

Article

Beyond Fragmentation: On International Law’s Integrationist Forces

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INTRODUCTION

What is a country to do when international law presents it with two conflicting yet binding norms? This question has been haunting international law scholars for the past two decades. It has arisen with particular fervor in the context of the proliferation of international legal regimes and, specifically, international tribunals since the 1990s. Conceptualized as the “fragmentation” of international law, this multiplicity of legal regimes and institutions has been seen

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as one of the most vexing problems of international law.¹ One main concern has been that different regimes will issue inconsistent legal guidance, thereby jeopardizing international law's coherence and authority, placing States in an impossible bind.

Although many scholars have agreed that fragmentation poses a risk to international law, they have struggled to agree on how exactly to characterize this phenomenon. As I explain below, rather than providing an exact definition of fragmentation, scholars have opted to use one of two conflicting figurative accounts. Some scholars have described fragmentation as the breakup of international law into a multitude of disconnected legal islands. Others, however, have suggested that fragmentation refers to the increasing overlap between different international legal regimes, which leads to unhealthy competition between them.

This Article addresses a central concern raised in fragmentation scholarship: that inconsistent guidance received from different international legal regimes places States in an impossible conflict, having to breach the binding norms of one regime to abide by another. I argue, however, that such a situation may also serve as a catalyst for integration efforts on the part of States. Rather than remaining paralyzed in the face of normative conflict, States sometimes take a proactive, creative approach and try to reconcile their various international legal obligations without forsaking their domestic agendas. Such efforts promote harmonization of rules across legal regimes, thereby rendering such regimes normatively more compatible with each other. In other words, to borrow the legal islands metaphor, States build bridges between international law's various legal regimes and promote integration between them. These integration efforts mitigate international law's fragmentation and its adverse effects. Such efforts by States may sometimes also render the domestic law on a particular issue more in line with the governing norms of international law. However, coherence between international law and domestic law is not the focus of this Article.

This Article thus calls into question a theoretical assumption that has long fueled the fragmentation literature: that international law is likely to continue down a path of increasing fragmentation. While fragmentation is unlikely to disappear from the realm of international law, I submit that international law's future is more likely to be characterized by a struggle between two opposing forces: international legal fragmentation and international legal integration.

Scholars have suggested that the issuance of diametrically opposed rulings by the Southern Common Market (MERCOSUR) and the World Trade

1. For further information, see, particularly, two symposia on the subject. The first convened in 1998 at New York University Law School and discussed the implications of the proliferation of international courts and tribunals. It was published as a special issue of the *NYU Journal of International Law and Politics* in 1999 with a foreword by Benedict Kingsbury. Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1998). The second was convened by the *Michigan Journal of International Law* in 2004, under the title "Diversity or Cacophony? New Sources of Norms in International Law?" It was also published as a special issue with a foreword by Bruno Simma. Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845 (2003).

Organization (WTO) in the case of Brazil's regulation of tire imports is among the most concerning scenarios resulting from fragmentation.² Challenging the common understanding of this case, this Article shows that Brazil persistently strove to find a common ground between its different international obligations—a common ground that is, moreover, compatible with its own domestic agenda. By “domestic agenda” I refer to those policy goals that the State is committed to achieving, whether within its borders or internationally. In the case of Brazil, the relevant policy goal was the elimination of tropical diseases and their underlying causes. Brazil's situation proved to be a catalyst for integration efforts, mitigating international law's fragmentation rather than serving as its ultimate manifestation. Brazil's case serves to illustrate the Article's claim that States proactively promote integration of international norms in response to fragmentation.

The Article's contribution is thus threefold. First, the Article's novel claim about States' response to fragmentation calls into question a widely-held opinion according to which fragmentation is likely to increasingly dominate international legal development. The Article argues that this should not be expected to be the case due to: (1) the structural overlap between the communities of subjects of the different international legal regimes and (2) these subjects' reasonably anticipated activism. Fragmentation and its adverse effects are, therefore, mitigated and offset.

Second, the Article challenges the prevalent understanding of the Brazil case and its implications for conceptualizing the fragmentation of international law. Rather than serving as the poster child for fragmentation's woes, Brazil's actions tell an entirely different story: one where Brazil strives to comply with its international legal obligations and remains committed to a multilateral world.

