

BOOK REVIEWS

Oran Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict*, Oxford and Portland, Oregon, Hart Publishing, 2004, ISBN 1-84113-348-5, 288 pp., £42.00 (hb).
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INTRODUCTION

Oran Perez starts his book exactly where this review begins – in Seattle. The city streets are calm now, order prevails and it is hard, in the crispy fall days of 2004, to picture the events of 1999. I came from Rio, straight to Seattle. Nothing could differ more than those two cities and the international encounters they hosted: Seattle in 1999 and Rio 1992 – trade and environment, development and environment, government and non-government, a tale of two cities as an emblem of international law and order. Rio in 92 spoke of the environment in conjunction with development and popularized the concept of sustainable development, it celebrated the possibility of civil society's participation in international affairs, it brought familiarity with international law to the domestic order in Brazil, and it forecasted hope. Seattle in 99 highlighted the difficulties of dialogue, it exposed the contradictions of globalization, especially as related to economic and environmental values, and it revealed confusion and exclusion in the international plane. Now, in 2004, Rio seems a far away city and Seattle a placid place that lends itself to a reflection on Perez's work.

Almost five years after the protests against the WTO Third Ministerial Conference have passed, the international order has greatly changed in the aftermath of September 11th but Perez's inquiry remains fundamental: to unravel the trade and environment conflict in a new light, one that takes into account the complex discourses about both arenas.¹ Perez is uncomfortable with the binary distinction between *greens* and *free traders* as a simplistic separation which operates to suppress important conceptual and institutional diversity within each group.² Thus, he seeks both to develop a more nuanced theoretical framework to explain the debate and to apply it in different areas of law where the controversy has manifested itself; his ultimate 'goal is to produce a rich map of *ecological (in)sensitivities*, stretching over

1. Oran Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict*, Hart Publishing, Oxford and Portland Oregon (2004) 6.
2. *Ibid.*, at 6.

various transnational domains,³ thus allowing a more relaxed interaction between the two domains.⁴

Perez's approach takes his readers on a deep dive into troubled waters; I felt, nonetheless, secure. He conveys complex arguments in a clear manner. The structure of the book itself gives the reader a solid stance from where to observe the debate since theory and practice are combined harmoniously – he does provide a more sensitive map and a comprehensive one for his readers. Perez fully achieves his goal; his main contribution is to give us a new theoretical framework to pursue research in environmental law and policy. His book innovates in the way the research is structured and presented, tying an underlying theory to a complete analysis of every aspect of the trade/environment controversy. He guides his readers with confidence through a maze of complex concepts and is quite sensitive to the many points of view at issue and to the multiple fields of law involved in the discussion. Perez does not leave stones unturned; he carefully examines every aspect of the controversy, thus greatly enriching the debate.

The breadth of Perez's discussion is indeed impressive and well balanced throughout the seven chapters of the book. The first two offer an explanation and a critique of the current trade–environment debate and convey the theoretical construction for a new approach to the matter. The following five chapters study trade and environment in different legal areas: chapter 3 and 4 discuss the World Trade Organization (WTO) and its jurisprudence; chapter 5 describes private international construction law as relating to the issue; chapter 6 portrays transnational environmental litigation and chapter 7 analyses international financial law. This review follows the author's structure, highlighting his central arguments on each section of the book and commenting on the extent to which they shed new light on the controversy at issue.

Chapter 1: Deconstructing the trade and environment conflict: a pluralistic perspective

Seattle 1999 is the starting point of the book, with the fierce protests held against the meeting of the Third Ministerial Conference of the World Trade Organization (WTO), representing many interests: agriculture, labour rights, trade and environment, market access to developing countries. Albeit not a new issue in the international agenda, it is against this convoluted background that the trade–environment debate gains shape.

The establishment of the WTO in 1995 is a catalyst for the environmental critique on two fronts: a substantive critique of the new regime's rules and a procedural one of the institutional lack of democracy.⁵ WTO defenders argued a rule-oriented institution meant progress for environmental protection and a more democratic

3. *Ibid.*, at 27.

4. *Ibid.*, 27.

5. *Ibid.*, at 4.

forum.⁶ How does one escape the antagonistic debate and the simplistic grouping of *greens v. free-traders*?

