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Summary

Problem Definition and Research Question

This thesis is about the fragmented state of global climate change governance. As a ‘super wicked’ problem with a causal chain marked by complexity and uncertainty, it is impossible to govern all facets of climate change through a single international regime. To achieve its goals, the international regime on climate change developed under the United Nations Framework Convention on Climate Change (UNFCCC) will therefore need to take into account that other international regimes may either mitigate or exacerbate the problem, while at the same time it needs to also consider its own impacts on those regimes.

Some degree of overlap between the United Nations (UN) climate regime and other regimes is likely to be inevitable given the scope of the climate change phenomenon, and could even be considered necessary for integrated efforts to limit greenhouse gas emissions and adapt to the detrimental impacts of a changing climate. However, on a systemic level, the fragmentation of international law and governance, and subsequent interactions between individual regimes, could also undermine coherence and possibly hamper effectiveness. The exact consequences of fragmentation thus remain unclear. In the debate on the fragmentation of international law, scholars on the one hand have feared that a multiplicity of international regimes would lead to normative conflicts, regulatory uncertainties, and general inefficiencies. On the other hand, there are scholars who point to the benefits of fragmentation, such as the extension of international law to new areas and the global diffusion of best regulatory practices.

Although studies in international law and international relations have thus contributed to general knowledge on the consequences of interactions between international regimes, there are

as of yet no in-depth studies into the various consequences of regime interactions in global climate governance.

Awareness of regime interactions and their consequences also raises the possibility of their management. Such management is aimed at capturing the synergies between different regimes, and minimizing potential or actual conflicts. There is a growing body of research on the management of regime interactions, which has examined the role of legal techniques and political approaches in interaction management. However, empirical evidence showing how legal techniques and institutional coordination have managed, and could manage, regime interactions in a specific issue area such as global climate governance is still lacking.

These questions concerning the consequences and the management of regime interactions are not merely of academic relevance. State and non-state actors participating in several regimes simultaneously generally seek to ensure that activities in one regime contribute to achieving the goals of another. As this thesis shows, their quest can be influenced by the pursuit of an overarching goal, such as normative coherence, mutual supportiveness, or sustainable development, but they may also be based on the more pragmatic desire to increase efficiency: how to make better use of existing human, financial, and technological resources to implement international agreements.

Against this background, the overarching research question for this thesis is:

What are the consequences of regime interactions between climate change-related regimes, and how can interaction management address conflicts and enhance synergies between them?

Research Approach

The thesis adopts an interdisciplinary, problem-driven research approach, taking into account both the legal and political aspects of the research subject. The discipline of international law provides valuable insights into determining the existence of a normative conflict; examining the possibilities for addressing such conflicts through the law of treaties; and identifying the scope for legal techniques to address conflicts and enhance synergies between international agreements. The discipline of international relations helps by shedding light on the driving forces behind regime interactions; identifying causal mechanisms for interactions; and assessing the impacts of interaction management on regime effectiveness. In other words, both disciplines address different, yet related questions, and can thus provide complementary insights.

The research methodology follows a case study approach in order to provide insights into the different types of interactions and interaction management. These case studies correspond to the following three types of regime interactions:

Regime interactions within the (narrowly defined) field of international climate law and governance. This case study analyzes interactions between the multilateral UN climate regime and unilateral clean technology agreements. To illustrate the interactions, the case study analyzes the Asia-Pacific Partnership on Clean Development and Climate. This Partnership is representative of a number of non-legally binding governance arrangements that have been initiated outside the United Nations framework, consisting of only a limited number of participating countries and focused on technology cooperation.

Regime interactions within the field of international environmental law and governance. This case study analyzes interactions between the UN climate regime and the biodiversity regime based on the Convention on Biological Diversity (CBD). The case study particularly examines the role of forests at the nexus of

climate and biodiversity governance. Forests are important from the perspective of biodiversity conservation as well as from the perspective of climate change mitigation, as they can form either a net source or sink of carbon dioxide emissions.

Regime interactions between two distinct fields of international law and governance. This case study analyzes interactions between the UN climate regime and the World Trade Organization (WTO). More specifically, it examines how the use of unilateral climate-related trade measures by participants in the UN climate regime may lead to conflicts with the principles and rules of the WTO.

For each of these cases, the interactions are analyzed according to the interacting objects (hard or soft law), the causal mechanisms driving the interactions, intentionality, and their consequences (conflicting, synergistic, or neutral). With respect to the consequences of regime interactions, this thesis introduces a typology that adds two important nuances to the familiar and relatively straightforward distinction between ‘conflicts’ and ‘synergies’. First, it distinguishes between a narrow legalistic definition of ‘normative conflicts’ and a broader definition of ‘policy conflicts’. This distinction captures the fact that from an international lawyer’s point of view not all tensions between regimes should be regarded as ‘conflicts’, while at the same time conceding that those broader tensions also deserve attention. Second, it posits that some consequences of regime interactions may have already manifested themselves – i.e., they are ‘actual’ – whereas in other cases consequences may have not yet materialized – i.e., they are ‘potential’.