Finally, the Article adopts a bottom-up, process-minded empirical and theoretical approach. Rather than focusing strictly on the conflicting rulings and the classification of Brazil's actions as compliant or non-compliant with the judgments, the Article demonstrates how domestic decision-making processes have accounted for the rulings and strived to reconcile them. Such an approach is necessary for appreciating the degree to which, and the ways in which, international law impacts domestic processes, even if those eventually fall short of compliance. This approach is, furthermore, necessary to appreciate the dynamics within international law that promote integration and counterbalance international legal fragmentation.

The Article proceeds as follows. Part I reviews the literature on

2. See, e.g., Julia Ya Qin, *Managing Conflicts Between Rulings of the World Trade Organization and Regional Trade Tribunals: Reflections on the Brazil – Tyres Case*, in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY 601, 602 (Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010) (including Brazil's situation among the “worst type of conflicts” arising from fragmentation); see also Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 74 (2016) (positing that the WTO Appellate Body “showed no interest in facilitating Brazil's compliance with both sets of obligations and with the maintenance of a domestic regulatory scheme”); Nikolaos Lavranos, *The Brazilian Tyres Case: Trade Supersedes Health*, 1 TRADE L. & DEV. 231, 253 (2009) (referring to “the tragic consequences” of the ruling by the WTO in the case of Brazil).

fragmentation. The scholarship is abundant, and while it may facially appear to revolve around one central question, it actually deals with several distinct issues.³ These include questions of fragmentation's identification, its sources, its effects, assessments of its harms or benefits, possible responses to it, and its future trajectory. The Article introduces each of these debates before making its contribution to the last issue: whether fragmentation is likely to dominate the future of international law.

Part II argues that States in fact take a proactive, creative approach to conflicting international legal guidance and respond by attempting to identify common ground that also accommodates their own agendas. This phenomenon arises from the structural overlap in the communities of different international legal regimes, as well as from States' reasonably anticipated efforts to comply with their various legal obligations. States' efforts consequently produce harmonization of rules across regimes and thus promote systemic integration, mitigating the fragmentation that prompted their action in the first place.

Part III examines the case of Brazil's response to conflicting legal guidance. Brazil's plan to fight tropical diseases by, among other strategies, reducing tire imports was scrutinized by tribunals of both MERCOSUR and the WTO, which came out with conflicting directives. Brazil thus appeared to be stuck between a rock and a hard place, having to choose between violating one international legal regime or the other: MERCOSUR or WTO. Otherwise, it would have to forsake its own health initiative. As I show in Part III, Brazil persistently sought ways to reconcile its different international obligations without giving up its own policy goals. This case therefore also showcases the dynamics that drive systemic integration and offset international legal fragmentation and its adverse effects. The last Part concludes.

I. REASSESSING FRAGMENTATION SCHOLARSHIP

A. Defining Fragmentation: In Search of a Metaphor

Although the problem of fragmentation has been a key concern in international legal scholarship for the past two decades, scholars have struggled to agree on how to define the phenomenon in a way that accurately captures their concerns. As Anne Peters points out, the term "fragmentation" is used to denote both a process and a result. In fact, it is often used to capture such a vast array of phenomena that all of international law's development in the past century seems enveloped in it.⁴

3. For an excellent review of some of the issues at stake, see Kingsbury, *supra* note 1.

4. See Anne Peters, *Fragmentation and Constitutionalism*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 1011, 1012 (Anne Orford, Florian Hoffmann & Martin Clark eds., 2016) ("The term 'fragmentation of international law' denotes both a process and the result of that process, namely a (relatively) fragmented state of the law. The diagnosis refers to the dynamic growth of new and specialized sub-fields of international law after 1989, to the rise of new actors beside states (international organizations, non-governmental organizations [NGOs], and multinational corporations) and to new types of international norms outside the acknowledged sources."). *But see* William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 963 (2003) (challenging both the characterization of current developments as fragmentation and its assessment as a threat to the legal system, and arguing that

Rather than defining fragmentation, scholars have often turned to two somewhat conflicting figurative accounts. According to the first account, international law is breaking up into discrete legal islands with no bridge to connect them.⁵ According to the second account, international law is suffering from excessive overlap between the jurisdictions of an ever-increasing number of international organizations and legal regimes.⁶ This overlap leads to competition and even to hegemonic struggles between the different bodies and the norms they monitor or produce, each trying to pull international law in its own direction and infuse it with its own systemic interests.⁷ But these scholars' disagreement does not end there. Further debates include those surrounding fragmentation's sources, its effects, its correct normative evaluation, the possible responses to it, and its possible dominance in the future of international law.

