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INSTITUTIONAL FRAGMENTATION AND THE ONTOLOGICAL "ETHOS" OF INTERNATIONAL LAW AS A LEGAL SYSTEM IN A WORLD SOCIETY

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ABSTRACT

In the "institutional fragmentation of international IP law" debate, the analogy between international law and national legal systems, as the theoretical premise of the "institutional fragmentation" language, fails for the lack of "relevant similarity". And secondly, the ontological "ethos" of international law, which are the inherent virtues of international law-making and implementation, regime evolution and interaction in this world society, could rectify the chaos of this rhetoric of "institutional fragmentation" and illuminate the understated benefits as well as rationalities of institutional fragmentation. The "post-ontological era" is not coming yet for this "institutional fragmentation" debate, and the "institutional fragmentation" is the "new normal". Thirdly, The fundamental contradiction contained in this "institutional fragmentation of international law" debate is between the specialization of international law (the "functional approach" of modern international law's development, as the endogenous factors) and top-down systematic theoretical conception of international law (international law as a legal system, as the exogenous factors). The junction of those forces is the "concerns on the legitimacy of international law" against national legal systems in a world society. Fourthly, from analogical reasoning to ontological "ethos", there is a "paradigm shift" from the traditional "top-down" global governance paradigm (which is associated with analogical reasoning and hierarchical solutions to "regime complex") to a "bottom-up" approach with more ontological and inside-out-looking (which could better grasp and understand the dynamics and pulse of regime interaction and evolution). This fundamental change enables those arguments thereafter on the regime interactions and evolutions have totally different theoretical departures, journeys and destinations. Namely, it is more appropriate to ask "what is the status quo, and how to understand it in a historical, relational, structural and holographic way; through analyses of underlying reasons and rules, how will the landscape develop in the future and what could or should be done if there are certain preferences" with a realistic "bottom-up approach" in consideration of the "law of universal gravitation" and the structure of "tensional integrity" in this "regime interaction" perspective, rather

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than constructively and blindly ask “how to better manage the existing regimes and their collisions, and what are those workable (hierarchical or top-down-governance) solutions” from the perspective of “top-down” governance with cognitive path-dependence.

Keywords: Institutional Fragmentation; Ontological Ethos; International Law; Analogical Reasoning;

SUMMARY

Conceptual analysis is an indispensable cornerstone of legal argumentation and academic debates. The substantive connotations of the concepts of "fragmentation" and "institutional fragmentation" has been obscure and ambiguous, which gap could be filled through conceptual analysis with a historical and ontological approach. This is a starting point to reflectively understand the current "institutional fragmentation" debate and rhetoric.

Chapter Ⅱ hereby continues, in the first place, with a methodological reflection on analogical reasoning so as to capture the origin and conceptual premises of the "institutional fragmentation" concept, and also with investigations on the historical evolution of those two concepts of "fragmentation" and "institutional fragmentation".

Investigations on the connotations of the "fragmentation" concept in the existing literatures from three perspectives (from a descriptive perspective with regards to the healthy evolution of sub-fields of international law and co-existence of the treaties thereof, from a more interpretative and constructivist viewpoint derived from Niklas Luhmann's notion of "functional differentiation", from a more analytically and internally precise perspective of different phases of the international legal system) arrive at five preliminary conclusions. Firstly, the close analogy between international law and national legal systems is the theoretical precondition of this "fragmentation" debate in international law. Secondly, the intensification and aggravation of this fear of "fragmentation" arise from the explosive expansion and specialization of international law. The third noteworthy point is that this rhetoric of fragmentation seems to constantly emerge onto and along with arguments of various topics in the branches and subfields of international law, elusively and perpetually. The fourth preliminary concluding point is that there are disconnections and miscommunications between the overall theoretical researches in international law and specific question-oriented studies in sub-areas of international law, regarding this topic of institutional fragmentation of international (IP) law. Fifthly, modern international legal theories and academic researches in the twenty-first century, with the specific problem-oriented method, functional approach and pragmatism methodology, fault with traditional international legal theories, which leads to scorching arguments and dissensions on several significant and decisive topics (such as the "institutional fragmentation" of international law and the ontological "ethos" of international law herewith).

Afterwards, when it comes to the "institutional fragmentation" of international law, historical investigations on the evolution of "institutional fragmentation" concept find that this concept of "institutional fragmentation", as a sub-concept of "fragmentation" in international legal studies, is embodied with the same analogy between international law and national legal systems; and that this concept of "institutional fragmentation" stretched itself originally from the narratives about the proliferation of international (quasi-)judicial institutions all the way to today's pivotal role in a more broad and controversial debate on international law-making, regimes' evolutions, regime interactions, and international law's texture and landscape. There are three reasons for this extension and stretch of the "institutional fragmentation" concept: the background (the dominance of the top-down-approach academic studies in the international law); concept's good explanatory power ("institutional fragmentation" could illustrate the premier sources and the ultimate answers of those "chaos" in a world society); international regimes' prosperity as international law-makers (international regimes have got legal authority and recognition as main contributors of international law-making).

In this world society, the limited role of international law and the actual logic of international law-making are quite unique, which should not be simply assimilated in the analogy with domestic legal theories and interpretations. Accordingly, this concept of "institutional fragmentation", as originates from the analogy between international law and national legal systems, should be revisited and reflected in considerations of the ontological "ethos" of international law, so as to discover the core crux of this debate, as well as unearth the nature and essences of the "institutional fragmentation" of international law.

All the arguments and assertions above implicitly contain, greatly urge and require a delicate exposition on the ontological "ethos" of international (IP) law in this world society, since this ontological "ethos" has long been overlooked, downplayed, detached and ignored in the "institutional fragmentation" language of international (IP) law. For the "institutional fragmentation of international (IP) law" debate, the "post-ontological era" of mature and complex international (IP) law is not coming yet.

Firstly, on the level of the application, interpretation and implementation of international law，international law is "case-based applied", "auto-interpreted" and "disguised implemented". Secondly, on the level of the establishment, interaction and evolution of international regimes and legal rules, historically, pluralistically and functionally speaking, international (IP) law is accretive, accumulative

and progressive. Thirdly, comparatively and constructively from the perspective of the nature and legitimation of international legal system, international law is realistic and conservative, or even labeled as primitive.

Specifically to the topic of "institutional fragmentation of international IP law" here in the thesis, firstly, diversity and pluralism is the existential condition of international legal system in this world society. That requires international law to be more responsive and functional, and the coherence and unity is less valued and is not going to be valued in the same way as in national legal systems. Secondly, against this decentralized and realistic backdrop of world society, analogy between international legal system and national legal systems is untenable. Thirdly, pluralism and complexity reflects the complex interest appeals in this world society, and the benefits of "institutional fragmentation", making international law being effective and relevant, are understated and misinterpreted. Fourthly, bottom-up approach can be more explanatory and effective in the analyses of regime interaction and evolution, as it is more ontological and inside-out-looking to grasp and understand the dynamics and pulse of regime interaction and evolution.

The argumentation highlights to deconstruct this rhetoric of "institutional fragmentation" of international law in this thesis are as follows: (1) the analogy between international law and national legal systems, as the theoretical premise of the "institutional fragmentation" language, fails for the lack of "relevant similarity". (2) The ontological "ethos" of international (IP) law, which are the inherent virtues of international law-making and implementation, regime evolution and interaction in this world society, could rectify the chaos of this rhetoric of "institutional fragmentation" and illuminate the understated benefits as well as rationalities of institutional fragmentation. (3) The fundamental contradiction in this debate is between the specialization of international law and top-down systematic theoretical conception of international law. (4) From analogical reasoning to ontological "ethos", there is a "paradigm shift" from the traditional "top-down" global governance paradigm to a "bottom-up" approach with more ontological and inside-out-looking.

Regarding the benefits and rationalities of "institutional fragmentation", Firstly, the so-called "institutional fragmentation" achieves the market-oriented competition and allocation of international regimes and institutions. Secondly, the so-called "institutional fragmentation" endows the subjects of international law (particularly the States) with more options and bargain chips in the negotiations and conclusion of international legal documents. Thirdly, the so-called "institutional fragmentation"

requires that those international legal practices should pay more attention to the legitimacy of the regime/institution as an authority in this world society, as well as should be more closely and tightly linked to the latest dynamics and landscapes of this world society.

It is clear that the huge gap between academic research and practical, as well as "huge gap between normative level and implementation" in international law, has caused a lot of confusions and chaos on legal rhetoric and interpretation. And this debate of "institutional fragmentation", as "a powerful and defining metaphor of modern international law scholarship", is one of those. To sum up, the fundamental contradiction contained in this "institutional fragmentation of international law" debate is between the specialization of international law (the "functional approach" of modern international law's development, as the endogenous factors) and top-down systematic theoretical conception of international law (international law as a legal system, as the exogenous factors). And the junction of those forces is the "concerns on the legitimacy of international law" as a legal system in a world society.

This chapter concludes that it is clear that this is a good opportunity to theorize and internalize the "institutional fragmentation" debate into the ontological "ethos" of international law, with "a reconceptualization of both the functions and the effectiveness of modern international law and institutions" so as to better understand international law as a legal system in a world society. It is obvious that this topic of "institutional fragmentation" could be an excellent pointcut to realize the "paradigm shift" and get rid of the "top-down approach dependence" in international legal studies. And this ontological "ethos" perspective of international law guarantees a high-definition display of international IP regime interactions and evolution.

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"When one starts to deal with an international legal problem, say a dispute about the rights of States, one very soon enters certain controlling assumptions which seems to demand solution before the problem can even be approached in some determinate way and a legal solution be suggested."

From Apology to Utopia: The Structure of International Legal Argument.

Koskenniemi, Martti. 1989

2.1 INTRODUCTION

Conceptual analysis is one of the most vital components of legal reasoning and academic arguments, and is also considered as the touchstone of a successful theoretical presentation of a social phenomenon in high definition.[1] On the one hand, from the perspective of traditional "black letter" legal studies, conceptual analysis is one of the most effective and appropriate methods to start an argument and settle a controversy. That's, firstly, because a clear composition of the core concepts' definitions as well as connotations is the origin, cradle and carrier of subsequent descriptive panoramas, analytical pillars and conceptual framework constructions,[2] in terms of the methodologies of legal researches;[3] and secondly, in terms of rational cognition, because a clear, thorough and rational conceptual analysis, necessarily but not sufficiently, guarantees and demonstrates rationalities onto the disenchantment and

[1] See Jackson, Frank. From Metaphysics to Ethics: A Defence of Conceptual Analysis. Oxford: Clarendon Press, 1998. (Jackson claims that conceptual analysis plays an essential role in all rational inquiry.) See Plunkett, David. Expressivism, Representation, and the Nature of Conceptual Analysis. Philosophical Studies 156.1 (2011): 15-31. ("One of the standard projects that philosophers claim to engage in is the project of conceptual analysis. In broad terms, we might say that this is the project of better understanding the content or meaning of concepts that we use in thought and practice—e.g., free will, belief, or law.") As for critics of Jackson, see Laurence, Stephen, and Eric Margolis. Concepts and Conceptual Analysis. Philosophy and Phenomenological Research 67.2 (2003): 253-282. Regarding applications of conceptual analysis in specific fields, see Victora, Cesar G., et al. The Role of Conceptual Frameworks in Epidemiological Analysis: A Hierarchical Approach. International Journal of Epidemiology 26 (1997): 224-227, 227. ("Conceptual hierarchical frameworks" are used for many studies, including childhood infectious disease, malnutrition, low birthweight, infant mortality, hypertension and obesity.)

[2] Vygotskiĭ, L. S., and Alex Kozulin. Thought and Language. Cambridge, Mass: MIT Press, 1986, p 132-134. Also see Keil, Frank C. Concepts, Kinds, and Cognitive Development. Cambridge, Mass: MIT Press, 1992, p 6. ("More often than not, new phenomena and objects are named after inessential attributes, so that the name does not truly express the nature of the thing named…the result is a ceaseless struggle within the developing language between conceptual thought and the heritage of primitive thinking in complexes.")

[3] See Machery, Edouard. Concepts Are Not a Natural Kind. Philosophy of Science 72.3 (2005): 444-467. ("In cognitive science, concepts are the bodies of knowledge that are stored in long-term memory and are used by default in the higher cognitive processes (categorization, inductive and deductive reasoning, analogy making, language understanding, etc.).")

cognitive processes in the form of logical reasoning,[4] which is more than likely to disambiguate the pre-existing fallacies and cut off the "poisonous tree" where "poisonous fruits" grow.[5]

On the other hand, from the perspective of socio-legal study in the "context", revisiting to basic concepts could reveal those underexplored realms and underexposed spectrums that is inadvertently sealed or ignored, and thus prop up a fresh architecture of arguments.[6] It could be deep downwards contextualized in the latest empirical contexts, and high upwards abstracted to top-down regulatory legal setup.[7] Moreover, in terms of the persuasiveness and explanatory power in respects to the concept of "fragmentation" in this debate, "rethinking the conceptually useful yet functionally artificial analysis",[8] if it could be considered as that, would better reflect the complex realities and development of international law under this "world society".[9]

Therefore, regarding this study on the institutional fragmentation of international IP law henceforth, we should firstly have a clear understanding about the two concepts of "fragmentation" and "institutional fragmentation", both historically and reflectively, under the context of the concurrent development of international legal system in this "world society". Only after all those clarifications could we have the methodological confidence and necessary theoretical foundations to start the expedition to the institutional fragmentation of international IP law comprehensively in the subsequent

[4] Masalova, Svetlana. Cognitive Rationality and Its Logic-Mathematical Language. Psychology Research, 2.12 (2012): 744-751. ("Structural basis of the cognitive (flexible) rationality is a concept—a form of the inseparability of the rational and irrational cognition.") Also see Kant, Immanuel, Marcus Weigelt, and F. Max Müller. Critique of pure reason. London: Penguin, 2007.

[5] See Jackson, Frank. From Metaphysics to Ethics: A Defence of Conceptual Analysis. Oxford: Clarendon Press, 1998. p 28-55. (Frank Jackson places the cause of conceptual analysis as central to philosophical inquiry, and argues that conceptual analysis has been undervalued and widely misunderstood, preventing a whole range of important questions from being productively addressed. "[C]onceptual analysis is the very business of addressing when and whether a story told in one vocabulary is made true by one told in some allegedly more fundamental vocabulary. When Roderick Chisholm and A. J. Ayer analysed knowledge as true justified belief, they were offering an account of what makes an account of how things are told using the word 'knowledge' true in terms of an account using the terms 'true', 'justified', and 'belief'. It counted as a piece of conceptual analysis because it was intended to survive the method of possible cases.") Also see Larkins, Christopher M. Judicial Independence and Democratiziation: A Theoretical and Conceptual Analysis. Am. J. Comp. L. 44 (1996): 605.

[6] For example, see Griffiths, John. What is Legal Pluralism?. The Journal of Legal Pluralism and Unofficial Law 18.24 (1986): 1-55. Also see Himma, Kenneth Einar. Do Philosophy and Sociology Mix? A Non-Essentialist Socio-Legal Positivist Analysis of the Concept of Law. Oxford Journal of Legal Studies 24.4 (2004): 717-738. (Criticizing the "socio-legal positivism" with respects to the concept of law.)

[7] As for other literatures on the top-down and bottom-up approaches, see Sabatier, Paul A. Top-down and Bottom-up Approaches to Implementation Research: A Critical Analysis and Suggested Synthesis. Journal of Public Policy (1986): 21-48.

[8] See Puig, Sergio. International Regime Complexity and Economic Law Enforcement. Journal of International Economic Law (2014): 1–26, 3. (The article tries to "encourage rethinking the conceptually useful yet functionally artificial analysis of international trade and investment law as discrete, separate systems".)

[9] It is true for many concepts in international law, as the "evolutionary process" is unceasing. For example, see Alex Mills. Rethinking Jurisdiction in International Law. British Yearbook of International Law 84.1 (2014): 187-239.

sections and next several chapters.[10]

Specifically speaking to the topic hereof, fragmentation is certainly not a new but still quite controversial as well as decisive issue, either when Judge Gilbert Guillaume, as the President of the International Court of Justice, was addressing the General Assembly of the United Nations and giving a warn about the fragmentation's potential damages to international legal order on 27 October 2000,[11] or when Hersch Lauterpacht was defending the "reality of the law of nations" before the Royal Institute of International Affairs, Chatham House, in 1941.[12]

> *"The disunity of the modern world is a fact; but so, in a truer sense, is its unity. Th[e] essential and manifold solidarity, coupled with the necessity of securing the rule of law and the elimination of war, constitutes a harmony of interests which has a basis more real and tangible than the illusions of the sentimentalist or the hypocrisy of those satisfied with the existing status quo. The ultimate harmony of interests which within the State finds expression in the elimination of private violence is not a misleading invention of nineteenth century liberalism."*[13]

And always, the fragmentation debate is deeply tangled with the "semantics of unity and diversity"[14] of international law as a legal system, the construction of the international legal order as a conceptual invention,[15] and the concerns over international law's texture, configuration as well as future

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[10] Contextualizing the fragmentation debate in specific historical backgrounds would greatly complement the analytical or the structural approach and thus shed light on the politics of fragmentation and what we are really arguing about. See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 1-4.

[11] See Gilbert Guillaume. 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. ("In effect, they not only create a choice of courts - not to say a market - for the parties concerned, but they also increase the risk of conflicting judgments.") See Guillaume, Gilbert. The Future of International Judicial Institutions. International and Comparative Law Quarterly 44.04 (1995): 848-862. Also see Aspremont, Jean d'. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. Oxford: Oxford University Press, 2011, p 205.

[12] See Koskenniemi, Martti. Lauterpacht: The Victorian Tradition in International Law. Eur. J. Int'l L. 8 (1997): 215, 220-221, 262. ("Lauterpacht's main theoretical work. The Function of Law in the International Community (1933), set up the doctrine of a comprehensive international legal order to defend in legal terms the unity of a world that seemed to be heading from fragmentation to catastrophe, from the League of Nations to the Holocaust. It was compatible with the ideas of the nineteenth century Jewish enlightenment and prevailing pacifist sentiments. It also helped Lauterpacht to assimilate within a cosmopolitan elite that constructed its identity from rationalist, anti-nationalist sentiments and an individualist cultural outlook.")

[13] See H. Lauterpacht. The Reality of the Law of Nations. In Lauterpacht, Elihu. International Law, Being the Collected Papers of Hersch Lauterpacht. Systematically Arranged and Edited by E. Lauterpacht. Cambridge [Eng.]: University Press, 1970, p 26.

[14] See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28.

[15] See Schermers, Henry G., and Niels M. Blokker. International Institutional Law: Unity within Diversity. Martinus Nijhoff Publishers, 2011, p 723. ("Whenever there is a law-maker there is a legal order. Each state has its own legal order, composed of the totality of legal rules regulating the national community. At the global level, the

evolution,[16] arising originally from the ontological "ethos" of international law and international law's analogy with national legal systems.[17] All those hang there just like some sort of "Sword of Damocles", reemerging from time to time to stir the studies on international law and sub-areas.[18] By drawing on the current debate about fragmentation in international law, reflections and reconstructions are still in their infancy; and meanwhile, noises and controversies continue to rise one after another.

However, amid all those literatures, it seems to be that few articles seem to be concerned about the accurate connotations of the concept of "(institutional) fragmentation" or prepare to offer a precise definition wherein,[19] so as to better architect the intellectual edifice of international law's fragmentation debate.[20] It is quite likely that the academia tends to take this concept for granted due to its descriptive representation and historical complexity, but the consequential damages accordingly to the fragmentation debate in international law cannot be emphasized too much.[21] The evolution, referents and the connotations of this concept of "fragmentation", both linguistically and conceptually,

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law-maker is still underdeveloped, international law being made principally by states. Global law-making is not centralized, in contrast to law-making at the national level, and consequently international law lacks the unity that characterized domestic legal order exists at all. An affirmative answer is given by some writers, while a negative answer is given by others, depending on the criteria used for the definition of a legal order.")

[16] For example, see Taylor, Allyn L. Global Governance, International Health Law and WHO: Looking towards the Future. Bulletin of the World Health Organization 80.12 (2002): 975-980. (Arguing about the coordination, coherence and implementation of international health law policy under the context of globalization, by examining the forces and factors behind the emerging expansion of conventional international health law.) Actually, the issue of "the evolution of international law" has been explored from various perspectives and connected to many issues of international legal order in a world society. For example, see Benvenisti, Eyal, and George W. Downs. National Courts, Domestic Democracy, and the Evolution of International Law. European Journal of International Law 20.1 (2009): 59-72.

[17] More clearly and specifically speaking, this debate is not about fragmentation. Rather it is about how to conceive and understand international law as a unique legal system, or the so-called "international legal order". See Prost, Mario. All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation. Finnish Yearbook of International Law 17 (2006): 1-29, 1. ("It is concerned with the mainstream discourse on unity/fragmentation and what that discourse reveals about the way international lawyers conceive of 'their' law (and of their role in it).")

[18] See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 4. ("Understood as such, the notion of fragmentation has appeared in the international legal discourse at regular intervals since the mid-nineteenth century. Although its connotation has certainly changed over time…, its denotation has remained the same: to invoke fragmentation is to evoke an image of chaos, explosion.")

[19] See Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 13. ("In fact, most discussions about unity/fragmentation provide no definition at all. Often, unity and fragmentation are simply presented as opposite theoretical positions. But their meaning remains rather vague and intuitive.")

[20] For example, "[t]his approach is not free of ambiguity. The Commission recognized and defined self-contained regimes as a subcategory (namely a "strong form") of lex specialis within the law of State responsibility. As such, it appears to cover the case where a special set of secondary rules claims priority over the secondary rules in the general law of State responsibility." "The judgment by the Permanent Court of International Justice in the S.S. Wimbledon case, however, uses a broader notion of a self-contained regime." See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 66, par. 124, 126.

[21] See von Benda-Beckmann, Franz. Who's Afraid of Legal Pluralism?. The Journal of Legal Pluralism and Unofficial Law 34.47 (2002): 37-82, 37. ("Rather than looking at the heuristic value of the concept for describing and analysing complex empirical situations, the conceptual struggles seem to create two camps, effacing the many differences in assumptions and approaches to law in society that can be found within both these camps.")

somehow are downplayed. As such, this language of fragmentation becomes ambiguous and somewhat unintelligible.[22] If we are not able to abort the chaos and clarify the concept of fragmentation in the first place, it is far from possible to expect a debate with rationality and a language of fragmentation embodying rigorous legal reasoning. And that's why, right now in the language of fragmentation, we are sometimes confronted with endless but pointless or even clueless contests. And what's worse, substantially misleading but seemingly plausible arguments, such as the semantic dimensions in regard to the designatum of "self-contained regime"[23] and "the unity of international legal order",[24] are still reverberating. And many associated concepts alike have been in dark for way too long. For instance, regarding the notion of "self-contained regime", although the International Law Commission endeavors to synthesize various definitions of the notion of "self-contained regime" in different senses, none of them is "clear or straightforward"[25]; and underlying theoretical origins of the alternative concept—"special" regimes—have been inadequately probed. In the case of the unity of international legal order, argumentations about international legal pluralism and international regimes' interaction seem to be chaotic and disordered.[26]

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[22] For example, see Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 8-9. ("[I]t is precisely because international lawyers view international law as leading from political chaos to legal unity while refusing to engage in discussing the substance of that unity (and the extent to which it includes diversity), that they have had recourse to the language of fragmentation as a discursive tool for contestation and criticism." "Nevertheless, what links the various moments together is the relatively stylized ways in which the word 'fragmentation' is invoked, either as the prologue to unity or as a menace to unity.")

[23] See Dupuy, Pierre-Marie. A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law. Eur. J. Legal Stud. 1 (2007): 1. ("However, none of the theoretical justifications advanced by those who identify special regimes wherever it suits them stand up to analysis. Even when a sub-system of law is original in terms of its secondary norms of recognition, enactment and adjudication, to use the terminology of H.L.A. Hart, it does not necessarily become cut off from the body of governing principles.") See Simma, Bruno, and Dirk Pulkowski. Of Planets and the Universe: Self-Contained Regimes in International Law. European Journal of International Law 17.3 (2006): 483-529. (The authors argue that "'conceptual' arguments for so-called self-contained regimes are unconvincing", and propose a fallback on general international law.) Also see Simma, Bruno. Self-contained Regimes. Netherlands Yearbook of International Law 16 (1985): 111-136.

[24] See Burke-White, William. International Legal Pluralism. Mich. J. Int'l L. 25 (2003): 963. (It argues that the international law is being transformed into a pluralist system rather than the so-called fragmentation, and this international legal pluralism strengthens the international legal order.) Marschik, Axel. Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System. European Journal of International Law 9.1 (1998): 212-239, 213. ("Using the term 'subsystem', as defined above, it is possible to rephrase the main question of the book: Is the existence of diverse subsystems a threat to the unity and efficacy of the international system?")

[25] ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 70, par. 133-135. ("None of this is to say that the effect of a self-contained regime in this third sense would be clear or straightforward." "The three notions of 'self-contained regime' are not clearly distinguished from each other.")

[26] See Mosler, Hermann. The International Society as a Legal Community. Alphen aan den Rijn, the Netherlands: Sijthoff & Noordhoff, 1980, p 191, 203. ("States have their own exclusive domestic sphere which is protected by international law, while the legal order of international organizations is created by the constituent members and is therefore not so complete. It is, in fact, limited to the exercise of the functions entrusted to the organizations by its constituent treaty". As for the legal nature of the internal law, "the question has been raised as to whether the internal legal order of international organizations is part of international law or whether it forms a separate legal

"Regardless of the conclusion that is reached regarding the existence of an international legal order, there is general agreement that international law lacks the coherence of national law. This lack of unity is to some extent compensated for by international organizations, each of which has a legal order of its own. This legal order is not similar to domestic legal orders. It is partial and functional legal order, because it is limited to the field of operation of the organization and to those states that participate in it. Within the limits of their competence, international organizations are used by the member states as framework for law-making. In addition, these organizations may also be involved in the supervision of the rules in question. In this way, international organizations provide some unity, some coherence in the international legal order."[27]

Here, the thesis is not saying that offering a clear definition is the only priority or a must-do, nor is it asserting that this revisiting would guarantee to disambiguate all the controversies, disenchant projected structures and cure all those "diseases". Obviously, whatever conceptual, methodological and theoretical approaches we may use, the reach and accomplish would still be limited in many senses, not to mention that it is almost impossible to arrive at a definition of "fragmentation" and associated notions that everyone agrees with.[28] Different literatures are engaged in different discourses and situations in multiple-dimensional level of discussions.[29] Rather, it is proposed here and pushed forward as a starting point to ask: what kind of implications could be spelled out from this situation where the researchers in the academia conceive and continually shape the debate on (institutional) fragmentation of international law stuck in the status quo? Why and how is this "hybrid fusion"[30] maintained all the way up to now? What could be deduced from the status quo mentioned above in respects to this debate, language, rhetoric and politics of international law's (institutional)

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order analogous to the legal systems of states.") Also see Schermers, Henry G., and Niels M. Blokker. International Institutional Law: Unity within Diversity. Martinus Nijhoff Publishers, 2011, p 724. ("There is more difference of opinion as to whether the legal orders of international organizations are also separate from the international legal order.")

