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# *Experimentalism, Destabilization and Control in International Law: Afterword to Laurence Boisson de Chazournes' Foreword*

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## Abstract

*In this Afterword in response to the Foreword by Laurence Boisson de Chazournes, I argue that to address the challenges of coordination between the growing number of international courts and tribunals, the role of international judges is necessary but not sufficient. Overcoming the various obstacles requires not only clarifying rules and relationships (ex-ante specification) but also adding mechanisms that effectively accommodate interests while limiting pitfalls and contributing to calibrating adjudicatory authority (ex-post control). Such additional tools may help to control the tribunals' ability to make and apply their decisions. They also can serve to relieve the international law processes from the pressures exerted by excessive legal 'experimentalism'. Among the most obvious of such tools emerging in international economic agreements are consolidation or joint decision-making provisions, stays and under-ride processes, interaction requirements or special delegation arrangements.*

More is different. The albino redwoods – about 30 mutant white trees that cannot manufacture chlorophyll living in the forests of northern California – depend on sucking nutrients from parent trees. The redwood's capacity to succeed despite the paradoxical feature that deprives them of the very source of their own sustenance hearkens back to genetic material. Redwood trees possess six sets of chromosomes (totalling 66 chromosomes, compared to humans who have 46) and are

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considered among the most adaptable living beings because of their ability to mutate so efficiently.[1]

In her *EJIL* Foreword, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', Laurence Boisson de Chazournes provides a convincing account of how international courts and tribunals (ICTs) have evolved to the challenges imposed by a richer, more complex and plural environment.[2] Specifically, her Foreword provides a description of how international judicial institutions have adapted to the fluidity enabled by the growth of international dispute settlement options – from international trade courts to the controversial investor–state arbitration tribunals; from the International Tribunal on the Law of the Sea to the International Court of Justice – as well as treaties with common rules and jurisdictional overlaps. Such an environment enables the linkage of proceedings and issue areas across multiple fora; it also opens up international law to experimentalism, new avenues of influence and novel challenges that have concerned international law scholars for years.[3]

Like genetic material, one of the properties of legal regimes and institutions is their ability to interact, unveil variations and – over time – trigger evolution. Such a dynamic, as Boisson de Chazournes explains, exposes legal regimes to the challenges of coordination and control. An obvious way to respond to such challenges is by improving international treaties – for instance, by refining drafting, adding conflict-of-law rules or strengthening requirements to bring overlapping enforcement actions. But for adjudicatory decision makers, who do not typically participate in the 'upstream' law production process or the creation of rules before disputes arise,[4] the use of tools to organize jurisdiction such as principles like '*lis alibi pendens, connexité, res judicata or electa una via*' is the most viable alternative.[5] As she explains, thanks in part to adapting well-developed procedural tools of private international law for coordinating jurisdiction, 'taking into account the specificities of the international judicial scene', ICTs have shown 'concern for securing the rule of law of the international legal system, rather than undermining it by introducing the risk of conflicting judgments, wasted resources and uncertainty'.[6] Accordingly, recent international practice shows 'that judicial actors and institutions are reflexive and aware of their judicial surroundings'; they are 'key players in shaping the international legal system' coherently.[7]

[1] L. Steakley, 'Sequencing the Genome of the rare Albino Redwood Tree, *Scopeblog* (29 November 2010), available at http://scopeblog.stanford.edu/2010/11/29/sequencing_albino_redwoods/: 'Genetically, the tree is what's called a hexaploid. That means that each of its cells contains six sets of chromosomes, for 66 chromosomes total. In contrast, humans are merely diploid, with 23 chromosomes. Such abundance is very unusual – and could suggest more opportunities for mutations.'

[2] Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', 28(1) *European Journal of International Law* (*EJIL*) (2017) 13.

[3] *Ibid.*

[4] Stephan, 'Privatizing International Law', 97 *Virginia Law Review* (2011) 1573, at 1586.

[5] Boisson de Chazournes, *supra* note 2, at 16.

[6] *Ibid.*, at 71.

[7] *Ibid.*, at 34.