B. Sources of Fragmentation

Scholars have made various suggestions as to the sources of international legal fragmentation. In this discussion, the line between the definition of

international law is in fact being transformed into a pluralist system, which, rather than undermining the legal system, may in fact strengthen it).

5. This metaphor possibly served more as a strawman than a serious argument. See Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 Mich. J. Int'l L. 903, 904 (2003) (pleading to refrain from allowing fragmentation to lead "to self-contained islands of international law, de-linked from other branches of international law"); see also Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Declaration of J. Greenwood, 2012 I.C.J. Rep. 324, 394 (June 19) ("International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions."). But see Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Mich. J. Int'l L. 999, 1004, 1045 (2003) (arguing that international law cannot be viewed as a unitary system, that "[a]ny aspirations to a normative unity of global law are . . . doomed from the outset," and that we can expect, at most, "weak normative compatibility between the fragments").

6. See, e.g., Eyal Benvenisti & George W. Downs, *The Empire's New Clothes*, 60 STAN. L. REV. 595, 596 (2007) [hereinafter Benvenisti & Downs, *The Empire's New Clothes*] (suggesting that fragmentation is the "increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries"). But see EYAL BENVENISTI & GEORGE W. DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY 9 (2017) [hereinafter BENVENISTI & DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY] (discussing new global institutions' fragmented nature as relating to their "distinct, clearly defined competences [which] ensure that there will be little or no institutional cooperation among them, despite their potentially related interests"); but see also YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 73–74 (2003); JOEL P. TRACHTMAN, THE FUTURE OF INTERNATIONAL LAW 217 (2014) (arguing that fragmentation arises when there are overlaps "between policy measures in the international legal setting"); *id.* at 226 (using the metaphor "congestion"); Pauwelyn, *supra* note 5, at 904 (arguing that fragmentation is not new, but what is new is "the realization that the different fields or branches of international law necessarily overlap").

7. See Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 562–63 (2002). Koskenniemi and Leino describe fragmentation as a "kaleidoscopic reality in which competing actors struggled to create competing normative systems." *Id.* at 560; see also Tomer Broude, *Fragmentation(s) of International Law*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW 99, 114 (Tomer Broude & Yuval Shany eds., 2008) (claiming that since norm integration also leads to integration of authority and thus to loss of authority by the various international tribunals, they would be deterred from pursuing integration of norms); Fischer-Lescano & Teubner, *supra* note 5, at 1007 ("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.").

fragmentation and its sources is sometimes blurred. One suggestion is that fragmentation is a child of the decentralized structure of international law, which lacks a central legislator and an apex court.⁸ In a domestic legal system, we often look to the judicial organ at the top of the hierarchical pyramid to do the work of finding harmonious solutions to conflicting legal rules, integrating divergent judicial decisions, or pulling stray administrative decisions back into line. International law, however, does not have the same kind of reconciling institution. Likewise, there is not a top international legislator or a top international executive who could somehow compensate for the lack of an apex court.

Another suggestion points to the specialization of international legal regimes (i.e., the proliferation of tribunals specializing in trade, human rights, law of the sea, etc.) and the growing influence of individual actors on international law. Both phenomena are said to have given rise to political pluralism in the international system.⁹ Some scholars stress that fragmentation is not strictly a legal phenomenon but rather reflects the political and social fragmentation of the global society.¹⁰

A central argument is that fragmentation is State-driven. Fragmentation is thus explained as either a result of the fact that different groups of States establish different international regimes,¹¹ a representation of States' response to globalization,¹² or, at least in part, a result of a "calculated effort on the part of powerful states to protect their dominance and discretion by creating a system that only they have the capacity to alter."¹³ Thus, according to Eyal Benvenisti and George Downs, powerful States employ various strategies that have the effect of promoting fragmentation.¹⁴

Anne Peters and Andrew Lang offer a somewhat different account: they argue that fragmentation is not generated by States per se but is rather a result of States' domestic struggles. According to Peters, fragmentation is a result of the fact that different issue areas are handled by different and uncoordinated domestic authorities.¹⁵ According to Lang, fragmentation is also due to domestic political struggles over regulatory measures, which are projected internationally

8. Peters, *supra* note 4, at 1013–14.

9. Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 849–50 (2003); Koskenniemi & Leino, *supra* note 7.