Perez does it by looking through two central blind-spots of the conversation in combination with an application of Niklas Luhmann's theory on social systems.⁷ The two blind-spots are: (a) the assumption that the WTO is the 'epitome of the trade and environment conflict',⁸ (b) the relationship between key concepts in the debate. The controversy spills out of the WTO, including different institutional settings, the fields of transnational arbitration, technical standardization, financial law, private legal systems.⁹ A pluralist approach to the problem, continues Perez, 'should be able to expose both *cultural differences* between these various legal domains (which inevitably affect how they view environmental dilemmas), and the *intricate linkages* between them'.¹⁰ The second blind-spot is the proper relationship between nature/environment, trade/economic growth and democracy.¹¹ Those are open-ended terms, whose lack of a unitary discourse explains how the constitution of the environmental movement as '... a powerful *collective concern*, the *contents* and *practical consequences* of this concern remain undetermined'.¹²

Perez, then, proposes the substitution of the binary opposition nature/society to a multi-partite distinction, a triangle composed of three realms: '... *nature* (which includes living systems and a-biotic entities), *societies* (the multiplicity of communicative structures, which comprise the human society), and *consciousness* (humans).'¹³ The comprehension of ecological problems requires decoding how these systems interact.¹⁴ Perez uses Niklas Luhmann's communicative sociology to characterize social systems as '... *self-referential networks of communications*'¹⁵ '... a product of *recursive communicative processes, which mark themselves off the environment (that is, other social systems) through a process of self-reflection*'.¹⁶

Under this analysis, society interacts with the environment through human beings, environment is the reality that humans seek to grasp through a communicative process (the social system) composed of three basic types: interaction systems (physical presence), organization systems (membership association) and societal systems (all communicable experience and action, in fact the world society, as Luhmann indicates, comprised of functional sub-systems such as law, science, economy, politics). Thus, we could see Perez's triangle (nature, society and humans) as a kaleidoscope that explains nature's socialization: the parts involved are autonomous but constantly changing, forming new contexts, ever affecting each other, through

6. Ibid., at 5.

7. Ibid., at 7, 12 and 18.

8. Ibid., at 7.

9. Ibid., at 8, 26.

10. Ibid., at 9, 26.

11. Ibid., at 13.

12. Ibid., at 15.

13. Ibid., at 17.

14. Ibid., at 17, 23.

15. Ibid., at 18 citing Luhmann 1992:254; Luhmann and Sciulli 1994:38.

16. Ibid., at 18 citing Luhmann 1982:88.

co-evolution, or co-determination (variation, self-selection and stabilization).¹⁷ The implications of Perez's theory are clear:

[t]he primary challenge of the social sciences – from economics, to law and sociology – lies in developing richer and more accurate descriptions of the *communicative processes through which 'nature' enters into the social realm* (that is, the varied ways into which concepts such as 'environment,' 'pollution,' 'conservation,' or 'sustainable development' are interpreted in distinct social domains).¹⁸

Perez inquires into thematic features of socio-ecological dilemmas, which means a two step investigation into, first the bio-physical properties and spatio-temporal boundaries of the problem at hand and, second, the social context surrounding it. The chapter closes with an explanation of the author's goals, his effort to unveil the many facets of the international economic field and its responsiveness (or lack thereof) to environmental concerns. It is both a descriptive effort (at exposing the system's structure) and a prescriptive one (the generation of greater environmental sensitivity in the system).¹⁹

Chapter 2: The trade–environment problematic: fantasy or reality?

There are here two central lines of inquiry: whether the trade/environment controversy represents a true controversy and whether international economic law should provide the solutions for the matter. The answers are straightforward: the controversy does constitute a true problem since trade liberalization (with consequent economic growth) leads to environmental problems and international economic law would be the more effective tool to face the issue in light of other systems' inabilities to cope with it.²⁰

What are the environmental impacts of trade? Perez identifies four effects measuring trade impact: scale effect (measuring the impact of increased scales of production); composition effect (analysing changes in industry composition in light of greater specialization); technological effect (technological improvement) and regulatory effect (impact on environmental standards). He then organizes the literature in three groups: global effect of liberalization (highlighting environmental indicators); specific economic sectors and specific countries.²¹ What are the results? In terms of the global effect of the Uruguay Round, the environment would suffer with increased emissions of pollutants, particularly in developing countries. For carbon dioxide emissions, studies indicate an increase in worldwide trade but not in regionally, within a Free Trade Area of the Americas (FTAA). In terms of specific countries, there is increased environmental degradation shown in studies for Costa Rica and Indonesia because of economic growth, weaker regulatory setting and change in industry composition. The case of Mexico, nonetheless, might be different due to

17. *Ibid.*, at 19–21, 23.