In addition, for each of the cases, the effectiveness and feasibility of various legal techniques and institutional coordination to address regime interactions is examined through a study of the existing literature. To this end, the thesis introduces a broad distinction between legal and political approaches in interaction

management. The first category consists of various legal techniques well known to international lawyers, such as treaty drafting, treaty interpretation, conflict clauses, and priority rules for the resolution of conflicts of norms such as *lex superior*, *lex specialis* and *lex posterior*. These techniques can not only be applied by judicial bodies, but may also be employed by negotiators and policy makers at the domestic level. The second category refers to a range of activities carried out by (groups of) actors participating in the interacting regimes that do not involve legal means such as dispute settlement. These actors include the regimes' decision-making bodies (e.g., the UNFCCC Conference of the Parties), administrative bodies (e.g., the CBD secretariat) or dispute settlement bodies (e.g., the WTO Appellate Body). These actors can seek to influence the outcomes of regime interactions individually or jointly; on an ad hoc or a more permanent basis; and with or without a clear legal mandate to do so.

Main Conclusions

Consequences of regime interactions

The first key finding on the consequences of regime interactions is that despite the concerns raised in the debate on the fragmentation of international law, *no normative conflict can be identified* in the three case studies. This does not mean that tensions between the climate regime and other regimes are absent; the small sample of regime interactions covered in this thesis already provides sufficient evidence for broader policy conflicts. However, the absence of actual conflicts between norms mean that it is necessary to look beyond legal approaches aimed primarily at avoiding or resolving normative conflict.

A second key finding is that, in line with earlier studies conducted by international relations scholars, there were *various instances of synergies* resulting from regime interactions in global climate governance. Notwithstanding this finding, international lawyers still pay insufficient attention to the conditions under which

certain regime interactions may result in synergy. These conditions may be linked to the nature and structure of a particular problem, but also to design elements of a particular regime, an area that should be of particular interest to international lawyers. Further analyses of how and why regime interactions lead to synergies are therefore clearly apposite for regime interactions, both in more narrowly defined fields (e.g., climate governance; international environmental law) and in global governance more broadly.

Third, the outcome of regime interactions (conflict or synergy) often *depends on factors that are under the control of actors participating in the interacting regimes*. This emphasizes the importance of understanding how regime interactions in global climate governance can be, and have been, managed.

Management of regime interactions

With respect to the management of regime interactions, the first key finding is that in a world where the lines between law and non-law are blurry, and where international law based on formal sources is more and more accompanied by informal international lawmaking, the *relevance of formal legal techniques and the law of treaties in addressing regime interactions is increasingly being challenged*. While different regimes may be at odds with each other, the tensions between them cannot always be traced back to the texts of treaties upon which the regimes are based.

Second, if they are approached in novel and original ways, *legal techniques nevertheless hold potential for managing regime interactions*. In particular, this thesis suggests that the international legal debate should acknowledge that methods of treaty interpretation that do not require parallel membership but instead require the careful review of the legitimacy of extraneous rules may also be used in the pursuit of harmonious treaty interpretation. There is a potential role for Article 31.3(c) of the Vienna Convention on the Law of Treaties, but its theoretical attractiveness is reduced by reluctance on the part

of adjudicators to use the provision in practice. Moreover, while dispute settlement bodies will remain an important locus for applying the technique of treaty interpretation, the thesis draws attention to the fact that treaty interpretation is also carried out by government officials at the domestic level, meaning that attention should also be paid to the role of national-level policy makers. Furthermore, it shows how ‘conflict’ or ‘savings’ clauses governing the relationship between individual treaties could be strengthened by: 1) acknowledging potential synergies between treaties; 2) drafting them more clearly; and 3) mandating inter-institutional coordination, adding a dynamic element.

Third, the general limitations of legal techniques require us to think more deeply about *institutional coordination as a means of interaction management*. This thesis provides a contribution by adding insights into different types of institutional coordination. More specifically, it gives initial insights into the advantages and drawbacks of these different types of institutional coordination (formal/informal; structural/ad hoc; strong/weak legal basis; involving decision-making/administrative bodies) for regime interactions in global climate governance.

Fourth, *institutional coordination raises key questions of accountability and legitimacy*, as interaction management may sideline some interests and concerns of actors in the interacting regimes, and prioritize others. The risk that coordination by treaty bodies does not reflect the consent of the states participating in the interacting regimes is valid in particular for bureaucracies (such as the secretariats of the UNFCCC and the CBD), which generally are not granted decision-making authority. Moreover, when the two interacting regimes can be considered unequal, for instance because powerful states participate in one regime but not the other, institutional coordination may become a vessel for those states to wield their influence beyond a particular regime. One way to address these accountability and legitimacy concerns is for treaty bodies

wishing to engage in institutional coordination to carefully review how the norms in another regime have been created, and whether this has been done in a process that enjoyed wide participation and can be characterized by transparency and openness.