10. Fischer-Lescano & Teubner, *supra* note 5, at 1004; Hafner, *supra* note 9, at 849–50.

11. TRACHTMAN, *supra* note 6, at 224.

12. Peters, *supra* note 4, at 1013–14.

13. Benvenisti & Downs, *The Empire's New Clothes*, *supra* note 6, at 625.

14. These include:

(1) avoiding broad, integrative agreements in favor of a large number of narrow agreements that are functionally defined; (2) formulating agreements in the context of one-time or infrequently convened multilateral negotiations; (3) avoiding, whenever possible the creation of a bureaucracy or judiciary with significant, independent policymaking authority and circumscribing such authority when its creation is unavoidable; and (4) creating or shifting to an alternative venue when the original one becomes too responsive to the interests of weaker states and their agents.

Id. at 599; *see also id.* at 609–15.

15. Peters, *supra* note 4, at 1013–14.

and, in the process, take on a different character and an even greater sensitivity.¹⁶

C. Effects of Fragmentation

The literature lists various effects of international legal fragmentation, both positive and negative. The most salient negative effect is the refusal by different regimes to apply general international law. International legal regimes thus turn themselves into self-contained islands, delinked from other regimes, resulting in a de facto break-up of the international legal system.¹⁷ A second, connected concern is that the lack of hierarchical relationships between institutions leads to conflicts between legal rules, lack of clarity, and loss of predictability.¹⁸ According to much of the literature, these concerns jeopardize the authority of international law.¹⁹ However, the International Law Commission (ILC) report on “Fragmentation of International Law” concludes the opposite, noting that “the emergence of special treaty-regimes (which should not be called ‘self-contained’) has not seriously undermined legal security, predictability or the equality of legal subjects.”²⁰

Gerhard Hafner explains that the concerns arising from fragmentation include, among others, situations in which it is unclear which substantive rules apply, and situations in which there are conflicting obligations incumbent on a State.²¹ Further, he notes that conflicting secondary norms might lead to forum shopping, made possible by the multiplicity of tribunals with overlapping geographical, personal, or subject matter jurisdictions, such as the European Court of Justice and the European Court of Human Rights. Hafner submits, further, that solutions reached by one regime are not necessarily applicable to others, or to the universal system. Thus, these solutions may further undermine the homogeneous development of international law and engender legal uncertainty. Moreover, they undermine the authority and reliability of

16. Lang argues that these disputes take on a different character through projection:

While in the domestic context, they are essentially about the rights and wrongs of the regulatory measure in question, in the international plane, they come to be about much more. As rules from different fields of international law are deployed on both sides, and as each side uses different international legal venues . . . , the issue become as much about the systemic fragmentation of international law as it is about the rights and wrongs of the original regulatory measure. Through this process, what starts out as a difficult and sensitive political controversy . . . now seems to implicate a broader hierarchy of values and objectives of the international community – or perhaps even the incremental constitutionalisation of international law.

Andrew Lang, *Twenty Years of the WTO Appellate Body's "Fragmentation Jurisprudence"*, 14 J. INT'L TRADE L. & POL'Y 116, 122 (2015).

17. Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 796–97 (1998); Pauwelyn, *supra* note 5, at 904.

18. Dupuy, *supra* note 17, at 796–97.

19. E.g., Hafner, *supra* note 9, at 856–58.

20. Int'l Law Comm'n, Rep. of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (Apr. 3, 2006), as corrected by CN.4/L.682/Corr.1 (Aug. 11, 2006) (finalized by Martti Koskenniemi), at 248–49 [hereinafter ILC Fragmentation Report]; see also Anne Peters, *The Refinement of International Law*, 15 INT'L J. CONST. L. 671 (2017); Simma, *supra* note 1, at 846 (observing that, so far, the various courts and tribunals have shown great caution not to contradict each other).