18. *Ibid.*, at 23.

19. *Ibid.*, at 28.

20. *Ibid.*, at 32.

21. *Ibid.*, at 34, 36.

specialization in less pollution-intensive industries and greater societal demand for environmental protection associated with income per capita increase.²²

Perez's critique of the aforementioned findings is precise: first, the research is limited (few environmental indicators, failing to account for other consequences of human activity, does not contemplate transboundary effects or irreversible long term effects), second, it assumes a problematic co-relation between increased per capita income and demand for a cleaner environment, unproven empirically and flawed theoretically since it does not measure the wellbeing of the society examined.²³ Perez's accurate analysis does show the reader the problematic nature of drawing conclusions from limited science and unproven social assumptions.

In the next step of his analysis, Perez makes the case for using trade law to solve the convoluted relation between trade and environment. He argues the existence of a significant institutional asymmetry, locally and globally, between the trade and other realms (environmental, for example), and provides the basic incentive for using the very *tools of the trade* to help create environmentally sound solutions. At the global level, Perez easily asserts his argument by noting the palpable power imbalance between the WTO or the International Monetary Fund (IMF) and the United Nations Environment Program (UNEP) or treaty secretariats. Nationally, the same imbalance persists, particularly in developing countries, where environmental institutions are noticeably weak.²⁴

Chapter 3: The GATT/WTO trade–environment jurisprudence

In chapter 3, Perez describes the GATT/WTO jurisprudence in great detail. His goals are to understand the evolution of trade jurisprudence at the WTO and to suggest possible reforms.²⁵

WTO's predecessor, the General Agreement of Tariffs and Trade (GATT), had a mercantilist ethos, a product of the ideals of fairness and nationalism – it did not give an accurate account of the costs involved in freer trade while at the same time being blind to ecological concerns, mainly through a narrow interpretation of Article XX (general exceptions to the agreement); ignorance of institutional imbalance between trade and environment and resistance to examining the environmental effects of trade disputes.²⁶ There are two categories of measures affecting the environment: those involving production and consumption standards (*inward oriented measures*) and those involving an extra-territorial effect of government regulation (*outward oriented measures*); Perez examines outward-oriented measures in chapter 3 and inward ones in chapter 4.

The paramount example of an outward-oriented measure is the Tuna-Dolphin dispute involving the United States and Mexico, and later the United States and the EC and the Netherlands, within the GATT dispute resolution framework. The United States banned tuna products whose catch incidentally killed dolphins. Two

22. *Ibid.*, at 37–9.

23. *Ibid.*, at 42.

24. *Ibid.*, at 44.

25. *Ibid.*, at 49.

26. *Ibid.*, at 51–5.

GATT panels on the issue concluded the measure violated the agreement and could not be justified as an exception among those established in Article XX. The panels were weary of measures that, in essence, regulated the process through which a product was made. Tuna was tuna, whether or not there were dolphins killed, and Article III allows for no discrimination between like products. Turning its eyes to possible exceptions, the panels decided the US measures were not necessary, in the sense that there were less restrictive trade measures available, such as negotiation of cooperation agreements. The environment did not play an independent role in the panel's concerns by the refusal to scrutinize the effect of practical killing on the dolphin population or the difficulties of securing an international agreement.²⁷

Within the WTO context, a similar case is the shrimp–turtle dispute between the United States and India, Pakistan, Thailand and Malaysia (with Australia, Ecuador, EC, Hong Kong, China and Nigeria as third participants). The WTO jurisprudence reveals a different approach. Here, the conflict arose out of a United States prohibition on shrimp importation whose catch involved killing of turtles. The WTO moved towards a broader interpretation of the institution's goals, including in its mission a protection of the environment. The decision was more inclusive also of the possibilities for third-party participation, by accepting to review unsolicited information submitted by non-governmental organizations. Substantively, the appellate body does not reject a priori a measure simply because of its extra-territorial effects. Such measures may still be justified under the exceptions of Article XX.

