

WTO LAW IN A FRAGMENTED, DECENTRALIZED
INTERNATIONAL LEGAL ORDER:
SYMPOSIUM INTRODUCTION

Gregory Shaffer[†]

This symposium issue arises from a conference held at Loyola University School of Law on February 15, 2008, which was co-sponsored by the American Society of International Law. The special issue addresses WTO law in a fragmented, decentralized legal order, examining on the one hand its relation to other international law, and on the other its relation to national law. That is, the papers in this issue examine WTO law in its vertical and its horizontal dimensions in terms of the allocation of authority, legitimacy and impact.

This introduction provides an overview of the conference and introduces the five papers published here. The conference was organized into four sessions, complemented by a keynote address from Merit Janow on her reflections as a member of the WTO Appellate Body. For each session, a commentator prepared a series of questions prior to the conference that were drawn from the papers. Here is a list of the panels and panelists.

Panel 1. *Doha Round Appraisal and Implications*

Raj Bhala, Rice Distinguished Professor, University of Kansas, School of Law

Sungjoon Cho, Professor of Law, Chicago-Kent College of Law

Spencer Waller, Professor of Law, Loyola University Chicago

Panel 2. *WTO Law in a World of Fragmented International Law*

Tomer Broude, Faculty of Law & Int'l Relations, Hebrew University Jerusalem

Ernst-Ulrich Petersmann, Professor of Law, European University Institute

Joel Trachtman, Professor of Int'l Law, The Fletcher School, Tufts University

Keynote Address. Merit Janow, *Reflections of a Member of the Appellate Body*

Member of the WTO Appellate Body & Professor of Law, Columbia University

Panel 3. *The Impact of WTO Law in Domestic Legal Orders*

Jeffrey Dunoff, Charles Klein Professor of Law & Government, Temple University

Padideh Ala'i, Professor of Law, American University

Deborah Steger, Professor of Law, University of Ottawa

[†] Melvin C. Steen Chair of Law, University of Minnesota Law School. At the time of the symposium, Gregory Shaffer was the Wing-Tat Lee Chair of International Law at Loyola University Chicago School of Law.

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Karen Alter, Associate Professor of Political Science, Northwestern University

Rachel Brewster, Assistant Professor of Law, Harvard Law School

Panel 4. WTO Law and Developing Countries

William Davey, Guy Raymond Jones Chair, University of Illinois

Gregory Shaffer, Wing-Tat Lee Chair of Int'l Law, Loyola University Chicago

Brett Frischmann, Associate Professor of Law, Loyola University Chicago

Jide Nzelibe, Associate Professor of Law, Northwestern University

This special issue begins with former Appellate Body member Merit Janow's keynote address in which she provides her "Reflections on Serving on the Appellate Body." Professor Janow addresses the "legalization" of WTO dispute settlement from the preceding system under the GATT, finding that it is now very much a "judicial mechanism." Appellate Body members now operate more like judges, ensuring their independence from governments (including by rendering their decisions anonymously), and deploying "legal interpretive reasoning" as their methodology. She remarks how Appellate Body members operate as part of a "collegial" body so that, even though only three members are allotted to each panel, the members engage collectively in an "exchange of views" in each case, reflecting a "deliberative process." She observes, in parallel, the development of a specialized professional trade bar representing the users of the system. She finds that certain parties nonetheless are relatively less prepared than others for questioning in oral hearings because they only repeat the written arguments in their legal briefs.

Professor Raj Bhala, in turn, addresses, the political dimension, providing a careful examination of the deep schisms between countries in the Doha Round negotiations.¹ Professor Bhala notes the divides between not only rich and poor WTO Members, but also among them. He provides a detailed explanation of Members' positions in agricultural trade, industrial trade, services trade and trade remedies negotiations as their positions developed from the fall of 2007 through the summer of 2008. He concludes by stressing the importance of development issues and the engagement of developing countries in the Round, despite skepticism among some commentators that the WTO has become unwieldy and distracted from its core mission of trade liberalization through the mechanism of reciprocity.