21. Hafner, *supra* note 9, at 849–51.

international institutions and international law.²²

Benvenisti and Downs argue that fragmentation “sabotage[s] the evolution of a democratic and egalitarian international regulatory system and undermine[s] the normative integrity of international law”²³ since it (1) restricts cross-issue coalitions, making it harder for weaker States to join forces; (2) enables powerful States to abandon or threaten to abandon fora that are not sympathetic to their interests or positions, which is made possible by institutional competition; and (3) appears to develop without intention or design, thereby obscuring its origin as the product of a calculated strategy by the powerful.²⁴

On the other hand, some scholars claim that fragmentation leads to favorable results. Some suggest that the needs of the international community today drive regime specialization and flexibility. According to these scholars, positive results associated with fragmentation include: more compliance with international law, an accommodation of the plurality of the positions of States, and a development of international law by arriving at a common denominator in a piecemeal fashion, one region or one regime at a time.²⁵ These scholars reject the pejorative term²⁶ “fragmentation” and, instead, frame the phenomenon as “pluralism.”²⁷ Some even suggest that “fragmentation may be a necessary and important growing pain that attends the international legal system’s maturation.”²⁸

D. Possible Responses to Fragmentation

Two primary approaches have been suggested to combat fragmentation and its adverse effects: a legal approach and a political one. The legal approach includes interpretive principles and rules used to diminish fragmentation and alleviate its effects. The ILC report, concluded by Martti Koskenniemi, suggests various interpretive solutions to overcome an apparent conflict of norms:

The techniques of *lex specialis* and *lex posterior*, of *inter se* agreements and of the superior position given to peremptory norms and the (so far under-elaborated) notion of “obligations owed to the international community as a whole” provide a basic professional tool-box that is able to respond in a flexible way to most substantive fragmentation problems.²⁹

Another popular suggestion is to adopt an interpretive principle of coherence or harmonization, according to which proper interpretation requires

22. *Id.* at 856–58.

23. Benvenisti & Downs, *The Empire’s New Clothes*, *supra* note 6, at 596–98.

24. *Id.* at 596–98; BENVENISTI & DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY, *supra* note 6, at 7.

25. Hafner, *supra* note 9, at 859–60; TRACHTMAN, *supra* note 6, at 230.

26. Peters, *supra* note 4, at 1011.

27. Burke-White, *supra* note 4, at 963.

28. Anthony J. Colangelo, *A Systems Theory of Fragmentation and Harmonization*, 49 N.Y.U. J. INT’L L. & POL. 1, 7 (2016). See generally Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation*, 25 MICH. J. INT’L L. 929 (2004) (arguing that the creation of multiple international tribunals is a result of international law’s growing maturity and their practice reveals no cause for concern of fragmentation).

29. ILC Fragmentation Report, *supra* note 20.

striving to understand various international legal texts as compatible with each other.³⁰ Joost Pauwelyn, for instance, suggests that for one regime to consider the law of another where the same States are members follows logically from the principle of *pacta sunt servanda*.³¹ Anthony Colangelo suggests, in addition, adopting a “presumption of catholicity,” according to which decision-makers are urged “to use all international legal sources available to resolve disputes and [act] as a bulwark against parochial or idiosyncratic interpretations unmoored from, and unguided by, the full spectrum of international legal materials.”³²

The second set of suggested responses is political. This set includes promoting structural hierarchy³³ or establishing sufficiently powerful institutions that will impose such hierarchy.³⁴ Some have suggested establishing a supreme court of international law which would be the final arbiter and would bring together conflicting decisions of the courts of the various international legal regimes.³⁵ This proposal, however, has not been broadly endorsed, and neither such body nor such pyramid of hierarchy of international tribunals presently exists.

