealed-off, biased regime that protects property, investment, and foreign investors without sufficient regard for other non-investment-related interests of host states.[73] However, balancing and proportionality analysis may offer a certain remedy and are therefore backed by academic defenders of the system.[74] Even though balancing or proportionality tests are not yet strongly conceptualized, several investment treaty arbitrations have applied them, providing some basis to counter the said critique.[75] Yet, comparable to the WTO dispute settlement system, proportionality analysis confers power on arbitrators to decide on policy conflicts, and *ad hoc* investment tribunals might be in a particularly weak institutional position to bear this weight.[76] In investment case law, proportionality analysis is referred to in order to distinguish between indirect expropriations that require compensation and non-compensable regulation. Furthermore, it is an element of assessing whether a regulatory measure is consistent with the fair and equitable treatment standard.[77] Apart from that, it plays a role in the application of so-called non-precluded-measures (NPM) clauses, which concern measures necessary for the maintenance or restoration of public order, international peace and security, and the protection of the host state's own essential security interests. Many bilateral investment treaties (BITs) contain such NPM clauses. In these different doctrinal contexts, states may defend themselves by recourse to principles of international law, which must be balanced with investor protection. For example, they may refer to international human rights law in order to justify protective measures for indigenous tribes,[78] affirmative action programs against race discrimination,[79] the freezing

[73] *See*, *e.g.*, Olivia Chung, Note, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VJIL 953, 956 (2007); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2008); and *cf.* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHICAGO JOURNAL OF INTERNATIONAL LAW 471, 474 (2009), with further references in footnote 14.

[74] Alec Stone Sweet & Florian Grisel, *Transnational Investment Arbitration: From Delegation to Constitutionalization?*, in: HUMAN RIGHTS, INTERNATIONAL INVESTMENT LAW AND INVESTOR-STATE ARBITRATION, 118, 130 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds, 2009), embracing of balancing and proportionality by investment tribunals as an indicator of the gradual entrenchment of investment arbitration as a stable system of governance in the field of international investment.

[75] Brower & Schill (note 73), 484–489.

[76] *Cf.* Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, IILJ WORKING PAPER 39 (2009/6).

[77] *Id.*, 30; Jasper Krommendijk & John Morijn, *'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration*, in: HUMAN RIGHTS, INTERNATIONAL INVESTMENT LAW, AND INVESTOR-STATE ARBITRATION, 422, 432 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds, 2009).

[78] Example taken from van Aaken (note 15), 507, with references.

of water prices based on citizens' right to water,[80] or the introduction of rent control based on the right to housing.[81]

Investment treaty jurisprudence typically holds that covered direct and indirect expropriations are only lawful if they fulfill a public purpose, are implemented in a non-discriminatory manner, and observe due process of law. Additionally, both direct and indirect expropriations regularly require compensation. In order to distinguish between compensable and non-compensable regulation of property, the majority of tribunals do not solely consider the effects of the host state's regulatory measure, but also take into account the object and purpose of the measure, which must then be balanced in relation to its effects.[82] In *Tecmed v. Mexico*, the tribunal explicitly referred to the ECtHR jurisprudence on Article 1 of the First Additional Protocol to the European Convention on Human Rights,[83] and weighed the conflicting interests using a proportionality test.[84] In *LG&E v. Argentina*, a case that concerned the emergency measures Argentina passed in the context of its economic crisis in 2001/2002, the tribunal undertook a similar proportionality analysis.[85]

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[79] *Cf.* the case of *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/I.

[80] *Cf.* the cases of *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v. Argentine Republic*, ICSID Case No. ARB/03/17; *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3. For further cases involving water distribution, *see* van Aaken (note 15), 509, references in footnote 108. For the implications of the right to water (Art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), *see* Committee on Economic, Social and Cultural Rights (hereafter CESCR), General Comment No. 15, 20 January 2003, UN Doc. E/C.12/2002/11.

[81] Art. 11(1) of the International Covenant on Economic, Social and Cultural Rights, example taken from Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in: INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, ESSAYS IN HONOUR OF CHRISTOPH SCHREUER, 678 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds, 2009).

[82] Kingsbury & Schill (note 76), 31, with references.

[83] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, CETS No. 009.

[84] *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 122. *See* Peter Behrens, *Towards the Constitutionalization of International Investment Protection*, 45 ARCHIV DES VÖLKERRECHTS 153, 165 (2007); Moshe Hirsch, *Interactions Between Investment and Non-Investment Obligations*, in: THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 154, 170 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds, 2008); Kingsbury & Schill (note 76), 32; van Aaken (note 15), 507.

[85] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 194 *et seq*. For an overview of the case law, *see* José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in: 1 YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY, 378 (Karl P. Sauvant ed., 2008–2009).

The standard of fair and equitable treatment, referred to in many BITs, offers an approach to disputes which involve tensions between an investor's rights (including legitimate expectations in investment security) and the host state's legitimate interest in regulating for the public good.[86] It has been interpreted by different tribunals as encompassing the stability and predictability of the legal framework, consistency in domestic decision-making, the protection of investor confidence or "legitimate expectations," procedural due process and the prohibition of denial of justice, the requirement of transparency, and the concepts of reasonableness and proportionality.[87] However, the protection of an investor's legitimate expectations does not subject every change to a compensation requirement. Rather, a balancing test is sometimes needed in order to actually apply the fair and equitable treatment in this context. For example, the tribunal in *Saluka v. Czech Republic* reasoned that, to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. Accordingly, the determination of a breach of the investment treaty required a weighing of the claimant's legitimate and reasonable expectations, on the one hand, and the respondent's legitimate regulatory interests on the other.[88] The general approach of the tribunal in *Saluka* has been endorsed by various other tribunals.[89] Arbitrators who take up this approach will balance the interests of the investor and the interests of individuals and social groups who seek protection against possible adverse impacts of the investment on their life or their environment.

Furthermore, some tribunals understood the application of so-called NPM clauses to imply judicial balancing. In *CMS*, *Enron*, and *Sempra* the tribunals did not separate the NPM clause in the BIT from the customary law defense of necessity as set forth in Article 25 of the Articles on State Responsibility.[90] Based on this understanding, "necessary means"

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[86] Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS OF HUMAN RIGHTS 47, 62 (2010); for an account of fair and equitable treatment, *see further* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 119 *et seq.* (2008).