Professor Tomer Broude next provides an extremely useful analytic framework for assessing the severe challenges of normative integration of international law in a fragmented international legal order.² As he writes, there is "a strong linkage between the fragmentation of norms and the fragmentation of authority,

¹ Raj Bhala, *Doha Round Schisms: Numerous, Technical, and Deep*, 6 LOY. U. CHI. INT'L. L. REV. 5 (2009).

² 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 LOY. U. CHI. INT'L. L. REV. 173 (2009).

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in the simple sense that an increase in normative integration generally results in a corresponding increase in authority integration, and vice versa.”³ Any use by an international body, such as the WTO Appellate Body, of principles of normative integration also entails assertions of authority to decide over the application of these principles. Normative legal integration can thus lead to the centralization of international legal authority, a development which may give pause to those who stress the importance of global governance as opposed to global government. Professor Broude nonetheless contends that “qualitatively different models of norm integration can lead to different degrees of authority integration,” pointing to the United Nations Rio Declaration on Environment and Development and WTO jurisprudence’s application of the Vienna Convention on the Law of Treaties as examples.⁴ He predicts that international tribunals should respond more favorably toward normative models based on softer forms of law which create less pressure towards authority integration.

The fragmentation of international law exists not only along the horizontal dimension of non-hierarchical international institutions. It also involves a vertical dimension in which countries determine whether and how to enact and implement international law. Professor Jeffrey Dunoff provides a fascinating exploration of these issues in his review of the status of WTO law in US courts. One means to ensure greater consistency of international law proposed by many “internationalists” is through direct enforcement of international law by national courts. In his contribution, however, Professor Dunoff argues that providing for domestic enforcement of WTO law could, ironically, lead to further fragmentation of international law.⁵ All law is subject to interpretation, so that even if domestic bodies directly apply international law, they will do so in different ways. Professor Dunoff contends that the costs of the resulting doctrinal disarray would outweigh the benefits, especially because, he states, there is already an excellent record of Member compliance with WTO panel and Appellate Body rulings.

Professor Ernst-Ulrich Petersmann puts forth an alternative perspective to those of Professors Broude and Dunoff in an application of his normative constitutionalist approach.⁶ Professor Petersmann points to the potential of reducing normative fragmentation of international law through a cosmopolitan constitutional approach based on methods of treaty interpretation, building from the experiences of multilevel judicial cooperation in the European Union, the European Economic Area and the European Convention of Human Rights. He maintains that the explicit WTO requirement of “providing security and predictability to the multilateral trading system . . . in accordance with customary rules of interpretation of public international law” calls for interpreting WTO rules in conformity

³ *Id.*

⁴ *Id.*

⁵ Jeffrey L. Dunoff, *Less Than Zero: The Effects of Giving Domestic Effect to WTO Law*, 6 *LOY. U. CHI. INT’L. L. REV.* 279 (2009).

⁶ 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 (2009).

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with “principles of justice” and “human rights” in application of the Vienna Convention on the Law of Treaties, which offers a flexible framework for reducing legal fragmentation in international economic law for the benefit of citizens. Judges, both at the national and international levels, he argues, should cooperate as “exemplars of public reason” (citing the work of John Rawls) in clarifying and reconciling indeterminate treaty obligations of governments with constitutional principles of rule of law and judicial protection of individual rights, while providing due respect for the legitimate diversity of national constitutional traditions regarding human rights and principles of justice.

The symposium also includes an article by Professor Padideh Ala’i in which she addresses the role that the WTO and its requirements of government transparency and due process can play within domestic legal systems.⁷ She finds that, indirectly, the WTO can play a more powerful role in combating corruption at the national level than other international institutions, such as the World Bank, which attempt to do so directly. Her article exhibits once more the ways in which international economic law scholarship can assess the WTO in relation both to other international institutions — in this case regarding anti-corruption efforts — and to different domestic settings.

In sum, the articles in this symposium issue demonstrate how the study of the interaction between the WTO, other international legal regimes and domestic legal orders will comprise a key part of the future of the discipline.

⁷ Padideh Ala’i, *The WTO and the Anti-Corruption Movement*, 6 LOY. U. CHI. INT’L. L. REV. 259 (2009).