The law should clearly recognize the relevance of trade measures for environmental protection. There is a resistance to linking trade and environment in WTO negotiations. There are also legal barriers, including how far the *Shrimp* reasoning may be applied, especially taking into account institutional difficulties with processing and gathering environmental data, its social identity, in terms of the greater responsibility it would entail, and cultural distortion or blindness.²⁸ Perez advocates a greater linkage with environmental international organizations (by giving, for example, UNEP the power to intervene in disputes or organize expert review); participation of non-governmental organizations (for example, allowing access to coalitions of NGOs); greater burden sharing with the parties for empirical questions; and finally an alteration on the burden of proof under Article XX when it comes to proving the necessity of the measure (the party refuting the application of the exception would have to show it was not necessary or the least trade-restrictive measure).

Chapter 4: Science, standardization and the SPS/TBT agreements

The focus here is how to distinguish between protectionist and legitimate domestic regulation on health and safety which affect international trade. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT) deal with the matter in the WTO. The institution

27. Ibid., at 63, 64.

28. Ibid., at 86, 91, 92.

thus enters the international debate on risks. The matter is highly problematic. The agreements rely on international standards and science to solve very contentious conflicts: can society trust science to decide health matters? Whose science anyway? Measured by whom, according to what criteria? There are no easy answers.

Perez argues for a more pluralistic decision-making strategy.²⁹ Science is incomplete, knowledge is plural and legal decisions should reflect this.³⁰ WTO case law is flawed for its reliance on formal risk assessment, scientific knowledge, the specificity of risks involved as guiding principles. He suggests the institution ‘... should extend the institutional web with which they consult in the adjudication of risk-disputes’.³¹

Chapter 5: Environmental conflicts in the private realm of international construction law

In this chapter Perez explores the relationship of trade and environment in traditionally private realms of law. The current chapter discusses *lex constructionis*, a branch of *lex mercatoria*, dealing with large-scale construction projects whose great impact on the environment is quite obvious throughout the world. Perez begins by rejecting the notions of deep-ecology (with its strict bio-egalitarianism or holistic visions) in favour of Bruno Latour’s focus on the relationship between nature and humans – the many ways by which they interact as value choices are channelled through the political process.³²

Lex constructionis gained relevance with the expansion in worldwide large-scale construction projects. This field of law, essentially regulated by contract, technical guidelines and arbitration awards, involves a myriad of parties: host governments, sponsors, lenders, contractors, operators and insurers. The International Federation of Consulting Engineers, FIDIC (a private group comprising national Member Associations), is the most prominent player, elaborating standard contracts within the industry.³³ The problem is the alienation of contractual making from public scrutiny and control tools such as the Environmental Impact Assessment, EIA – a tool that allows for environmental consequences of construction projects to be previously evaluated and corrected. Construction projects separate the EIA phase from the actual construction regulated by contracts. There are no mechanisms in the contract to assure implementation and monitoring of EIA conclusions or for dealing with unforeseen consequences that call for revisions to the original plan.³⁴

Lex constructionis, in effect, delegates the environmental responsibility to host state law, ignoring the fact that the projects under consideration have major social impacts; they are ‘... webbed into their social and ecological surroundings’.³⁵ The contract should include environmental monitoring systems and novel dispute resolution models – more inclusive and open bodies, such as a Dispute Adjudication

29. *Ibid.*, at 118, 152–7.

30. *Ibid.*, at 127, 152.

31. *Ibid.*, at 156.

32. *Ibid.*, at 162.

33. *Ibid.*, at 167.

34. *Ibid.*, at 174.

35. *Ibid.*, at 178.

Board (DAB), where an adjudicator/mediator deals with conflicts before an arbitration panel. As a last step, Perez describes the need for broadening the training of engineers to include environmental concerns. This should not be problematic, given the professional training focus on pragmatic problem solving, one would have to insist on the environment as yet another pragmatic challenge in search of resolution.³⁶

Chapter 6: Transnational environmental litigation

Perez discusses transnational environmental litigation, an important reflection of the impact of globalization on law. The transnationality of these suits stems from their adjudication in a jurisdiction other than where the environmental damage took place; there is a *legal migration* from the developing world to developed states,³⁷ because of weak institutions in developing countries, litigation complexity, and insufficient resources of subsidiaries to pay for damages caused.

Two main doctrines are at play here, legal jurisdiction and corporate entity: ‘should the “home state” open its gates to foreign claimants, suing domestic MNEs over incidents that occurred outside the jurisdiction? Should an MNE be held responsible for incidents that occurred elsewhere in the corporate web?’³⁸ Common law countries may refuse jurisdiction, so the doctrines of *forum non conveniens* (FNC) and *international comity* further complicate the matter. As far as corporate structure goes, subsidiaries are distinct entities from their parent corporation, thus making it hard to attribute to them direct responsibility for the damages inflicted by overseas subsidiaries.