[27] See Schermers, Henry G., and Niels M. Blokker. International Institutional Law: Unity within Diversity. Martinus Nijhoff Publishers, 2011, p 723-724.

[28] For similar arguments about legal pluralism, see von Benda-Beckmann, Franz. Who's Afraid of Legal Pluralism?. The Journal of Legal Pluralism and Unofficial Law 34.47 (2002): 37-82, 39. ("While our conceptual choices concerning law and legal pluralism are based on a number of methodological and theoretical assumptions, these must be supplemented by a more encompassing social theoretical understanding of the social world. The concepts of 'law' or 'legal pluralism' are only a part of our wider conceptual and analytical tools.")

[29] See von Benda-Beckmann, Franz. Who's Afraid of Legal Pluralism?. The Journal of Legal Pluralism and Unofficial Law 34.47 (2002): 37-82, 41.

[30] See Geertz, Clifford. Local Knowledge: Further Essays in Interpretive Anthropology. New York: Basic Books, 1983, p 232.

fragmentation? As a conceptually useful metaphor of this world society and international law therein, this debate of (institutional) fragmentation could surely reveal deeper insights concerning international law's "ethos" and its further (institutional) development under the background of a world society.

Therefore, as the necessity, reasonability, feasibility and significance of this analytical approach – "conceptual analysis" – are quite good for the study hereof on the institutional fragmentation of international (IP) law in a world society, the following are: firstly, a historically comprehensive revisiting of those two concepts of "fragmentation" and "institutional fragmentation" with the conceptual analysis method, by rethinking those concepts in contextualized international scenes and from the perspective of evolutionary processes; secondly, some further narratives on the "ethos" of international law and rhetoric of "institutional fragmentation"; thirdly and lastly, some concluding remarks about this perspective of ontological "ethos" and institutional fragmentation in international (IP) law.

2.2 A METHODOLOGICAL REFLECTION ON ANALOGICAL REASONING

It is always more than necessary and helpful to make a preliminary methodological rethinking amid a mass of literatures on an issue,[31] so as to get a more accurate and keen grasp of what is essentially referred and argued in the name of this issue or concept. That's particularly true in the case of this (institutional) fragmentation debate that is used as a metaphor in the development of international law and hereof is reassessed as well as reanalyzed from a more empirical and ontological perspective.[32]

As no stranger to jurisprudence scholars, analogical reasoning is widely used in legal reasoning,[33] especially in common law system, and it is even recognized as the cornerstone and hallmark of common law reasoning.[34] But the persuasiveness and validity of different categories of analogies in legal arguments depend on "the cogency of the reasoning" in specific cases,[35] namely, whether certain analogy can provide analytically appropriate as well as explanatorily valuable interpretations and solutions that are consistent with legal principles and rationale in that specific field.[36] Those legal principles, rationale or "inter-doctrinal coherence"[37] originate from the realities and contexts where analogy is tentatively constructed and entrusted to resolve disputes about diverse and plural interests.[38]

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[31] For example, see Abi-Saab, Georges. Fragmentation or Unification: Some Concluding Remarks. NYUJ Int'l L. & Pol. 31 (1998): 919.

[32] See Kennedy, David. International Law and the Nineteenth Century: History of an Illusion. Nordic Journal of International Law 65.3 (1996): 387. (A more "sophisticated, functional and pragmatic" perspective towards modern international law should be adopted, compared to the philosophy of international law in the nineteenth century.)

[33] Generally, see Levi, Edward H. An Introduction to Legal Reasoning. Chicago: University of Chicago Press, 1949. (For example, "It is Levi's view that analogical reasoning is the principle method by which lawyers argue their cases, and reasoning by analogy is thus, for him, the primary window into law's manipulability.")

[34] Weinreb, Lloyd L. Legal Reason: The Use of Analogy in Legal Argument. Cambridge University Press, 2005, p 1-5. Also see Grant Lamond. Analogical Reasoning in the Common Law. Oxford Journal of Legal Studies, Vol. 34, No. 3 (2014), 567-588, 587. ("Close analogies, for example, are a cornerstone of common law reasoning, since close analogies complement and expand a narrow conception of the nature of precedent.")

[35] See Grant Lamond. Analogical Reasoning in the Common Law. Oxford Journal of Legal Studies, Vol. 34, No. 3 (2014), 567-588, 587. ("What matters far more is the cogency of the reasoning in the analogical case, i.e., whether it presents a good case for dealing with an issue in a certain way.")

[36] See Grant Lamond. Analogical Reasoning in the Common Law. Oxford Journal of Legal Studies, Vol. 34, No. 3 (2014), 567-588, 588. ("All forms of analogical reasoning draw on the fact that legal doctrines are not simply a body of standards with a particular structure, but a body of standards with an intelligible rationale that are nested within wider bodies of law.")

[37] See Grant Lamond. Analogical Reasoning in the Common Law. Oxford Journal of Legal Studies, Vol. 34, No. 3 (2014), 567-588, 588.

[38] See Sunstein, Cass R. On Analogical Reasoning. Harvard Law Review (1993): 741-791. 746. ("In law, analogical reasoning has four different but overlapping features: principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction. Taken in concert, these features produce both the virtues and the vices of analogical reasoning in law.") Weinreb, Lloyd L. Legal Reason: The Use of Analogy in Legal Argument. Cambridge: Cambridge University Press, 2005, 29-30. (Sunstein commends analogical legal reasoning as a means of resolving disputes when there is not agreement about underlying principles. Lawyers and judges resort to analogical reasoning when they lack a "comprehensive theory that would account for the particular outcomes [analogical reasoning] yields.") Also see Sunstein, Cass R. Legal Reasoning and Political Conflict. New York: Oxford University Press, 1996, p 68.

That means analogical reasoning should be both faithful to the former doctrines and sensitive to the latter new situations, two items—source and target—being compared, which then is able to link and transfer legal thoughts progressively and accurately.[39] Otherwise, the method is just window-dressing and deductively invalid.[40]

And the heart of this method of analogical reasoning, with respects to its deductive validity and logical rationality force, essentially lies in the "relevant similarity"[41], which means that we have to know that A and B are "relevantly" similar, and that there are not "relevant" differences between them.[42] That notion of "relevance", however, is "tenaciously resistant to conceptual explication" and makes analogy "largely mysterious and unanalyzed".[43] Analogical legal reasoning is thus considered to be "logically flawed"[44], as it cannot proceed on its own without "identification of a governing ides…to account for the results in the source and target cases"[45].[46] That's also why many scholars assert that analogical legal reasoning is a "fantasy".[47]

> *"The heart of the matter, Brewer asserts, and the reason why analogies are so hard to tame, is the requirement of* ***relevant similarity****. All accounts of analogical argument agree that an analogy is successful and justifies its conclusion only if the observed similarity between the*

[39] See Grant Lamond. Analogical Reasoning in the Common Law. Oxford Journal of Legal Studies, Vol. 34, No. 3 (2014), 567-588, 588. ("Its importance lies in the way that it serves the courts' adjudicative functions: it enables courts to develop the law in ways that are both faithful to existing legal doctrine and sensitive to the novel context in which the law is to be applied.")

[40] See Teitelbaum, Joshua C. Analogical Legal Reasoning: Theory and Evidence. American Law and Economics Review, V0 N0 (2014), 1–32, 2. (Stating that "it suffers from theoretical and empirical indeterminacy")

[41] See Brewer, Scott. Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy. Harvard Law Review (1996): 923-1028, 933. Also see Weinreb, Lloyd L. Legal Reason: The Use of Analogy in Legal Argument. Cambridge: Cambridge University Press, 2005, p 33. ("So, one might say, a source and target are relevantly similar and the analogy is successful if there are relevantly similar and the analogy is successful if there are reasons to conclude that the characteristics that are observed to be similar are regularly accompanied by the characteristic that is in doubt. ")

[42] See Sunstein, Cass R. On Analogical Reasoning. Harvard Law Review (1993): 741-791. 745.

[43] See Brewer, Scott. Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy. Harvard Law Review (1996): 923-1028, 933.

[44] See Weinreb, Lloyd L. Legal Reason: The Use of Analogy in Legal Argument. Cambridge: Cambridge University Press, 2005, p 31. Also see Sunstein, Cass R. On Analogical Reasoning. Harvard Law Review (1993): 741-791. 744. ("At most, analogical thinking can give rise to a judgment about probabilities, and often these are of uncertain magnitude.")

[45] See Sunstein, Cass R. Legal Reasoning and Political Conflict. New York: Oxford University Press, 1996, p 65.

[46] Weinreb, Lloyd L. Legal Reason: The Use of Analogy in Legal Argument. Cambridge: Cambridge University Press, 2005, p 31. ("For Levi acknowledges explicitly that analogical reasoning is logically flawed, and Sunstein, in effect, does as well. Extolling the virtues of incompletely theorized agreements reached on the basis of an analogy, Sunstein says in an aside: 'To be sure, analogical reasoning cannot proceed without identification of a governing ides…to account for the results in the source and target cases.' The analogy is important nevertheless, he says, because it 'helps identify the governing idea.' That, however, has no more to do with the validity of the argument than Brewer's abductive step does. From a logical point of view, the crux of the matter is that analogical reasoning 'cannot proceed' on its own.")

[47] See Brewer, Scott. Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy. Harvard Law Review (1996): 923-1028. Also see Sunstein, Cass R. On Analogical Reasoning. Harvard Law Review (1993): 741-791. See Sunstein, Cass R. Legal Reasoning and Political Conflict. New York: Oxford University Press, 1996.

source and the target is relevant to the further similarity that is in question."[48]

And the concept of "fragmentation" originally arises from the analogy between international legal system and national legal system.[49] This language of fragmentation lastingly continues and emerges at intervals, with basic theoretical foundations unchanged and discussion emphasis as well as objectives ever-changing.[50] Those theoretical premises include one significant and central argumentation point: international law is a legal system whose texture and structure should be the same, or at least mostly similar, with national legal systems within states.[51]

Undoubtedly, international law is a legal system,[52] whether it is defined as a decentralized one, a horizontal one, or a legal system with other special ethos, by nature or its functions.[53] And through the ages, it used to be conceptually and theoretically assumed as an international legal system that is, or ought to be, similar to national legal systems to some extent under a traditional systematic vision of international law,[54] such as the unity and a coherent legal order of international law. But no matter how scholars respond to the fragmentation debate with criticism or welcome,[55] empirically speaking, it is

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[48] Weinreb, Lloyd L. Legal Reason: The Use of Analogy in Legal Argument. Cambridge: Cambridge University Press, 2005, p 32. (Words in bold are originally highlighted in italics in Weinreb's book)

[49] This kind of analogy can be found in many fields of international law. For example, see Lauterpacht, H. First Report on the Law of Treaties. United Nations document, A/CN 4.63 (1953), Yearbook of the International Law Commission, 1953 vol. II, p 156-159. (Analogy between international tribunals and domestic courts) Also see Jenks, C. Wilfred. The Conflict of Law-Making Treaties. Brit. YB Int'l L. 30 (1953): 401, 403. ("In the absence of a world legislature with a general mandate, law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.")

[50] See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28.

[51] See Fischer-Lescano, Andreas, and Gunther Teubner. Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law. Mich. J. Int'l L. 25 (2003): 999. 1002. ("By this token, they identify a danger to the unity of international law because the conceptual-doctrinal consistency, the clear hierarchy of norms and the effective judicial hierarchy that was developed within the nation-states, is lacking. Accordingly, they direct themselves to a hierarchical solution to the problem, which, whilst not wholly reproducing the ideal of legal hierarchies of the nation-state, at least comes somewhere close to it. …")

[52] See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006. Adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10, par. 251). The report will appear in Yearbook of the International Law Commission, 2006, vol. II, Part Two. ("*International law as a legal system*. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.")

[53] For example, as for the special characteristics of international law as a decentralized legal system, see Malanczuk, Peter, and Michael Barton Akehurst. Akehurst's Modern Introduction to International Law. London: Routledge, 2002, p 1-9. See Koh, Harold Hongju. How Is International Human Rights Law Enforced?. Indiana Law Journal 74.4 (1999): 1397-1417. (The conventional "horizontal" story about international human rights law enforcement)

[54] See Benvenisti, Eyal. The Conception of International Law as a Legal System. German Yearbook of International Law 50 (2008): 393-405.

[55] Some literatures assert that this fragmentation phenomenon is a "strategic choice" or "multiple forum capture" to preserve dominance. See Eyal Benvenisti and George W. Downs. The Empire's New Clothes: Political

more about conceptual understandings of international law as a legal system, rather than "a true reflection of political, economic, and social realities" in the international community,[56] at least from the perspective of the narrative and rhetoric of international law and international politics in a world society.

> *"The international legal system has never enjoyed the kind of coherence that may have characterized the legal orders of States……International law will need to operate within an area where the demands of coherence and reasonable pluralism will point in different directions."*[57]

For example, Benvenisti, Eyal, and George W. Downs believe that the fragmentation of international law "represents an ongoing effort on the part of powerful states to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to reduce their accountability both domestically and internationally".[58] Apparently, the prerequisite of this argument is that theoretical "quality and justice" is the normal value, or at least should be the normal value, of international law in today's world society, while the realities of international law and international politics are ignored either consciously or accidentally.[59] Namely, this argument starts not from an empirical observation and analysis of international society, but from a somehow conceptually constructed "good and efficient" conception of the international legal order or international legal system, which tends to be at the first place more legally principled rather than empirically pragmatic.[60] Those issues are no stranger to international lawyers, who must continually juggle the distance between "ought" and "is", law and

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Economy and the Fragmentation of International Law. Stanford Law Review (2007): 595-631. About the fear of "multiple forum capture", which means that developed countries "bring the TRIPs-plus agenda simultaneously and coordinately at various forums, including by establishing initiatives in forums that lie outside the regular multilateral institutional framework for intellectual property norm-setting", see Viviana Muñoz Tellez. The Changing Global Governance of Intellectual Property Enforcement: A New Challenge for Developing Countries. In Li Xuan and Carlos Correa (eds.), Intellectual Property Enforcement: International Perspectives. Cheltenham, UK: Edward Elgar, 2009, p 9-10.

[56] Benvenisti, Eyal. The Conception of International Law as a Legal System. German Yearbook of International Law 50 (2008): 393-405, 403.

[57] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 249, par. 493.

[58] See Benvenisti, Eyal, and George W. Downs. The Empire's New Clothes: Political Economy and the Fragmentation of International Law. Stanford Law Review (2007): 595-631.

[59] For example, see Burley, Anne-Marie Slaughter. International Law and International Relations Theory: A Dual Agenda. Am. J. Int'l L. 87 (1993): 205-239. ("For instance, if it could be reliably shown that a great-power condominium was the best guarantee of international peace, then international law and organization should accommodate and support an arrangement that confers special privileges on a group of great powers. On the other hand, if the prospects for peace hang on some other set of characteristics, then international security organizations and norms designed to regulate the use of force should be reshaped accordingly.")

[60] See Benvenisti, Eyal. The Conception of International Law as a Legal System. German Yearbook of International Law 50 (2008): 393-405, 404.

fact.[61] And "it is not surprising that the real world . . . is one of blotches, blends, and blurs",[62] while our academic research language has always been failing to grasp the dynamic rhythm of the reality, especially for the regime interactions and evolution/transformation processes in international society.[63]

> *"They are unrealistic because they do not reflect the decentralized nature of the international community, a feature which is likely to persist in the foreseeable future. They are inadequate because centralism is not a promising recipe for social stability or a better world order…These models are also undesirable because they tend to stifle pluralism and cultural diversity."*[64]

However, it should be noted that it is not argued here that this way of understanding and interpretation of international law altogether is not logically right or theoretically reasonable. Actually, this view does goods to the understanding of international law as a legal system and the systematic theoretical construction of international law, as well as the subsequent application and implementation.[65] But all those benefits to the theoretical construction of international law and practical interpretation as well as implementation thereafter don't imply that this approach is immune from any critical inspection and reflection,[66] or that this perspective should be applied to the "fragmentation" debate, not to mention that this new approach of revisiting cannot be easily ignored given its rationality. On another level, all those benefits and believed advantages may become the otherwise or self-defeating if the conceptual

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[61] See Koskenniemi, Martti. Lauterpacht: The Victorian Tradition in International Law. Eur. J. Int'l L. 8 (1997): 215.

[62] See Guntram H. Herb and David H. Kaplan. Nested Identities: Nationalism, Territory, and Scale. MD: Rowman & Littlefield Publishers, 1999, p 35.

[63] See Klabbers, Jan, Anne Peters, and Geir Ulfstein. The Constitutionalization of International Law. Oxford: Oxford University Press, 2009, p 14-15. (Emphasizing that the fragmentation of international law has two different levels. "One is the level of international practice, where what matters is what states and other actors do, whereas the other is the level of scholarship. While the two influence each other without a doubt, care should be taken to keep them separate and not mix them up entirely.")

[64] See Schreuer, Christoph. The Waning of the Sovereign State: Towards a New Paradigm for International-Law?. European Journal of International Law 4.1 (1993): 447-471, 449.

[65] See Benvenisti, Eyal. The Conception of International Law as a Legal System. German Yearbook of International Law 50 (2008): 393-405. ("This approach has contributed significantly to the emergent conception of international law as a legal system. The system of norms constitutes a map that guides lawyers in their search for applicable norms, and empowers judges to fill lacunas, interpret treaties, manage the interface between different treaties, and in general develop and further solidify the system. Probably the most significant political outcome of the vision of international law as a legal system is the empowerment of courts to develop international law beyond the intention of governments, and the equalizing effect of a coherent and consistent interpretation and application of the law.")

[66] See Benvenisti, Eyal. The Conception of International Law as a Legal System. German Yearbook of International Law 50 (2008): 393-405, 396. ("This legal discourse empowers primarily judges, whose province is not to promote the good and the efficient, but rather to proclaim what is legal. Their authorization to assert what the law is requires them to use the lawyers' tools to reach specific conclusions. The vision of international law as a legal system rather than a mix of discrete treaties allows them to interpret, deduct, draw inferences and resolve conflicts not only by resorting to the specific treaties at hand but also by relying on the basic principles of the system and its underlying norms.")

premises and methodological methods are just slightly changed, apart from entirely overthrew.[67] And those changes, based on and oriented to either international legal practices or theoretical arguments, can occur anywhere at any time in conceptual arguments and theoretical debates, if it is necessary.[68]

> *"Fragmentation puts to question the coherence of international law. Coherence is valued positively owing to the connection it has with predictability and legal security. Moreover, only a coherent legal system treats legal subjects equally. Coherence is, however, a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so. Therefore, alongside coherence, pluralism should be understood as a constitutive value of the system. Indeed, in a world of plural sovereignties, this has always been so."*[69]

Simply here, it aims to clearly point out that this notion of "the fragmentation of international law" is developed in those above-analyzed cognitive perspectives and methodological approaches.[70] And those clear, thorough analyses of them are believed to be helpful for a reflective and critical revisit of the concept of "fragmentation" and "institutional fragmentation", about its historical development processes, changing connotations and its referents.[71] It is worthwhile to anticipate that all those would

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[67] For example, "[a]s a result of this implicit authorization, perhaps the most significant political outcome of the vision of international law as a legal system is the empowerment of courts to develop international law beyond the intention of governments. The systemic or constitutional conception of international law supplies relatively independent bureaucracies and judiciaries with doctrines that enable them to expand their authority while maintaining coherence and consistency through broad interpretation of treaties and the development of customary international law." But the so-called "coherence and consistency" here may not be the appropriate or the equivalent merits of international law, as it may be just a cognitive result or outcome of this vision and all the premises. And it possibly becomes the obstacle to correctly understand the ethos of international law if we choose other different premises for our reasoning. See Benvenisti, Eyal. The Conception of International Law as a Legal System. German Yearbook of International Law 50 (2008): 393-405, 396. Regarding the relationship of fragmentation and coherence in international law, see ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 248, par. 491.

[68] For example, "[t]he proliferation of informal means of creating inter-state commitments, as well as the growing reliance on coordination among private actors, challenge the vision of international law as a coherent legal system. The assumption that states cannot contract out of international law, an assumption most recently articulated by the International Law Commission, seems increasingly in tension with political, social, and economic realities." See Benvenisti, Eyal. The Conception of International Law as a Legal System. German Yearbook of International Law 50 (2008): 393-405, 404.

[69] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 248, par. 491.

[70] For example, disparities found in the abundant literature on the topic could also be read as representative of European (formalist) and American (realist) approaches to international law. See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 2.

[71] "The impetus for such an analysis emerged from the finding that over the last 150 years, international lawyers have had recourse to the language of fragmentation as an argument for criticism and contestation." "We shall see that the play between integration and disintegration, and more generally between unity and diversity, is one of the discursive patterns used by the discipline to deploy criticism and propose reform projects." See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 2-3.

be conducive to better understand, and thus possibly better explain, the current fragmentation debate's legal assumptions and broader implications.

2.3 THE CONCEPT OF "FRAGMENTATION" AND "INSTITUTIONAL FRAGMENTATION" REVISITED

Under the context of the analogy between international law and national law in this "fashionable debate"[72] and "complicated language"[73], the concern of the "fragmentation of international law", as a threat to the alleged "unity and coherence" of international legal system, is repeatedly emphasized for a lot of times on many occasions,[74] whether it's about the proliferation of international regimes and institutions from the perspective of a coherent order of regimes and their interaction, or the "normative specialization" and "institution-building" from the perspective of top-down vision of international law as a consistent legal system,[75] or the expansion of international law's scope and the diversification of international regulation networks from the perspective of international law's pragmatic functions.[76]

But it seems that the conceptual and methodological presuppositions of international law's fragmentation are inadequately reviewed or reflected, notwithstanding other aspects of the fragmentation in international law are already so much emphasized, analyzed and argued, with attention to their legal nature, systematic damages, potential causes and possible solutions.[77] The connotations of international law's fragmentation lie closely with the descriptive effectiveness and the analytically explanatory power of a few concepts in international law, including the unity of international law, the international legal pluralism and the regime interaction. That's because the

[72] See Lindroos, Anja, and Michael Mehling. Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO. European Journal of International Law 16.5 (2005): 857-877. ("It has become fashionable to claim that international law is becoming increasingly fragmented, and that its supposed unity as a decentralized system of rules is threatened by an expanding scope and a multiplicity of international judicial bodies.")

[73] See Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 9. ("Fragmentation, as we shall see in the rest of the this book, raises a host of important questions of a legal, political, technical and ideological nature. The literature on fragmentation is not only abundant: it is also extremely dense, diverse, complex and – in its own way – fragmented.") Also see Dupuy, Pierre-Marie. A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law. Eur. J. Legal Stud. 1 (2007): 1. (Fragmentation has become the doctrinal debate *par excellence* in this globalization era.)

[74] For example, see Wellens, Karel C. Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends. Netherlands Yearbook of International Law 25 (1994): 3-37. (The study focuses on the application of "secondary rules" in specialized regimes and endeavors to find out "whether they would become a potential risk, constituting a threat to the global unity and efficacy of the international legal order." And the conclusion of this paper is comparatively optimistic, arguing that "the secondary rules……promoted and guaranteed the growing effectiveness of their own particular set of primary rules, without putting in jeopardy the unity or coherence of the international legal order.")

[75] See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 3.

[76] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 244, par. 481. ("[T]he emergence of technically specialized cooperation networks with a global scope")

[77] It can be sensed with the following example: the influence of the ideology of legal centralism on the discussions of legal pluralism. See Griffiths, John. What is Legal Pluralism?. The Journal of Legal Pluralism and Unofficial Law 18.24 (1986): 1-55.

concept of fragmentation, as well as the language of fragmentation in international law, is developed with deeper touches, broader links and bigger scores. Those concepts, as the theoretical precondition of the fragmentation debate, are so vital to the discussions that it should never be easily let go without in-depth analyses and all-sided deliberations. So, before further and detailed discussion on the fragmentation of international law, what about those premises and preconditions promoting the concept of fragmentation in the analogy between international law and national legal systems? This paper mainly focuses on two core ones here: legal pluralism, and the unity of international law in the play between unity and diversity in international law.

Originally and traditionally in domestic legal systems, legal pluralism is defined as to the study of the coexistence of indigenous and Western law in old colonial territories as well as the emergence of types of private law in domestic societies.[78] Scholars for this paradigm of pluralism believe that legal centralism is an ideal illusion that unreasonably holds academia's structural imagination, while legal pluralism is the constitutive reality.[79] And the official legal system tends to be the secondary, other than the assumed primary, locus of regulation,[80] with repeated rediscovery of the other hemisphere of the legal world.[81]

> *Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion. Nevertheless, the ideology of legal centralism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation stone of social and legal theory. A central objective of a descriptive conception of legal pluralism is therefore destructive: to break the stranglehold of the idea that what law* ***is****, is a single, unified and exclusive hierarchical normative ordering depending from the power of the state, and of the illusion that the legal world actually looks the way such a conception requires it to look.*[82]

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[78] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 11, par. 8, footnote 13. Also see VAN, COTT, and Donna Lee. A Political Analysis of Legal Pluralism in Bolivia and Colombia. Journal of Latin American Studies 32.01 (2000): 207-234.

[79] See Galanter, Marc. Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law. The Journal of Legal Pluralism and Unofficial Law 13.19 (1981): 1-47, 18. ("'Legal centralism' has impaired our consciousness of 'indigenous' law".)

[80] See Galanter, Marc. Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law. The Journal of Legal Pluralism and Unofficial Law 13.19 (1981): 1-47, 20.

[81] See Weber, Max. Max Weber on Law in Economy and Society. Ed. Max Rheinstein. Vol. 84. Cambridge, MA: Harvard University Press, 1954, p 16-20, 140-149. Also see Fuller, Lon L. The Morality of Law. Vol. 152. Yale University Press, 1969, p 123. (The plural or multiple character of law in a society is taken note of.)

[82] See Griffiths, John. What is Legal Pluralism?. The Journal of Legal Pluralism and Unofficial Law 18.24 (1986):

As said by John Griffiths, this debunking with "clear empirical thought"[83] should be continued and this false comparison with the idealized picture of law in modern society needs to be rectified. The never-ending shock of the gap between the realistic approach of empirical investigation and the ideal conceptions as well as ideologies should be envisaged, decompressed and reconstructed, thus to better analyze the role of law in a society and better define the concept of law.[84] Moreover, that is definitely far-reaching and transformative for a more comprehensive and penetrating grasp of the alleged "institutional fragmentation of international law".