In her compelling account, Boisson de Chazournes spends substantial time on examples of international trade and investment proceedings – domains on which I want to focus in this brief Afterword. This choice is quite fortunate as international economic law lends itself to a productive case study; it is indeed 'a laboratory' to observe how ICTs are experiencing and confronting the challenges brought by legal experimentalism.[8] Despite their separation, trade and investment laws share 'genetic material' that make them complementary, dynamic and very often prompt to react to interactions and cross-pollinations.[9] Moreover, economic regionalism and legal specialization have increased the density of the rules and the complexity of their enforcement. Theoretically, the picture that emerges from this Foreword is one of judicial adaptation within the now classic debate between the 'fragmentation' and the 'pluralism' camps of international law. At the crux of such debate is whether the presence of nested, partially overlapping and parallel international regimes is a positive or negative development.[10] Accordingly, Boisson de Chazournes' is a positive account that renders the criticism of the complexity created by fragmentation with limited, if any, merit.

Despite the brilliance of her piece, I take slight issue with its almost exclusive focus on legal principles applied in legal procedures. This choice may obscure some of the more substantive and policy consequences of the richer environment she describes handsomely. Scholars have emphasized how the growth in complexity shows a particular propensity for what I have here referred to as experimentalism – strategic decisions by states (or other actors) 'to weaken established law, either by opting for contradicting obligations in other venues or by watering down existing obligations that create legal uncertainty'.[11] In the abstract, such debate may not be sufficiently productive; hence, the immense value of an article that concisely clarifies the practice on judicial tools that can be used for an effective 'management of a plural world of courts and tribunals'.[12] However, it overlooks what in my view are the deeper consequences of

[8] *Ibid.*, at 45.

[9] Broude, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law?', 10–11 *International Law Forum of the Hebrew University of Jerusalem Law Faculty* (2011) 9; Alford, 'The Convergence of International Trade and Investment Arbitration', 12 *Santa Clara Journal of International Law* (2013) 13. The ultimate goals of both regimes are similar: combat protectionism and limit disparate treatment by governments. Both regimes are ultimately concerned with economic interdependency and integration as well as managing the external costs imposed by virtue of state policies. Overall, international trade law and investment law seek the promotion of transnational business and the facilitation of economic efficiency through global economic interdependence.

[10] See, e.g., Bjorklund, 'Private Rights and Public International Law: Why Competition among International Economic Law Tribunals Is Not Working', 59 *Hastings Law Journal* (2007) 101; Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law', 102 *American Journal of International Law* (2008) 475; A.K. Bjorklund and S. Nappert, *Beyond Fragmentation in New Directions in International Economic Law – In Memoriam Thomas Walde CMP* (2011); International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, at 253.

[11] See, e.g., Allee, Elsig and Lugg, 'The Ties between the World Trade Organization and Preferential Trade Agreements: A Textual Analysis', 20(2) *JIEL* (2017) 333.

[12] Boisson de Chazournes, *supra* note 2, at 14.

this multi-faceted interplay of proceedings, including how navigating it may not be without consequences, distributional or otherwise.

As I have argued in the past, a richer environment can translate into policy or legal outputs that are more likely to present variations chiefly because governments find it more difficult to exercise control over them.[13] These potential negative effects can result from different expressions of the interplay between different regimes such as intra-regime and inter-regime shifting as well as different forms of transplantation of concepts in the process of rule interpretation.[14] In this sense, assuming a more proceduralistic perspective may come at the expense of understanding some of the more substantive consequences of the shift of authority and decision-making power to legal actors across many domains of public international law. In other words, as in biological evolution, legal adaptations may also come with undesired mutations. Boisson de Chazournes' focus exposes little of those mutations.

Two examples suffice. First, sub-optimal policy outcomes may result from the effects of migrating a substantive issue area from one regime into another. While the conceptual problems may prove to be exaggerated even in regimes where private interest groups control or dominate enforcement like international economic law, the concerns of unsound outputs are real. Through enforcement actions, rules from different regimes can be contrasted and texts distinguished, resulting in more precision as to their normative content. In the process, miscalculations can easily be made by adjudicators. Hence, governments seeking to contest or roll back interpretations that result in inconvenient outcomes must identify the exact way those rules are in opposition to, or at least in tension with, particular provisions of an elemental regime or its rationale and policy goals. This feedback has the potential to improve the quality of the regimes as well as the consistency between the rule goals and future practice. Nevertheless, it can also add confusion if governments decide not to exercise political control for whatever reasons – for example, the cost of correcting unfortunate interpretations or the inability by political actors to fully grasp the consequences of regime mutations.