[87] Kingsbury & Schill (note 76), 10–16, 37, with references.

[88] *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, paras 305 *et seq*.

[89] *See*, *e.g.*, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award of 24 December 2007, para. 298; *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, para. 112.

[90] Report of the International Law Commission on the work of its Fifty-third session, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, FIFTY-SIXTH SESSION, SUPPLEMENT NO. 10 (A/56/10), ch. IV. E. 1, 43 *et seq.* With regard to the interpretation of non-precluded measures clauses, *see* William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VJIL 307 (2008).

need to be the only means available, and the necessity test does not allow for balancing.[91] By contrast, in *LG&E* and in *Continental Casualty*, the tribunals distinguished between the state of necessity in customary international law and the requirements of the NPM clause. The *Continental Casualty* award explicitly referred to Article XX GATT and thus adopted the view that the necessity of a measure should be determined through "a process of weighing and balancing of factors."[92]

III. Balancing as a Technique of Systematic Interpretation

Apart from the interpretation of general exception clauses in WTO law and certain BIT clauses, balancing may be an overall technique of systemic interpretation and "defragmentation" of international law.[93] Article 31(3)(c) VLCT specifies that, together with the context, "any relevant rules of international law applicable in the relations between the parties" shall be taken into account. The Study Group of the ILC emphasized the role of this provision and recognized in it a principle of harmonious or "system(at)ic interpretation."[94]

[91] *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, 353 *et seq.*; *Enron Corp., Ponderosa Assets, L. P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007. In its report of 25 September 2007, the Annulment Committee of the ICSID found that the *CMS* Tribunal had made a "manifest error of law" in its interpretation of the NPM clause. According to the committee, the tribunal had mistakenly conflated the stringent customary principles on necessity with the terms of the treaty exception. However, the committee denied a "manifest excess of powers." The initial awards both in *Sempra* and in *Enron* have meanwhile been annulled, *see* Decisions on the Argentine Republic's Application for Annulment of the Award of 29 June 2010 and of 30 July 2010, respectively. In the *Sempra* Case, the Annulment Committee reached the conclusion that the tribunal - in respect of the NPM clause - had failed altogether to apply the applicable law and, by failing to do so, has committed a manifest excess of powers (para. 165).

[92] *LG&E* (note 85), para. 245; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008, paras 192–199.

[93] Van Aaken (note 15), 484.

[94] Terminology in the ILC report changes. *See* title of section F ("systemic"), paras 410–413 ("systematic"/"systemic"). The term 'systemic integration' may insinuate that, thanks to a process of harmonious integration, the system of international law is becoming more complete, firm, compact, and uniform - or: integrated, *see* Vassilis P. Tzevelekos, *The Use of Article 31 (3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration*, 31 MICHIGAN JOURNAL OF INTERNATIONAL LAW 621, 633 (2010). For a variety of further mechanisms by which a tribunal may undertake a broader interpretative approach by referring to extraneous legal material, *see* Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (ICLQ) 281 (2006).

1. Two Different Relationships Between "External" Law and the Treaties Being Interpreted

Neither Article 31(3)(c) VLCT nor the Fragmentation Report expounds a methodology of how to incorporate "external" norms of public international law by treaty interpretation.[95] Based on the practice of international courts in applying Article 31(3)(c) VLCT, two different relationships between "external" law and the treaties being interpreted can be distinguished:[96] first, courts determine the meaning of a discrete or individual term appearing in a treaty by recourse to external law, referring to the normative content of the external rule to clarify the meaning of a specific term as used in the treaty.[97] Second, external law may exert a sort of "gravitational pull"[98] on a treaty rule, resulting in a treaty interpretation that coheres more closely with the external rule. It is submitted that in this second situation, where competing norms are to be taken into account, balancing could be an adequate method of interpretation in case of normative tensions between the treaty rule and an external rule.[99] As set out above, balancing presupposes that the norms to be balanced have the dimension of weight. Indeed, the Report of the Study Group on Fragmentation acknowledged that the dimension of weight plays a role under Article 31(3)(c) VCLT.[100] However, despite introducing a distinction between rules and principles, the Fragmentation Report did not discuss the potential ramifications of this distinction.[101] Balancing as an element of systemic interpretation in international law may nevertheless tie in with a reconstruction of the three sub-principles of proportionality analysis—suitability, necessity, and proportionality in a narrow sense—as *topoi* of a systematic-teleological interpretation.[102]

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[95] ILC, Fragmentation Report (note 3), para. 419; van Aaken (note 15), 502.

[96] ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 371, 373 (2008); Simma & Kill (note 81), 682.

[97] This is the only function of Art. 31(3)(c) VLCT, according to ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 366 (2009).

[98] Simma & Kill (note 81), 683; Regan (note 72), 235 – "normative gravitational force".

[99] Van Aaken (note 28), 108; Anne van Aaken, *Balancing of Human Rights – Constitutional Interpretation in International Law*, in: HUMAN RIGHTS TODAY - 60 YEARS OF THE UNIVERSAL DECLARATION, 51, 66 (Miodrag Jovanović & Ivana Krstić eds, 2010); Benedict Kingsbury & Stephan Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality*, in: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 4 (Stephan Schill ed., 2010, forthcoming).

[100] ILC, Fragmentation Report (note 3), para. 473; to the same effect: Simma & Kill (note 81), 707; Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 ICLQ 279, 310 (2005).

[101] ILC, Fragmentation Report (note 3), para. 28; for a critique, *see* Vranes (note 7), 97.

[102] KLAUS F. RÖHL & HANS CHRISTIAN RÖHL, ALLGEMEINE RECHTSLEHRE: EIN LEHRBUCH 655 (2008); Erich Vranes, *Der Verhältnismäßigkeitsgrundsatz: Herleitungsalternativen, Rechtsstatus und Funktionen*, 47 ARCHIV DES VÖLKERRECHTS 1, 12 (2009), who also reports further foundations for the principle of proportionality.