In a globalized world, the legal doctrines mentioned may bar justice. While there are costs to the local system associated with an increased case load, however, I agree with Perez’s observation that if the logic of free trade is ‘applauded when invoked by traders and bankers – why should it be condemned when it is exercised by the common man?’³⁹ Perez makes the same mirror argument when discussing corporate doctrine, noticing the unfairness of shielding corporation risks in the face of immense profits achieved by internationalized activity. He then analyses American and English case law.

In British jurisprudence, justice is a controlling principle in rejecting the notion of FNC. English courts introduced and built upon the notion of justice as a fundamental element of concern in their analysis: ‘[t]he themes of *justice* and *direct duty of care* emerge, then, as the cornerstones of the modern English law of transnational litigation’.⁴⁰ In the United States, adjudication is based on state (tort) law or the idea of universal jurisdiction, according to the Alien Tort Claims Act (ATCA), a 1789 statute allowing jurisdiction in cases of a violation of the law of nations or a treaty of the United States.

36. *Ibid.*, at 188.

37. *Ibid.*, at 193.

38. *Ibid.*, at 195.

39. *Ibid.*, at 198.

40. *Ibid.*, at 210.

Under the statute, plaintiffs must show a violation of international law and state involvement in contributing to the damage, since public international law is directed to nation states.⁴¹ The stakes are high and the doors are still shut. Courts have not been receptive to the argument that violations of principles of international environmental law amount to violations of the law of nations and they adhered to the doctrine of FNC or *comity* as grounds for dismissal. Using state tort law is another avenue for foreign plaintiffs. However, Perez warns these courts are more likely to dismiss suits on FNC grounds than English courts because of the weight they attribute to considerations of public interests (judicial overload) and an institutional ‘dislike’ of foreign plaintiffs.⁴² There is an infant criticism of FNC doctrine in state courts but the results are yet to be seen. Corporate entity doctrine also remains a force to be recognized. Opportunities for piercing the corporate veil are restricted to cases of direct involvement of the parent corporation or extensive interference in the management of the subsidiary.

To sum up, there is still a great imbalance in the way individuals and MNEs are perceived by law, the latter receiving more protection. Trends point to attempts at strengthening control of MNEs, as revealed by the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, and the OECD Guidelines for the conduct of MNE, but much work remains to be done.⁴³

Chapter 7: International financial law as a new locus for environmental action

Globalization, with its consequent greater market integration, brought many changes to international finance law, including project finance, banking, investment, reporting. In this chapter, Perez describes how these changes may affect environmental protection. The chapter has three sections of study: supply side, demand side and reporting.

On supply-side regulation, the World Bank took the lead to incorporate environmental concerns into its practices after much criticism of the impact of Bank-financed projects. Nonetheless, in the last decade, private finance has taken a greater role in project financing. Such actors have incorporated environmental concerns to the extent that these may be risky for the lenders, through either direct or indirect liability or reputation risks. Regulations have also helped, such as the US Superfund Act or, to a lesser degree, UNEP’s Financial Services Initiative on the Environment. However, monetary considerations are the drive behind private lenders’ awareness of the environmental impact of the projects they finance.⁴⁴

On demand-side regulation, consumer preference had an impact in shaping concern for the environment through a demand for ethical investment – there is a growing market for socially responsible investment (SRI).⁴⁵ Finally, Perez considers

41. *Ibid.*, at 213.

42. *Ibid.*, at 221.

43. *Ibid.*, at 225, 227.

44. *Ibid.*, at 235.

45. *Ibid.*, at 236.

environmental and financial reporting as an important tool for environmental protection because reporting contributes to environmental information availability, thus enriching the debate on the topic.⁴⁶

Environmental reporting is required when the data may influence the firm's future revenues (compliance, response action, legal fees). Important factors for effective reporting as an environmental protection mechanism are greater precision on reporting criteria and more consistent reporting (companies still fail to report important data).⁴⁷ Perez advances a new mode of reporting – environmentally oriented and exemplified by the Global Reporting Initiative (GRI). It proposes the reporting of a company's contribution to sustainable development by including information not only on economic, but also on social and environmental performance. Ultimately the objective is to measure the impact on 'living and non-living natural systems, including ecosystems, land, air and water'.⁴⁸ Albeit an important initiative, it is still problematic when it comes to establishing accurate monetary indicators to environmental values (how can one precisely value and report the loss of biodiversity or of aesthetic value?).