An example of this problem, involving a case discussed by Boisson de Chazournes, is illustrative. As governmental measures increasingly affect both trade and investment, lawyers have become better at problematizing trade law matters as investment law violations before investor–state tribunals.[15] Tribunals have found most of these crossovers to be unmeritorious when no clear investment exists in the territory of the offending

[13] Puig, 'The Merging of International Trade and Investment Law', 33 *Berkeley Journal of International Law* (2015) 1.

[14] Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', 29 *Yale International Law Journal* (2004) 1, at 16 (describing international law as a product of strategic use of venues situated within the same regime [intra-regime shift] and/or venues located in different regimes [inter-regime shift]).

[15] See, e.g., NAFTA (UNCITRAL), *Canadian Cattlemen for Fair Trade (CCFT) v. United States*, Award on Jurisdiction, 28 January 2008: '[I]nvestors do not exist ... in isolation, but are explicitly linked to their investments.' See generally Verhoosel, 'The Use of Investor–State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law', 6 *JIEL* (2003) 493.

party.[16] However, the investment tribunal in Cargill in the soft drinks tax context found that a series of trade measures directly breached the investment provisions of the North American Free Trade Agreement.[17] More problematic, the tribunal effectively granted damages resulting from intra-company international trade, even if the damages were not connected with the existing investment in the territory of the respondent.[18] This decision happened despite the availability of control tools and relatively good communication between different ICTs. Nevertheless, it also set a precedent that seems disconnected from the policy goals, purpose and intention of the investment regime: it allows investors to convert losses suffered by production facilities in one country into recoverable losses suffered in another and goes beyond the jurisdictional authority and into trade matters.[19] Despite an attempt by Mexico to clarify the agreement interpreted by the tribunal, the treaty partners have abstained from using the mechanisms of political control available to roll back this questionable interpretation.

Second, strategic linkages between regimes may also have important consequences. To be sure, trade and investment enforcement mechanisms show a reasonable level of complementarities that increase the successful enforcement of rules without the need of exaggerated concerns. However, the low determinacy of some rules may result in more aggressive use, eventual rights accretions and attempts to litigate issues settled in one regime through the adjudicatory process of another. By linking different regimes, governments may be subjected to constant harassment and the pressures that accompany such legal actions. The need to defend 'policy space', often in strategically timed proceedings, can result in risk aversion and regulatory chill in governments. It is especially problematic in a context like investor–state arbitration where a great number of arbitrators do not view their role as potentially influencing policy but, rather, as providing a service to the disputing parties – hence, responsive to their needs, arguments and dispute settlement desires.

The broader effects of this strategy are best illustrated with another recent series of well-publicized cases brought before different ICTs – this time, against Australia for its plain packaging legislation. While private interests like tobacco companies do not have direct access to the World Trade Organization (WTO), some firms may have high enough stakes in a case to be willing to influence political representatives across the globe. Considering that the commercial interests that seek compliance actions on their behalf are supplying legal assistance for the purpose of developing analysis and drafting briefs, it is conceivable that such interests could influence the legal interpretations about the limits imposed by the WTO agreements.[20] Moreover, a component

[16] Davies, 'Scoping the Boundary between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?', 15(3) *JIEL* (2012) 793.

[17] ICSID (NAFTA), *Cargill Inc. v. United Mexican States*, Award, 18 September 2009, ICSID Case no. ARB(AF)/05/2, para. 175.

[18] *Ibid.*, para. 526.

[19] ICSID (NAFTA), *Cargill Inc. v. United Mexican States*, Decision on the Application to Set Aside the Award (Ontario Court of Appeal), 4 October 2011, ICSID Case no. ARB(AF)/05/2.

[20] Sykes, 'Public versus Private Enforcement of International Economic Law: Standing and Remedy', 34 *Journal of Legal Studies* (2005) 637; Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 11 *EJIL* (2000) 763, at 811.

of these commercial interests – Phillip Morris – relies on its network of subsidiaries to trigger litigation under investor–state arbitration, a forum where some arbitrators have interpreted treaties to severely constrain the regulatory actions of governments. In addition to seeking compensation, they have requested to have the TRIPS and TBT Agreements of the WTO interpreted – the very same treaties at issue before the world trade court.[21] These strategies afford Phillip Morris, a very powerful company, a huge opportunity to shape the interpretation of rules and litigate limits on the regulation of tobacco marketing; perhaps even chill the effects of the World Health Organization's framework on tobacco that serves as a basis of these regulatory efforts.[22] In fact, some countries have delayed regulation in the sector for fear of being sued by tobacco giants, suggesting to some that concerns over regulatory chill are not completely misplaced.