> *"In sum, pluralism offers not only a more comprehensive descriptive account of the world we live in, but also suggests a potentially useful alternative approach to the design of procedural mechanisms, institutions, and practices."*[85]

Despite that those interpretative concepts essentially are used in national legal systems and the fragmentation issue is mainly argued in international law, the conceptual premises linked and transmitted through the analogy between national legal system and international law are of the same kind and in substantially identical texture.[86] That's why this concept of legal pluralism could be interpretative and expositive to the alleged institutional fragmentation of international law and further on the "ethos" of international law. However, when the concept of legal pluralism is transferred into international law for interpreting the issue of the unity/diversity play in international law,[87] which gives rise to the debate on international legal pluralism, the past shadow of legal pluralism in national legal systems should be refused to go on haunting the debate between unity and pluralism in international law. And it is sequacious and misleading to artificially set up unity and pluralism as two opposite perspectives of international law's fragmentation so as to be consistent with the traditional paradigm. That's because compared to national legal systems, the correspondent structure of

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1-55, 4-5. (The word in bold is originally highlighted in the original text.)

[83] See Griffiths, John. What is Legal Pluralism?. The Journal of Legal Pluralism and Unofficial Law 18.24 (1986): 1-55, 5.

[84] See Berman, Paul Schiff. Global Legal Pluralism. S. Cal. l. Rev. 80 (2006): 1155. ("[W]e need to realize that normative conflict among multiple, overlapping legal systems is unavoidable and might even sometimes be desirable, both as a source of alternative ideas and as a site for discourse among multiple community affiliations. Thus, instead of trying to stifle conflict either through an imposition of sovereigntist, territorially-based prerogative or through universalist harmonization schemes, communities might sometimes seek (and increasingly are creating) a wide variety of procedural mechanisms, institutions, and practices for managing, without eliminating, hybridity.")

[85] See Berman, Paul Schiff. Global Legal Pluralism. S. Cal. l. Rev. 80 (2006): 1155.

[86] See Teubner, Gunther. Global Bukowina: Legal Pluralism in the World Society. In Teubner, Gunther. Global Law Without a State. Aldershot: Dartmouth, 1997, p 3-28. ("Global law can only be adequately explained by a theory of legal pluralism which turned from the law of colonial societies to the laws of diverse ethnic, cultural and religious communities in modern nation-states.")

[87] See Berman, Paul Schiff. Global Legal Pluralism. S. Cal. l. Rev. 80 (2006): 1155. (Legal pluralism "helps us understand the global legal environment".)

international law and the "local context" of this world society or international community are completely different, which makes this analogy feels like "why is a raven like a writing desk".[88]

And it is basically the same thing for the concept of "unity" in the argument of national legal system's coherence and international law's fragmentation: refuse the shadow of the past, and embrace the fear of the future.[89] In international law, the traditional concept of "unity" in national legal systems is far from capable to capture the "peculiar characteristics" of international law as fully-fledged law.[90] On the other way around, this projected "unity" of international law probably exists as conceptual obstacles and cognitive biases.[91]

> *"For nation-building in the past, unity of the law was one of the main political assets - a symbol of national identity and simultaneously a symbol of (almost) universal justice. A worldwide unity of the law, however, would become a threat to legal culture. For legal evolution the problem will be how to make sure that a sufficient variety of legal sources exists in a globally unified law. We may even anticipate conscious political attempts to institutionalize legal variation, for example, at regional levels."*[92]

Therefore, in the first place, the academia needs to inspect whether it is workable and feasible to go along with this language of fragmentation using those projected concepts. Namely, what does the concept of "fragmentation" really mean and stand for, and how should it be critically constructed in this debate? The following is the revisiting to the concepts.

2.3.1. The Evolution of the Concept of "Fragmentation"

Many scholars have provided various interesting and controversial interpretations, with both descriptive and analytical, both comparative and ontological, both forward-looking and historical

[88] See James D. Fry. China's Version of the US Foreign Corrupt Practices Act and the OECD Anti-Bribery Convention: Comparing Ravens and Writing Desks?. K.L.J. 2013, 24(1), 60-84.

[89] See Pauwelyn, Joost. Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands. Mich. J. Int'l L. 25 (2003): 903. ("At the same time, fragmentation is not necessarily a bad thing, nor will it disappears anytime soon. Law making and law enforcement by specialized organizations are likely to lead to better law. Regulatory competition may increase efficiency and provide a laboratory for the development of new legal instruments. Moreover, the diversity of states means that not all states have the same interests and hence that not all states will want to, or should, join all treaty-regimes.")

[90] See Teubner, Gunther. Global Bukowina: Legal Pluralism in the World Society. In Teubner, Gunther. Global Law Without a State. Aldershot: Dartmouth, 1997, p 4, 8.

[91] If the concept of "unity" is expected to be used in international law to describe the practical function, the theoretical connection and systematic structure of all those international legal rules, namely international law as a legal system, then "unity" of international law should be endowed with new connotative meanings. See Pauwelyn, Joost. Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands. Mich. J. Int'l L. 25 (2003): 903.

[92] See Teubner, Gunther. Global Bukowina: Legal Pluralism in the World Society. In Teubner, Gunther. Global Law Without a State. Aldershot: Dartmouth, 1997, p 8.

perspectives,[93] so as to vest the scholarship to comprehensively and critically understand this phenomenon of fragmentation as well as empower this fragmentation debate the role of *ab uno disce omnes* onto deeper theoretical issues and the broader texture of international legal system.[94]

For instance, Martineau, Anne-Charlotte, as being curious about the revival of fragmentation in the international legal discourse after the new millennium, innovatively contextualized the "fragmentation" debate back to those historical periods and approached this issue from the perspective of legal rhetoric, arguing about the correlation between the general macroclimate of international society and the sub-environment of the perception of the fragmentation debate, along with uncovering underlying "implicit assumptions and political implications" of this continued debate on fragmentation.[95] Despite that it contains a possible risk of falling back to stereotype and oversimplification,[96] its historic interpretation of the politics of fragmentation and its connotations throughout the past several centuries is valuable. Different researchers highlight this concept of "fragmentation" on various dimensions, from diverse perspectives, with different approaches,[97] and on different levels.[98] But various alleged or designated connotations behind those different facets reveal some common merits and peculiarities of this language of fragmentation.

Firstly, from a descriptive perspective with regards to the healthy evolution of sub-fields of international law and co-existence of the treaties thereof, the possible emergence of "treaty

[93] For example, "hence, in order to offer a full account of the politics of fragmentation, the historical perspective will need to be complemented with an analytical or structural one." See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 3.

[94] For example, see Koskenniemi, Martti, and Päivi Leino. Fragmentation of International Law? Postmodern Anxieties. Leiden Journal of International Law 15.03 (2002): 553-579. See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28. See Dupuy, Pierre-Marie. A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law. Eur. J. Legal Stud. 1 (2007): 1. Also see Koskenniemi, Martti. Lauterpacht: The Victorian Tradition in International Law. Eur. J. Int'l L. 8 (1997): 215, 220-221.

[95] Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28.

[96] See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28. ("'It has become a platitude to say that international law is changing', said Maurice Bourquin at The Hague Academy of International Law in 1931. Some seventy five years later, it is still commonplace to address international law in terms of its evolution." And it claims that the play between unity and diversity is "one of the discursive patterns used by the discipline to deploy criticism and propose reform projects". This "periodization method" is privileged therein to emphasize the cyclic recourse to the language of fragmentation.) Also see Kennedy, David. When Renewal Repeats: Thinking against the Box. NYUJ Int'l L. & Pol. 32 (1999): 335. Kennedy, David. International Law and the Nineteenth Century: History of an Illusion. QLR 17 (1997): 99.

[97] As for different and even opposing approaches taken by European (formalist) and American (realist) academia to international law, it is quite clear just by comparing these literatures of some seminars on this topic. For example, see Romano, Cesare PR. The Proliferation of International Judicial Bodies: The Pieces of the Puzzle. NYUJ Int'l L. & Pol. 31 (1998): 709. Also see Symposium Introduction by Author/Symposium Introduction by Title/Symposium Conclusion by Author. 25 Mich. J. Int'l L. vii (2003-2004).

[98] See Klabbers, Jan, Anne Peters, and Geir Ulfstein. The Constitutionalization of International Law. Oxford: Oxford University Press, 2009, p 14-15.

congestion" [99] in international environmental law, which would give rise to "substantive incompatibility" and "operational inefficiency",[100] had already been highlighted by Weiss, Edith Brown several decades ago (1992). Then some scholars have used "regime complex"[101] to illustrate the connotation of the "fragmentation" of international law (2004). It is thus presupposed that those "overlaps and uncoordinated regimes" would lead us to be confronted with a new and somewhat paradoxical situation, where the believed "integrity and unity of international law" is impaired not by the underdevelopment of regimes but rather by the overdevelopment of regimes and legal rules (2007).[102] And the basic and prevalent meaning of "fragmentation" in today's debate upon the fragmentation of international law and sub-areas of international legal regulation is as follows: fragmentation refers to the threatening consequence of excessive, explosive or kaleidoscopic normative expansion and institutional specialization (2009).[103] This diversification, expansion and specialization of international legal rules represent the prodigious development of international legal regulation, and can be reflected in the "greater density, complexity, and diversity" of its normative network and institutional flux.[104] And "the proliferation of different legal regimes and institutions governing inter-state relations"[105] would be a good summary of the connotations of the so-called "fragmentation" in modern international law, particularly for the "institutional fragmentation" aspect herein.

Secondly, from a more interpretative and constructivist viewpoint, Niklas Luhmann's notion of "functional differentiation", which has been developed to explain the evolution of late-modern societies,

[99] See Weiss, Edith Brown. International Environmental Law: Contemporary Issues and the Emergence of a New World Order. Geo. LJ 81 (1992): 675. Also see Hicks, Bethany Lukitsch. Treaty Congestion in International Environmental Law: The Need for Greater International Coordination. U. Rich. L. Rev. 32 (1998): 1643.

[100] See Weiss, Edith Brown. International Environmental Law: Contemporary Issues and the Emergence of a New World Order. Geo. LJ 81 (1992): 675, 697-699.

[101] Raustiala, Kal, and David G. Victor. The Regime Complex for Plant Genetic Resources. International Organization 58.02 (2004): 277-309, 279. ("We term the collective of these elements a regime complex: an array of partially overlapping institutions governing a particular issue-area, among which there is no agreed upon hierarchy.")

[102] See Kanwar, Vik. International Emergency Governance: Fragments of a Driverless System. Available at SSRN 978361 (2007). ("From a practical standpoint, this points to the potential of confusion regarding applicable law caused not by gaps or black holes but by overlaps and uncoordinated regimes. From a theoretical standpoint, this Article argues that the driverless features of these multiple regimes, and their attempts at coordination, reveal deeper anxieties concerning the status and coherence of international law as a whole.") Also see Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 4.

[103] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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). Also see Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 4.

[104] See Abi-Saab, Georges. Fragmentation or Unification: Some Concluding Remarks. NYUJ Int'l L. & Pol. 31 (1998): 919, 925.

[105] Benvenisti, Eyal. The Conception of International Law as a Legal System. German Yearbook of International Law 50 (2008): 393-405, 402.

is transposed to international law to describe the emergence of autonomous technical "boxes" that cater for special audiences with special interests and special ethos (2003, 2009),[106] under the context of a world society where international cooperation and legal regulation are happening everywhere.[107] But it is also pointed out that the so-called "self-contained regime" is an inappropriate and "misleadingly labeled"[108] concept, literally, as none of these bodies of law could be created, interpreted and applied in a "clinical vacuum".[109] All those different parts of international law (as a legal system) constitute a "constellation" or a "living organism",[110] which by definition is correlated within the international legal order through "highways"[111] connections.[112] Accordingly, the evolution and specialization of international law is certainly not the opposite side of "the unity of international law", despite that both of them should be someway balanced and coordinated in the academic researches with ontological investigations as well as analogical analyses.[113]

> *"As things become more complex, they reflect a higher degree of division of labor, or specialization, which is a higher stage of evolution. But the participants in this process must be conscious of its direction and requirements. The further the division of labor and*

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[106] See Fischer-Lescano, Andreas, and Gunther Teubner. Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law. Mich. J. Int'l L. 25 (2003): 999, 999-1000. ("In 1971, while theorizing on the concept of world society, Luhmann allowed himself the "speculative hypothesis" that global law would experience a radical fragmentation, not along territorial, but along social sectoral lines.") Also see Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 4. See Koskenniemi, Martti. The Politics of International Law–20 Years Later. European Journal of International Law 20.1 (2009): 7-19, 9.

[107] For example, one similar narrative is "the transition from nationally organized societies to a global society". See Fischer-Lescano, Andreas, and Gunther Teubner. Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law. Mich. J. Int'l L. 25 (2003): 999, 999-1000.

[108] See Klabbers, Jan, Anne Peters, and Geir Ulfstein. The Constitutionalization of International Law. Oxford: Oxford University Press, 2009, p 11. (The article refers to it as "misleadingly labeled 'self-containment'".)

[109] See WTO Appellate Body. United States - Standards for Reformulated and Conventional Gasoline. WT/DS2/AB/R, 29 April 1996. Also see Marceau, Gabrielle Zoe. A Call for Coherence in International Law: Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement. Journal of World Trade 33.5 (1999): 87-152. See Simma, Bruno, and Dirk Pulkowski. Of Planets and the Universe: Self-contained Regimes in International Law. European Journal of International Law 17.3 (2006): 483-529. ("'Conceptual' arguments for so-called self-contained regimes are unconvincing.")

[110] See Abi-Saab, Georges. Fragmentation or Unification: Some Concluding Remarks. NYUJ Int'l L. & Pol. 31 (1998): 919, 920-921.

[111] See Schachter, Oscar. International Law in Theory and Practice. Dordrecht, The Netherlands: M. Nijhoff Publishers, 1991, p 1.

[112] See Abi-Saab, Georges. Fragmentation or Unification: Some Concluding Remarks. NYUJ Int'l L. & Pol. 31 (1998): 919, 926. ("But however autonomous and particular these may be, there cannot be a totally self-contained regime within the legal order. If the special regime is to remain part of the legal order, some relationship, however tenuous, must subsist between the two. Otherwise, if all links are severed, the special regime becomes a legal order unto itself—a kind of legal Frankenstein, or Kelsen's "gang of robbers"—and no longer partakes in the same basis of legitimacy and formal standards of pertinence.")

[113] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 15, par. 17. ("The fragmentation of the international legal system into technical 'regimes', when examined from the point of view of the law of treaties, is not too different from its traditional fragmentation into more or less autonomous territorial regimes called 'national legal systems'.")

specialization, the greater the need for the preservation of the unity of the whole that makes specialization possible and meaningful, but which becomes harder to maintain because of the centrifugal effects of specialization."[114]

Thirdly, from a more analytically and internally precise perspective of different phases of the international legal system, fragmentation is defined to contain two aspects by the 2006 ILC Report and many other literatures: the normative and institutional fragmentation, respectively.[115] The normative aspect refers to the substantive conflict of international legal rules as the consequence of the institutional fragmentation,[116] while the latter institutional aspect is more concerned about international overlapping law-making, regime interactions and "tribunal fatigue"[117] in a globalized world.[118] Moreover, normative fragmentation stands for the debate on the application and interpretation of international law as a unique legal order,[119] as well as potential mitigation measures respectively ("the quasi-judicial part"),[120] while institutional fragmentation pays extensive and focused attention to the abstract unity of international legal system, regime interactions and international law-making therein ("the quasi-legislative part").[121] And the 2006 ILC Report uses the concept of "self-contained regime"

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[114] See Abi-Saab, Georges. Fragmentation or Unification: Some Concluding Remarks. NYUJ Int'l L. & Pol. 31 (1998): 919, 925.

[115] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 13, par. 13.

[116] The normative fragmentation is "the substantive question - the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and from the general law". See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 13, par. 13.

[117] See Alford, Roger P. The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance. Am. Soc'y Int'l L. Proc. 94 (2000): 160. Also see Romano, Cesare PR. The Proliferation of International Judicial Bodies: The Pieces of the Puzzle. NYUJ Int'l L. & Pol. 31 (1998): 709.

[118] See Boyle, Alan E., and C. M. Chinkin. The Making of International Law. Oxford: Oxford University Press, 2007, p 1-40. (For example, "fragmentation is also seen in the variety of law-making processes and the separate legal regimes that exist alongside and within the international legal order.")

[119] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 166, par. 324, p 249, par.493. ("Much of the concern over the fragmentation of international law emerges from the awareness of the "horizontal" nature of the international legal system. The rules and principles of international law are not in a hierarchical relationship to each other. Nor are the different sources (treaty, custom, general principles of law) ranked in any general order of priority. This is a key difference between international and domestic legal systems." "The international legal system has never enjoyed the kind of coherence that may have characterized the legal orders of States.")

[120] For example, see Harrison, James. Making the Law of the Sea: A Study in the Development of International Law. Cambridge: Cambridge University Press, 2011, p 242-277.

[121] Her in this thesis, it is argued that the institutional aspect should be paid more attention since it is more fundamental and vital for our understanding of and possible solution to this debate of fragmentation. For example, see Van Asselt, Harro, Francesco Sindico, and Michael A. Mehling. Global Climate Change and the Fragmentation of International Law. Law & Policy 30.4 (2008): 423-449. ("This article concludes that a narrow focus on conflicts misrepresents the multifaceted nature of climate change and precludes an adequate jurisprudential understanding of the relationship between the climate regime and other regimes. An improved understanding, particularly with respect to interactions with the biodiversity regime, requires a broadening of the debate that takes account of the institutional aspects of these relationships that may allow enhanced political cooperation and coordination. Further,

to delineate the bigger picture of institutional fragmentation arising from the diversification and expansion of international law, and elucidates the normative fragmentation with case studies.[122] Although the emphasized facets of the concept of "fragmentation" may have been changing through time,[123] the conceptual preconditions and assumptions of both normative and institutional fragmentation remain almost the same, and the referent both on the level of theoretical argument and practical implication frequently overlap and integrate.[124] And that's why it is not advisable to overemphasize the division or their difference between the normative aspect and institutional counterpart. When it comes to the correlation and interaction of normative fragmentation and the institutional aspect, the normative expansion and the multiplication of specialized regimes is a healthy and consequent match.[125]

Thus, it is shown that theoretical premise of all those concerns on the fragmentation of international law can be defined as follows: international law, as an international legal system which is presumed to be similar with national legal systems by a close analogy, is confronted with the risk of diversification and specialization because of a lack of overall structure planning or overarching hierarchical design in the development of international legal rules.[126] And that anxiety mainly comes from the multiplicity of judicial bodies and proliferation of international law-making regimes, with their own "special"[127] institutional frameworks respectively, thus potentially causing normative conflicts and regime

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international law, and in particular the emerging concept of systemic integration, has the potential to make a positive contribution to the climate-trade interplay.")

[122] The ILC identifies three potential forms of normative fragmentation: the emergence of deviating interpretations of general international law; emergence of institutionalized exceptions to general international law; the clash of particular laws. See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 248-249, par. 491-493.

[123] See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28, 4. ("Although its connotation has certainly changed over time (technically speaking, fragmentation has referred to the elaboration of highly detailed treaties, to the establishment of regional institutions, to the setting up of specialized jurisdictions, etc.), its denotation has remained the same: to invoke fragmentation is to evoke an image of chaos, explosion.")

[124] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 14, par. 14. Also see Abi-Saab, Georges. Fragmentation or Unification: Some Concluding Remarks. NYUJ Int'l L. & Pol. 31 (1998): 919, 925-926. ("To each level of normative density, there corresponds a level of institutional density necessary to sustain the norms".)

[125] See Abi-Saab, Georges. Fragmentation or Unification: Some Concluding Remarks. NYUJ Int'l L. & Pol. 31 (1998): 919, 925-926. ("Complexification creates a need for specialized tribunals to accommodate normative diversification and specialization.")

[126] See Koskenniemi, Martti, and Päivi Leino. Fragmentation of International Law? Postmodern Anxieties. Leiden Journal of International Law 15.03 (2002): 553, 575-576. Also see Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 191-193.

[127] See Koskenniemi, Martti. Study on the Function and Scope of the lex specialis Rule and the Question of "Self-Contained Regimes". Preliminary Report by the Chairman of the Study Group submitted for consideration during the 2004 session of the International Law Commission'(unpublished, on file with the author), UN Doc. ILC(LVI)/SG/FIL/CRD.1/Add.1 (2004), par. 134. (Martti Koskenniemi suggested that "special regimes" is a more appropriate term than "self-contained regime".)

complex.

This is the first preliminary conclusion regarding the analogical origin and conceptual referent of the concept of "fragmentation" in this debate of the fragmentation of international law. And the analogy between international law and any other legal systems started from the early process of professionalization of international law.[128] However, this thesis does not agree with this conceptual premise whether it is conceived as a methodological approach or used as any theoretical argument, and this disagreement will be elaborated in the later sections.

The second point is that the intensification and aggravation of this fear of "fragmentation" arise from the explosive development of international law, as a result of both expanded scope of international legal order and the deepening of global social sectorial specialization.[129] Compared to traditional international law and international legal regulation, the 20th century and 21st century has witnessed a huge proliferation of international regulatory regimes on the global level and competing, overlapping as well as complementary regional arrangements on the regional level.[130]

> *"Nevertheless, its functioning as a system faces the challenge of specialisation and the unbalanced and irregular institutional growth of its diverse sectors. The debate on fragmentation of international law which essentially tended to turn on the emergence of specialized dispute settlement mechanisms is a clear expression of this phenomenon."*[131]

For example, in the field of international trade law, international intellectual property law, as an

[128] See Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30. Also see Lauterpacht, Hersch. The Function of Law in the International Community. Oxford: Clarendon Press, 1933, p 432.

[129] See Hafner, Gerhard. Risks Ensuing from Fragmentation of International Law. Report of the International Law Commission on the Work of its fifty-second Session, UN Doc. A/55/10 (2000), 321-353. As for the "sectoral differentiation", see Fischer-Lescano, Andreas, and Gunther Teubner. Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law. Mich. J. Int'l L. 25 (2003): 999, 1009. ("The traditional differentiation in line with the political principle of territoriality into relatively autonomous national legal orders is thus overlain by a sectoral differentiation principle: the differentiation of global law into transnational legal regimes, which define the external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a global validity for themselves.")

[130] See Fischer-Lescano, Andreas, and Gunther Teubner. Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law. Mich. J. Int'l L. 25 (2003): 999. 1009. ("Global regulatory regimes certainly give us a picture of the fundamental transformation of global law from territorial to a sectoral differentiation, …") The most appropriate, representative and remarkable example for this coexistence and competition between globalism and regionalism is the international trade law, including global trade structures (such as WTO and World Bank) and regional trade arrangements (EU, NAFTA and FTAAP). See Baldwin, Richard E. Multilateralising Regionalism: Sphagetti Bowls as building Blocs on the Path to Global Free Trade. The World Economy 29.11 (2006): 1451-1518. Also see Mansfield, Edward D., and Eric Reinhardt. Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements. International Organization 57.04 (2003): 829-862. Goldstein, Judith L., Douglas Rivers, and Michael Tomz. Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade. International Organization 61.01 (2007): 37-67. See Goldstein, Judith L. The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO. Princeton University Press, 2008.

[131] See Zapatero, Pablo. Modern International Law and the Advent of Special Legal Systems. Ariz. J. Int'l & Comp. L. 23 (2005): 55, 63.

indispensable and also one of the most controversial components of any global trade agreement and regional trade arrangement,[132] has been astonishing and overwhelming with its historical evolution processes and current development dynamics;[133] and as a result of the complexity and extensity of the correlation between intellectual property and other legal issues (such as human rights, environmental protection and cultural diversity in this world society),[134] the regime interactions within international IP law and beyond onto other international regimes are fierce and active.[135] And it is almost the same thing with the specialization and auonomization of those international regimes, either it is presented as "self-contained boxes"[136] as a result of "functional differentiation" or "legal diversification and specialization" as a result of "sectoral differentiation".[137] Different informal labels like "international trade law", "international human rights law", "international environmental law" and "international intellectual property law" are characterized at the discretion of big powers for their national interests

[132] For example, in these regimes of NAFTA, WTO, TPP, FTAAP, and other global, regional and bilateral trade agreement, as well as investment protection agreement, intellectual property is a core element of the negotiation processes and the treaty text. It is the similar thing with some other topics, like environmental protection. See Sell, Susan K. Private Power, Public Law: the Globalization of Intellectual Property Rights. Cambridge: Cambridge University Press, 2003, p 37-39, 76. As for the globalization and the international harmonization process of IP protection, see Yu, Peter K. Currents and Crosscurrents in the International Intellectual Property Regime. Loy. LAL Rev. 38 (2004): 323. See Boyle, James. A Manifesto on WIPO and the Future of Intellectual Property. Duke L. & Tech. Rev. 2004 (2004): 9-15. See Grossman, Gene M., and Edwin L-C. Lai. International Protection of Intellectual Property. The American Economic Review 94.5 (2004): 1635-1653. See Yu, Peter K. The Harmonization Game: What Basketball Can Teach about Intellectual Property and International Trade. Fordham Int'l LJ 26 (2002): 218.

[133] See Yu, Peter K. Currents and Crosscurrents in the International Intellectual Property Regime. Loy. LAL Rev. 38 (2004): 323. (Arguing that: the backwards tracking of the historical development of the international intellectual property regime demonstrates that those regimes are products of repeated interactions between various sets of currents and crosscurrents. While the currents of multilateralism push for uniformity and harmonization, the crosscurrents of resistance enable countries to retain diversity while engaging in continuous legal experimentation.)

[134] For example, see Raustiala, Kal. Density and Conflict in International Intellectual Property Law. UC Davis L. Rev. 40 (2006): 1021. ("The increasing intersection of IP and human rights appears inevitable, and it will alter the shape and the trajectory of legal rules in both camps. To understand the future of both IP and human rights law we must think systematically about how the rising density of the international system affects the processes of rulemaking.")