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N. Lavranos, *Legal Interaction between Decisions of International Organizations and European Law*, Groningen, Europa Law Publishing, 2004, ISBN 90-76871-19-1, 310 pp., €45, \$76
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A clear conception of both the nature and the variety of decisions of international organizations is needed in order to understand the legal interaction between these decisions and domestic legal orders. However, so far, the legal researchers who study the decisions of international organizations have failed to reach a conceptual agreement. Lavranos, who is a Lecturer in EU Law at the University of Amsterdam and a Senior Researcher at the Amsterdam Center for International Law, tries to take a step forward. In his dissertation, *Legal Interaction between Decisions of International Organizations and European Law*, Lavranos not only tries to specify the nature of decisions of international organizations but he also attempts to explain the legal interaction between such decisions and some selected national legal orders: Germany, France and the Netherlands.

In the following, we will first discuss some central observations in Lavranos's book, against the background of the scientific debate on decisions of international organizations. Second, we will explain that Lavranos's definition of decisions is too restricted to do justice to the variety in the legal practices of international organizations. Third, we will discuss the consequence of a more differentiated conception of

46. Ibid., at 242.

47. Ibid., at 243, 245.

48. Ibid., at 248.

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decisions of international organizations for our understanding of the legal interaction between such decisions and domestic legal orders.

The scientific debate on decisions of international organizations is dominated by two theoretical positions. The first position is the so-called legal-system theory as developed, among others, by Prosper Weil.¹ According to Weil, decisions of international organizations should be understood in terms of binding norms of conduct. In his view, binding norms of conduct provide the only criterion for a straightforward definition of such decisions. These binding rules derive their validity from more basic general rules contained in the treaty establishing the international organization. Weil's definition of decisions is very restrictive. His perspective implies, for example, that recommendations adopted by international organizations do not qualify as decisions, because they do not contain any binding norms of conduct.

The second position in the scientific debate on decisions of international organizations is the social-realism theory, which is represented, among others, by Myres McDougal.² McDougal takes his point of departure in the power relations of the international decision-making process. In his view, decisions of international organizations should primarily be understood in terms of their social effectiveness. This means that decisions should be identified with their actual influence on social reality. This approach suffers from a serious vulnerability. Those who understand decisions in terms of social effects tend to neglect the problems of validity and logical consistency between legal norms. Decisions, understood in terms of social realism, tend to lose some basic characteristics presupposed in normal legal research.

With good reason, Lavranos tries to avoid the pitfalls of the social-realism theory by adhering to the first school of this debate: the legal-system theory. He defines decisions in terms of binding rules of conduct. "The term "decision of an international organization" is understood as referring to a law-making decision which is binding on its addressees and which lays down general and abstractly formulated rules of conduct."³

This definition of decisions of international organizations is the starting point for Lavranos's analysis of the legal interaction between such decisions and national legal systems. From a historical point of view, Lavranos distinguishes two kinds of legal interaction. First of all, the 'classic legal interaction',⁴ which implied two layers: (1) the international organizations and (2) the domestic legal systems. On the one hand, the decisions of international organizations impose certain obligations on the member states. On the other hand, the national constitutional provisions determine how the decisions of international organizations are implemented, in particular whether the decisions enjoy supremacy and possible direct effect in the domestic legal systems.

1 P. Weil, "Towards Relative Normativity in International Law?", (1983) 77 AJIL 413-42, at 416.

2 M. S. McDougal, 'International Law, Power and Policy: a Contemporary Conception', (1953) 82 *Receuil des cours* 133-259, at 181.

3 N. Lavranos, *Legal Interaction between Decisions of International Organizations and European Law*, (2004) Groningen: Europa Law Publishing, see 13.

4 *Ibid.*, at 3.