2. Applicable Law

Applying the principle of proportionality as a tool of systemic integration presupposes that the competing external norm may be referred to within the framework of systemic interpretation. Notably, the WTO dispute settlement system only serves to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law (Article 3(2) WTO Dispute Settlement Understanding, DSU).[103] Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements (see also Article 19(2) DSU in this respect). To restrain the significance of this restriction, different models for the use of non-WTO law in WTO dispute settlement have been developed.[104] By contrast, the range of applicable law in international investment law is generally less restrictive. Article 42(1) of the ICSID Convention[105] refers to "international law as applicable," and so do most BITs.[106]

At any rate, the application of "external" norms is unproblematic in the case of explicit reference to these norms, and whenever they can be referred to in the course of interpreting a treaty provision on the basis of its ordinary meaning or its object and purpose (Article 31(1) VCLT), or based on systematic interpretation (Article 31(3)(c) VCLT).[107] In the literature, a distinction has been introduced between direct and indirect application of sources beyond the respective legal sub-system. Whereas a direct application of external sources may be doubtful in the absence of concrete entry-points,[108] an indirect consideration when interpreting "internal" law should generally be possible.[109] With regard to the latter, however, the question arises in the case of multilateral treaties whether all parties to the treaty equally have to be party to the other treaties relied upon.

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[103] Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, UNTS, vol. 1869, 401.

[104] For an overview, *see* HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES 209 *et seq.* (2007).

[105] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, UNTS, vol. 575, 159.

[106] Van Aaken (note 15), 496; for the impact of non-investment international obligations in investment case law, *see* Hirsch (note 84).

[107] McLachlan (note 100), 305; RICHARD K. GARDINER, TREATY INTERPRETATION 288 *et seq.* (2008); van Aaken (note 15), 495.

[108] For some entry points of human-rights law in investment law, *see* van Aaken (note 15), 495.

[109] Van Aaken (note 28), 100; van Aaken (note 15), 500.

In this regard, the WTO panel in the *Biotech* case took a narrow view in order to ensure or enhance the consistency of the applicable rules of international law and contribute to avoiding conflicts between the relevant rules.[110] Although the panel accepted that Article 31(3)(c) VCLT applies to general international law and other treaties,[111] its approach makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under Article 31(3)(c) VCLT would be allowed.[112] This understanding leads to the odd consequence that the greater the membership of a multilateral treaty, the less other treaty laws could be taken into account.[113] Thus, in all probability, it does not correspond with the intent of most treaty-makers.[114]

3. Interpretation of Competing Norms as Principles

Apart from restrictions resulting from the applicable law, there are structural boundaries of balancing as a technique of systemic interpretation. The idea of a "gravitational pull" exerted by external rules is based on a presumption in favor of the coherence of international law. This presumption, however, has its limits. States will often conclude treaties for the precise purpose of producing effects that are not in accordance with the law that was previously binding upon them.[115] Thus, this type of systemic interpretation is excluded as far as the conflict rules of *lex specialis* and *lex posterior* apply.[116] Accordingly, the Report of the Study Group points to the limits of harmonization: though harmonization may resolve "apparent" conflicts, it cannot resolve "genuine" conflicts, especially where a treaty lays out clearly formulated rights or obligations of legal

[110] Report of the Panel, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr. 1 and Add. 1–9, 21 November 2006, paras 7.68–7.70.

[111] To the same effect: ORAKHELASHVILI (note 96), 366 – all relevant sources of international law; contra: MITCHELL (note 49), 83 – only rules, not principles.

[112] ILC, Fragmentation Report (note 3), para. 450.

[113] Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EJIL 753, 781 (2002); ILC, Fragmentation Report (note 3), para. 471.

[114] ILC, Fragmentation Report (note 3), para. 471. However, it is to be admitted that this interpretation is difficult to reconcile with the ordinary meaning of the term 'parties' in Art. 31(1) VCLT in its context in the VCLT. Obviously, there is no reference to a dispute in the VCLT. Thus, so the argument goes, 'parties' can only mean parties to the treaty. *See* Regan (note 72), 233; Thiele (note 19), 26. For a discussion of the pros and cons of different interpretations of Art. 31(3)(c) VCLT, *see further* Benn McGrady, *Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: EC - Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties*, 42 JWT 589 (2008).

[115] Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989, Part Three*, 62 BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 60 (1991); Simma & Kill (note 81), 689.

[116] Matz-Lück (note 10), 45; ORAKHELASHVILI (note 96), 373 *et seq*.

subjects.[117] In the language of principle theory, balancing is only possible where the competing norms can be considered as legal principles or optimization requirements. This situation must be contrasted with cases where the conflict rules of *lex specialis* and *lex posterior* apply and give preference to one of two rules. Whether a legal norm is a strict rule or a principle and whether the conflict rules of *lex specialis* and *lex posterior* apply is a matter of interpretation.[118] In most cases, the wording does not offer clear guidance here.[119] However, the general context of the treaty and the preambular paragraphs in particular may give an indication of how deeply a particular regime is embedded in its legal environment.

In order to extend the scope of application of balancing as a technique to solve norm conflicts, legal scholarship, not always convincingly, has qualified many of the goals which different regimes in public international law pursue as principles or optimization requirements: free trade, protection of foreign investors and development, protection of basic human rights, humanization of armed conflict, self-determination, putting an end to impunity for the perpetrators of international crimes, and protection of the environment. On this basis, conflicts between these goals can be tackled by the technique of balancing.[120] The hasty construction of the mentioned systems of rules as principles, however, is problematic. It would not be appropriate if international judicial institutions were in a position to weigh principles as they pleased and thereby soften an international order of strict rules. Therefore, considerable attention is to be paid to the qualification of norms as principles. A principle of "free trade," for example, is doubtful at best,[121] and balancing in WTO law presupposes concrete entry points such as Article XX GATT. At any rate, judicial practice based on Article 31(3)(c) VCLT, as reported in the Fragmentation Report,[122] is rather scarce.