[135] See Raustiala, Kal, and David G. Victor. The Regime Complex for Plant Genetic Resources. International organization 58.02 (2004): 277-309. ("Given the rising density of international institutions, we suggest that an increasingly common phenomenon is the "regime complex"—a collective of partially-overlapping regimes. We suggest that regime complexes evolve in special ways. They are laden with legal inconsistencies because the rules in one regime are rarely negotiated in the same fora and with the same interest groups as rules in other regimes.") Also see Helfer, Laurence R. Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking. Yale J. Int'l L. 29 (2004): 1. (The international intellectual property system provides an important illustration of how regime complexity shapes domestic and international strategies of states and non-state actors. This article describes and graphically illustrates the multifaceted nature of the international intellectual property system. It then analyzes the consequences of regime complexity for international and domestic politics, emphasizing the strategy of regime shifting and its consequences for chessboard politics and the domestic implementation of international rules.)

[136] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 13-14, par. 13.

[137] See Helfer, Laurence R. Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking. Yale J. Int'l L. 29 (2004): 1, 81-82.

and preferences in international politics and negotiations on the one hand,[138] and on the other hand for the sake of professional specialization in the academic community of international legal studies.[139] Actually, this functional and technical specialization approach not only results from the "natural evolution" of the practical needs in international governance and regulation, but also is an "artificial selection" with conceptual preferences and purposeful orientations early in 1920s,[140] despite that those subjective "cosmopolitan" constructions and "global law" plans didn't come true,[141] and that those inherent tensions in international legal discourse and the nature of international law as a legal system are still inadequately explored.[142]

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[138] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 17, par. 21. ("They are only informal labels that describe the instruments from the perspective of different interests or different policy objectives. Most international instruments may be described from various perspectives: a treaty dealing with trade may have significant human rights and environmental implications and vice versa. A treaty on, say, maritime transport of chemicals, relates at least to the law of the sea, environmental law, trade law, and the law of maritime transport. The characterizations have less to do with the "nature" of the instrument than the interest from which it is described.") Also see Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30, 4-8. ("Such characterizations are not intrinsic to the relevant problem but emerge from the interest or preference from which it is examined. This is where, as I have elsewhere written, fragmentation becomes struggle for institutional hegemony.") See Koskenniemi, Martti. International law and Hegemony: A Reconfiguration. Cambridge Review of International Affairs 17.2 (2004): 197-218, 205-206.

[139] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 129, par. 254. (The report points out that: those terms such as "human rights law", "trade law" or "environmental law" and so on are arbitrary labels on forms of professional specialization.) And this is neither the only cost nor the first time that the so-called professional specialization of international law accidentally does damages to a better understanding of the ethos of international law and also the fragmentation of international law specifically herein. See Lauterpacht, Hersch. The Function of Law in the International Community. Oxford: Clarendon Press, 1933, p 432-433.

[140] See Paz, Reut Yael. Making It Whole: Hersch Lauterpacht's Rabbinical Approach to International Law. Goettingen J. Int'l L. 4 (2012): 417. ("Both the rabbis and Lauterpacht seem to have made a similar turn into the world of the legal text, its significance, interpretations and possibilities, arguably as the result of being greatly disappointed by the loss of "a powerful sovereign" to begin with. It is possible that Lauterpacht's endeavors, just like the rabbinical attempts centuries before his time, were simply to create a space apart from the arbitrariness of power politics, a room that allows for the creation of an extra-territorial, ahistorical space that is over and above the turmoil of the present and where law rules in a supreme way.") Also see Koskennemi, Martti. Hersch Lauterpacht (1897-1960). In Beatson, J., and Reinhard Zimmermann. Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain. Oxford: Oxford University Press, 2004, p 601-661, p 613-614.

[141] See Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30, 14-15. ("Lauterpacht and other inter-war lawyers were right to assume that statehood would be slowly overcome by the economic and technical laws of a globalizing modernity. This is what functional differentiation in both of its forms - fragmentation and de-formalization - has done. But they were wrong to believe that this would lead into a cosmopolitan federation") Also see Reisman, W. Michael. Sovereignty and Human Rights in Contemporary International Law. American Journal of International Law (1990): 866-876.

[142] See Lieblich, Eliav, and Yoram Shachar. Cosmopolitanism at a Crossroads: Hersch Lauterpacht and the Israeli Declaration of Independence. British Yearbook of International Law (2014): bru004. ("This article contributes to international legal theory by discussing unexplored tensions in Lauterpacht's work – tensions that have reached their boiling point in his draft declaration. Their incidence, and his attempts to resolve them, are telling not only regarding Lauterpacht's jurisprudence, but also revealing of the nature (and limitations) of international legal argument at large. Namely, they reflect the inherent tension in international legal discourse between cosmopolitanism and sovereignty, universalism and particularism. We argue that by participating in a national project, Lauterpacht's cosmopolitanism was compromised. His attempt to reconcile, in the Draft, between cosmopolitanism and national sovereignty – an attempt so common in the argumentation of international lawyers – ultimately led not only to the Draft's rejection by the nascent Israeli establishment, but also, perhaps, to its downplaying by those that have reconstructed Lauterpacht's cosmopolitan legacy.")

"Indeed, it is no too far-fetched to suggest that the fragmentation of international law goes hand in hand with a process of verticalization: the system is no longer exclusively made up, as it still was in earlier days, of independent and sovereign states who famously interact as if they are billiard bals on the green sheet of a pool table. …… The previous emphasis on states sovereignty, resulting in the images of international law as a horizontal legal order made up of equals, so the sovereignty goes, is slowly giving way to a conception of international law as more vertical organized. The subsystems that give rise to fears (or hopes) of fragmentation are, in this conception, independently functioning regimes where business is being done, indeed, which are eventually themselves doing the business, overcoming the traditional paradigm of states sovereignty."[143]

In sum, the believed or alleged "integrity and unity of international law" is impaired not by the underdevelopment of international legal rules and regimes, or simply by the overdevelopment of international legal rules and regimes, but rather by the overdevelopment of international legal rules and regimes in a direction and a way that is different from the conceptually presupposed "overall plan"[144] regarding international law as a legal system.[145] And, of course, the broader context of this assertion is still the lack of hierarchy ("decentralized" nature) in a world society and the "ethos" of international law always tooted in the fragmentation debate.[146]

"The debate about the unity of international law is full of paradoxes, and therein lies the fascination it exerts on its participants. Not only are opposite views voiced simultaneously; a great irony also lies at the very core of the whole issue. The ''fragmentation'' of international law did not arise out of some intrinsic weakness in a legal order which, based on unsteady foundations and paralyzed by the specter of sovereignty, is prevented from developing and slowly disintegrates. On the contrary, it actually arose from the

[143] Klabbers, Jan, Anne Peters, and Geir Ulfstein. The Constitutionalization of International Law. Oxford: Oxford University Press, 2009, p 14. Also see Fischer-Lescano, Andreas, and Gunther Teubner. Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law. Mich. J. Int'l L. 25 (2003): 999

[144] See Koskenniemi, Martti, and Päivi Leino. Fragmentation of International Law? Postmodern Anxieties. Leiden Journal of International Law 15.03 (2002): 553, 575-576. Also see Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 191-193.

[145] Prost, Mario, and Paul Kingsley Clark. Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?. Chinese Journal of International Law 5.2 (2006): 341-370, 343.

[146] See Pauwelyn, Joost. The Role of Public International Law in the WTO: How Far Can We Go?. American Journal of International Law (2001): 535-578. (For example, "the WTO treaty, WTO panels, and the Appellate Body were not only created in the wider context of public international law; they continue to exist in that context".)

unprecedented normative and institutional expansion of international law, often into new areas. It is because international law is in fact evolving and because institutions are being created to ensure its implementation and, occasionally, its enforcement that there now exists this growing concern for its unity. The irony, then, lies in the fact that international lawyers, having long fought for the recognition of ''their'' law as ''real'' law, are now concerned that there may be an excess of international law. In other words, the achievements of international law may institute its own downfall."[147]

However, deeper insights and fundamental reflections from empirical investigation as well as realistic legal studies, on the underlying causes of this fragmentation debate and seemingly systematic crisis in public international law and subfields of international law, have been long overdue,[148] while the shadow resulting from the unexamined analogical reasoning and conceptually presupposed stereotypes continues to tarnish the academic value of the concept of "fragmentation" and even disable its potential outputs of further theoretical implications on the development of international legal system in a world society.[149] The side effects of this paradigm are too methodologically damaging and essentially impertinent to be overlooked or ignored.[150]

And the third noteworthy point is that this language of fragmentation seems to constantly emerge onto and along with various arguments of many topics in the field and subfields of international law,

[147] Prost, Mario, and Paul Kingsley Clark. Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?. Chinese Journal of International Law 5.2 (2006): 341-370, 343.

[148] See Alford, Roger P. The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance. Am. Soc'y Int'l L. Proc. 94 (2000): 160. (It argues that "the proliferation of international courts and tribunals represents a profound change in international law and international relations", but this change of landscape has not been reflected with enough attentions.) At least, "imaginative uses of its traditional techniques" with consideration to those changes and transformation on varying degrees should be called for. See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 246, par. 487.

[149] See Ole Spiermann. Twentieth Century Internationalism in Law. EJIL (2007), Vol. 18 No. 5, 789-790. ("In its deep structure, international law is neither the constitution of an international community nor a tailor-made instrument of global governance, almost whatever those terms mean.") Also see Hafner, Gerhard. Risks Ensuing from Fragmentation of International Law. Report of the International Law Commission on the Work of its fifty-second Session, UN Doc. A/55/10 (2000), 321-353.

[150] See Fischer-Lescano, Andreas, and Gunther Teubner. Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law. Mich. J. Int'l L. 25 (2003): 999. 1007. ("Seen in this light, the problems of global society, namely environmental degradation, spectacular social under-provision and stark discrepancies in life and development potential, have an underlying cause that must be framed in terms of functional differentiation and autonomous systems dynamics; by the same token, it is simply inappropriate to explain the problems raised by global finance markets, hedge funds, financial speculation, pharmaceutical patents, the drug trade and reproductive cloning within a political paradigm, and with a solving faith within the potential of political solutions. Such problems are caused by the fragmented and operationally closed functional systems of a global society, which, in their expansionist fervor, create the real problems of the global society, and who at the same time make use of global law in order normatively to secure their own highly refined sphere logics.")

elusively and perpetually.[151] That makes this fragmentation debate or language become more of a rhetoric metaphor of fundamental concerns of international law as a legal system and the tip of the big "shifts and evolution of international law" iceberg. How to understand the fragmentation language in the "the rhetoric of fragmentation of international law" approach, from the efforts to interpret international law as analogous to any other legal systems in 1930s,[152] to the proliferation of international courts and tribunals in late 20th century,[153] and to the rethinking of the asserted "post-ontological era" [154] in this "modern era of fragmentation" [155] ? Why this language of "fragmentation of international law" is always raised up with unexplainable anxieties and pre-configured orientations? And what are the potential and foreseeable effects of this "postmodern anxiety"[156] onto the development of international law in a world society?[157] Is that why this concept of "fragmentation" has been fuzzified and been ambiguous?

> *"Fragmentation, pluralism, and verticalization are very much in the eye of the beholder. As Martti Koskenniemi recently wrote, what looks like fragmentation from one perspective may look more like unity from a different vantage point. More importantly, perhaps, to the extent that these phenomena take place, they take place on two distinct levels. One is the level of international practice, where what matters is what states and other actors do, whereas the other is the level of scholarship. While the two influence each other without a doubt, care should be taken to keep them separate and not mix them up entirely: the circumstance that many academics write about fragmentation as such only means that many academics write about fragmentation, and interpret certain events and trends as indicating fragmentation. While there usually is no smoke without fire, still it does not mean that therewith fragmentation becomes an irreversible fact or trend, and strictly speaking, it does not even*

[151] See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28

[152] See Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30. Also see Lauterpacht, Hersch. The Function of Law in the International Community. Oxford: Clarendon Press, 1933, p 432.

[153] See Buergenthal, Thomas. Proliferation of International Courts and Tribunals: Is It Good or Bad?. Leiden Journal of International Law 14.02 (2001): 267-275. Also see Kingsbury, Benedict. Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem. NYUJ int'l L. & pol. 31 (1998): 679. See Pocar, Fausto. The Proliferation of International Criminal Courts and Tribunals - A Necessity in the Current International Community. J. Int'l Crim. Just. 2 (2004): 304.

[154] Franck, Thomas M. Fairness in International Law and Institutions. Oxford: Clarendon Press, 1995, p 6.

[155] Khrebtukova, Alexandra. A Call to Freedom: Towards a Philosophy of International Law in an Era of Fragmentation. J. Int'l L & Int'l Rel. 4 (2008): 51.

[156] See Koskenniemi, Martti, and Päivi Leino. Fragmentation of International Law? Postmodern Anxieties. Leiden Journal of International Law 15.03 (2002): 553, 575-576.

[157] For example, see Teubner, Gunther. Global Bukowina: Legal Pluralism in the World Society. In Teubner, Gunther. Global Law without a State. Aldershot: Dartmouth, 1997, p 3-30.

imply that fragmentation 'really' exists."[158]

From the perspective of legal rhetoric, this concept of "fragmentation" can be disambiguated, deconstructed and reconstructed to a more pure and original sense.[159] And either specific or general "structural biases" are equipped within or demonstrated onto the specialization of international law with their own preferred idiom, career prospects, and those different or even opposite arguments in the language of fragmentation is a good example.[160] Only by penetrating through those different fragmented terms and obscure descriptions of the "augmented realities"[161] could insights and judgment be achieved, connection and systematic intergrowth be expected.[162]

The fourth preliminary concluding point is that there are disconnections and miscommunications between the overall theoretical researches in international law and specific question-oriented studies in sub-areas of international law,[163] which leads to the dilemma that the accumulatively progressive deepening of theoretical researches in public international law is accompanied by sustained-ly inappropriate, ambiguous theoretical frameworks and conceptual presuppositions in the studies of sectoral legal regulations.[164]

The famous metaphor, firstly coined by Oscar Schachter, considers general international law as the

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[158] See Klabbers, Jan, Anne Peters, and Geir Ulfstein. The Constitutionalization of International Law. Oxford: Oxford University Press, 2009, p 14-15.

[159] For example, see Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30. ("Reducing international law to a mechanism to advance functional objectives is vulnerable to the criticisms raised against thinking about it as an instrument for state policy: neither regimes nor states have a fixed nature or self-evident objectives. They are the stories we tell about them.")

[160] See Koskenniemi, Martti. The Politics of International Law – 20 Years Later. European Journal of International Law 20.1 (2009): 7-19, 9. ("This is why much about the search for political direction today takes the form of jurisdictional conflict, struggle between competing expert vocabularies, each equipped with a specific bias.")

[161] Taking the concept of "unity" in international law for example, see Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 14. ("To this day, this gap remains unaddressed. Moreover, despite the proliferation of fragmentation discourse, one simple question is yet to be answered, regardless of whether it is good or bad, possible or utopian, a mere postulate or an actual fact, what does the 'unity' of international law actually mean? What does this taken for-granted concept entail in theory and in practice?")

[162] See Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30, 7. ("In a world of plural regimes, political conflict is waged on the description and re-description of aspects of the world so as to make them fall under the jurisdiction of particular institutions.")

[163] This kind of disconnection has been narrated form different perspectives with various arguing purposes and conclusions. For example, see Pauwelyn, Joost. The Role of Public International Law in the WTO: How Far Can We Go?. American Journal of International Law (2001): 535-578. Also see Sands, Philippe. Treaty, Custom and the Cross-fertilization of International Law. Yale Hum. Rts. & Dev. LJ 1 (1998): 85, 88. ("The separate subject matter areas are treated as a part of general international law, but often presented as organically disconnected from each other. The whole is made up of a collection of fragmentary parts, the implication being that the different parts only seldom, if ever, connect." "Norms arising in different subject matter areas can and do touch. They co-mingle and compete. These apparently distinct subject matter areas do not exist in a state of isolation.")

[164] For example, Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties requires the interpretation of international legal texts should be interpreted with "other relevant rules of international law" in the context taken into account, in a systematic way or similar method. See Sands, Philippe. Treaty, Custom and the Cross-fertilization of International Law. Yale Hum. Rts. & Dev. LJ 1 (1998): 85, 86-87. ("Article 31(3)(c) has a potentially generic application, which could encompass the relationships between other areas and other norms, including human rights and development, trade and labor, and even the law of the sea and human rights.")

highways between the otherwise isolated villages of international law,[165] and now in academic researches those highways are not that efficient any more, especially when international law is always undergoing changes.[166] And one of those fitting and representative examples is this debate on the (institutional) fragmentation of international law and this debate in subareas of international law. On the one hand, theoretical researches on the play between unity and diversity in international law is in ever-increasing deepening, which undoubtedly would and should shed light on the understanding of the fragmentation debate with more insights on the "ethos" of international law.[167] And, on the other hand, arguments and reasoning on the fragmentation issue in specific subfields of international law, such as international trade law, international IP law, international institutional law and the so-called global law, are still engaged with wrong theoretical frameworks or vague presuppositions.[168]

This kind of "disconnections and miscommunications" happens not merely downwards in specific sub-areas of international law on the front lines, but also upwards in the broad context of international law as a legal system.[169] And one of the most severe consequences of this sort of asymmetry and disconnection is that the referent and the connotations of this concept of "fragmentation" have already been and tend to become more vague, evasive and elusive, not to mention those detailed elaborations;[170] and the role of this concept of "fragmentation", in theoretically conducting and closely linking the branches of international law and public international law, has been gradually and greatly

[165] Schachter, Oscar. International Law in Theory and Practice. Dordrecht, The Netherlands: M. Nijhoff Publishers, 1991, p 1.

[166] Although it is quite a stereotype to say that international law is ever-changing. For example, see a conference on 'The Changing Structure of International Law Revisited' convened by the Institut des hautes études internationales and the European Journal of International Law in March 1997. Papers on four themes appeared in EJIL volume 8, numbers 3 and 4 in 1997, and volume 9, number 1 and 2 in 1998.

[167] As for the play between unity and diversity in international law, see Dupuy, Pierre-Marie, Denis Alland, Vincent Chetail, Olivier de Frouville, and Jorge E. Viñuales. Unité et diversité du droit international: ecrits en l'honneur du professeur Pierre-Marie Dupuy. 2014. Also see Schermers, Henry G., and Niels Blokker. International Institutional Law: Unity Within Diversity. Leiden: Martinus Nijhoff Publishers, 2011.

[168] Prost, Mario, and Paul Kingsley Clark. Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?. Chinese Journal of International Law 5.2 (2006): 341-370. ("This essay proposes to address the preliminary question which, in fact, precedes and underpins all the others as regards the multiplication of IOs and international legal unity: how do IOs matter in the making of international law?")

[169] See Klabbers, Jan, Anne Peters, and Geir Ulfstein. The Constitutionalization of International Law. Oxford: Oxford University Press, 2009, p 15-16. ("Moreover, increasingly with fragmentation too, the constitutionalist discussion takes on 'constitutionalist' dimensions, if you will, and understandably so: there is a deep-seated anxiety that merely to respond to fragmentation by invoking general international law will be insufficient. Instead, in order to keep fragmented units together, something of a higher status must be involved and invoked, and it is precisely constitutionalism, or constitutionalization, that promises to be able to create some order in what otherwise would be chaos. Fragmentation, in yet other words, would lose some of its risks because it would, on the constitutionalist view, always be subject to higher imperatives.")

[170] See Klabbers, Jan, Anne Peters, and Geir Ulfstein. The Constitutionalization of International Law. Oxford: Oxford University Press, 2009, p 14-15. Also see Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 13.

diminished and weakened.[171]

> *"Law as a theoretical and analytical device is a concept which embraces a category of phenomena (ethnographic facts) selected according to the criteria the concept specifies. Although it is composed of a set of individual phenomena, the category itself is not a phenomenon – it does not exist in the outer world. The term 'law' consequently is applied to a construct of the human mind for the sake of convenience. The justification of a concept does not reside in its existence outside the human mind, but in its value an as analytical, heuristic device."*[172]

The vitality and value of a legal concept lies in its explanatory power, which is composed of its capability to provide an analytical summary and interpretative construction, as well as to carry and illuminate a certain kind of facts/phenomena under certain backgrounds.[173] With the help of empirical studies and other devices, legal concepts should be able to supply convincing theoretical constructions and practical guidelines.[174] As a result, this concept of "fragmentation" actually is teetering on the brink of bankruptcy, as a result of the ambiguity of its referent and connotations.[175] This is a problematic issue and also a legal phenomenon that arises with increasing frequency.[176]

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[171] See Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 9. ("Fragmentation, as we shall see in the rest of the this book, raises a host of important questions of a legal, political, technical and ideological nature. The literature on fragmentation is not only abundant: it is also extremely dense, diverse, complex and – in its own way – fragmented.")

[172] See Pospisil, Leopold J. Anthropology of Law: A Comparative Theory. New York: Harper & Row, 1971, p 39.

[173] For example, see Singleton, Royce, Bruce C. Straits, and Margaret Miller Straits. Approaches to Social Research. New York: Oxford University Press, 1993, p 20-21. ("Concepts are abstractions communicated by words or other signs that refer to common properties among phenomena". "Similarly, scientist develop special concepts because they are useful for understanding……This implies a third rule about language usage in science: concepts are judged by their usefulness.") Also see Wisker, Gina. The Postgraduate Research Handbook: Succeed with your MA, MPhil, EdD and PhD. Basingstoke, Hampshire; New York: Palgrave Macmillan, 2008, p 55. ("Operationalizing a concept or idea means putting it work for you – open up and questioning what seems an idea we just take for granted; problematizing something that seems to be accepted by everyone; and then breaking it down into issues and questions about which one can ask further questions and observe interesting contradictions, elements, problems, changes, opportunities and ideas about which you can seek to research.")

[174] Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30. ("The emergence of regimes resembles the rise of nation States in the late nineteenth century. But if nations are 'imagined communities', so are regimes.")

[175] For example, see Chimni, Bhupinder S. The Past, Present and Future of International Law: A Critical Third World Approach. Melb. J. Int'l L. 8 (2007): 499, 509. ("But the flaw within the current celebration of fragmentation and its criticism is that both perspectives reify the concepts of fragmentation and unity. The concepts of fragmentation and unity are perceived as things and not part of a historical process that can be reconciled at a different site. Formal logic, to put it differently, rules out the unity of opposites. It helps disregard the fact that the future may see a fragmented international law reunite to reflect the interests of the transnational capitalist class. In other words, the earlier unity has necessarily to split to create a new unity. The nostalgia for a lost world blinkers a generation of international lawyers to the new configuration of global social forces that drives both fragmentation and unity. If a new unified international law that is responsive to the fate of global subalterns is to be created, it is imperative to imagine suitable alternative futures.")

[176] One similar example is the concept of "sovereignty". For instance, see Reisman, W. Michael. Sovereignty and Human Rights in Contemporary International Law. American Journal of International Law (1990): 866-876. ("Although the venerable term 'sovereignty' continues to be used in international legal practice, its referent in modern international law is quite different." "International law is still concerned with the protection of sovereignty,

The fifth point is that modern international legal theories and academic researches in the twenty-first century, with the specific problem-oriented method, functional approach and pragmatism methodology,[177] fault with traditional international legal theories, which leads to those scorching arguments and dissensions on several significant and decisive topics including, but not necessarily limited to, the ethos of international law as a legal system, the unity of international law, and herewith the institutional fragmentation of international law.[178] And sometimes, it even leads to the revival of defensive ontology to justify and prove the existence of international law.[179] Therefore, it is far too early to say that "international law has entered its post-ontological era"[180], if those ontological ethos are forgotten and the "risks ensuing from fragmentation of international law"[181] are just another resurgence of providing an *apologia pro vita sua*.[182]

> *"This liberty was short-lived. After the passage of only 10 years, the legitimacy of international law is already back in the spotlight. Whilst it is no longer questioned in terms of its existence as a legal order worthy of the name, it is, nonetheless, challenged as regards its unity. Faced with the contemporary explosion of legal norms, increasing normative specificity, the proliferation of international organizations and the multiplication of international tribunals, some have highlighted the risk of ''fragmentation'' of international law into a more or less coherent set of ''normative islands'' constituted by partial, autonomous and perhaps even ''self-contained'' legal sub-systems."*[183]

Although "it is essential that international lawyers should develop an attitude of criticism in regard to

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but, in its modern sense…")

[177] For example, see Dunoff, Jeffrey L., Steven R. Ratner, and David Wippman. International law: Norms, Actors, Process: A Problem-oriented Approach. New York: Aspen Law & Business, 2002. Also see Johnston, Douglas M. Functionalism in the Theory of International Law. Can. YB Int'l L. 26 (1988): 3.

[178] See Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30, 28. ("In order to begin re-imagining international law, it is first necessary to see in what way the internationalism of Lauterpacht and his generation is no longer plausible.")

[179] See Prost, Mario, and Paul Kingsley Clark. Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?. Chinese Journal of International Law 5.2 (2006): 341-370, 342-343. Also see Lauterpacht, Hersch. The Function of Law in the International Community. Oxford: Clarendon Press, 1933, p 434. ("But this is an additional reason why it should be construed on the basis of what is best and most developed in legal experience-not on the basis of the emaciated, fragmentary, and historically questionable experience of primitive communities in past ages. It is of the essence of the dignity of legal science-including the science of international law-to resist the temptation to lower the standard of law to the low level of an avowedly rudimentary practice.")

[180] Franck, Thomas M. Fairness in International Law and Institutions. Oxford: Clarendon Press, 1995, p 6.

[181] Hafner, Gerhard. Risks Ensuing from Fragmentation of International Law. Report of the International Law Commission on the Work of its fifty-second Session, UN Doc. A/55/10 (2000), 321-353.

[182] It means "an apology for itself". See Henkin, Louis. International Law: Politics and Values. Dordrecht: M. Nijhoff, 1995, p 3.

[183] Prost, Mario, and Paul Kingsley Clark. Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?. Chinese Journal of International Law 5.2 (2006): 341-370, 342.

the very effective -- although now somewhat trite -- argument that law is not a panacea",[184] it is quite realistic and to admit that international law is an indispensable tool to regulate the international relations of states and to predict the accumulative achievements of international politics.[185] And it is also of great significance to admit that the modern international law is still fundamentally limited and continually developed in the traditional framework of national sovereignty and those processes of international politics as well as international relations, as statehood and national sovereignty are still core elements of contemporary international law, both at this time and in the foreseeable future.[186]

All in all, through this study on the fragmentation of international IP law, we can carry out an in-depth reflection on how to embrace, understand and make use of the "ethos" of international law in contemporary international legal researches, particularly here onto the fragmentation debate. That is a radical and essential step for many other issues and studies in international law.[187] Then, by specifically narrowing down to the issues in the field of international intellectual property law, the verification and improvement of those theoretical arguments can be conducted in a case-study approach. Jus as Ronald St. J. Macdonald and Douglas M. Johnston wrote more than three decades ago, a focus on theory is increasingly needed in a field such as international law that has been driven to great degrees of both specialization and fragmentation.[188]

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[184] See Lauterpacht, Hersch. The Function of Law in the International Community. Oxford: Clarendon Press, 1933, p 437.