Together, what these two examples show is that, for ICTs, deciding specific disputes in this new context may translate into a Herculean task: balancing the protection of governments against the potential excessive 'destabilization' pressures that can result when experimentalist claims are asserted in an interlinked, interactional and interconnected environment. While it is wise to demand that adjudicators avoid an isolationist approach, enhance communication and rely on available doctrines to encourage harmonization, predictability, stability and coherence, we must also recognize the limits of such an approach. Since the boundaries between issue areas have become less rigid and international governance has expanded, controlling adjudicatory processes and the flux of relevant information between ICTs has also become more demanding.[23] This complexity has consequences that touch upon the legitimacy of ICTs as the 'fabric' of ICTs has its own structural limits that are set by those who can access them, the rules that can be applied, and the remedies that can be obtained through them.

To be sure, international adjudicators are oft aware of the new normal and should continue the use of any available tools. However, states also have an important role in this managerial approach of ICTs and in preventing the use of ICTs from destabilizing legitimate regulatory actions. While it may be close to impossible to catalogue all of the consequences of converging structures, overlapping jurisdictions and parallel lawmakers, some conceptual work has provided guidance on how states can aid adjudicators and, with that, strengthen the fabric of ICTs and international law more generally. States can promote coordination across tribunals and, to a limited

[21] Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299; Agreement on Technical Barriers to Trade 1994, 1868 UNTS 120.

[22] Framework Convention on Tobacco Control (FCTC) 2003, 42 ILM 518 (2003). The FCTC was adopted by WHA Res. 56.1, 21 May 2003. The FCTC contains tobacco control measures such as implementing pictorial health warnings (50 per cent minimum) on tobacco products packs; adopting a total ban on tobacco advertising, promotion and sponsorship; enforcing a complete ban on tobacco use in public places; increasing tobacco prices to control access by young people and continuing to monitor the epidemic and introduce tobacco dependence treatments. Puig and Shaffer, 'A Breakthrough with the TPP: The Tobacco Carve-out', 16(2) *Yale Journal of Health Policy, Law, and Ethics* (2016) 4.

[23] Fischer-Lescano and Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25(4) *Michigan Journal of International Law* (2004) 999.

extent, among independent, but interconnected, regimes by understanding the ways in which proceedings interact. Such coordination requires not only clarifying rules and relationships (*ex-ante* specification) but also adding mechanisms that effectively accommodate interests while limiting pitfalls and contributing to calibrating the adjudicatory authority and law-making process (*ex-post* control). Such additional tools help to control the tribunals' ability to make and apply their decisions. They can serve to relieve the international law processes from the pressures exerted by excessive legal experimentalism. This approach enables adaptation to changing conditions while averting the limitations of '*ex-ante*' specification. Among the most obvious of such tools are consolidation or joint decision making, stays and under-ride processes, interaction requirements or special delegation arrangements.[24]

To conclude, experimentation with more complex forms of litigation to vindicate rights and values through international judicial remedies has not been unnoticed.[25] In a celebrated article in the *Harvard Law Review*, Charles Saibel and William Simon describe a trend in the USA as 'core instances of "destabilization rights" – rights to disentrench an institution that has systematically failed to meet its obligations and remained immune to traditional forces of political correction'.[26] The emergence of ICTs has led to a stage of this experimentalism, which is generally a welcome trend. It might be both effective in inducing compliance with legal obligations and consistent with the structure and capacity of international law as well as the delegated power and authority of ICTs. Nevertheless, this emergence may also destabilize international law by promoting unintended creativity and risk taking among different actors and stakeholders; it can result in undesirable mutations and sub-optimal recombination of different bodies of laws. The role of judges is important in controlling this process. Yet it is not sufficient; hence, states (and treaty drafters more specifically) should be equally concerned with the positive evolution of the international legal system.

[24] For a catalogue of these tools, see Puig, *supra* first unnumbered note.

[25] Koh, 'Transnational Public Law Litigation', 100 *Yale Law Journal* (1991) 2347.

[26] Sabel and Simon. 'Destabilization Rights: How Public Law Litigation Succeeds', 117 *Harvard Law Review* (2004) 1015, at 1016.