Fifth, *autonomous interaction management by state and non-state actors can complement collective forms of interaction management in important ways, but is in itself insufficient* as a means to effectively address regime interactions. The main reason for this is that autonomous interaction management does not address underlying systemic tensions in international law and governance. International regimes can generally be considered to be more durable than policy positions adopted by individual governments, and even though actions by non-state actors can pave the way for effective interaction management at the international level, they still require scaling up.

Lastly, there are *no clearly identifiable and objective standards against which interaction management can be evaluated*. This is because regime interactions reflect the often contested values underlying specific regimes. Managerial approaches that do not take into account the underlying politics do not address the root causes of regime interactions. This does not mean that all interaction management is pointless. Regime interactions do not always reflect ideological divides, and through interaction management it is possible to enhance a shared understanding how specific policy problems – and the institutional frameworks governing them – are related. Moreover, in some cases, linking implementing activities can help reduce inefficiencies and allow for inter-regime learning. Even if values do clash, there is still a sound argument for accountable interaction management that carefully considers how the legitimacy of the interacting regimes. Hence, in regime interactions characterized by high stakes, there is still a strong case for the interacting regimes to take extraneous norms into account.

Policy Recommendations

The thesis draws attention to several aspects that are relevant from a policy maker's perspective, and lead to the following policy recommendations. The first three recommendations are based upon the individual case studies; the fourth recommendation highlights the changing role of the UN climate regime in a fragmented governance landscape.

On the basis of the first case study, the thesis suggests that it should be examined how the multilateral climate regime could co-exist with flanking unilateral approaches. The thesis suggests that with respect to the issue of technology development and transfer, the UNFCCC can continue to play an important role in identifying developing countries' climate technology needs, and linking technology initiatives to various funding mechanisms. Unilateral clean technology agreements, conversely, can play their part in the design and implementation of specific actions related to technology development and transfer. Formalized institutional coordination, through more frequent and comprehensive reporting by the administrative bodies of unilateral agreements to the UNFCCC, could enhance transparency and predictability by showing how – and possibly how much – the actions of other institutions contribute to the UNFCCC's objective.

With regard to the second case study, the thesis provides guidance on how to improve the biodiversity impacts of a mechanism for reducing emissions of deforestation and forest degradation (REDD) under the UNFCCC. The thesis does not provide an ideal solution on how REDD could deliver both climate and biodiversity benefits. However, it does suggest that climate negotiators should incorporate a brief reference to the contribution of REDD to biodiversity benefits in a future legally binding agreement. Such a provision could open up negotiating space for better integrating biodiversity concerns in the future. This would mean that the broad obligation to protect biodiversity would be anchored in a treaty, and

thus provides an opportunity to reinforce the inclusion of biodiversity considerations in the UN climate regime over time. Furthermore, although common biodiversity standards for forest-related climate activities adopted either under the UNFCCC or under the CBD will likely be unacceptable and undesirable, it is suggested that there is potential for further collaboration between the treaty bodies of the climate and biodiversity regimes on the monitoring and reporting of biodiversity impacts. Over the years, the CBD has built up significant institutional capacity in the area of monitoring and reporting on various aspects of biological diversity, and it is sensible to build on its experience in this regard. Lastly, the thesis highlights the role of various actors to ensure that climate measures deliver biodiversity benefits. Governments in developed countries can seek to safeguard biodiversity through financial channels, either through direct funding to projects in developing countries, or through market access requirements. Governments in developing countries can adopt policies and measures, such as domestic biodiversity standards, impact assessment requirements, and generally improving policy and legal coherence at the national and sub-national levels. Efforts by non-state actors can support these actions, for instance by providing services in terms of monitoring, reporting and verifying the biodiversity impacts of climate policies.

The case study on interactions between the climate and trade regimes provide the basis for suggestions on how to tackle the politically sensitive issue of unilateral climate-related trade measures. Faced with the prospect of such measures being adopted, starting an informed intergovernmental dialogue under both the UNFCCC and the WTO forms a sensible first step in addressing their potential implications, particularly for developing countries. Because there is a real risk of disguised protectionism, it is important for states wishing to adopt a measure to make the climate change rationale as clear as possible, and to show that the measure is not simply designed to protect domestic producers. In addition, developed countries seeking

to use trade measures need to show how they seek to minimize the impacts on developing countries or how these countries may possibly benefit from adopting the measures. In case unilateral trade measures are inevitable, it is suggested that governments design them in such a way that they could be changed or made void if the climate objectives can be achieved through other means.

On a more general level, the UN climate regime can play an important part as ‘orchestrator’, mobilizing climate change action outside of the UNFCCC. This means, for instance, that subsidiary bodies under the UNFCCC could be mandated to keep track of the variety of governance arrangements outside the climate regime, and assess whether adding up the efforts of these initiatives is in line with common objectives, such as keeping temperature increases below 2° Celsius. Orchestration could also seek to reduce inefficiencies by avoiding duplication of efforts, and decrease the risk of double counting mitigation actions, for instance, through the establishment of common guidelines and accounting frameworks by the Conference of the Parties to the UNFCCC.