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[117] ILC, Fragmentation Report (note 3), para. 42 – with a caveat concerning the distinction between 'apparent' and 'genuine' conflicts. *See also* Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 573, 640 (2005). *See further* ILC, Fragmentation Report (note 3), para. 43: "Inasmuch as the question of conflict arises regarding the fulfilment of the objectives (instead of the obligations) of the different instruments, little may be done by the relevant body. In any case, the third party settlement body is always limited in its jurisdiction."

[118] Martineau (note 57), 1008.

[119] For the basic rights under the German Basic Law, *cf*. BOROWSKI (note 44), 114 *et seq*.

[120] Van Aaken (note 15), 492.

[121] *Cf.* Peter-Tobias Stoll, *Freihandel und Verfassung: Einzelstaatliche Gewährleistung und die konstitutionelle Funktion der Welthandelsordnung (GATT/WTO)*, 57 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 83, 116 (1997).

[122] ILC, Fragmentation Report (note 3), paras 433–460.

D. The Legitimacy of Balancing as a Strategy in Response to Fragmentation

Balancing as a convincing "methodological proposal for defragmentation through interpretation"[123] not only presupposes that it has its space, albeit limited, in international legal doctrine, it also presupposes that balancing is a legitimate strategy in response to fragmentation. One important factor determining the need to justify balancing is its lawmaking potential: the more considerable its lawmaking effect, the greater its need for legitimacy. Intuitively, balancing is more context-sensitive than applying rules and thus less apt to create normative expectations beyond the settlement of the specific dispute at hand (I.). Nevertheless, due to well-known problems of justifying judicial lawmaking activities (II.), much depends on whether balancing processes can be subjected to rational criteria in order to avoid arbitrariness (III.).

I. Creation of Normative Expectations by Balancing

1. Context-Sensitivity of Balancing

The balancing of principles gives judicial institutions considerable strategic space.[124] Still, on the face of it, the results of balancing processes do not seem to work particularly well as precedents, and accordingly, balancing would not appear to be a suitable instrument for the exercise of judicial authority beyond the case at hand. Basically, the balancing of principles appears to be more context-sensitive than interpreting rules and, thus, its potential to create normative expectations for the future appears to be limited. In legal theory, balancing and subsumption have been distinguished as two judicial techniques of applying norms to facts.[125] Whilst balancing is the basic operation of principles, subsumption refers to rules. Since both balancing and subsumption relate norms to facts, they are sensitive to the individual circumstances of the case. But beyond this coincidence, the context-sensitivity of balancing stems from the characteristics of principles. Since principles require something to be realized to the greatest possible extent legally and factually, they are not definitive, but only prima facie requirements.[126] The relationship between different principles is dynamic. In one case, the balancing of goods may lead to the result that principle A prevails over the colliding principle B, but under different

[123] Van Aaken (note 15), 484.

[124] For the WTO and Art. XX GATT, *see* Martineau (note 57), 1023; Venzke (note 1), 1113.

[125] JAN-REINARD SIECKMANN, REGELMODELLE UND PRINZIPIENMODELLE DES RECHTSSYSTEMS 18 *et seq.* (1990); Alexy (note 47), 433; KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 474 *et seq.* (1991).

[126] ALEXY (note 44), 57.

circumstances principle B may be the stronger one. Accordingly, the balancing approach to regime conflicts "on a case-by-case basis" has been expressly contrasted to the establishment of fixed hierarchies of values,[127] which seems neither preferable nor realistic. Also, the ILC Study Group acts on the assumption that the "question of the normative weight to be given to particular rights and obligations at the moment they appear to clash with other rights and obligations can only be argued on a case-by-case basis,"[128] and the WTO Appellate Body emphasized that the location of the "line of equilibrium" under Article XX is "not fixed and unchanging."[129]

2. Balancing and Precedent

Nevertheless, in the WTO, adjudication has already *de facto* taken steps towards establishing a balance between trade and environmental concern through adjudicative interpretation of Articles III and XX GATT.[130] Comparably, a look at domestic law reveals that, despite its context-sensitivity, the adoption of proportionality analysis by domestic constitutional courts has led to a steady accretion of judicial authority over how constitutions evolve: proportionality balancing constitutes a doctrinal underpinning for the expansion of judicial power globally.[131] This power is not only based on the capability of judicial institutions to leave the outcome of future balancing processes open. Through the balancing exercises undertaken by judicial institutions, over time a network of relatively concrete rules derived from different principles develops.[132] The mechanism, according to which the outcomes of judicial balancing function as precedents, is twofold. First, abstract evaluations of certain trade-off problems or inter-regime conflicts may be taken from the reasoning of courts. Second, normative expectations may rest on factual analogies, which give orientation for future cases with comparable facts. The Common Law tradition adequately reflects this working of precedents on the basis of factual

[127] Niels Petersen, *How Rational is International Law?*, 20 EJIL 1247, 1257 (2009).

[128] ILC, Fragmentation Report (note 3), para. 474, quoting the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) ICJ Reports 2002, 86, para. 79: "International law seeks the accommodation of this value [the prevention of unwarranted outside interference in the domestic affairs of States] with the fight against impunity, and not the triumph of one norm over another."

[129] Appellate Body Report, *US - Shrimp* (note 50), para. 159.

[130] BUGGE THORBJØRN DANIEL, WTO ADJUDICATION: AN INSTITUTIONAL ANALYSIS OF ADJUDICATIVE BALANCING OF COMPETING INTERESTS – EXEMPLIFIED WITH DEVELOPMENTS IN INTERPRETATION OF GATT ARTICLE III AND XX 13, 343 *et seq.* (2005); for a comprehensive analysis, *see also* ANUPAM GOYAL, THE WTO AND INTERNATIONAL ENVIRONMENTAL LAW: TOWARDS CONCILIATION (2006); ERICH VRANES, TRADE AND THE ENVIRONMENT: FUNDAMENTAL ISSUES IN INTERNATIONAL LAW, WTO LAW, AND LEGAL THEORY (2009).

[131] Stone Sweet & Mathews (note 41), 72, 76.