[185] The core feature and underlying goal of a "rule-oriented structure" is creating greater predictability, redressing unfair power imbalances, and preventing escalating international tensions'. See Jackson, John H. The World Trading System: Law and Policy of International Economic Relations. Cambridge, MA: MIT Press, 1997, p 340. See Jackson, John H. The Crumbling Institutions of the Liberal Trade System. Journal of World Trade 12.2 (1978): 93-106. Also see Pauwelyn, Joost. Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How they May Outcompete WTO Treaties. Journal of International Economic Law (2014): jgu042. ("a transition can be made from rule-based trade 1.0, focused on output and effect, to rule-based trade 2.0, ensuring both output predictability, stability, and neutrality and input legitimacy and coherence".)

[186] Lauterpacht tried to overcome the negative effects of this statehood on international law, but up to now those endeavors by generations of international lawyers are still far from making a success. See Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30, 14-15, 27-28. Also see Koskenniemi, Martti. The Politics of International Law–20 Years Later. European Journal of International Law 20.1 (2009): 7-19. ("[T]he most important political conflicts in the international world are often legally articulated as conflicts of jurisdiction and applicable law.") See Koskenniemi, Martti. The Politics of International Law. European Journal of International Law 1.1 (1990): 4-32. (It made the point about the inevitability of "politics" in the profession of public international law.) See Niemeyer, Gerhart. Law Without Force: The Function of Politics in International Law. New Brunswick, N.J.: Transaction Publishers, 2001.

[187] See Hafner, Gerhard. Risks Ensuing from Fragmentation of International Law. Report of the International Law Commission on the Work of its fifty-second Session, UN Doc. A/55/10 (2000), p 132, par.731. ("The Commission took note that the last topic, 'Risks ensuing from fragmentation of international law', was different from other topics which the Commission had so far considered. Nevertheless, the Commission was of the view that the topic involved increasingly important issues relating to international law and that the Commission could make a contribution to the better understanding of the issues in this area. The Commission also took note that the method and the outcome of the work of the Commission on this topic, while they did not fall strictly within the normal form of codification, was well within the competence of the Commission and in accordance with its statute.") Also see Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 9.

[188] See Macdonald, Ronald St. J., and Douglas M. Johnston. The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory. The Hague: Martinus Nijhoff, 1983, p 1-3.

2.3.2. The Evolution of the Concept of "Institutional Fragmentation"

When it comes to the "institutional fragmentation" of international law here in this thesis, it refers to the fear of the academia about "the increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries",[189] or the perceived threat arising from "the ongoing proliferation of special regimes endowed with strong institutional frameworks and an ability to set new international norms",[190] or the fundamental disconnects and institutional gaps that have hitherto impeded attempts to develop synergistic systems of international law and policy,[191] on the level of the theoretical studies of international law.[192] Despite that potential conflict of rules is the main concern of "normative fragmentation" and "fragmentation" on the level of international legal practices, "some degree of normative interaction and overlap"[193] is merely one aspect of the fragmentation issue and simply the prelude of concerns as well as academic studies on the institutional fragmentation of international law. Therefore, the interaction of those regimes,[194] the correlation of their international law-makings in a world society,[195] corresponding influences on the function and development of international law,[196] and, most importantly, how to understand and interpret those

[189] Benvenisti, Eyal, and George W. Downs. The Empire's New Clothes: Political Economy and the Fragmentation of International Law. Stanford Law Review (2007): 595-631, 596.

[190] See Lindroos, Anja, and Michael Mehling. Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO. European Journal of International Law 16.5 (2005): 857-877.

[191] See Piñon Carlarne, Cinnamon. Good Climate Governance: Only a Fragmented System of International Law Away?. Law & Policy 30.4 (2008): 450-480, 450.

[192] See Klabbers, Jan, Anne Peters, and Geir Ulfstein. The Constitutionalization of International Law. Oxford: Oxford University Press, 2009, p 14-15. (Emphasizing that the fragmentation of international law has two different levels. "One is the level of international practice, where what matters is what states and other actors do, whereas the other is the level of scholarship. While the two influence each other without a doubt, care should be taken to keep them separate and not mix them up entirely.")

[193] See Van Asselt, Harro, Francesco Sindico, and Michael A. Mehling. Global Climate Change and the Fragmentation of International Law. Law & Policy 30.4 (2008): 423-449, 424.

[194] For example, see Oberthür, Sebastian, and Thomas Gehring. Institutional Interaction in Global Environmental Governance: Synergy and Conflict Among International and EU Policies. Cambridge, Mass: MIT Press, 2006. Also see Van Asselt, Harro, Francesco Sindico, and Michael A. Mehling. Global Climate Change and the Fragmentation of International Law. Law & Policy 30.4 (2008): 423-449.

[195] See Helfer, Laurence R. Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking. Yale J. Int'l L. 29 (2004): 1. Also see Yu, Peter K. International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia. Mich. St. L. Rev. (2007): 1.

[196] Alter, Karen J., and Sophie Meunier. The Politics of International Regime Complexity. Perspectives on Politics (2009): 13-24. ("The increasing density of international regimes has contributed to the proliferation of overlap across agreements, conflicts among international obligations, and confusion regarding what international and bilateral obligations cover an issue. This symposium examines the consequences of this "international regime complexity" for subsequent politics. What analytical insights can be gained by thinking about any single agreement as being embedded in a larger web of international rules and regimes? Karen Alter and Sophie Meunier s introductory essay defines international regime complexity and identifies the mechanisms through which it may influence the politics of international cooperation. Short contributions analyze how international regime complexity affects politics in specific issue areas: trade (Christina Davis), linkages between human rights and trade (Emilie Hafner-Burton), intellectual property (Laurence Heifer), security politics (Stephanie Hofmann), refugee politics (Alexander Betts), and election monitoring (Judith Kelley). Daniel Drezner concludes by arguing that international regime complexity may well benefit the powerful more than other.")

phenomena and interplays from ontological, historical as well as comparative perspectives,[197] are the core components of the studies hereof on this topic: the institutional fragmentation of international (IP) law in a world society.

And, more specifically, investigations are needed on the establishment, evolution and interaction of those regimes in a certain sub-area of international law,[198] and special attention should be paid to the formulation as well as future application of international legal rules within those regimes in order to better unfold and review the regimes interactions in accordance with the "the law of universal gravitation"[199] of regime interaction of international legal regimes.[200] All aspects of the "evolutionary process"[201] of those regimes and the overall landscape of international (IP) law could reveal some parts of the "institutional fragmentation" mystery in this world society, like the blind men's elephant, because of the synergies and strengthening effects therein.[202] And afterwards, those observations and interpretations are capable of looking back, reflecting and redefining how should this "fragmentation" and "institutional fragmentation" debate take the next step towards a more enlightening and clarifying direction.

Undoubtedly, prior to all of those elaborations and argumentations at great length, understanding the

[197] For example, see Koskenniemi, Martti, and Päivi Leino. Fragmentation of International Law? Postmodern Anxieties. Leiden Journal of International Law 15.03 (2002): 553, 575-576.

[198] This mitigates some scholars' concerns on the use of "regime" in international legal studies, and more importantly, provides an empirical and comprehensive perspective on the institutional fragmentation of international IP law in a world society. See Young, Margaret A. Toward a Legal Framework for Regime Interaction: Lessons from Fisheries, Trade, and Environmental Regimes. Am. Soc'y Int'l L. Proc. 105 (2011): 107, 108. ("As developed in international law jurisprudence, and restated in the ILC's seminal 2006 fragmentation study, 'special regimes' is a term used to describe semi-autonomous branches of international law (especially where primary rules are tied to secondary rules concerning the consequences of breach), as well as whole bodies of professional specialization and expertise. The international relations scholarship similarly emphasizes the convergence of principles, norms, rules, and decision-making procedures in set issue-areas of international concern. Yet there are major problems in this conception of contained normativity. For one, focusing on regimes may obscure the general principles and overall system of international law. There is also a danger in reducing regimes to a single set of characteristics, which may preclude a debate about those characteristics or their evolution. The danger is especially great if it forecloses the process of regime interaction.")

[199] It implies that those regimes in international law also inter-connect and interact in a similar way, with general rules and laws directing their evolution and competition, just like the law of universal gravitation for all the objects in this universe. As for the hologram theory and more discourses on holographic universe, see Bohm, David, and B. J. Hiley. The Undivided Universe: An Ontological Interpretation of Quantum Theory. London: Routledge, 1993. Also see Talbot, Michael. The Holographic Universe. London: Harper Collins Publishers, 1996.

[200] See Margaret A. Young. Trading fish, Saving Fish: the Interaction between Regimes in International Law. New York: Cambridge University Press, 2011, p 113-124. Also see Young, Margaret A. Toward a Legal Framework for Regime Interaction: Lessons from Fisheries, Trade, and Environmental Regimes. Am. Soc'y Int'l L. Proc. 105 (2011): 107, 108.

[201] See Koh, Harold Hongju. Why Do Nations Obey International Law?. Yale LJ 106 (1997): 2599-2697, 2603.

[202] See Van Asselt, Harro, Francesco Sindico, and Michael A. Mehling. Global Climate Change and the Fragmentation of International Law. Law & Policy 30.4 (2008): 423-449. ("This article concludes that a narrow focus on conflicts misrepresents the multifaceted nature of climate change and precludes an adequate jurisprudential understanding of the relationship between the climate regime and other regimes. An improved understanding, particularly with respect to interactions with the biodiversity regime, requires a broadening of the debate that takes account of the institutional aspects of these relationships that may allow enhanced political cooperation and coordination.")

definition, the connotations and the evolution of "institutional fragmentation", as a legally principled and theoretically constructed concept in this debate of international law's fragmentation, is the starting point.[203]

At the very beginning, the "institutional fragmentation" in international law mainly stands for the anxieties upon the increasing number of international judicial institutions, both courts and arbitration tribunals, regionally and globally.[204] And it was not highly concerned or heatedly discussed until it was particularly emphasized by ICJ judges,[205] asserting that this proliferation might create inconsistency and conflicts among judgments, thus jeopardizing "the unity of international law" and international law's role in international relations.[206] The aftermath of the outburst of this "institutional fragmentation" debate in international law is that the concept of "institutional fragmentation" has been gradually spreading out onto other topics with similar contexts and concerns,[207] and innovatively shed new light on other universal phenomena and issues, such as the proliferation of new international norm-setting mechanisms,[208] interaction of international law-making regimes and other international

[203] As for the importance of conceptual analysis, see the discourses at the beginning of this chapter. Also see Buzan, Barry. From International System to International Society: Structural Realism and Regime Theory Meet the English School. International Organization 47.03 (1993): 327-352, 327. (The paper argues about the importance of a clear definition of "international society" and "international system": "Without such a boundary, the concept of international society is too fuzzy to be used either for comparative analysis of different international systems or for analysis of the historical development of any given international society.")

[204] See Romano, Cesare PR. The Proliferation of International Judicial Bodies: The Pieces of the Puzzle. NYUJ Int'l L. & Pol. 31 (1998): 709. See Charney, Jonathan I. The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea. American Journal of International Law (1996): 69-75. See Spelliscy, Shane. The Proliferation of International Tribunals: A Chink in the Armor. Colum. J. Transnat'l L. 40 (2001): 143. See Alford, Roger P. The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance. Am. Soc'y Int'l L. Proc. 94 (2000): 160. ("concern over 'tribunal fatigue'.")

[205] See Gilbert Guillaume. 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. Also see Koskenniemi, Martti, and Päivi Leino. Fragmentation of International Law? Postmodern Anxieties. Leiden Journal of International Law 15.03 (2002): 553-579.

[206] See Koskenniemi, Martti, and Päivi Leino. Fragmentation of International Law? Postmodern Anxieties. Leiden Journal of International Law 15.03 (2002): 553-579, 555. (Institutional fragmentation "may jeopardize the unity of international law and, as a consequence, its role in inter-State relations".) Also see Benvenisti, Eyal, and George W. Downs. The Empire's New Clothes: Political Economy and the Fragmentation of International Law. Stanford Law Review (2007): 595-631, 597. (Arguing that the institutional fragmentation "operates to sabotage the evolution of a more democratic and egalitarian international regulatory system and to undermine the normative integrity of international law.")

[207] For example, the regime interaction and regime complex in many branches of international law, and international governance of many issues, including human rights, environmental protection, public health, cultural diversity and so on. That also contributes to the development of the so-called "Global Administrative Law". See Hassel, Anke. The Evolution of a Global Labor Governance Regime. Governance 21.2 (2008): 231-251. See Haas, Peter M. Addressing the Global Governance Deficit. Global Environmental Politics 4.4 (2004): 1-15. Also see Deere Birkbeck, Carolyn. Global Governance in the Context of Climate Change: The Challenges of Increasingly Complex Risk Parameters. International Affairs 85.6 (2009): 1173-1194.

[208] For example, see Betts, Alexander. Institutional Proliferation and the Global Refugee Regime. Perspectives on Politics 7.01 (2009): 53-58. Also see Forman, Shepard, and Derk Segaar. New Coalitions for Global Governance: The Changing Dynamics of Multilateralism. Global Governance: A Review of Multilateralism and International

regulatory bodies in those subfields of international law,[209] as well as international law's general formulation and integral implementation.[210]

There are mainly three reasons for this proliferation and stretch of the "institutional fragmentation" concept: the background (the dominance of the top-down-approach academic studies in international law); concept's good explanatory power ("institutional fragmentation" could illustrate the premier sources and the ultimate answers of those "chaos" in this world society); international regimes' prosperity as international law-makers (international regimes have got actual legal authority as main contributors of international law).

Firstly, this one-more-step-forward approach, going beyond the original scope of institutional fragmentation arguments on international judicial or quasi-judicial bodies, should be contextualized in the bigger backdrop of the progressively increasing discussions on top-down approaches in international politics as well as international law in the past several decades, such as "global governance",[211] "international institutional law",[212] and "global administrative law".[213] As the concept of "institutional fragmentation" could help the academia to better unfold and carry out the scroll of the argumentation and reasoning on how to enhance the management and coordination of international regimes and regulatory mechanisms,[214] it is more than often assimilated to express views alike in the parallel top-down approach.[215] That is the broad and overall contextual background of the

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Organizations 12.2 (2006): 205-225.

[209] For example, see Van Asselt, Harro, Francesco Sindico, and Michael A. Mehling. Global Climate Change and the Fragmentation of International Law. Law & Policy 30.4 (2008): 423-449. See Cernat, Lucian. Eager to Ink, But Ready to Act? RTA Proliferation and International Cooperation on Competition Policy. Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (2005): 1.

[210] For example, see ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 27, par. 41. ("And negotiation is rarely about the 'application' of conflict-rules rather than trying to find a pragmatic solution that could re-establish the disturbed harmony.")

[211] For example, see Von Bogdandy, Armin, Philipp Dann, and Matthias Goldmann. Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities. German Law Journal 9.11 (2008): 1375-1400. See Biermann, Frank, et al. The Fragmentation of Global Governance Architectures: A Framework for Analysis. Global Environmental Politics 9.4 (2009): 14-40.

[212] See Schermers, Henry G., and Niels M. Blokker. International Institutional Law: Unity within Diversity. Martinus Nijhoff Publishers, 2011. Also see Klabbers, Jan. An Introduction to International Institutional Law. Cambridge, UK: Cambridge University Press, 2009.

[213] For example, see Marks, Susan. Naming Global Administrative Law. NYUJ Int'l. L. & Pol. 37 (2004): 995. Krisch, Nico, and Benedict Kingsbury. Introduction: Global Governance and Global Administrative Law in the International Legal Order. European Journal of International Law 17.1 (2006): 1-13. Harlow, Carol. Global Administrative Law: The Quest for Principles and Values. European Journal of International Law 17.1 (2006): 187-214.

[214] Because it implicitly assumes that the existing structure or pattern of international regimes' interaction and evolution is not good, whether in a way of alleging the "unity" of international law or the legitimacy of international law as a legal system, so that it should be and could be improved constructively with the top-down approach.

[215] For example, on the importance of bottom-up approach for international law and the revision of top-down

diffusion and stretch of the concept of "institutional fragmentation" in international legal studies.

Secondly, many international legal scholars find it more pertinent to focus on those concepts involved with "institutional fragmentation", including institutional jurisdiction, law-making processes, interaction and evolution of international regimes, to analyze and mitigate the alleged "side effects"[216] of the fragmentation of international law.[217] That's because the judicial and quasi-judicial judgments are just legal application and interpretation of international legal rules (where potential normative conflicts of rules are the preliminary manifestations and superficial characterizations), while those law-making boundaries and jurisdictions' overlapping in international regimes are the premier sources of normative conflicts and subsequent fluxes, therefore making it highly probably become capable of providing ultimate answers for those issues in this debate.[218] It is an implicit way of recognizing the good explanatory power of this concept and also the perspective.[219]

> *"In truth, however, international law has always been fragmented without losing its ability to operate. A threat, rather, arises from the ongoing proliferation of special regimes endowed with strong institutional frameworks and an ability to set new international norms."*[220]

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approach, see Slaughter, Anne-Marie. A Liberal Theory of International Law. Am. Soc'y Int'l L. Proc. 94 (2000): 240. (Beginning from "the proposition that seeing the international political system as some political scientists see it – from the bottom up rather than the top down – radically change our view of the international legal system. The 'theory' of international law developed here sketches the broad contours of that re-vision.")

[216] In this paradigm and the context of conceptual prepossessions, the benefits of the institutional fragmentation are inevitably understated, and it is thus considered as the "side-effect" or "byproduct" of globalization processes and the specialization of international law. See Benvenisti, Eyal, and George W. Downs. The Empire's New Clothes: Political Economy and the Fragmentation of International Law. Stanford Law Review (2007): 595-631.

[217] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 245, par. 484. ("They require a legislative, not a legal-technical response.")

[218] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 27, par. 42. ("However, although harmonization often provides an acceptable outcome for normative conflict, there is a definite limit to harmonization: 'it may resolve apparent conflicts; it cannot resolve genuine conflicts'." "In this respect, there is a limit to which a 'coordinating' solution may be applied to resolve normative conflicts.") Also see Borgen, Christopher J. Resolving Treaty Conflicts. Geo. Wash. Int'l L. Rev. 37 (2005): 573, 605-606. See Van Asselt, Harro, Francesco Sindico, and Michael A. Mehling. Global Climate Change and the Fragmentation of International Law. Law & Policy 30.4 (2008): 423-449, 425. ("An improved understanding requires a broadening of the debate to the institutional aspects of these relationships with the aim of enhanced political cooperation and coordination.")

[219] It is not saying that this "institutional fragmentation" is right, or better, or more right than "normative fragmentation", to understand the texture and landscape of the current dynamics of international law's development and evolution. It is still highly needed to reflect and rethink this rhetoric of "institutional fragmentation" debate in international law. Rather, this "institutional" perspective can lead to further insights on how to understand international law, and shed light on what are the answers for those concerns. That's the importance and effectiveness of a concept's explanatory power: to invoke true and deep-going interpretation of social phenomena.

[220] See Lindroos, Anja, and Michael Mehling. Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO. European Journal of International Law 16.5 (2005): 857-877.

"Unlike Fricker, in 'The Legal Nature' Radnitzky put the foundation of public law upon the concept of power. Further, he genuinely observed the world as a big complex of administrative departments or jurisdictions. In a word, Radnitzky transformed the conception of territorial sovereignty into the notion of jurisdiction."[221]

And thirdly, international regimes, which are international law makers in this world society on a more frequently, more in-depth and comprehensively dimension, have actually got the passport of becoming authoritative bodies of international lawmaking.[222]All those factors contribute to the expansion of the concept of "institutional fragmentation" in international law, the same as the "global governance" concept.[223]

In summary, historical investigations on the evolution of "institutional fragmentation" as a concept in this debate find out that this "institutional fragmentation" concept, as a sub-concept of "fragmentation" in international legal studies, is embodied with the same analogy between international law and domestic legal systems. And it is also clearly deduced from the historical investigations that this concept of "institutional fragmentation" stretched itself originally from the narratives about the proliferation of international (quasi-)judicial institutions all the way to today's role in a more broad and controversial debate on international law-making, regime interactions, regimes' evolutions, and international law's overall development, as a result of three main reasons.

Nevertheless, it should be noted that there is no plan, and no point at all in blaming or trying to overturn this extension here in this paper, not to mention that methodologically this stretch is reasonable and that this is a good opportunity (which necessarily comes sooner or later) for deeper reflection about the "institutional fragmentation" debate and international law itself.[224] As a matter of fact, what is really necessary, valuable, and also may be urgent, is to analyze: could we conceptually use "institutional fragmentation" as an entry point to probe into the current dynamics of international

[221] See García-Salmones Rovira, Mónica. The Project of Positivism in International Law. Oxford, United Kingdom : Oxford University Press, 2013, p 193.
[222] See Danilenko, G. M. Law-Making in the International Community. Dordrecht: M. Nijhoff, 1993. Also see Alvarez, José E. International Organizations As Law-Makers. Oxford [England]: Oxford University Press, 2005.
[223] See Hewitt de Alcántara, Cynthia. Uses and Abuses of the Concept of Governance. International Social Science Journal 50.155 (1998): 105-113. Also see Dingwerth, Klaus, and Philipp Pattberg. Global Governance as a Perspective on World Politics. Global Governance: A Review of Multilateralism and International Organizations 12.2 (2006): 185-203.
[224] See Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 12. ("[W]hat all of the above demonstrates is that the interest in issues of fragmentation has not faded away. Fragmentation, it seems, is here to stay.")

regimes' law-making, interactions and evolution;[225] internal powers and external factors of the development of international law;[226] and further beyond to the texture and ontological "ethos" of modern international law in a world society?[227]

It is widely acknowledged that the logic of international law's development is quite unique, as a result of or as an internal part of the unique texture of international law.[228] And the ontological "ethos" of international law cannot be emphasized too much if it is expected to obtain more dynamic insights on international law's operational characteristics and inherent contradictions.[229] Compared to the analogical perspective, the explanatory power and theoretical value of this ontological viewpoint have not yet been fully understood and recognized. Just as the Report of the International Law Commission puts it in 2002:

> *"There was also agreement that drawing analogies to the domestic legal system may not always be appropriate. It was thought that such analogies introduced a concept of hierarchy that was not present on the international legal plane, and should not be superimposed. It was suggested that there was no well-developed and authoritative hierarchy of values in international law. In addition, there was no hierarchy of systems represented by a final body to resolve conflicts."*[230]

How to understand the "ontology", of one thing, is always enigmatic for us.[231] And belief in any "substance" or "form" of law on the level of essentialism,[232] based on national legal systems, may do damages to the understanding of international law, if it is rigidly used between national law and

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[225] For example, see Prost, Mario, and Paul Kingsley Clark. Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?. Chinese Journal of International Law 5.2 (2006): 341-370

[226] See Berman, Paul Schiff. From International Law to Law and Globalization. Colum. J. Transnat'l L. 43 (2004): 485.

[227] See Hurrell, Andrew. On Global Order: Power, Values, and the Constitution of International Society. Oxford: Oxford University Press, 2007. See Yeates, Nicola. Globalization and Social Policy: From Global Neoliberal Hegemony to Global Political Pluralism. Global Social Policy 2.1 (2002): 69-91.

[228] See Burley, Anne-Marie Slaughter. International Law and International Relations Theory: A Dual Agenda. Am. J. Int'l L. 87 (1993): 205-239, 207. ("Regardless of their domestic colors, states in the international real were champions only of their own national interest. 'Law', as understood in the domestic sense, had no place in this world. The only relevant laws were the 'laws of politics', and politics was 'a struggle for power'.")

[229] See Schachter, Oscar. The Evolving International Law of Development. Colum. J. Transnat'l L. 15 (1976): 1. ("This compels us to think about fundamentals, an activity not always congenial to practical lawyers who have difficulty enough with the uncertainties of international law and its elusive sources. It become even more difficult when legal theory is entangled with the shifting and unruly facts of international politics, economics, and social injustice.")

[230] See Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10), p 240, par. 506.

[231] See Descartes, René, Elizabeth Sanderson Haldane, and George Robert Thomson Ross. Meditations on First Philosophy in Focus. Psychology Press, 1993, p 133.

[232] See Cartwright, Richard L. Some Remarks on Essentialism. The Journal of Philosophy (1968): 615-626.

international law in a comparative or analogical way.[233] Just as said by García-Salmones Rovira, Mónica: "International law was neither designed dualistically or monistically. And in the later case, state law was either integrated within international law or the other way round (international integrated within state law)."[234] This "ontological ethos" perspective of international law enables us get rid of all those artificial fallacies and unrealistic fantasies, which is either conceptually effective or functionally useful.[235] And that's one of the preconditions for a truly "holographic" and "high-definition" understanding of the nature, function and evolution of international law as a legal system.[236]

Specifically, the operational "ethos" of international law-making, whether in the means of law-making treaties or through international regimes and organizations, is quite different from that of the domestic legal systems.[237] And thus, it should be clearly pointed out and always thoroughly reflected in the studies of the institutional fragmentation of international (IP) law that interactions of international legal regimes, no matter how it is perceived as competition or complementation, the so-called "regime-shifting" or "forum-shopping" among international legal regimes within the international law-making and international legal regulations processes,[238] should not be simplified in analogy with domestic legal pluralism or overgeneralized by "international legal pluralism" without adequate empirical researches and ontological reflections.[239] This kind of labeling has no point in explaining or clarifying the true connotations of the concept, rather than merely fuzzification of a stigmatized concept to a certain extent.

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[233] See Bastian, B.; Haslam, N. Psychological Essentialism and Stereotype Endorsement. Journal of Experimental and Social Psychology. 2006, 42 (2): 228–235. Also see Barrett, H. Clark. On the Functional Origins of Essentialism. Mind & Society 2.1 (2001): 1-30.

[234] García-Salmones Rovira, Mónica. The Project of Positivism in International Law. Oxford, United Kingdom : Oxford University Press, 2013, p 146.

[235] For example, see Puig, Sergio. International Regime Complexity and Economic Law Enforcement. Journal of International Economic Law (2014): 1–26, 3.

[236] As for hologram, see Bohm, David, and B. J. Hiley. The Undivided Universe: An Ontological Interpretation of Quantum Theory. London: Routledge, 1993.

[237] For example, see ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 245, par. 484-485. ("But the absence of general hierarchies in international law does not mean that normative conflicts would lead to legal paralysis. The relevant hierarchies must only be established ad hoc and with a view to resolving particular problems as they arise." "However, such priorities cannot be justifiably attained by what is merely an elucidation of the process of legal reasoning. They should reflect the (political) preferences of international actors, above all States.")