For Germany, France and the Netherlands, the ‘classic legal interaction’ is modified since the EC has been inserted as a new legal system between the international organizations and the national legal systems. The result is ‘new legal interaction’,⁵ which has three layers: (1) the international organizations; (2) the European Community (EC); (3) the domestic legal systems. Lavranos explains this new legal interaction with a reference to the decisions of some international fisheries organizations such as the North-East Atlantic Fisheries Commission (NEAFC), which regulates the ‘Total Allowable Catches’ for the various fish stocks. The decisions of the NEAFC – of which the European Community is a member, whereas EC member states are not – impose obligations on the EC. Usually, these obligations are implemented by means of EC Regulations which ‘copy’ the ‘Total Allowable Catches’. Thus, NEAFC decisions are ‘communitarized’: the decisions are ‘transformed’⁶ into EC Regulations with Community law features such as supremacy and possible direct effect. Hence, from the point of view of a domestic legal order, such NEAFC decisions resemble ordinary EC Regulations.

The ‘new legal interaction’ and the ‘classic legal interaction’ are often linked in complex patterns. Lavranos particularly discusses the decisions of the Conference of Parties (COP), established by a Multilateral Environmental Agreement, of which both the EC and the EC member states are members. Some of these COP decisions are communitarized: if the COP decisions fall within the competences of the EC, the EC is required to implement them. The implementation instrument can again be an EC Regulation with Community law features such as supremacy and possible direct effect. This amounts to new legal interaction. However, if the COP decisions fall within the member states’ competences, member states are required to implement them according to their national constitutional provisions, which amounts to classic legal interaction.

In addition, Lavranos explains that classic and new legal interactions sometimes occur simultaneously, for example in the case of some United Nations Security Council Resolutions. If these Resolutions impose economic sanctions, they are implemented by the EU/EC in a two-step procedure. The first step implies that EU member states agree on a Common Position. The second step implies that the EC Council adopts an implementation instrument, again mostly an EC Regulation. As a consequence, Security Council Resolutions are communitarized and acquire Community law features such as supremacy and possible direct effect. This amounts to new legal interaction. Simultaneously, the individual member states are also obliged to fulfil their legal obligations under UN law. Accordingly, alongside the new legal interaction the classic legal interaction still remains intact.

Lavranos concludes that in most cases of new legal interaction the EC legal system strengthens the decisions of international organizations by attaching supremacy and possible direct effect to them. According to Lavranos, the EC legal system works like an ‘amplifier’ that transforms the decisions of international organizations

5 Ibid., at 4.

6 Ibid., at 60.

from '12 Volt into 220 Volt before they enter the electric circuit of the Member States'.⁷

Nevertheless, Lavranos presents a few cases where the EC legal system weakens decisions of international organizations. In terms of Lavranos' metaphor, the EC legal system then reduces the current of '12 Volt to 1.5 Volt'.⁸ In particular, Lavranos discusses the WTO Dispute Settlement Report on bananas, which declares that the 'EC Regulation organizing the common banana market' violates WTO rules. The EC is obliged to implement this WTO Report. However, the European Court of Justice denies member states and individuals the possibility to rely on the WTO Report and thereby to challenge the EC Regulation, unless they fulfil special conditions. As a consequence thereof, the WTO-law-inconsistent EC Regulation remains applicable. As a result, German courts are faced with two conflicting (judicial) decisions. On the one hand, the WTO Report which states that the EC Regulation violates WTO rules. On the other hand, the decision of the European Court of Justice which refuses to review whether the EC Regulation is in conformity with WTO rules. By virtue of Community law, Lavranos explains, the German courts are forced to follow the case-law of the European Court of Justice, which thereby compels Germany to violate its WTO law obligations.⁹

At the end of the book, Lavranos focuses on one special kind of 'new legal interaction'. He explains various binding decisions adopted by the EU within the second and third pillar. Such EU decisions impose obligations on the EU member states. The EU allows its member states to determine how to implement EU decisions. This amounts to classic legal interaction. However, the classic legal interaction is affected by EC law principles such as supremacy and possible direct effect. Lavranos explains this in terms of the 'influence of the EC legal order',¹⁰ as distinguished from 'transformation by the EC legal order'. In my view, this notion of 'influence of the EC legal order' should have been clarified more extensively by Lavranos.

After this summary of some central observations in Lavranos's dissertation, we can make two critical remarks. First, Lavranos's definition of decisions is too restricted and needs to be differentiated in order to come to terms with the variety of decisions adopted by international organizations. Second, we discuss the consequence of a differentiated conception of decisions for our understanding of the legal interaction between decisions of international organizations and domestic legal orders.