[132] *Cf.* ALEXY (note 44), RÖHL & RÖHL (note 102), 667.

analogies, which is, by contrast, underestimated, e.g., in German constitutional law scholarship, which focuses on the abstract evaluations to be found in the legal reasoning of the Federal Constitutional Court.[133]

The recourse to precedents in the field of inter-regime law is, however, hampered by the obvious reluctance of specialized international judicial institutions to integrate external norms originating from other "regimes" into their own legal sub-system via balancing. Supposedly, the reason for this reluctance is to be seen in institutional concerns: normative integration may be deterred by concerns over an undue arrogation of authority.[134] Overall, the integration of external norms by balancing and other legal techniques leads to a dialectic interaction between norm integration and the assertion of authority over external norms.[135] First, to integrate norms of another system means to acknowledge the authority of that other system to produce pertinent norms. Conversely, it also means asserting authority over those norms.[136] Consequently, to integrate norms of another system is to introduce the problems of overlapping authority. Finally, these problems of overlapping authority foster authority-integrating solutions (e.g., deference).[137] In the end, specialized international courts will refrain from applying external norms as norms and consider them—in a kind of dualist approach—as factual evidence at best, as has already been shown with regard to the WTO Appellate Body.[138]

II. The Problem of Justification

A certain uneasiness of international judicial institutions towards really applying external norms reflects their fragile standing in terms of legitimacy when deciding on policy conflicts.[139] The general quandary of justifying the exercise of authority by international judicial institutions apart,[140] it is notable that specialized judicial institutions, as already

[133] For a comparison of German and U.S. constitutional law scholarship, and their approaches to the case law of the German Federal Constitutional Court and the U.S. Supreme Court, respectively, *see* Oliver Lepsius, *Was kann die deutsche Staatsrechtslehre von der amerikanischen Rechtswissenschaft lernen?*, in: STAATSRECHTSLEHRE ALS WISSENSCHAFT, 319 (Helmuth Schulze-Fielitz ed., 2007). For the common law and civil law paradigms of precedent, *see* Jacob (note 14), 1008–1010.

[134] Broude (note 7), 190.

[135] To be sure, qualitatively different models of norm integration can lead to different degrees of authority integration, *see* Broude (note 7), 176.

[136] *Id.*, 187.

[137] *Id.*, 186.

[138] Regan (note 72).

[139] For a critical stance, *see*, *e.g.*, French (note 94), 314.

[140] *See*, *supra*, and, generally, von Bogdandy & Venzke (note 2), 989–997.

mentioned, may suffer from an institutional bias. Since resolving policy conflicts in fragmented international law involves substantive value choices, this bias is particularly problematic with regard to systemic interpretation as a response strategy to fragmentation. The general significance of this bias is debated in literature, in particular with regard to the WTO dispute settlement system.[141] For example, WTO panels were understood to be making a choice that trade liberalization should trump environmental rules.[142] To be sure, the panels' lack of sensitivity to non-trade preferences follows less from any malevolent bias in the panelists than from the function of the dispute settlement system to seek a response only to the question of possible violations of the WTO agreements (Article 7(1) DSU). Social and other positive human rights may be pursued by governments only to the extent to which they can be shown as "necessary" limits on market freedoms.[143] In case of conflict between a human rights or environmental treaty and a WTO agreement, WTO bodies are constitutionally prevented from concluding that the WTO standard has to be set aside.[144] If a WTO member is also a party to an environmental or a human rights treaty that conflicts with its WTO obligations, this should neither decrease nor increase a member's WTO rights or obligations.[145]

It is also relevant here that other sub-systems of international law are less developed institutionally, in particular with regard to litigation and compliance schemes. This unequal institutionalization of the different functional sub-systems gives the stronger system an advantage over the weaker system.[146] Naturally, this is deeply unsatisfactory from the perspective of the interests or values that present themselves as legitimate claims competing with trade interests. As some have observed, it is, for structural reasons, quite doubtful whether a trade regime is ever able to give effect to them.[147] Accordingly, the

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[141] With regard to human rights and the WTO, *see*, *in particular*, Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EJIL 621 (2002); Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EJIL 815 (2002); Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EJIL 651 (2002); Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and 'Constitutional Justice'*, 19 EJIL 769 (2008); Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply*, 19 EJIL 945 (2008).

[142] Robert Howse, *From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 94, 103 (2002).

[143] Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EJIL 651, 655 (2002).

[144] Koskenniemi & Leino (note 27), 572; Paulus (note 37), 214; *see also* David W. Leebron, *Linkages*, 96 AJIL 5, 22 (2002).

[145] Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions. The Relationship between the WTO Agreement and MEAS and other Treaties*, 35 JWT 1082, 1103 (2001).

[146] Paulus (note 37), 214, with references.

[147] Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EJIL 754 (1999); Koskenniemi & Leino (note 27), 573.

solution to the problem of institutional bias will not be reached by expanding WTO competence, since this would also expand the scope of the economic logic.[148] However, assessments of such in-built biases differ. It has also been said that a bias of the WTO tribunals in favor of a regime value "free trade" does not give much cause for concern at present. Rather, the Appellate Body cannot plausibly be accused of trade bias because it is not essentially biased in favor of trade.[149] Indeed, the Appellate Body used a variety of jurisprudential techniques to do justice to the delicate interrelationship of values and interests in such cases.[150]

Furthermore, judicial lawmaking may be inappropriate because of the internal structure of international governance systems, which leads to a decoupling of law and politics. A particular concern about lawmaking by the WTO tribunals is the lack of an efficient legislator which makes the "correction" of an unsatisfactory interpretation through amendment an overwhelming task to undertake. Admittedly, in the WTO the relationship between judicial inventiveness and the impasse of the Doha Round negotiations is ambivalent. On the one hand, the judiciary may enhance the legitimacy of the system through evolving its practices to reflect shifting conceptions of a legitimate international order. On the other hand, the difficulty of political adjustments to the WTO bargain and the resulting situation of the "missing legislature" make the legitimacy of judicial activism in the WTO more precarious.[151] Subsequent domestic majorities unsatisfied with the interpretation of international trade regulations by the Appellate Body are left with little more than the option to withdraw from the WTO altogether.[152] From this perspective, it is problematic if interpretations of external law made under the system—with its built-in bias—will come to possess value as precedent not only within the WTO, but also more generally across the judicial board.[153]

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[148] Dukgeun Ahn, *Environmental Disputes in the GATT/WTO: Before and After US - Shrimp*, 20 MJIL 819, 859 (1999); Koskenniemi & Leino (note 27), 574; Paulus (note 37), 214.