Another suggestion is to recognize and embrace the dominant status occupied by the World Trade Organization’s dispute settlement system.³⁶ And yet another is to seek defragmentation through linkages struck via political negotiation and bargaining.³⁷

In a new book, Benvenisti and Downs suggest that coordination between domestic and international courts promises to address democratic concerns which arise, among others, as a result of fragmentation. Such coordination would be able to “maintain a proper distribution of political power at both the domestic and the international levels by helping to ensure that the interests of a greater share of relevant stakeholders are taken into account by decision-makers.”³⁸

E. The Future Trajectory of International Legal Development

Many scholars agree that international law has always been fragmented,³⁹ even if its fragments used to be broken along different lines.⁴⁰ At the same time,

30. Hafner, *supra* note 9, at 861; Koskenniemi and Leino, *supra* note 7, at 574.

31. Pauwelyn, *supra* note 5, at 904. He suggests, further, that we think of international law as “a universe of inter-connected islands.” *Id.* at 916; *see also* TRACHTMAN, *supra* note 6, at 231–44 (covering various possible responses to fragmentation, including informal mechanisms; judicial responses; implicit judicial responses; engendering structural subordination (e.g. *lex specialis*); and normative responses, allocating authority and hierarchy between international legal rules and between international organizations).

32. Colangelo, *supra* note 28, at 10. Colangelo suggests that an “ideational impasse” blocks our way out of fragmentation. He thus calls for re-energizing the legal imagination by viewing international law as a unified system which will lead towards a coherent, rather than merely coordinated, legal system. *Id.* at 22.

33. TRACHTMAN, *supra* note 6, at 231–44.

34. Koskenniemi & Leino, *supra* note 7, at 575.

35. *See* Kingsbury, *supra* note 1, at 693.

36. TRACHTMAN, *supra* note 6, at 237.

37. *Id.* at 244–50.

38. BENVENISTI & DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY, *supra* note 6, at 6.

39. Pauwelyn, *supra* note 5, at 904.

40. ILC Fragmentation Report, *supra* note 20, at 15; Dupuy, *supra* note 17, at 792.

many agree that in order to identify fragmentation, one must assume that the international legal system is, in fact, a single system.⁴¹ Koskenniemi and Päivi Leino argue, moreover, that “[c]oncern over fragmentation, conflicts and special regimes could only arise after 1989, once it could be assumed that the project of a coherent system could be revived.”⁴² Judges of the International Court of Justice (ICJ) have suggested that the international legal system is not only a single system but in fact a unified one.⁴³

This rosy picture of the present international legal system notwithstanding, many scholars have offered rather grim predictions with respect to its future development. “Any aspirations to a normative unity of global law are thus doomed from the outset,” conclude Andreas Fischer-Lescano and Gunther Teubner.⁴⁴ In fact, they insist that we should expect “intensified legal fragmentation” and claim that “[l]egal fragmentation cannot itself be combated. At the best, a weak normative compatibility of the fragments might be achieved.”⁴⁵ Joel Trachtman concurs.⁴⁶ Lang, too, struggles to imagine how the current dynamic of fragmentation might change in the short or even medium term.⁴⁷ Benvenisti and Downs estimate that the likelihood that the trend towards fragmentation will be reversed is “relatively poor.”⁴⁸ And, although she is generally skeptical about the fragmentationist scare,⁴⁹ Peters recognizes that fragmentation does bear some risks and opines that unless it is channeled by constitutional principles and procedures,⁵⁰ international law’s “unity, harmony, cohesion, order, and—concomitantly—the quality of international law as law” are in peril.⁵¹

In contrast, Yuval Shany compellingly points out that, “[w]ith the benefit of some 20 years of hindsight, it appears that some of the rumors about the death

41. Simma, *supra* note 1, at 847; ILC Fragmentation Report, *supra* note 20, at 23; Int’l Law Comm’n, Rep. on its Fifty-Eighth Session, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Conclusions)*, U.N. Doc. A/61/10, at 407–423 (July 18, 2006). For a contrary position, see Hafner, who claims that international law is not presently a homogenous system. Hafner, *supra* note 9, at 850.

42. Koskenniemi & Leino, *supra* note 7, at 560.

43. ICJ Judge Antônio Augusto Cançado Trindade has opined that a systemic outlook has been flourishing in recent years. Whaling in the Antarctic (*Austl. v. Japan*, N.Z. intervening), 2014 I.C.J. Rep. 226, ¶¶ 25–26 (Mar. 31) (separate opinion by Cançado Trindade, J.). Judge Greenwood has, moreover, stated that,

International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.

Ahmadou Sadio Diallo, *supra* note 5, at 8.