[238] See Eyal Benvenisti and George W. Downs. The Empire's New Clothes: Political Economy and the Fragmentation of International Law. Stanford Law Review (2007): 595-631, 628. Also see Hafner, Gerhard. Risks Ensuing from Fragmentation of International Law. Report of the International Law Commission on the Work of its fifty-second Session, UN Doc. A/55/10 (2000), 321-353, 343.

[239] On the level of epistemology, the approach of "ontological ethos" has stronger explanatory power than the close analogy. And on the level of legal reasoning and legal studies, "how to resolve the conjunction of what is and what ought to be is one of the fundamental problems of jurisprudence." See Weinreb, Lloyd L. Legal Reason: The Use of Analogy in Legal Argument. Cambridge University Press, 2005, p 2.

For example, the proliferation of international legal regimes has been argued for many times as the most representative example of the "institutional fragmentation" and the most severe threat to the supposed "unity and integrity of international law".[240] And it is taken for granted to argue that the emergence of a new regime means that those existing ones are far from well-functioning and high-efficiency;[241] and this flux of regimes cannot enhance international cooperation or other aspects, except just increase the transaction costs of international legal regulation and future law-making.[242] But the establishment of a new regime does not explicitly or directly means that those prior exiting international regimes operate ineffectively or inefficiently, as new regimes should be assessed under a context of the network of regimes comprehensively.[243] Rather, it just implies that new regimes are truly needed, on the basis of those existing ones in the international legal system, to accommodate some unilateral interests or aspirations of bloc countries, as well as those of one country.[244]

> *"[T]reaty-making is required for international law to give effect to shared interests that states are unable to further in their respective national legal systems. In its deep structure, international law is neither the constitution of an international community nor a tailor-made instrument of global governance, almost whatever those terms mean."*[245]

> *"There is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives - they are 'bargains' and 'package-deals' and often result from spontaneous reactions to events in the environment."*[246]

Apparently, this is the actual logic of international law-making and the creation of many international

[240] See Romano, Cesare PR. The Proliferation of International Judicial Bodies: The Pieces of the Puzzle. NYUJ Int'l L. & Pol. 31 (1998): 709. Also see Hafner, Gerhard. Pros and Cons Ensuing from Fragmentation of International Law. Mich. J. Int'l L. 25 (2003): 849.

[241] See Benvenisti, Eyal, and George W. Downs. The Empire's New Clothes: Political Economy and the Fragmentation of International Law. Stanford Law Review (2007): 595-631, 603. ("At both the domestic and international levels, the proliferation of regulatory laws and institutions often signals incapacity and ineffectiveness as institutions generate new bodies and mandates in response to the failure of existing ones.")

[242] See Alter, Karen J., and Sophie Meunier. The Politics of International Regime Complexity. Perspectives on Politics (2009): 13-24.

[243] See Van Asselt, Harro, Francesco Sindico, and Michael A. Mehling. Global Climate Change and the Fragmentation of International Law. Law & Policy 30.4 (2008): 423-449. ("Born into the wider body of international law, the climate regime needs to be understood in light of preexisting regimes.")

[244] Henkin, Louis. How Nations Behave: Law and Foreign Policy. New York: Published for the Council on Foreign Relations by Columbia University Press, 1979, p 20-21.

[245] See Ole Spiermann. Twentieth Century Internationalism in Law. EJIL (2007), Vol. 18 No. 5, 790.

[246] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 23, par. 34.

organs, which is one of the ontological "ethos" of international law.[247] Any country or group of countries in the international community can promote the establishment of a new international organization or body so as to pursue the interests of its or their own.[248] It is the basic and normal logic of the international community that has always been in a world society. Further, in an era of globalization nowadays, under the context of multipolarization trends and the continual obstruction of multilateralism in the international community, the main negotiating big powers have serious conflict of interests, continuous disputes and many divergences on the basic landscape of international regimes,[249] including basic structures and strategic objectives.[250] It is no exaggeration to say that it is ever-increasingly difficult to reach international compromises and arrive at substantial agreements,[251] not to mention international cooperation of vital topics containing core interests, at the level of basic and overall frameworks.[252] It is evident that more and more big powers or groups of countries are trying to achieve their interest and demands by methods other than multilateralism, for example, the plurilateral doctrine and unilateralism.[253] Apparently, the establishment of new international regimes, and the proliferation of international regimes, as a result, both are exactly the consequences of the tactics mentioned above.[254]

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[247] See Burley, Anne-Marie Slaughter. International Law and International Relations Theory: A Dual Agenda. Am. J. Int'l L. 87 (1993): 205-239, 209. (The reconceptualization of the relationship between international law and politics as a jurisprudential response to the Realist challenge.)

[248] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 245, par. 484. ("New rules and legal regimes emerge as responses to new preferences, and sometimes out of conscious effort to deviate from preferences as they existed under old regimes.")

[249] For example, the collision and competition between FTAAP and TPP, which is mainly dominated by China and U.S., respectively. This kind of phenomenon is quite common since there tends to be more and more international regulatory regimes on a certain field.

[250] "Climate change" and "benefit-sharing of genetic resources" are two classic case studies to show the strategic divergences in international IP law. See Drahos, Peter. Developing Countries and International Intellectual Property Standard - Setting. The Journal of World Intellectual Property 5.5 (2002): 765-789. Also see Hoekman, Bernard M., Keith E. Maskus, and Kamal Saggi. Transfer of Technology to Developing Countries: Unilateral and Multilateral Policy Options. World Development 33.10 (2005): 1587-1602. See von Lewinski, Silke, and Anja von Hahn, eds. Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore. Kluwer Law International, 2004. Also see Bodeker, Gerard. Traditional Medical Knowledge, Intellectual Property Rights & (and) Benefit Sharing. Cardozo J. Int'l & Comp. L. 11 (2003): 785.

[251] WTO Doha Round, the exemplary ACTA, and the difficult negotiations on the legal framework of climate change are good examples, and they are related to the development of international IP law to some extent.

[252] For example, see Hafner, Gerhard. Risks Ensuing from Fragmentation of International Law. Report of the International Law Commission on the Work of its fifty-second Session, Official Records of the General Assembly, Fifty-fifth session, Supplement No.10, UN Doc. A/55/10, p 143. ("A major factor generating this fragmentation is the increase of international regulations; another factor is the increasing political fragmentation juxtaposed with growing regional and global interdependence in such areas as economics, the environment, energy, resources, health, and the proliferation of weapons of mass destruction.")

[253] See Koh, Jean Kyongun. Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision. Harv. Int'l. LJ 23 (1982): 71. See Dupuy, Pierre-Marie. The Place and Role of Unilateralism in Contemporary International Law. European Journal of International Law 11.1 (2000): 19-29. See Sands, Philippe. "Unilateralism", Values, and International Law. European Journal of International Law 11.2 (2000): 291-302.

[254] See Raustiala, Kal, and David G. Victor. The Regime Complex for Plant Genetic Resources. International

And also, the so-called "institutional fragmentation" should not be a scapegoat or a resolution for any failure of international cooperation or international law's implementation.[255] The "institutional fragmentation" of international law and the implementation of international law in a disguised way, which might be quite different from those of domestic legal systems, are currently the realities of this world society.[256] This concept of "institutional fragmentation" should not be used in a vague and ambiguous way to cover generalized assertions without adequate legal reasoning and demonstration of causality.[257] Otherwise, the referents and the connotation of the concept of "institutional fragmentation" would be further out of focus, and thus the explanatory power and analytical ability of the concept of "institutional fragmentation" would be drastically reduced.[258] Amid those researches, analysis and reasoning of legal studies, one concept should have its own respective explanatory power and analytical ability, that's to say, the concept must be created to analyze and interpret a certain type of facts or phenomena.[259] Those propositions that it intends to make may be theoretically analytical, or empirically confirmable, and that's why this concept is meaningful and helpful.[260] On the contrary, if the usage of a certain concept is similar to that of a vocabulary word in aesthetics and ethics, such as "beautiful" or "ugly" which is simply about to express a particular emotion and evoke particular responses rather than statements about social facts, then this concept has poor explanatory power in the corresponding legal studies, and therefore it is valueless.[261] Besides, it cannot be emphasized too much to prevent our scholarship from being mired in the abyss of illusion and idealism, and empirical studies for reexamining or revisiting various theories are always of great value in jurisprudence.[262]

Organization 58.02 (2004): 277-309. ("In an increasingly legalized world, the lack of legal consistency that flows from differing and overlapping rules pushes states to seek resolutions and to negotiate broad rules. At times, states also create strategic inconsistency as they seek to move the rules in one or another direction.")

[255] This has happened for many times, already. See Fischer-Lescano, Andreas, and Gunther Teubner. Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law. Mich. J. Int'l L. 25 (2003): 999, 1002-1007. ("Legal fragmentation is merely an ephemeral reflection of a more fundamental, multidimensional fragmentation of global society itself.")

[256] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 8. ("Indeed, the law governing the international community is typical of primitive societies, with the aggravating circumstance—rightly emphasized by Hoffmann—that unlike primitive communities (which are highly integrated, with all the ensuring benefits), the world community is largely based on the non-integration of its subjects, from the viewpoint of their social interrelations.")

[257] See Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 13. ("We are thus in a situation where unity, as one legal theorist puts it, is retreated by lawyers as a basic assumption, similar to the assumption of causality in the natural sciences." "We are thus in a paradoxical situation where the fragmentation rhetoric is omnipresent but where unity – its *sine qua non* condition – remains entirely under-theorised.")

[258] See Popper, Karl R. The Logic of Scientific Discovery. London: Routledge, 2005, p 39. (The principle of universal causality)

[259] See Stanovich, Keith E. How to Think Straight About Psychology. Boston: Allyn and Bacon, 2001.

[260] See Ayer, Alfred Jules. Language, Truth and Logic. Courier Dover Publications, 2012, p 7-9.

[261] See Ayer, Alfred Jules. Language, Truth and Logic. Courier Dover Publications, 2012, p 44, 108-111.

[262] See Weinreb, Lloyd L. Legal Reason: The Use of Analogy in Legal Argument. Cambridge University Press,

"Despite the rapid proliferation of international environmental law over the last thirty years, many species continue to deteriorate in numbers. The global regimes for the protection and management of sharks illustrate how fragmentation and disharmony in international law can be damaging."[263]

Taking this failure of the protection and management of sharks under international legal framework for example, is it essentially caused by the "institutional fragmentation" of international law? Could it be that "institutional fragmentation" is indeed a sort of disease? And if not contaminated with the disease, would international law be more systematically healthy and have better capability to cope with a lot of contentious issues and disputes in the international community?[264]

Apparently, the answer is negative. Institutional fragmentation is certainly not a disease that international law accidentally got infected with, nor is it a defect, a kind of disability or a bug that international law should be ashamed of or get rid of.[265] Hypothetically, if an answer for the question that "what is the so-called 'institutional fragmentation' for international law?" must be provided for no some reason, then institutional fragmentation is the ontological feature, the "ethos" or the identity of international law as a legal system. It is international law that is born with this ontological ethos and comparative features among those legal systems.[266] What really needs to change for this debate lies in the ideology and cognitive perspectives.[267]

Actually, this is far from difficult to imagine and understand it, as just centuries ago, the entire western world were still deeply biased against woman, both on the level of conceptual ideologies and practical actions, not to mention the discrimination against peoples and persons diagnosed with various

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2005, p 2. Also see Wittgenstein, Ludwig. Philosophical Investigations. New York: Macmillan, 1968, p 31. (It argues that: What is common to them all? — Don't say: "There must be something common, or they would not be called 'games'" — but look and see whether there is anything common to all. — For if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that. To repeat: don't think, but look!)

[263] Techera, Erika J. Good Environmental Governance: Overcoming Fragmentation in International Law for Shark Conservation and Management. Am. Soc'y Int'l L. Proc. 105 (2011): 103. There are so many other similar arguments and parallel examples in international environmental law, international trade law and other sub-areas of international legal regulation. For example, see Piñon Carlarne, Cinnamon. Good Climate Governance: Only a Fragmented System of International Law Away?. Law & Policy 30.4 (2008): 450-480, 475.

[264] This kind of thinking is widely assumed, rather than analyzed and argued, in the existing literatures of "institutional fragmentation" debate.

[265] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 245, par. 484. ("Normative conflicts do not arise as technical 'mistakes' that could be 'avoided' by a more sophisticated way of legal reasoning.")

[266] See Teubner, Gunther. Global Bukowina: Legal Pluralism in the World Society. In Teubner, Gunther. Global Law without a State. Aldershot: Dartmouth, 1997, p 3-30, 4.

[267] See Brierly, J. L. The Basis of Obligation in International Law, and Other Papers. Oxford: Clarendon Press, 1958, p 1-2.

diseases. Those women, in themselves, by no means have any alleged "defect"; and those characteristics in women, which have been assigned to them by God, are not any kind of diseases that need to be healed or bad habits that need to be corrected.

As can be seen from all the arguments and assertions above, on a theoretically more in-depth level, this debate implicitly contains, greatly urges and requires a delicate exposition on the ontological "ethos" of international (IP) law in this world society, since this ontological "ethos" has long been downplayed, detached, overlooked and ignored in the debate of the "institutional fragmentation" of international law. And for the language of the "institutional fragmentation" of international law, the "post-ontological era"[268] of "mature and complex" international law is still not coming.[269] In terms of the demonstration that international law is a self-contained and true legal system, there is a basic consensus that the ontology of international law should be seriously taken.[270] The cause of "liberating the discipline of international law from a sense of its own futility"[271] had already been accomplished.[272] However, the significance and effectiveness of this ontological perspective, which is herein stated as "the ontological 'ethos' of international law", deserves our treasure as a huge mineral deposit for more comprehensive and three-dimensional understandings of international law.

[268] Franck, Thomas M. Fairness in International Law and Institutions. Oxford: Clarendon Press, 1995, p 6.
[269] For more review and comments on the "post-ontological era" of international law, see Koh, Harold Hongju. Why Do Nations Obey International Law?. Yale LJ 106 (1997): 2599-2697.
[270] See Spiermann, Ole. Twentieth Century Internationalism in Law. European Journal of International Law 18.5 (2007): 785-814, 789. Also see Hafner, Gerhard. Risks Ensuing from Fragmentation of International Law. Report of the International Law Commission on the Work of its fifty-second Session, UN Doc. A/55/10 (2000), p 143-144.
[271] See Falk, Richard A. The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View. In Gross, Leo, Karl W. Deutsch, and Stanley Hoffmann. The Relevance of International Law; Essays in Honor of Leo Gross. Cambridge, Mass: Schenkman Pub. Co, 1968, p 133, 142.
[272] See Burley, Anne-Marie Slaughter. International Law and International Relations Theory: A Dual Agenda. Am. J. Int'l L. 87 (1993): 205-239, 205. (Stating "this is the end of a long journey".)

2.4 THE ONTOLOGICAL "ETHOS" OF INTERNATIONAL (IP) LAW AND THE RHETORIC OF "INSTITUTIONAL FRAGMENTATION"

Undoubtedly, in international legal studies, international law is considered as a legal system, and also a quite unique one.[273] And from the perspective of ontological "ethos" of international (IP) law, our understanding of this "institutional fragmentation" debate should be reconstructed, renewed and even reversed, compared to traditional analogical arguments of "institutional fragmentation of international (IP) law".

2.4.1. The Ontological "Ethos" of International (IP) Law

Firstly, on the level of the application, interpretation and implementation of international law，international law is "case-based applied",[274] "auto-interpreted"[275] (by states) and "disguised implemented",[276] even for the basic principles of international law[277] and international *jus cogens*.[278]

Nowadays, although the international legal system has quite many momentous advances as a unique legal system on the whole and international legal order is gradually shaping, international legal rules are still cased-based applied and interpreted at the discretion of powers and politics, and implemented

[273] See Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10), p 240, para. 506. Also see ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 248-249, par. 492-493.

[274] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 27, par. 41. ("And negotiation is rarely about the 'application' of conflict-rules rather than trying to find a pragmatic solution that could re-establish the disturbed harmony. Although it might be interesting to discuss the way States have resolved such problems by negotiation, the fact that any results attained have come about through contextual bargaining make it difficult to use their results as basis for some customary rule or other.")

[275] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 6 ("Of particular significance is the fact that each state has the power of 'auto-interpretation' of legal rules, a power that necessarily follows from the absence of courts endowed with general and compulsory jurisdiction.")

[276] See Anlei Zuo. Research on EU's Position and Strategy in the Implementation of DSB Rulings. Presentday Law Science 11.2 (2013): 104-118. (Arguing that EU implement DSB rulings in a disguised way with essentially perfunctory method, which reveals that the so-called quasi-judicial WTO DSB mechanism is a kind of rule-oriented process and power-oriented ending.)

[277] For example, see Orakhelashvili, Alexander. Unilateral Interpretation of Security Council Resolutions: UK Practice. Goettingen J. Int'l L. 2 (2010): 823.

[278] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 190, par. 375. ("Any 'criterion' that one might wish to invoke so as to support any particular norm as *jus cogens* would seem to infect that putative norm with all the uncertainties and vulnerabilities that relate to that criterion.") See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 204-205. Also see Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 323-325. ("If it is the point of jus cogens to limit what may be lawfully agreed by States - can its content simultaneously be made dependent on what is agreed between States?")

in a disguised way that is quite different from that of national laws. Many rules could be interpreted and implemented in such a manner as to defend some practices to be consistent with international legal obligations, even if it doesn't seems to be so.[279] It is not clear to determine which rule will be and will not be applied, and how is that rule will be interpreted and implemented. Namely, despite that the international normative network is already built up, the anticipated "implementation and enforcement machinery" of international law is still "in its infancy",[280] if it is likely to grow and mature. That makes it impossible to "flesh out and give teeth to the basic tenets destined to act as the backbone of the community"[281]. Consequently, a lot of substantive provisions in international law are not going to be implemented or observed in the same way as national laws and regulations, due to this absence of specific procedural provisions about legal interpretation and legal remedies.[282] A varied, disguised way, or even a contradictory one, is sometimes happening simultaneously, spontaneously and implicitly in international law.[283] That makes the ontological "ethos" of international legal system fully exposed.

> *"This situation presents a remarkable oddity, which however is indicative of the still rudimentary development of international law: on the one hand, there exist fundamental principles which comprise the 'international public order', principles from which consequently States cannot derogate in their dealings; on the other hand it is only possible to rely upon these principles in relatively exceptional circumstances. Such principles thus remain essentially in a state of* ***potentiality****, rather than producing their legal effects on an everyday basis and in any direction."*[284]

Then, why does international legal system continue to exist in such a peculiar manner? The answers are quite obvious and natural, which is that this world society is still decentralized and divided, with diffused authority and power as the "existential conditions"[285]. International law is accordingly

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[279] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 206.

[280] See Delbruck, Jost. A More Effective International Law or a New "World Law"?--Some Aspects of the Development of International Law in a Changing International System. Ind. LJ 68 (1993): 705-1417. ("In some respects, international law is changing into the 'internal law' of a World Community. However, the still-defective system of international law enforcement and the still-persisting role of the paradigm of sovereignty suggest that it would be premature to speak of such a far-reaching change in the nature of international law")

[281] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 67.

[282] This has been a long-lasting problem for international law since the try of the League of Nations. See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 37.

[283] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 64.

[284] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 204. (The word in bold is originally highlighted in italics in the book.)

[285] See Chimni, Bhupinder S. The Past, Present and Future of International Law: A Critical Third World Approach. Melb. J. Int'l L. 8 (2007): 499. Also see Koskenniemi, Martti, and Päivi Leino. Fragmentation of International Law? Postmodern Anxieties. Leiden Journal of International Law 15.03 (2002): 553-579. See Fischer-Lescano, Andreas, and Gunther Teubner. Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law.

developed to reflect and facilitate the operation and pursuit of various national interests and interests of the community, not the other way around.[286] So, the "complexity and pluralism"[287] in this world society requires international law to be as flexible and responsive as it could, so as to be effective and relevant to balance different interests, allocate decision-making authorities and ease potential conflicts in many subtle and intractable situations.[288]

Inevitably, compared to national legal systems, international law is in such a lack of so-called "coherence" and "unity" that its application, interpretation and implementation cannot be understood and comprehended as it is, as a result of dogmatic behavior.[289] But this is how international law works and works quite well, as is analyzed here: it is applied, interpreted and implemented in own unique way so that the it can accomplish, maintain and enhance its role among international politics and international intercourses in a world society. In other words, the so-called "unity", "predictability" and "legal security", which are closely connected to the "unity/fragmentation" debate hereof, are comparatively less valued in international law, or couldn't be valued too much in international law. By contrast, responsiveness to contexts and functionality of international regulation are more significant for the development and evolution of international law in this world society.[290]

Mich. J. Int'l L. 25 (2003): 999.

[286] Similar arguments could be found in See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 204. ("History has shown that the will and the capacity of individual peoples to contribute to their world environment is constantly changing. It is only logical that the organizational forms (and what else are such things as borders and governments?) should change with them. The function of a system of international relationships is not to inhibit this process of change by imposing a legal straitjacket upon it but rather to facilitate it: to ease its transitions, to temper the temper the asperities to which it often leads, to isolate and moderate the conflicts to which it give rise, and to see that these conflicts do not assume forms too unsettling for international life in general.")

[287] See Young, Margaret A. Toward a Legal Framework for Regime Interaction: Lessons from Fisheries, Trade, and Environmental Regimes. Am. Soc'y Int'l L. Proc. 105 (2011): 107, 110. ("Yet they represent an effort to understand the progressive development of international law in the context of fragmentation and an attempt to improve the way fisheries governance adapts to complexity and pluralism.")

[288] Kennan, George Frost. American Diplomacy, 1900-1950. Chicago: University of Chicago Press, 1951, p 95. ("But this is a task for diplomacy, in the most old-fashioned sense of the term. For this, law is too abstract, too inflexible, too hard to adjust to the demands of the unpredictable and the unexpected.") Also see Lapidoth, Ruth, Tomer Broude, and Yuval Shany. The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity; Essays in Honour of Professor Ruth Lapidoth. Oxford: Hart, 2008. ("International law is fragmented and complex, and at the same time increasingly capable of shaping reality in areas as diverse as human rights, trade and investment, and environmental law. The increased influences of international law and its growing institutionalization and judicialization invites reconsideration of the question how should the authority to make and interpret international law be allocated among states, international organizations and tribunals, or in other words, "who should decide what" in a system that formally lacks a central authority? This is not only a juridical question, but one that lies at the very heart of the political legitimacy of international law as a system of governance, defining the relationship between those who create the law and those who are governed by it in a globalizing world.")

[289] See Popper, Karl R. Conjectures and Refutations: The Growth of Scientific Knowledge. London: Routledge, 2002, p 64.

[290] As for responsiveness and functionality, see ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 248-249, par. 492-493. Also see Fitzpatrick, Peter. Modernism and the Grounds of Law. Cambridge, UK: Cambridge University Press,

"A program of subordinating all variation of the 'law in action' to the uniformity of formal law is like a program of making all spoken language an exact replica of written language, but it does not invariably afford the best guidance about how to speak. We should be cautioned by the way that our tendency to visualize the 'law in action' as a deviant or debased version of the higher law, the 'law on the books', parallels folk beliefs about language usage."[291]

For example, there are 34 WTO disputes cases citing TRIPs Agreement in the request for consultations. (*See APPDNEIX Ⅰ: A List of the 34 cases Citing TRIPs Agreement in the Request for Consultations*) Although there are official DSB rulings and AB Reports, parties are free to choose and agree the means to implement those DSB rulings as long as it could satisfy the interests demands of both parties in reference to the covered WTO Agreement.[292] "Mutually satisfactory solution" is the content of the "obligation of result" in WTO DSB mechanism, and other goals would be properly resolved through diplomatic means.[293] Consequently, DSB rulings are always implemented in a disguised way with an essentially perfunctory method, which reveals that the so-called quasi-judicial WTO DSB mechanism is a kind of rule-oriented process and power-oriented ending.[294]

And it should be well noted that this thesis is not simply about pulling the understanding of modern international law back to the power-based, "national interest"-fueled realism, or any pattern like that.[295] Rather, it endeavors to "embrace a type of socio-legal realism-looking to the complex, dynamic and varied social processes that mold international law in practice", as said by Levit, Janet Koven in 2007. None of those concepts of "institutional fragmentation", "international legal pluralism" or "unity of international law" is something that is to be dogmatically affirmed or completely denied.[296] Instead,

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2001, p 4-6, 218. (Arguing about the compromise between certainty and responsiveness)

[291] Galanter, Marc. Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law. The Journal of Legal Pluralism and Unofficial Law 13.19 (1981): 1-47, 5. Also see Ferguson, Charles A. Language Structure and Language Use; Essays. Stanford, Calif: Stanford University Press, 1971, p 222-223. ("[W]riting almost never reflects speech in an exact way, written language frequently develops characteristics not found in the corresponding spoken language.")

[292] See World Trade Organization. Dispute Settlement Reports 2009: Volume 9, Pages 3817-4282. Cambridge: Cambridge University Press, 2011, p 3852. Also see Di Gianni, Fabrizio, and Renato Antonini. DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be More Flexible when the Flexibility of the WTO System has Come to an End?. Journal of World Trade 40.4 (2006): 777-794.

[293] See Kennan, George Frost. American Diplomacy, 1900-1950. Chicago: University of Chicago Press, 1951, p 95. ("But this is a task for diplomacy, in the most old-fashioned sense of the term. For this, law is too abstract, too inflexible, too hard to adjust to the demands of the unpredictable and the unexpected.")

[294] See Anlei Zuo. Research on EU's Position and Strategy in the Implementation of DSB Rulings. Presentday Law Science 11.2 (2013): 104-118.

[295] There are already many criticisms for realism. For example, see Buchanan, Allen E. Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law. Oxford: Oxford University Press, 2003, p 31-35.

[296] See Chimni, Bhupinder S. Third World Approaches to International Law: A Manifesto. Int'l Comm. L. Rev. 8

they should be critically observed, analyzed, understood and explained.[297] Different environments, backgrounds and aspirations produce the cherished diversification of this world. So does international law. It is not argued here that "existence is reasonable and should not be questioned and modified", but that "what is actual is rational, and therefore a true understanding is the prerequisite for debate, the first step before judging".