[149] Regan (note 72), 238.

[150] Howse (note 142), 109 - analyzing Appellate Body Report, *US - Shrimp* (note 50); Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998; Appellate Body Report, *EC - Asbestos* (note 61).

[151] Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, in: 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 609 (Jochen A. Frowein & Rüdiger Wolfrum eds, 2001); Robert Howse, *Moving the WTO Forward - One Case at a Time*, 42 CORNELL INTERNATIONAL LAW JOURNAL 223, 228 (2009), with further references; Ioannidis (note 11), 1187–1190.

[152] Ioannidis (note 11), 1191.

[153] Koskenniemi & Leino (note 27), 573.

III. Rationalization of Balancing Processes

However, the picture changes if a strict methodology of balancing could subject processes of judicial balancing to rational control. Rationality here relates to the purpose of providing decisions that could best fulfill the exigency of legitimacy.[154] The more rational judicial balancing is, the less problematic its justification is. In legal and constitutional theory, there is an ongoing debate whether balancing in cases of conflict between principles rationalizes legal discourse[155] or whether it is "arbitrary" and lacking "rational standards."[156] The very language of "balancing" evokes a sense of objectivity. A set of balance scales is the symbol of neutrality par excellence: its geometry seems incorruptible. Balancing may thus even serve as a tactical instrument in order to camouflage the exercise of power.[157] That said, many would say the idea that a method of balancing should provide for rational standards is counterintuitive. For them, the control of norms and legal methods ends when balancing, as an undifferentiated sense of justice,[158] cuts in and creates the space for judicial subjectivism and decisionism. Balancing lacks precision, it entails a comparison of two measures which, due to their radical differences, cannot be compared, and its results cannot be predicted.[159] In order to recover balancing in the law, a law-and-economics approach resorts to numerical systems of balancing.[160] It is, however, doubtful whether international judicial institutions will have recourse to numerical systems. At any rate, these systems will not be able to determine objectively

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[154] *Cf.* BENVINDO (note 39), 135.

[155] ALEXY (note 44), 100–109; Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 572, 577 (2005).

[156] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 256 *et seq.* (1992, trans. William Rehg, 1996); *see*, *in particular*, 259: "Values must be brought in to a transitive order with other values from case to case. Because there are no rational standards for this, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies." Note 38: "Because there are not unambiguous units for measuring so-called legal values, Alexy's economic model of justification also does not help operationalize the weighing process." *See also* Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, in: 2 KLÄRUNG UND FORTBILDUNG DES VERFASSUNGSRECHTS: FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT, 445, 460 (Peter Badura & Horst Dreier eds, 2001): essentially "subjective." For a critique vocalized in US scholarship, *see* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE LAW JOURNAL 943 (1987).

[157] Martineau (note 57), 1014.

[158] Martti Koskenniemi, *The Politics of International Law*, 1 EJIL 4, 19 (1990).

[159] *Cf.* Carlos Bernal Pulido, *The Rationality of Balancing*, 92 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 195, 196 (2006) – with references.

[160] *Cf.* EKKEHARD HOFMANN, ABWÄGUNG IM RECHT: CHANCEN UND GRENZEN NUMERISCHER VERFAHREN IM ÖFFENTLICHEN RECHT 5 (2007).

the numerical values of certain goods,[161] which are instead defined by judges.[162] This objection corresponds to a significant blind spot of economic theory, which gives no suggestions as to how preferences come about.[163]

Alexy, who holds that constitutional rights are principles and that principles are optimization requirements,[164] accepts the critique that judicial balancing creates the space for judicial subjectivism and decisionism, insofar as he admits that balancing is not a procedure leading in every case to a precise and unavoidable outcome. Although not objective, balancing is a rational procedure for him.[165] According to this account, rationality and methodology are intimately related for the purpose of controlling empirical knowledge and constitutional evaluations. Although it is not possible to point out a substantive methodological or normative status of the evaluation demanded, at least a formal framework can be rationally conceived, in which different views establishing a rule for balancing can be made explicit. As a structural theory, which detaches itself from the substantive discussion that occurs when arguments are inserted into its framework, this approach does not intend to establish the solution to the case, but rather it intends to specify how, structurally speaking, a decision in the field of constitutional rights can be made.[166] A rational approach to balancing demands that every statement of preference be justified. For this justification, Alexy introduces the *Law of Balancing*, the most elementary rule which shall ensure the rationality of the procedure: the *Law of Balancing* states that the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.[167] Accordingly, it is an essential ingredient of rational balancing that it provides for a transparent procedure of argumentation. The offering of reasons for decisions based on the legal materials, and consistency with the reasons given in other cases, provides a transparent, public basis for critique and contestability of the manner in which the tribunal has handled the legal materials in the presence of competing values.[168] By structuring the inquiry, balancing may add important,

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[161] Andreas Fischer-Lescano, *Kritik der praktischen Konkordanz*, 41 KRITISCHE JUSTIZ 166, 172 (2008).

[162] Martineau (note 57), 1011.

[163] Petersen (note 127), 1258.

[164] ALEXY (note 44), 388.

[165] *Id.*, 100; similarly Pulido (note 159), 198. For a challenge of Alexy's premises with Jacques Derrida's philosophy, *see* BENVINDO (note 39), 161 *et seq.*

[166] ALEXY (note 44), 137 *et seq*.

[167] *Id.*, 102. The *Law of Balancing* leads necessarily to the *Weight Formula*, *see* Alexy (note 47).