Lavranos defines decisions of international organizations in line with the legal-system theory and, as a consequence, the criticism outlined above that the legal-system theory's definition of decisions is too restricted because it overemphasizes binding norms of conduct also applies to Lavranos's book. Does this imply that the legal-system theory should be abandoned for the social-realism theory? We do not think so. Rather, it could be argued that the social-realism theory invites us to

⁷ *Ibid.*, at 247.

⁸ *Ibid.*, at 248.

⁹ *Ibid.*, at 154.

¹⁰ *Ibid.*, at 191.

amend the legal-system theory towards a broader, more differentiated conception of decisions. I would claim – in line with the so-called institutional theory of law¹¹ – that this amendment of the legal-system theory is both possible and desirable. I want to emphasize that the legal practices of international organizations imply many types of decision. The variety of decisions can be subdivided into at least three categories. First, decisions which imply judgments about existing situations. A recent example is the UNMOVIC decision of early 2003, which implied the assertion that the UNMOVIC did not know if there were any weapons of mass destruction in Iraq. Second, decisions which contain formulations of ideal situations. Third, decisions which lay down judgements about the ways in which existing situations are to be changed in order to approach ideal situations. These judgements imply not only binding rules of conduct but also non-binding recommendations. We suggest broadening the definition of decisions of international organizations so as to include these three types of decision.

The second remark results from the first: Does a differentiated definition of decisions of international organizations need to be mirrored in a differentiated account of legal interaction? Lavranos, of course, does not address this matter; he only considers the interaction between *binding* decisions and domestic legal systems. In response to Lavranos, I want to explain my view by reiterating the UNMOVIC decision mentioned above, which implied the following judgement about the situation that existed in Iraq in early 2003: Hans Blix made the claim that the UNMOVIC did not know if there were any weapons of mass destruction in Iraq. Moreover, Blix explained the knowledge-standard which formed the basis of his claim. The UNMOVIC adhered to a high knowledge-standard. It searched for hard facts based on evidence collected by scientific experts. In early 2003, the UNMOVIC Inspectors did not find any scientific evidence of the presence of weapons of mass-destruction in Iraq, and that is why the UNMOVIC decided that it did not know if there were any weapons of mass destruction in Iraq.

How, then, can we understand the legal interaction between this UNMOVIC decision, based on such a claim and knowledge-standard, and domestic legal orders, for instance the legal order of the United States? In theory, the following three options were available. The first option was that US President George Bush should adopt both the same knowledge-standard (scientific evidence) and also the same claim as expressed by the UNMOVIC: the claim that they did not know if there were any weapons of mass destruction in Iraq. The second option was two-fold. On the one hand, US President Bush could have used the same knowledge-standard as the UNMOVIC Inspectors: scientific evidence. On the other hand, Bush was free to draw a different conclusion/claim. The third option was that Bush adopt neither the knowledge-standard nor the claim contained in the UNMOVIC decision.

To what extent was the USA compelled to use the high knowledge-standard (scientific evidence) mentioned in both the first and the second option? Was the third

11 See D. W. P. Ruiter *Legal Institutions* (2001), 21.

option a serious option as well? If the USA was free to formulate its own knowledge-standard, it would also be free to use a low, non-scientific knowledge-standard: common knowledge based on ordinary human experience. In terms of this standard, the USA concluded in early 2003 that there were weapons of mass-destruction in Iraq. First, the USA learned from the past that the Iraqi government had used weapons of mass destruction against the Kurds. Moreover, President Saddam Hussein obstructed the UNMOVIC Weapons Inspectors. It could be argued that these two indications were sufficient for Bush's claim, in response to Blix, that the USA *did* know that there were weapons of mass destruction in Iraq. We may conclude that conflicting descriptions of seemingly objective facts like the presence of weapons of mass destruction in Iraq are the result of decisions about knowledge-standards with far-reaching consequences for the legal interaction between international organizations (UNMOVIC) and national legal orders (USA).

Legal researchers who adhere to the legal-system theory, as Lavranos does, in fact use a restricted conception of decisions of international organizations and, as a consequence, do not give a realistic account of the legal interaction between the decisions of these organizations and domestic legal orders. Having said this, Lavranos's dissertation is nevertheless a valuable study of a specific type of decision of international organizations and the specific legal interaction between these decisions and the legal orders of Germany, France and the Netherlands. We therefore recommend the book to everybody interested in binding decisions of international organizations. If there should be a second edition, our suggestion would be to extend the scope of the analysis to include non-binding decisions and their legal interaction.

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