> *"Today, a new generation of international legal scholars arrives at a juncture hauntingly similar to that which the New Haven School confronted in the 1950s, and those of us who might be considered part of a "new" New Haven School have responded in a like manner. We choose to refute power-based, "national interest"-fueled realism, not by conceding its underlying premises, but by challenging them. And like our New Haven School predecessors, we embrace a type of socio-legal realism-looking to the complex, dynamic and varied social processes that mold international law in practice. In asking questions that strike at the very nature of international law, we paint a more representative portrait that is at once colorful in its nuance and daunting in its complexity."*[298]

Also, this thesis is not trying to question or get entangled into the issue of "the objectivity of international law".[299] As has been elaborated by Professor Martti Koskenniemi long before, international legal system is determinate,[300] as the application, interpretation and implementation processes in international legal system are totally other issues that are different from the objectivity of international legal rules and international legal system itself.[301] Rather, it is simply pointed out here that the paradoxes and contradictions between international law's effectiveness and validity reveal one more deep, profound and universal peculiarity of international legal system:[302] the fault between legal

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(2006): 3, 21. ("However, the presence or absence of the third world, it is worth stressing, is not something that is either to be dogmatically affirmed or completely denied. It is not to be viewed as an either/or choice in all contexts.")

[297] See Singleton, Royce, Bruce C. Straits, and Margaret Miller Straits. Approaches to Social Research. New York: Oxford University Press, 1993, p 20-21.

[298] See Levit, Janet Koven. Bottom-up International Lawmaking: Reflections on the New Haven School of International Law. Yale J. Int'l L. 32 (2007): 393, 419. (The response - a response indelibly marked by New Haven School jurisprudence - is to question the naysayers' foundational assumptions by turning from the detached, game-theoretic heights of power-based realism to the on-the-ground nuance and gradation of socio-legal realism.)

[299] See Schachter, Oscar. Invisible College of International Lawyers. Nw. UL Rev. 72 (1977): 217. Also see Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005.

[300] See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 32. Also see ICJ. South West Africa Case, Reports 1966, p 34.

[301] See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 32.

[302] In regards to the relationship between effectiveness and validity in international law, see Kelsen, Hans. Pure Theory of Law. Berkeley: University of California Press, 1967, p 213-214. (Arguing that "effectiveness is a

texts and political realities in this world society. International law exists to serve a social need,[303] and international law is an aspect of the broader political processes.[304] It is argued by many scholars that international law is a contingent surface of a socially shared manner of envisaging international politics and relations.[305]

Secondly, on the level of the establishment, interaction and evolution of international regimes and legal rules, historically, pluralistically and functionally speaking, international (IP) law is accretive, accumulative and progressive.[306] The so-called development, evolution, upgrading or updating of international (IP) law are different from the revocation and amendments of national laws, which are more swift, explicit and resounding.[307] If one prior national law or regulation is replaced or amended by another subsequent national law, there would be clear official notification and announcement, including the commencement date, scope of application and other basic matters. However, since there is no overarching authority or legislature in international law, practices as well as effectiveness are the legitimate sources for the evolution of legal regimes and rules;[308] and also the legitimacy of international regimes and rules are more social viewed in this world society.[309] Thus, the role of international regimes and the texts of international treaties are actually negotiated and finalized with

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condition for the validity—but it is not validity……If we replace the concept of reality (as effectiveness of the legal order) by the concept of power, then the problem of the relation between validity and effectiveness of the legal order coincides with the more familiar problem of the relationship between law and power or right and might.") Also see Kelsen, Hans. Principles of International Law. The Lawbook Exchange, Ltd., 1952, p 414.

[303] See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 31. Also see Tamanaha, Brian Z. A General Jurisprudence of Law and Society. Oxford: Oxford University Press, 2001. (Law is generally understood to be a mirror of society that functions to maintain social order)

[304] See Schachter, Oscar. International Law in Theory and Practice: General Course in Public International Law. Recueil Des Cours, Collected Courses, 1982/V, Martinus Nijhoff Publishers, 1985, p 24.

[305] For example, see Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 11.

[306] "The current range of international legal obligations benefits from a process of accretion and accumulation." Southern Bluefin Tuna case (Australia and New Zealand/Japan), Award of 4 August 2000 (Jurisdiction and admissibility), UNRIAA vol. XXIII (2004), p 40-41, par. 52. See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 220, par. 416. Also see Albrow, Martin. The Global Age: State and Society beyond Modernity. Cambridge, UK: Polity Press in association with Blackwell Publishers, 1996, p 125.

[307] For example, see Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China (adopted at the 13th Meeting of the Standing Committee of the Eleventh National People's Congress on February 26, 2010). Available at http://www.wipo.int/wipolex/en/text.jsp?file_id=198294.

[308] And vice versa, since they are mutually affected. See Bodansky, Daniel. The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?. American Journal of International Law (1999): 596-624, 603. Also see Karlsson‐Vinkhuyzen, Sylvia I., and Antto Vihma. Comparing the Legitimacy and Effectiveness of Global Hard and Soft Law: An Analytical Framework. Regulation & Governance 3.4 (2009): 400-420.

[309] See Meyer, Lukas H. Legitimacy, Justice and Public International Law. Cambridge, UK: Cambridge University Press, 2009, p 1-2. Also see Brunnée, Jutta, and Stephen J. Toope. Legitimacy and Legality in International Law: An Interactional Account. Cambridge: Cambridge University Press, 2010, p 8, 15, 350-352.

reference to other parallel international regimes and legal arrangements pointing to different directions of balance of interests, especially in international IP law.[310] Namely, "systematic thinking"[311] of international law starts early from the law-making phase all the way to legal interpretation and implementation, as the ontological "ethos" is accepted as the "new normal" and basic elements of international law in this world society. Therefore, the formation of an international regime (or legal rule) is always pluralistically accumulative, historically accretive and evolutionarily progressive.

From a perspective of internalization of those above-mentioned dynamics under the broad setting of "world society", that's also why regime interaction, forum shifting, norm-setting competition, overlapping boundaries are common phenomena in international legal system. The accomplishment of an effective and legitimate international regime (or legal rule) takes a period of time, during which the process may go back and forth repeatedly, with overlapping and coexistence of "prior and subsequent" international regimes and legal rules therein.[312] There are many parallel regimes and rules coexisting, as a result of the absence of clear rule for the abolishment of law. That's why in this world society, the approach of "seeking relationship"[313] and the perspective of social interaction and evolution are believed to be quite explanatory and insightful. And on the whole, all those international treaties, international legal documents and other research outputs produce a kind of "superimposed effect" to make international regimes and legal rules keep relevant and effective in their own way.[314]

Thirdly, comparatively and constructively from the perspective of the nature and legitimation of

[310] See Patrick Daillier and Alain Pellet, Droit International Public. Paris: Librairie générale de droit et de jurisprudence: 2002, p 266. Also see ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 210-211, par. 41.

[311] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 24, 206, par. 35, 410.

[312] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 24, 180-182 ("New standards of behavior became necessary. Consequently, either the old rules were given a new shape or new norms were developed.")

[313] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 23, par. 33. ("It is often said that law is a 'system'. By this, no more need be meant than that the various decisions, rules and principles of which the law consists do not appear not randomly related to each other. Although there may be disagreement among lawyers about just how the systemic relationship between the various decisions, rules and principles should be conceived, there is seldom disagreement that it is one of the tasks of legal reasoning to establish it.")

[314] For example, the codification and other studies done by International Law Commission on many topics are contributing. See, e.g. O'keefe, Constance. Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on the Topic of International Liability for Injuries Consequences Arising Out of Acts Not Prohibited by International Law. Denv. J. Int'l l. & Pol'y 18 (1989): 145. Ramcharan, Bertrand G. The International Law Commission: Its Approach to the Codification and Progressive Development of Interenational Law. Martinus Nijhoff Publishers, 1977.

international legal system, international law is realistic and conservative,[315] or even labeled as primitive.[316] That means that international law is quite reflective of international political realities and world visions.[317] Consequently, power and social diversity of this "world society" could reveal one aspect of international law's ontological "ethos" and inherent virtues.[318]

So, on the one hand, from the perspective of top-down approach of international legal studies, because of international law's ontological "ethos" of being realistic, international law is considered to be multi-faceted, general and lose, even tainted with some ambiguity.[319] There are so many various and conflicting national interest to accommodate, as well as community interests and values to uphold. On many occasions, it is not easy or even possible to provide justifiable solutions to normative problems, which come about in a legal determined way, independent from but closely related to political consideration.[320] That leads to, firstly, the unity and coherence of international law as a legal system is nowhere near national legal systems since it needs to be responsive and reflective; secondly, international law's role in international politics and international relations is still quite limited as a result of many structural factors.[321] The "objectivity of international law" and the "relevance of international law"[322] are confirmed, but the limited role of international law in this world society still needs further analysis and exploration.[323]

"Addressing gaps between international legal systems is fundamental both to the legitimacy

[315] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 12-13. ("International law is a realist legal system. It takes account of existing power relationships and endeavours to translate them into legal rules. It is largely based on the principle of effectiveness, that is to say, it provides that only those claims and situations which are effective can produce legal consequences. A situation is effective if it is solidly implanted in real life.")

[316] See Hart, H. L. A. The Concept of Law. Oxford: Clarendon Press, 1961, p 208-231. See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 8. Also see Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30, 1.

[317] See Koh, Jean Kyongun. Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision. Harv. Int'l. LJ 23 (1982): 71.

[318] See Prost, Mario, and Paul Kingsley Clark. Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?. Chinese Journal of International Law 5.2 (2006): 341-370, 342. Also see Nicolaidis, Kalypso, and Joyce L. Tong. Diversity or Cacophony? The Continuing Debate over New Sources of International Law. Mich. J. Int'l L. 25 (2003): 1349, 1361. Burke-White, William. International Legal Pluralism. Mich. J. Int'l L. 25 (2003): 963. Abi-Saab, Georges. Fragmentation or Unification: Some Concluding Remarks. NYUJ Int'l L. & Pol. 31 (1998): 919, 925.

[319] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 64.

[320] See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 24-25.

[321] See Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30, 1. ("Compared with the sophisticated techniques of domestic law, international law seemed primitive, abstract and above all political, too political.")

[322] Gross, Leo, Karl W. Deutsch, and Stanley Hoffmann. The Relevance of International Law; Essays in Honor of Leo Gross. Cambridge, Mass: Schenkman Pub. Co, 1968.

[323] See Morgenthau, Hans J. Politics Among Nations; The Struggle for Power and Peace. New York: Knopf, 1967, p 4-5, 25-26. Also see Morgenthau, Hans J. Positivism, Functionalism, and International Law. Am. J. Int'l L. 34 (1940): 260. See Boyle, Francis Anthony. World Politics and International Law. Durham [N.C.]: Duke University Press, 1985, p 3-16.

of international law in the twenty-first century and to ongoing efforts to use international law as a central component in global efforts to address climate change, one of the greatest social, economic and political problems of our age."[324]

Descriptively speaking, international law is divided and decentralized, with conceptual notions like "national legal systems" and "national sovereignties" as "background noise"[325] in a world society. It is obvious that those concepts are constructed and are still being reconstructed every minute. So are other notions in the studies with top-down approach.[326] So, if the theoretical premises are amended and partially denied, other alternative approaches could be used to analyze and theorize the "institutional fragmentation" phenomenon in consideration of the ontological "ethos" of international legal system.

"The fragmentation of the international legal system into technical 'regimes', when examined from the point of view of the law of treaties, is not too different from its traditional fragmentation into more or less autonomous territorial regimes called 'national legal systems'."[327]

On the other hand, from the perspective of bottom-up approach of international legal studies, international law has been developing and is still evolving in a bottom-up manner, but it has been constructed by so many top-down concepts on the level of theoretical scholarship.[328] For example, the contradiction between the specialization of international law (the "functional approach" of modern international law's development, as the endogenous factors) and top-down systematic theoretical conception of international law (international law as a legal system, as the exogenous factors), which is argued above, could be viewed totally from another perspective. It indicates that the specialization and expansion of international legal regulation, as the substance of this so-called "functional approach", is about to achieve the goal of "the integration of the international community" in a bottom-up manner, with normative networking and relational structures, thus making the "top-down systematic conception of international law as a legal system" come into being.

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[324] Piñon Carlarne, Cinnamon. Good Climate Governance: Only a Fragmented System of International Law Away?. Law & Policy 30.4 (2008): 450-480, 475.

[325] See Popper, Karl R. Conjectures and Refutations: The Growth of Scientific Knowledge. London: Routledge, 2002, p 64.

[326] Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30. ("The emergence of regimes resembles the rise of nation States in the late nineteenth century. But if nations are 'imagined communities', so are regimes.")

[327] See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion 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), p 15, par. 17.

[328] See Klabbers, Jan, Anne Peters, and Geir Ulfstein. The Constitutionalization of International Law. Oxford: Oxford University Press, 2009, p 14-15.

"This gradual interpenetration and cross-fertilization of previously somewhat compartmentalized areas of international law is a significant development: it shows that at least at the normative level the international community is becoming more integrated…"[329]

In a sense, the "ethos" of international law reflects the combination and the confluence of normativism and functionalism: on the one hand, international law could be used to delimit and leverage international politics; on the other hand, international law is still a significant tool for the contention of international political interests. Normative commitments of research methods do not imply that the political nature of the research object should be denied or ignored, and the strengthening of several analytical frameworks could arrive at a better conclusion with better explanatory power.

So, specifically to the topic of "institutional fragmentation of international IP law" here in the thesis, the ontological "ethos" of international law can be rendered or externally presented in the following aspects.

Firstly, diversity and pluralism are the existential conditions of international law as a legal system in this world society, which is and should be embedded into the very nature of international law and its further progressive development.[330] That requires international law to be more responsive and functional to the realities of this world society, which makes the ontological ethos of international law, whether in the form of debates on "relevance of international law"[331], "objectivity of international law"[332], "the unity of international law"[333] or the "institutional fragmentation of international law"[334] hereof, are definitely, inevitably and naturally different from that of national legal systems. Consequently, the coherence and unity are less valued and are not going to be valued in the same way

[329] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 45.

[330] See Prost, Mario, and Paul Kingsley Clark. Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?. Chinese Journal of International Law 5.2 (2006): 341-370, 342. ("Whilst the debate is generally framed in terms of 'proliferation' and 'fragmentation'—rather negative terminology—some perceive the phenomenon as healthy and reflective of the maturity of international law. Diversity and pluralism, they feel, should not be regarded as threats but, rather, as developments inherent in the very nature of international law.") Also see Nicolaidis, Kalypso, and Joyce L. Tong. Diversity or Cacophony? The Continuing Debate over New Sources of International Law. Mich. J. Int'l L. 25 (2003): 1349, 1361. Burke-White, William. International Legal Pluralism. Mich. J. Int'l L. 25 (2003): 963. Abi-Saab, Georges. Fragmentation or Unification: Some Concluding Remarks. NYUJ Int'l L. & Pol. 31 (1998): 919, 925.

[331] See Gross, Leo, Karl W. Deutsch, and Stanley Hoffmann. The Relevance of International Law; Essays in Honor of Leo Gross. Cambridge, Mass: Schenkman Pub. Co, 1968.

[332] See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005. Also see Schachter, Oscar. International Law in Theory and Practice. Dordrecht, The Netherlands: M. Nijhoff Publishers, 1991.

[333] See Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012.

[334] See Prost, Mario, and Paul Kingsley Clark. Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter. Chinese J. Int'l L. 5 (2006): 341. Also see Leathley, Christian. An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity. NYUJ Int'l L. & Pol. 40 (2007): 259.

as in national legal systems.[335] This is international law, as it is, always and always will be.

In other words, that kind of unity and thereby anticipated certainty and predictability is not suitable or anticipated in international law. That's because the kind of "certainty" or ethos that international really needs under this world society is the certainty that the supremacy and sanctity of national sovereignty enables all countries have the right to flexibly act on the basis of their national interests or will of states unless the country has a clear commitment in international law.[336] And in a sense, that's also why those provisions in international treaties that are compromises of contracting parties, particularly those contentious and national-interest-related parts, tends to be quite vague and obscure, on the one hand, and on the other hand, contracting parties are reluctant to apply them.[337] Those ambiguous legal provisions and texts realize the above-mentioned and states-anticipated certainty and predictability of law all the better, and it is the same thing for the reluctance to apply some provisions since taking risks to set precedents that could be potentially disadvantageous is inconformity with the cost-benefit analysis.

Secondly, within international legal system, against this decentralized, fragmented and realistic backdrop of world society, clashes of forces are presented as regime interactions, competition and evolutions, in an institutional sense.[338] All those make international law seem to be fragmented, from the stage of international law-making to its application, interpretation and implementation. But that's just how international law works and survives in this world society. Analogy between international legal system and national legal systems cannot be untenable, and the concept of "institutional fragmentation" is vacuous and of low explanatory power to the phenomena of international legal practices.[339]

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[335] Also, in different fields of international law, the degree of coherence, unity and responsiveness are verified. That's why the degree of fragmentation is different in different international regimes and sub-systems. See Biermann, Frank, et al. The Fragmentation of Global Governance Architectures: A Framework for Analysis. Global Environmental Politics 9.4 (2009): 14-40, 18. ("Fragmentation, in other words, is ubiquitous. Yet the degree of fragmentation varies from case to case.")

[336] In a sense, it's the interpretation of the principle of *pacta sunt servanda*, from a more realistic and bottom-up leans. See Lukashuk, Igor I. The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law. American Journal of International Law (1989): 513-518.

[337] See Judd, Patricia L. Retooling TRIPS. Va. J. Int'l L. 55 (2014): 117-257, 162. ("Even after twenty years' experience, the Agreement simply is not ready for any sort of significant change in the status quo. Part of the reason the Agreement is not ready for expanded tools has been the reluctance of TRIPS parties to test the Agreement's most important provisions.")

[338] For example, see Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30, 6. ("The choice of one among several applicable legal regimes refers back to what is understood as significant in a problem. And the question of significance refers back to what the relevant institution understands as its mission, its structural bias.")

[339] See Koh, Harold Hongju. The 1998 Frankel Lecture: Bringing International Law Home. Hous. L. Rev. 35 (1998): 623, 679-680. ("In the *Concept of Law*, H.L.A. argued that international law lacks two features he deemed

Thirdly, pluralism and complexity reflects the complex interest appeals in this world society, which would be transmitted to decentralized international law-making, regime interaction and enforcement machinery for the lack of overarching authority and legislature, as well as implementation and enforcement machinery.[340] So, within international legal system, against this decentralized, fragmented and realistic backdrop of world society, international law is case-based applied, auto-interpreted and disguised implemented. Those benefits of the so-called "institutional fragmentation", making international law being effective and relevant, are understated and misinterpreted.

Fourthly, bottom-up approach can be more explanatory and effective in the analyses of regime interaction and evolution, as it is more ontological and inside-out-looking. The pivotal role of international law and the "contemporarily limited but ever-increasing gravity" of international law in international legal governance and regulation enable the networking of international law. But the top-down conception of international law as a legal system should always be relevant with real bases and realistic requests, rather than the "augmented realities"[341]. That's why bottom-up approach is increasingly emphasized and relied, taking account of the ontological "ethos" of international legal system to explore those accurate dynamics of international practices and evolutionary processes.[342]

> *"It would appear that there exists no sense of a universal and abstract normativity. Rather, it seems that we (continue to) live in a world of legal islands, formed by states, international organizations and at best regimes, in which every interested legal actors has to struggle to attain its advantage. Furthermore, in what has been one of the more powerful waves of*

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central to the very concept of law…In effect, Hart defined the very notion of 'obedience' out of international law. Indeed, under his description, international rules are ones with which nations may conform or comply, but never 'obey' in the sense of internally accepting those rules into national law.") Also see Hart, H. L. A. The Concept of Law. Oxford: Oxford University Press, 2012, p 213-215, 231.

[340] See Forman, Shepard, and Derk Segaar. New Coalitions for Global Governance: The Changing Dynamics of Multilateralism. Global Governance: A Review of Multilateralism and International Organizations 12.2 (2006): 205-225. ("This article seeks to inform current debates on the changing architecture for global governance by cataloguing and suggesting evaluation criteria for alternative multilateral arrangements. Rather than describing a system in crisis, it focuses on the dynamics of change and flexibility in which established intergovernmental organizations are challenged to meet new demands and requirements while accommodating new mandates and members as well as non-state actors with global reach. A proliferating and fluctuating set of intergovernmental and multi-stakeholder arrangements with more assertive and diverse actors best describes the international operating environment for collective decision-making and action across a range of global issues, raising fundamental questions of effectiveness, accountability, legitimacy, and sustainability and posing challenges to the authority of existing IGOs.")

[341] See Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 14.

[342] This bottom-up approach makes it more accurate, concise and precise to investigate those interaction dynamics and evolutionary processes. For example, "power and egoistic self-interest are inadequate to account for the regime's formation and maintenance. The inadequacies of both the hegemonic stability and functional theories point towards another independent variable that needs central consideration in regime analysis: knowledge and learning." See Smith, Roger K. Explaining the Non-Proliferation Regime: Anomalies for Contemporary International Relations Theory. International Organization 41.02 (1987): 253-281.

interdependence, the globalization and global governance project after the end of the Cold War, it is as yet as difficult to recognize Kelsen's vision for a civitas maxima."[343]

All those make it particularly necessary to implant this "ontological ethos" approach for a better understanding of international law's fundamentals and evolution in a world society.[344]

2.4.2. The Rhetoric of "Institutional Fragmentation"

Then, why does this debate on the institutional fragmentation arise in the first place, and why could this language of institutional fragmentation become such a heated issue and topic in the academic studies of international law?[345] This is a question about the politics of the "institutional fragmentation" language in international law and a question about the implication of this "institutional fragmentation" rhetoric in international law.

On the one hand, it is claimed that international law is transformed from its original nature and foundations, or at least conceptual "cognitive prepossessions"[346], by the forces of globalization. And it is intrinsically related to the concerns over the legitimacy of international law as a legal system.

"The last decade of the twentieth century and the first of the twenty-first century will certainly rank high as a challenging period for the generally accepted assumptions of international law. The forces of 'globalization', accompanied by striking changes in government institutions, a remarkable increase in NGO activity and advocacy, an intense emphasis on market economic ideas and a backlash against them, have chipped away at the fragile theoretical foundations of the international legal system as it has been generally accepted for centuries."[347]

On the other hand, this "institutional fragmentation" debate is considered as just a fantastic illusion, since there are no fundamental or essential changes in the basic texture and structure of international

[343] García-Salmones Rovira, Mónica. The Project of Positivism in International Law. Oxford, United Kingdom: Oxford University Press, 2013, p 144.
[344] See Schachter, Oscar. The Evolving International Law of Development. Colum. J. Transnat'l L. 15 (1976): 1. ("This compels us to think about fundamentals, an activity not always congenial to practical lawyers who have difficulty enough with the uncertainties of international law and its elusive sources. It become even more difficult when legal theory is entangled with the shifting and unruly facts of international politics, economics, and social injustice.")
[345] See Martineau, Anne-Charlotte. The Rhetoric of Fragmentation: Fear and Faith in International Law. Leiden Journal of International Law 22.01 (2009): 1-28.
[346] See Brierly, J. L. The Basis of Obligation in International Law, and Other Papers. Oxford: Clarendon Press, 1958, p 1-2.
[347] See Jackson, John Howard. Sovereignty, the WTO and Changing Fundamentals of International Law. Cambridge ; New York : Cambridge University Press, 2006.

legal regulation, international governance and international law, while some hidden features and peculiarities of international law gradually manifest themselves under new circumstances of this world society.

> *"On the other hand, the lament of the lack of integrity of contemporary international law is seen by some as the anxiety of traditional international lawyers who cannot come to terms with a world that has dramatically changed. Fragmentation, in this view, simply has to be lived with and reforms sought in separate functional spaces. Fragmentation is merely the existential condition of international law in a postmodern world."*[348]

It is pointless to merely attach some labels or rhetoric concepts to the phenomena in international law and this world society, whether it is "unity/fragmentation" debate or the "proliferation/pluralism" argument, or even this "ontological ethos" approach, unless it could be helpful to explain and analyze the underlying driving forces, factors and rules, and attach clarity to the problems.[349] If not, then those concepts and arguments are nothing but rhetoric for unjustified and ungrounded preferences, assumptions or cognitive biases concerning international legal studies and this world society, which are confusing and puzzling both methodologically and analytically. Just like Prost, Mario said in 2012:

> *"The expansion, specialization and increased complexity of international law have promoted new territorial battles in which different classes of lawyers compete to gain control over contested areas of work and specialization. Central to these territorial battles are what Bourdieu calls 'classification struggles' (lutes de classement), that is, cognitive quarrels between different groups of social agents ('ancient' versus 'moderns', 'generalists' versus 'specialists', 'old cadres' versus 'new technocrats') regarding the legitimate definition of the social space and of their role within it. In this context, one quickly comes to realize, 'fragmentation' often constitutes a rhetorical device used by generalist/public international lawyers as an instrument of symbolic legitimization in their ongoing struggle for professional*

[348] See Chimni, Bhupinder S. The Past, Present and Future of International Law: A Critical Third World Approach. Melb. J. Int'l L. 8 (2007): 499. Also see Koskenniemi, Martti, and Päivi Leino. Fragmentation of International Law? Postmodern Anxieties. Leiden Journal of International Law 15.03 (2002): 553-579. See Fischer-Lescano, Andreas, and Gunther Teubner. Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law. Mich. J. Int'l L. 25 (2003): 999.

[349] See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 3-4. ("Conventional Scholarship associates such assumptions alternatively with naturalism, positivism, idealism, realism and so on. But I shall suggest that such labels are not at all useful for attaining clarity on problems which have bothered modern international lawyers. They have to be disentangled….One needs to explicate the assumptions about the present character of social life among States and on the desirable forms of such life which make it seem that one's doctrinal outcomes are justified even as they remain controversial.")

recognition and dominance."[350]

On a deeper level of international legal system's fundamentals and theories, the fundamental contradiction contained in this "institutional fragmentation of international law" debate is between the specialization of international law (the "functional approach" of modern international law's development, as the endogenous factors) and top-down systematic theoretical conception of international law (international law as a legal system, as the exogenous factors). And the junction of those forces is the "concerns on the legitimacy of international law" in a world society, which is manifested outwards as the question "to what extent is there, or should there be, some kind of 'unity' in international law"[351]. This issue of institutional fragmentation is of universal nature in international legal studies, as it evolves the basic properties, ontological ethos, operational characteristics, inherent contradictions and mode of existence of international law as a legal system, under a world society.