[168] Howse (note 52), 51.

output-influencing burdens of justification. Specifying the burdens of justification and structuring the order of inquiry can make a difference.[169]

In order to face the potential arbitrariness of balancing, under the given circumstances of judicial lawmaking in international law,[170] a shift of attention to the mindset of judges is also advisable. In particular, two mindsets of judges may be associated with judicial balancing. On the one hand, there is the paradigm of rational choice. Balancing, then, is a technical, objective, efficiency-oriented optimization process: it is a cost-benefit analysis, which integrates social science knowledge and rational choice into the law.[171] On the other hand, balancing requires "a willingness to listen to others, take their points of view into account and to find a reasoned resolution at the end."[172] To be sure, the first two steps of proportionality analysis, suitability, and necessity tests, which demand factual determinations, are more open to cost-benefit analysis.[173] By contrast, proportionality balancing *stricto sensu*, as the third step of proportionality analysis and as a strictly legal question, is more open to value judgments and does not lend itself easily to social science approaches, but rather to rational justification in law application.[174] Here, following a Kantian understanding, law is "about the application of procedures of reasoning to the available materials, aiming toward conclusions that ha[ve] the best chance of impartial, perhaps even universal, approval."[175] Whereas judges should be open-minded towards insights of social science, they should also display a certain sensitivity towards the value choices of other actors, in particular democratic domestic legislators. In this vein, judicial balancing by international judicial institutions neither epitomizes the ultimate rule of

[169] Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 LAW & ETHICS OF HUMAN RIGHTS 34, 36 (2010); for the WTO dispute settlement system, *see* Andenas & Zleptnig (note 42), 427; Martineau (note 57), 1022–1030.

[170] For strategies in response to the problem of justifying the exercise of public authority by international courts, informed by discourse theory, *see* Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GLJ 1341 (2011).

[171] Anne van Aaken, *A Functional Approach to International Constitutionalism: The Value Added of a Social Science Contribution*, LAW AND ECONOMICS RESEARCH PAPER SERIES, WORKING PAPER NO. 2008-08, 10.

[172] *Cf.* ILC, Fragmentation Report (note 3), para. 487.

[173] ALEXY (note 44), 67 *et seq.*; ANNE VAN AAKEN, "RATIONAL CHOICE" IN DER RECHTSWISSENSCHAFT: ZUM STELLENWERT DER ÖKONOMISCHEN THEORIE IM RECHT 328 *et seq.* (2003).

[174] Anne van Aaken, *How to do Constitutional Law and Economics: A Methodological Proposal*, LAW AND ECONOMICS RESEARCH PAPER SERIES, WORKING PAPER NO. 2008-04, 10; van Aaken (note 99), 69.

[175] Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization,* 8 THEORETICAL INQUIRIES IN LAW 9, 22 (2007).

law,[176] nor is it an instrument of judicial self-empowerment only. Of course, much will also depend on the personalities of judges in this regard.[177]

E. Recourse to Formal Principles as an Expression of Institutional Sensitivity

So far, we have seen that balancing by specialized judicial institutions is not only about striking the right balance between different policy goals set forth in different sub-systems of the international legal order. Rather, it is also a matter of an adequate allocation of authority. As already mentioned, proportionality analysis can refer to both the balancing of substantive goods and to the exercise of competences. If, with regard to the exercise of competences, a concern for institutional sensitivity is considered in the balancing processes,[178] the argument favors granting a margin of appreciation to other actors.[179] Here, it is important to note that "linkage" is a problem of allocating authority at three levels. Linkage in this sense refers to the horizontal allocation of jurisdiction among states, vertical allocation of jurisdiction between states and international organizations, and the horizontal allocation of jurisdiction among international organizations.[180] In several contexts, the relevant institution with a claim to superior legitimacy may not be domestic at all, but some other international regime (e.g., international environmental legal regimes in cases concerning trade measures to protect endangered species).[181]

Yet, concepts like "margin of appreciation," "deference" or "restraint" give little guidance as to how far the margin of appreciation, restraint or deference, respectively, should go in a given interpretive context. Compared to "deference" or "restraint," the concept of "margin of appreciation" has the advantage that it does not reduce available options to simply yielding to the determination of some other institution having some particular competence or credibility in dealing with a certain issue.[182] In fact, acknowledging certain margins of appreciation allows judges to make their own determinations, while giving

[176] BEATTY (note 38).

[177] Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, in this issue.

[178] *See* Howse & Nicolaidis (note 30), 184 – "spirit of subsidiarity" as an anchor for a global political ethics.

[179] van Aaken (note 15), 512.

[180] For a distinction of these dimensions, *see* Joel P. Trachtman, *Transcending "Trade and …"*, 96 AJIL 77, 79 (2002).

[181] Howse (note 52), 62.

[182] For the scope of a margin of appreciation doctrine in international law, *see* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law*, 16 EJIL 907 (2006). For deference by the WTO adjudicating mechanism to the assessments of other bodies (domestic and international), *see* Ioannidis (note 11), 1194–1195.

special weight to aspects of that other institution's analysis that draws on its particular competency or legitimacy.[183]

The reasons for granting a margin of appreciation may be spelled out by including formal principles in the balancing process. In principle theory, there is a relatively new discussion about the existence, necessity, structure, and content of formal principles. Most importantly, principle theory employs formal principles in the reconstruction of the authority of the democratically legitimated parliament.[184] According to the so-called *Law of Combination*, formal principles do not, by themselves, have the power to outweigh a substantive principle. Rather, they can override substantive principles only in connection with other substantive principles.[185] Therefore, their impact is limited. In comparison to this approach in constitutional theory, international judicial institutions may introduce formal principles in their balancing exercises and thereby take up legitimacy concerns like institutional balance, respect for democratic legislators, and due process. They are in a good position to do so if the introduction of formal principles is an expression of judicial restraint. Arguably, formal principles here hold a promising potential for judicial lawmaking. Once certain formal principles are introduced in the course of exercising a certain degree of judicial restraint, the argument is out in the world, and it puts the argumentative burden on any participant in legal discourse who tries to deviate from it.

Some decisions of the WTO dispute settlement system back this approach. Arguably, a principle of simulated multilateralism and a principle of respect for responsible, representative governments have already been applied, though not explicitly introduced as principles. These decisions may be interpreted as expressions of institutional sensitivity, both horizontally towards other regimes and vertically towards member states. The Appellate Body, referring to Article XX GATT, held that, when a sovereign decision affects economic interests of people in other WTO members, their interest must be taken into account, either through a negotiated solution between the affected members, or, if that is impossible, through "simulated multilateralism" in the domestic legislative process.[186] This can be understood as a response to an undemocratic feature of globalization. In the course of globalization, decisions taken at a given place can have important effects outside the borders of the state to which the place belongs.[187] If democracy means that those

[183] Howse (note 52), 62.