As once insightfully pointed out by Martti Koskenniemi, from the perspective of structural linguistics, the meaning of a concept in a discursive topic is established by "a network of binary oppositions between it and all the other surrounding expressions in the underlying language"[352], particularly the opposite concept.[353] Only by that can we, firstly thoroughly understand the connotations of a legal phrase/terminology, and secondly think and argue beyond those conceptual boxes and constrains. Particularly here in this thesis, the debate on the institutional fragmentation of international law is actually about the ontological ethos and underlying characteristics—principally the "unity"—of international law in this world society. Therefore, we should internalize this issue by making it tangible opportunity and visible entry point for a better understanding and construction of international law as a unique and distinct legal system. Any issue of universal nature could be raised on a certain level from the perspective of endogenous factors and ontological ethos, rather than merely in a way of exogenous factors and forces. What's more, those endogenous driving forces are of a more fundamental nature, while exogenous factors and external effects also play a part by being transmitted

[350] See Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 208. Also see Dezalay, Yves. Territorial Battles and Tribal Disputes. Mod. L. Rev. 54 (1991): 792. See Bourdieu, Pierre. Classement, Déclassement, Reclassement. Actes de la Recherche en Sciences Sociales 24.1 (1978): 2-22.
[351] See van Asselt, Harro. The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions. Cheltenham, UK: Edward Elgar Publishing, 2014, p 33.
[352] See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 8.
[353] See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 8-9.

and transformed to the endogenous ones.[354] And those endogenous and exogenous perspectives can be integrated for better analyses and elaborations.

Specifically speaking, the argumentation highlights to deconstruct this rhetoric of "institutional fragmentation" of international law in this thesis are as follows:

(1) In the "institutional fragmentation of international IP law" debate, the analogy between international law and national legal systems, as the theoretical premise of the "institutional fragmentation" language, fails for the lack of "relevant similarity".

(2) The ontological "ethos" of international (IP) law, which are the inherent virtues of international law-making and implementation, regime evolution and interaction in this world society, could rectify the chaos of this rhetoric of "institutional fragmentation" and illuminate the understated benefits as well as rationalities of institutional fragmentation. The "post-ontological era" is not coming yet for this "institutional fragmentation" debate, and the "institutional fragmentation" is the "new normal".

(3) The fundamental contradiction contained in this "institutional fragmentation of international law" debate is between the specialization of international law (the "functional approach" of modern international law's development, as the endogenous factors) and top-down systematic theoretical conception of international law (international law as a legal system, as the exogenous factors). The junction of those forces is the "concerns on the legitimacy of international law" against national legal systems in a world society.

(4) From analogical reasoning to ontological "ethos", there is a "paradigm shift" from the traditional "top-down" global governance paradigm (which is associated with analogical reasoning and hierarchical solutions to "regime complex") to a "bottom-up" approach with more ontological and inside-out-looking (which could better grasp and understand the dynamics and pulse of regime interaction and evolution). This fundamental change enables those arguments thereafter on the regime interactions and evolutions have totally different theoretical departures, journeys and destinations. Namely, it is more appropriate to ask "what is the status quo, and how to understand it in a historical, relational, structural and holographic way; through analyses of underlying reasons and rules, how will the landscape develop in the future and what could or should be done if there are certain preferences" with a realistic "bottom-up approach" in consideration of the "law of universal gravitation" and the

[354] Kuhn, Philip A., Jian Chen, and Zhihong Chen. Zhongguo Xian Dai Guo Jia De Qi Yuan (Origins of the Modern Chinese State). Hong Kong, the Chinese University Press. 2014, p 10.

structure of "tensional integrity" in this "regime interaction" perspective, rather than constructively and blindly ask "how to better manage the existing regimes and their collisions, and what are those workable (hierarchical or top-down-governance) solutions" from the perspective of "top-down" governance with cognitive path-dependence.

Time has been witnessing that these huge gaps among academic research, legal texts and international legal practices, as well as "huge gap between normative level and implementation" in international law,[355] have caused a lot of confusions and chaos with respects to legal rhetoric and interpretation. And this debate of "institutional fragmentation", as "a powerful and defining metaphor of modern international law scholarship,"[356] is one of those.[357] More importantly, "[W]hat all of the above demonstrates is that the interest in issues of fragmentation has not faded away. Fragmentation, it seems, is here to stay."[358]

> *"[B]etween theory and practice in politics, not always easy to trace because the actors themselves may easily be unconscious of their theoretical prepossessions which, nevertheless, powerfully influence their whole attitude towards practical affairs; and at no time has it been so important, as it is today, that we should see the facts of international life as they really are, and not as they come to us reflected in false or outworn theories."*[359]

All in all, international law, as a legal system under this decentralized, fragmented and divided world society, which is more significant and palpable than any other superficial rhetorics and seemingly satisfying theories, should be examined and surveyed as it is.

2.4.3. A Comeback: the Benefits and Rationalities of "Institutional Fragmentation"

One last issue that this chapter should expound is the benefits and rationalities of the "institutional fragmentation" phenomenon, since this thesis has been claiming that the benefit and rationalities of the institutional fragmentation have been understated from the beginning of our arguments, as the

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[355] See Cassese, Antonio. International Law. Oxford: Oxford University Press, 2005, p 17.
[356] Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 12.
[357] Piñon Carlarne, Cinnamon. Good Climate Governance: Only a Fragmented System of International Law Away?. Law & Policy 30.4 (2008): 450-480, 475. ("The suggestion here is not to force a false separation of law from its social, political, and economic context. Rather, this article shows how the issue of legal fragmentation—with its causes and consequences—functions as a stumbling block to achieving effective systems of international climate change law and governance. It also highlights the distinction between these two domains, which are often conflated in academic and political dialogue, and encourages commentators to more carefully consider how the terms of law, governance, and "good systems" of law and governance are being used.")
[358] Prost, Mario. The Concept of Unity in Public International Law. Oxford, U.K.: Hart Pub, 2012, p 12.
[359] See Brierly, J. L. The Basis of Obligation in International Law, and Other Papers. Oxford: Clarendon Press, 1958, p 1-2.

institutional fragmentation is the "new normal" in this world society and the post-ontological era has not come yet for this "institutional fragmentation" debate. Those benefits and rationalities could be summarized as follows.

Firstly, the so-called "institutional fragmentation" achieves the market-oriented competition and allocation of international regimes and institutions, thus ensuring that the international law-making and norm-setting could be experimented and developed on multi-level platforms, as well as refraining from monopoly of one single regime or some particularly designed institutions.

Secondly, the so-called "institutional fragmentation" endows the subjects of international law (particularly the States) with more options and bargain chips in the negotiations and conclusion of international legal documents, therefore containing the potential role of dogmatism and the happening of deadlocks, and ultimately facilitating the efficient functioning of international cooperation.

Thirdly, the so-called "institutional fragmentation" requires that those international legal practices, including but not limited to the application, interpretation and implementation of international law, should pay more attention to the legitimacy of the regime/institution as an authority in this world society, as well as should be more closely and tightly linked to the latest dynamics and landscapes of this world society, thus in a way making progress in the promotion of democratic governance on the international level.

As Professor Martti Koskenniemi once said, "the choice of one among several applicable legal regimes refers back to what is understood as significant in a problem. And the question of significance refers back to what the relevant institution understands as its mission, its structural bias."[360] That's about the initial institutional design, the gravity and relevance of different regimes, under the background of different interest demands and diverse gravity of international regime(s) to certain subject of international law in international politics and international relations. Normative conflicts and institutional proliferations are not necessarily negative things as long as it survives the cost-benefit analysis of so many subjects of international law.

[360] Koskenniemi, Martti. The Fate of Public International Law: Between Technique and Politics. The Modern Law Review 70.1 (2007): 1-30, 6.

2.5 CONCLUDING REMARKS

As Berman, Paul Schiff said in his 2012 book:

> *"We live in a world of legal pluralism, where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes imposed by state, substate, transnational, supranational, and nonstate communities. Navigating these spheres of complex overlapping legal authority is confusing, and we cannot expect territorial borders to solve all these problems because human activity and legal norms inevitably flow across such borders. At the same time, those hoping to create one universal set of legal rules are also likely to be disappointed by the sheer variety of human communities and interests. Instead, we need an alternative jurisprudence, one that seeks to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us. Such mechanisms, institutions, and practices can help mediate conflicts, and we may find that the added norms, viewpoints, and participants produce better decision making, better adherence to those decisions by participants and non-participants alike, and ultimately better real-world outcomes."*[361]

From those narratives, researches and theoretical debates above, it is clear that this is a good opportunity to theorize and internalize the "institutional fragmentation" debate into the ontological "ethos" of international law, with "a reconceptualization of both the functions and the effectiveness of traditional international law and institutions"[362] so as to better understand international law as a legal system in a world society. It is obvious that this rhetoric of "institutional fragmentation" could be an excellent pointcut to realize the "paradigm shift" and get rid of the "approach dependence" in international legal studies. Moreover, this ontological "ethos" of international law guarantees a high-definition display of international IP regime interactions and evolution, which is theoretically explanatory, conceptually realistic and functionally effective for this so-called "post-ontological" and "post-Westphalia" topic.[363]

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[361] See Berman, Paul Schiff. Global Legal Pluralism: A Jurisprudence of Law beyond Borders. Cambridge University Press, 2012, p i.

[362] See Slaughter, Anne-Marie. A Liberal Theory of International Law. Am. Soc'y Int'l L. Proc. 94 (2000): 240, 242.

[363] "Instead of bemoaning either the 'fragmentation' of law or the messiness of jurisdictional overlaps, we should

"Overall, international lawyers can ill afford to ignore the growing wealth of political science data on the world they seek to regulate. The measurements may be imprecise, the theories crude, but the while offers at least the hope of a positive science of world affairs."[364]

More importantly, on the level of research methods and the logic of arguments, it is far from reasonable or acceptable to enter into certain "controlling assumptions"[365] before we precisely approach and investigate an international legal problem. Those assumptions, premises and prerequisites must be disentangled and explicated against the "present character of social life among States"[366], so as to be justified.[367]

Please allow me to quote the following words by Popper, Karl R again to end the exploration of this chapter.

"Our propensity to look out for regularities, and to impose laws upon nature, leads to the psychological phenomenon of dogmatic thinking or, more generally, dogmatic behavior: we expect regularities everywhere and attempt to find them even where there are none; events which do not yield to these attempts we are inclined to treat as a kind of 'background noise'; and we stick to our expectations even when they are inadequate and we ought to accept defeat."[368]

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accept them as a necessary consequence of the fact that communities cannot be hermetically sealed off from each other. Moreover, we can go further and consider the possibility that this jurisdictional messiness might, in the end, provide important systemic benefits by fostering dialogue among multiple constituencies, authorities, levels of government, and non-state communities. In addition, jurisdictional redundancy allows alternative ports of entry for strategic actors who might otherwise be silenced." Berman, Paul Schiff. Federalism and International Law through the Lens of Legal Pluralism. Missouri Law Review, 2008, Vol. 73, 1183.

[364] Burley, Anne-Marie Slaughter. International Law and International Relations Theory: A Dual Agenda. Am. J. Int'l L. 87 (1993): 205, 239.

[365] See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 3-4.

[366] See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 4.

[367] "What these positions are, which intellectual operations lead into then, and what it is that one needs to assume in order to believe that such positions and operations are justified." See Koskenniemi, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press, 2005, p 7.

[368] See Popper, Karl R. Conjectures and Refutations: The Growth of Scientific Knowledge. London: Routledge, 2002, p 64.

APPDNEIX Ⅰ:

A List of the 34 Cases Citing TRIPs Agreement in the Request for Consultations

Case No.	Case Name	Basic Status	Implementation Status
DS467	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Indonesia)	Consultations requested: 20 September 2013; Current status: Panel composed;	——
DS458	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Cuba)	Consultations requested: 3 May 2013; Current status: Panel composed;	——
DS441	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco	Consultations requested: 18 July 2012; Current status: Panel composed;	——

	Products and Packaging (Complainant: Dominican Republic)		
DS435	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Honduras)	Consultations requested: 4 April 2012; Current status: Panel composed;	——
DS434	Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Ukraine)	Consultations requested: 13 March 2012; Current status: Panel composed;	——
DS409	European Union and a Member State — Seizure of Generic Drugs in Transit (Complainant: Brazil)	Consultations requested: 12 May 2010; Current status: In consultations;	——
DS408	European Union and a Member State — Seizure of Generic Drugs in Transit (Complainant:	Consultations requested: 11 May 2010; Current status: In consultations;	——

	India)		
DS372	China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (Complainant: European Communities)	Consultations requested: 3 March 2008; Current status: Settled or terminated (withdrawn, mutually agreed solution);	On 4 December 2008, China and the European Communities informed the DSB that they had reached an agreement in relation to this dispute in the form of a Memorandum of Understanding.[369]
DS362	China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights (Complainant: United States)	Consultations requested: 10 April 2007; Current status: Implementation notified by respondent;	On 8 April 2010, China and the United States notified the DSB of Agreed Procedures under Articles 21 and 22 of the DSU.[370]
DS290	European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complainant: Australia)	Consultations requested: 17 April 2003; Current status: Implementation notified by respondent;	At the DSB meeting on 21 April 2006, the European Communities said that they had fully implemented the DSB's recommendations and rulings by adopting a new regulation which entered into force on 31 March 2006. Australia and the United States disagreed that the European Communities had fully implemented the DSB's recommendations and rulings and invited the European Communities to take account of their

[369] See WTO. China - Measures Affecting Financial Information Services and Foreign Financial Information Suppliers - Joint Communication from China and the European Communities. WT/DS372/4, S/L/319/Add.1. IP/D/27/Add.1, 9 December 2008.

[370] See WTO. China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights - Understanding between China and the United States Regarding Procedures under Articles 21 and 22 of the DSU. WT/DS362/15, 13 April 2010.

			comments and revise the newly promulgated regulation.[371]
DS224	United States — US Patents Code (Complainant: Brazil)	Consultations requested: 31 January 2001; Current status: In consultations;	——
DS199	Brazil — Measures Affecting Patent Protection (Complainant: United States)	Consultations requested: 30 May 2000; Current status: Settled or terminated (withdrawn, mutually agreed solution);	On 5 July 2001, the parties to the dispute notified to the DSB a mutually satisfactory solution on the matter.[372]
DS196	Argentina — Certain Measures on the Protection of Patents and Test Data (Complainant: United States)	Consultations requested: 30 May 2000; Current status: Settled or terminated (withdrawn, mutually agreed solution);	On 31 May 2002, the US and Argentina notified the DSB that they have reached an agreement on all of the matters raised by the US in its requests for consultations regarding this dispute and that concerning Argentina — Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals (WT/DS171).[373]

[371] See WTO. European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs - Status Report by the European Communities – Addendum. WT/DS174/25/Add.3, WT/DS290/23/Add.3, 11 April 2006.

[372] See WTO. Brazil - Measures Affecting Patent Protection - Notification of Mutually Agreed Solution. WT/DS199/4, G/L/454, IP/D/23/Add.1, 19 July 2001. ("Should the U.S. withdraw the WTO panel against Brazil concerning the interpretation of Article 68, the Brazilian Government would agree, in the event it deems necessary to apply Article 68 to grant compulsory license on patents held by the U.S. companies, to hold prior talks on the matter with the U.S. Government. These talks would be held within the scope of the U.S. – Brazil Consultative Mechanism, in a special session scheduled to discuss the subject.")

[373] See WTO. Argentina - Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals (WT/DS171) - Argentina - Certain Measures on the Protection of Patents and Test Data, Notification of Mutually Agreed Solution According to the Conditions Set Forth in the Agreement. WT/DS171/3, WT/DS196/4, IP/D/18/Add.1, IP/D/22/Add.1, 20 June 2002. ("Following the rounds of consultations held on 15 June 1999, 27 July 1999, 17 July 2000, 29 November 2000, 2 April 2001, 13 July 2001, 21 September 2001, 5 November 2001, and 14 April 2002, the United States and Argentina have reached a mutually satisfactory solution on the matters indicated in items 1 through 8(a). The mutually satisfactory solution on the matters indicated in items 4, 5 and 6 of

DS186	United States — Section 337 of the Tariff Act of 1930 and Amendments thereto (Complainant: European Communities)	Consultations requested: 12 January 2000; Current status: In consultations;	——
DS176	United States — Section 211 Omnibus Appropriations Act of 1998 (Complainant: European Communities)	Consultations requested: 8 July 1999; Current status: Report(s) adopted, with recommendation to bring measure(s) into conformity;	At the expiry of the fourth extension of the reasonable period of time on 30 June 2005, the European Communities and the United States notified the DSB of their Understanding whereby the European Communities agreed not to request, at this stage, authorization from the DSB to suspend concessions or other obligations pursuant to Article 22.2 of the DSU. However, it retained its right to request authorization from the DSB to suspend concessions or other obligations, giving the United States advance notice. In exchange, the United States agreed not to block the European Communities' request for DSB authorization on the grounds that such DSB action would not be within the time period set out in the first sentence of Article 22.6 of the DSU.

the attached text is subject to the passage by the Argentine National Congress of the bills referred to in those items within one year of the date of the submission of this notification. The matters indicated in items 8(b) and 9 shall be subject to the conditions set forth in the respective paragraphs of this notification. This agreement is without prejudice to the rights and obligations of Argentina and the United States under the WTO agreements.")

			Following the notification of the Understanding between the parties, the United States has been providing status reports on its progress in the implementation of the DSB recommendations in this matter in accordance with Article 21.6 of the DSU.
DS174	European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complainant: United States)	Consultations requested: 1 June 1999; Current status: Implementation notified by respondent;	At the DSB meeting on 21 April 2006, the European Communities said that they had fully implemented the DSB's recommendations and rulings by adopting a new regulation which entered into force on 31 March 2006. Australia and the United States disagreed that the European Communities had fully implemented the DSB's recommendations and rulings and invited the European Communities to take account of their comments and revise the newly promulgated regulation.[374]
DS171	Argentina — Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals	Consultations requested: 6 May 1999; Current status: Settled or terminated (withdrawn, mutually	On 31 May 2002, the US and Argentina notified the DSB that they have reached an agreement on all of the matters raised by the US in its requests for consultations regarding this dispute

[374] See WTO. European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs - Status Report by the European Communities – Addendum. WT/DS174/25/Add.3, WT/DS290/23/Add.3, 11 April 2006.

	(Complainant: United States)	agreed solution);	and that concerning Argentina — Certain Measures on the Protection of Patents and Test Data (WT/DS196).[375]
DS170	Canada — Term of Patent Protection (Complainant: United States)	Consultations requested: 6 May 1999; Current status: Implementation notified by respondent;	At the DSB meeting of 24 July 2001, Canada informed the DSB that it had fully complied with the DSB's recommendations and rulings. On 12 July 2001, Bill S-17 had come into force. This legislation brought Canada's Patent Act into conformity with its obligations under the TRIPS Agreement.[376]
DS160	United States — Section 110(5) of US Copyright Act (Complainant: European Communities)	Consultations requested: 26 January 1999; Current status: Authorization to retaliate requested (including 22.6 arbitration);	On 23 June 2003, the United States and the European Communities informed the DSB of a mutually satisfactory temporary arrangement. Such temporary arrangement covered the period through to 20 December 2004. The United States has thereafter presented status reports to the DSB informing that the US Administration will work closely with the US Congress and will continue to confer with the European Union in order to reach a mutually satisfactory resolution of this matter.[377]

[375] See WTO. Argentina - Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals (WT/DS171) - Argentina - Certain Measures on the Protection of Patents and Test Data, Notification of Mutually Agreed Solution According to the Conditions Set Forth in the Agreement. WT/DS171/3, WT/DS196/4, IP/D/18/Add.1, IP/D/22/Add.1, 20 June 2002.

[376] See WTO. Dispute Settlement: Dispute DS170, Canada — Term of Patent Protection. Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds170_e.htm.

[377] See WTO. United States - Section 110(5) of the US Copyright Act - Status report by the United States –

DS153	European Communities — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: Canada)	Consultations requested: 2 December 1998; Current status: In consultations;	——
DS125	Greece — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs (Complainant: United States)	Consultations requested: 4 May 1998; Current status: Settled or terminated (withdrawn, mutually agreed solution);	On 20 March 2001, the parties to the dispute notified a mutually satisfactory solution on the matter to the DSB.[378]
DS124	European Communities — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs (Complainant: United States)	Consultations requested: 30 April 1998; Current status: Settled or terminated (withdrawn, mutually agreed solution);	On 20 March 2001, the parties to the dispute notified a mutually satisfactory solution on the matter to the DSB.[379]
DS115	European Communities — Measures Affecting the Grant of Copyright and Neighbouring Rights (Complainant: United States)	Consultations requested: 6 January 1998; Current status: Settled or terminated (withdrawn, mutually agreed solution);	On 6 November 2000, the parties notified the DSB that they had reached a mutually satisfactory solution.[380]

Addendum. WT/DS160/24/Add.119, 5 December 2014.

[378] See WTO. Greece - Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs - Notification of Mutually Agreed Solution. WT/DS125/2, IP/D/14/Add.1, 26 March 2001.

[379] See WTO. European Communities - Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs - Notification of Mutually Agreed Solution. WT/DS124/2, IP/D/13/Add.1, 26 March 2001.

[380] See WTO. Ireland - Measures Affecting the Grant of Copyright and Neighbouring Rights (WT/DS82) - European Communities - Measures Affecting the Grant of Copyright and Neighbouring Rights (WT/DS115). WT/DS82/3, WT/DS115/3, IP/D/8/Add.1, IP/D/12/Add.1, 13 September 2002.

DS114	Canada — Patent Protection of Pharmaceutical Products (Complainant: European Communities)	Consultations requested: 19 December 1997; Current status: Implementation notified by respondent;	At the DSB meeting of 23 October 2000, Canada informed Members that, effective from 7 October 2000, it had implemented the DSB's recommendations.[381]
DS86	Sweden — Measures Affecting the Enforcement of Intellectual Property Rights (Complainant: United States)	Consultations requested: 28 May 1997; Current status: Settled or terminated (withdrawn, mutually agreed solution)	In a communication dated 2 December 1998, the two parties notified a mutually agreed solution to this dispute.[382]
DS83	Denmark — Measures Affecting the Enforcement of Intellectual Property Rights (Complainant: United States)	Consultations requested: 14 May 1997; Current status: Settled or terminated (withdrawn, mutually agreed solution)	On 7 June 2001, the parties to the dispute notified to the DSB a mutually satisfactory solution on the matter.[383]
DS82	Ireland — Measures Affecting the Grant of Copyright and Neighbouring Rights (Complainant: United States)	Consultations requested: 14 May 1997; Current status: Settled or terminated (withdrawn, mutually agreed solution)	On 6 November 2000, the parties informed the DSB that they had reached a mutually satisfactory solution.[384]

[381] See WTO. Dispute Settlement: Dispute DS114, Canada — Patent Protection of Pharmaceutical Products. Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm

[382] See WTO. Sweden - Measures Affecting the Enforcement of Intellectual Property Rights - Notification of Mutually-Agreed Solution. WT/DS86/2, IP/D/10/Add.1, 11 December 1998.

[383] See WTO. Denmark - Measures Affecting the Enforcement of Intellectual Property Rights - Notification of Mutually Agreed Solution. WT/DS83/2, IP/D/9/Add.1, 13 June 2001.

[384] See WTO. Ireland - Measures Affecting the Grant of Copyright and Neighbouring Rights (WT/DS82) - European Communities - Measures Affecting the Grant of Copyright and Neighbouring Rights (WT/DS115). WT/DS82/3, WT/DS115/3, IP/D/8/Add.1, IP/D/12/Add.1, 13 September 2002.

DS79	India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: European Communities)	Consultations requested: 28 April 1997; Current status: Implementation notified by respondent	At the DSB meeting on 28 April 1999, India presented its final status report on implementation of DS50, which also applies to implementation in this dispute. The report disclosed the enactment of the relevant legislation to implement the recommendations and rulings of the DSB.[385]
DS59	Indonesia — Certain Measures Affecting the Automobile Industry (Complainant: United States)	Consultations requested: 8 October 1996; Current status: Implementation notified by respondent	By a communication dated 15 July 1999, Indonesia informed the DSB that it had issued a new automotive policy on 24 June 1999 (the 1999 Automotive Policy), which effectively implemented the recommendations and rulings of the DSB in this matter.[386]
DS50	India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: United States)	Consultations requested: 2 July 1996; Current status: Implementation notified by respondent	At the DSB meeting on 28 April 1999, India presented its final status report on implementation of this matter which disclosed the enactment of the relevant legislation to implement the recommendations and rulings of the DSB.[387]
DS42	Japan — Measures concerning Sound Recordings	Consultations requested: 28 May 1996; Current status:	On 7 November 1997, both parties notified a mutually agreed solution.[388]

[385] See WTO. India - Patent Protection for Pharmaceutical and Agricultural Chemical Products - Status Report by India – Addendum. WT/DS50/10/Add.4, WT/DS79/6, 16 April 1999.
[386] See WTO. Indonesia - Certain Measures Affecting the Automobile Industry - Status Report by Indonesia – Addendum. WT/DS54/17/Add.1, WT/DS55/16/Add.1, WT/DS59/15/Add.1, WT/DS64/14/Add.1 15 July 1999.
[387] See WTO. India - Patent Protection for Pharmaceutical and Agricultural Chemical Products - Status Report by India – Addendum. WT/DS50/10/Add.4, WT/DS79/6, 16 April 1999.
[388] See WTO. Japan - Measures Concerning Sound Recordings - Notification of a Mutually-Agreed Solution. WT/DS42/4, IP/D/4/Add.1, 17 November 1997.

	(Complainant: European Communities)	Settled or terminated (withdrawn, mutually agreed solution)	
DS37	Portugal — Patent Protection under the Industrial Property Act (Complainant: United States)	Consultations requested: 30 April 1996; Current status: Settled or terminated (withdrawn, mutually agreed solution)	On 3 October 1996, both parties notified a mutually agreed solution to the DSB.[389]
DS36	Pakistan — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: United States)	Consultations requested: 30 April 1996; Current status: Settled or terminated (withdrawn, mutually agreed solution)	At the DSB meeting on 25 February 1997, both parties informed the DSB that they had reached a mutually agreed solution to the dispute and that the terms of the agreement were being drawn up, and would be communicated to the DSB once finalized. On 28 February 1997, the terms of the agreement were communicated to the Secretariat.[390]
DS28	Japan — Measures Concerning Sound Recordings (Complainant: United States)	Consultations requested: 9 February 1996; Current status: Settled or terminated (withdrawn, mutually agreed solution)	On 24 January 1997, both parties informed the DSB that they had reached a mutually satisfactory solution to the dispute.[391]

[389] See WTO. Portugal - Patent Protection under the Industrial Property Act - Notification of a Mutually-Agreed Solution. WT/DS37/2, IP/D/3/Add.1, 8 October 1996.
[390] See WTO. Pakistan - Patent Protection for Pharmaceutical and Agricultural Chemical Products - Notification of a Mutually-Agreed Solution. WT/DS36/4, IP/D/2/Add.1, 7 March 1997.
[391] See WTO. Japan - Measures Concerning Sound Recordings - Notification of Mutually Agreed Solution. WT/DS28/41, IP/D/1/Add.1, 5 February 1997.