[184] ALEXY (note 44), 82, 313, 417; Martin Borowski, *The Structure of Formal Principles - Robert Alexy's 'Law of Combination'*, 119 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE – BEIHEFT 19, 27 (2010).

[185] ALEXY (note 44), 423; Borowski (note 184), 19.

[186] Von Bogdandy (note 151), 613, 666, referring Appellate Body Report, *US - Gasoline* (note 50), 27; Appellate Body Report, *US - Shrimp* (note 50), paras 166–176.

[187] For a recent analysis and critique of the "argument from transnational effects", *see* Alexander Somek, *The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement*, 16 EUROPEAN LAW

affected have a say, an understanding that is reflected in the right to vote as guaranteed by Article 25 ICCPR, these external effects are a consequence of globalization that is difficult to reconcile with the democratic principle. Although Article XX GATT does not stipulate a general duty to negotiate,[188] it can nevertheless be said that WTO jurisprudence considers an aspect of the democratic principle in the balancing process induced by Article XX GATT. It defers substantive decisions to WTO members but proscribes a certain procedure.[189]

Furthermore, the Appellate Body in the *EC–Hormones I* dispute paid special attention to the acts of "responsible, representative governments."[190] Here, the Appellate Body would seem to be according an extra margin of deference to the judgment of WTO members, but only where those states have "responsible, representative governments."[191] Arguably, this argument may be restated as the introduction of the formal principle of respect for responsible, representative governments. If their right to determine the level of protection is understood not as a strict rule, but as a formal principle based on respect for responsible, representative governments, then the "mantra"-like repetition of domestic regulatory autonomy and elements of substantive balancing is no longer contradictory in logical terms. Unlike the *in dubio mitius* interpretation rule, which can no longer be considered as a primary rule for treaty interpretation,[192] the principle of deference here is not based on state sovereignty and national prerogatives, but on the responsibility of the state to protect its people and its accountability to citizens' interests and needs.[193] In turn, in the context of the proportionality analysis required by Article 2(2) SPS, the Appellate Body also considered certain legitimacy deficits of the Codex Alimentarius Commission and limited the impact of its standards.[194]

JOURNAL 315 (2010); *id.*, *The Argument from Transnational Effects II: Establishing Transnational Democracy*, 16 EUROPEAN LAW JOURNAL 375 (2010).

[188] Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 491, 507 (2002); MICHAEL TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 535 (2005).

[189] S*ee further* Appellate Body Report, *Korea - Beef* (note 55), para. 178 – "responsible and representative governments may act in good faith".

[190] *EC - Hormones* (note 150), para. 124.

[191] *Cf.* Howse (note 151), 229.

[192] Rudolf Bernhardt, *Interpretation in International Law*, in: 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (EPIL), 1416, 1419 (Rudolf Bernhardt ed., 1995); Matthias Herdegen, *Interpretation in International Law*, in: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 29 (Rüdiger Wolfrum ed., 2008), available at: http//:www.mpepil.com (visited on 18 October 2010).

[193] Howse (note 151), 229; with regard to health policies, *see further* Maxwell Gregg Bloche, *WTO Deference to National Health Policy: Toward an Interpretive Principle*, 5 JIEL 825, 845 (2002).

[194] *EC - Hormones* (note 150), paras 176 *et seq*. and *cf.* MÖLLERS (note 34), 320–325.

In international investment law, a comparable tendency can be discerned. Tribunals have emphasized that the conformity of an administrative measure with the relevant domestic legal rules normally excluded a violation of the fair and equitable treatment standard.[195] The relevant case law has been understood as broadly aligning with the democratic requirement that public power derive its authority from a legal basis and be exercised along the lines of pre-established procedural and substantive rules.[196]

F. Conclusion

Fragmentation has a substantive and an institutional dimension. Consequently, from a normative point of view, adequate response strategies must take into account both dimensions and conceive fragmentation as a problem not only of the rule of law, but also of democratic legitimacy. If specialized judicial institutions were simply regarded as reacting to fragmentation on a case-by-case basis, this would play down the institutional dimension of fragmentation. The balances specialized international courts and tribunals strike will have precedential value and thus raise questions about the allocation of authority in a fragmented international legal system. Proportionality analysis offers a framework for legal discourse about trade-off problems, and balancing may add important, output-influencing burdens of justification. Still, its rationalization potential is limited. Accordingly, recourse to the judicial technique of balancing cannot camouflage that judicial institutions exercise considerable authority at regime interfaces. Therefore, a certain institutional sensitivity of courts who act at these interfaces of legal sub-systems is definitely in order. Additionally, legitimate adjudication with regard to trade-off problems and inter-regime relations demands ingredients of legitimacy in the adjudication of conflicting values that are familiar to the theory and practice of domestic public law litigation—fair procedures, coherence and integrity in legal interpretation,[197] and political inclusiveness (which contrasts with the "club paradigm" at the WTO).[198] If these caveats are taken seriously, international judicial institutions can legitimately respond to governance deficiencies with regard to inter-regime relations and trade-off problems. To

[195] *See Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, para. 178; *Lauder v. Czech Republic*, UNCITRAL, Final Award of 3 September 2001, para. 297.

[196] Kingsbury & Schill (note 76), 14.

[197] Howse (note 142), 42 *et seq.*

[198] Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, in: EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, 227, 243 (Roger B. Porter, Pierre Sauvé, Arvind Subramanian & Americo Beviglia Zampetti eds, 2001); Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?,* 16 GOVERNANCE 74, 86 (2003); von Bogdandy & Venzke (note 2), 1356 – publicness, transparency and adequate participation as "minimal safeguards" against an "autocratic rule of courts" entrusted with the task of systemic integration.

be sure, the allocation of authority beyond the state calls for further discussion. Still, international judicial institutions may produce important arguments here if they signal institutional sensitivity both vertically *vis-à-vis* domestic legislators and horizontally *vis-à-vis* other sub-systems of international law. Plainly, this would be judicial lawmaking by judicial restraint.