44. Fischer-Lescano & Teubner, *supra* note 5, at 1004.

45. *Id.* at 1004. However, that, too depends on the “ability of conflicts of law to establish a specific network logic, which can effect a loose coupling of colliding units.” *Id.*

46. TRACHTMAN, *supra* note 6, at 227–28.

47. Lang, *supra* note 16, at 123.

48. Benvenisti & Downs, *The Empire’s New Clothes*, *supra* note 6, at 628.

49. See generally Peters, *supra* note 20 (arguing that fragmentation is successfully managed by international courts, tribunals and other actors who use various techniques to coordinate international law’s subfields).

50. Peters, *supra* note 4, at 1014.

51. *Id.* at 1015.

of legal coherence and jurisdictional order as a result of the proliferation of international judicial bodies might have been premature.”⁵² Peters, too, eventually bids “farewell to fragmentation” and declares that it is time to “bury the f-word.”⁵³ Tomer Broude asserts that fragmentation has been “normalized” and its grand questions dissipated “as if they were never asked.”⁵⁴

Taking these latter observations as a point of departure, the following Part asks what accounts for the failure of the grave forecasts attributed to fragmentation to materialize, and what the implications are, if any, for the future trajectory of international law. As I argue, concerns arising from fragmentation, while not unjustified, ought to be somewhat alleviated by the moderating influence of the international system’s parallel integrationist dynamics. Such dynamics also support careful skepticism regarding the likelihood that fragmentation will gain the upper hand in the struggle between the two competing trends.

II. INTERNATIONAL LAW’S INTEGRATIONIST FORCES

It is widely believed that international legal fragmentation is inevitably destined to increase. I argue, however, that when faced with conflicting guidance from international legal regimes, States adopt a proactive, creative approach to try to reconcile their various obligations. To be recognized as compliant with all their obligations, States must successfully convince their peers and international monitoring bodies that the common ground they have identified is indeed a reasonable construction of the law. Such efforts encourage the harmonization of rules across regimes and, consequently, their systemic integration. These efforts therefore have a moderating impact on international legal fragmentation and its adverse effects. While such efforts may also render domestic law more in line with governing international law, this is not the focus of my argument. Rather, my focus is on the strengthened normative coherence between international law’s different legal regimes.

Such practice by States has both structural and agential aspects worth highlighting. As I elaborate below, the structure of the international legal system is such that the communities of subjects of its various legal regimes overlap considerably, and particular subjects are under systemic pressure to conform to more than one set of norms or guidelines. By “subjects,” I mean those actors whose behavior the particular international regime’s norms aim to guide. The subjects are therefore incentivized by the different regimes to find common ground between their commitments in order to plan and execute policies that are compatible with all of their obligations.

International law’s subjects—States as well as people—are not submissive, passive actors who freeze at any appearance of conflicting guidance from

52. Yuval Shany, *International Human Rights Bodies and the Little-Realized Threat of Fragmentation 2* (Feb. 7, 2016) (Hebrew Univ. Jerusalem Legal Research Paper No. 16-06), <https://papers.ssrn.com/abstract=2722663> (last visited Dec 22, 2016).

53. Peters, *supra* note 20, at 672.

54. Tomer Broude, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 *TEMP. INT’L & COMP. L.J.* 279, 280 (2013).

different international legal regimes. Rather, they are more often proactive, determined agents who operate in multiple ways—legal, political, diplomatic, economic, and others—to reach equilibrium and meet their different commitments while also promoting their own agendas.

William Burke-White submits that “[t]he international legal system today appears to be at the center of two opposing sets of forces—one set pushing toward fragmentation, the other toward interconnection and coherence.”⁵⁵ His conclusion is that the emerging system is likely to be “neither fully fragmented, nor completely unitary,” but rather a pluralist system.⁵⁶

Building on the picture of a struggle between international law’s opposing forces, I claim that States’ systemic incentives to promote integration and their corresponding practice amount to integrationist counterforces that operate in the international legal system and work to mitigate legal fragmentation and its effects.⁵⁷ I submit that such counterforces ought to generate some skepticism regarding forecasts of increasingly dominant fragmentation of international law. In contrast to Burke-White’s pluralist model, I suggest that a struggle between the system’s fragmentationist and integrationist forces is likely to define the future system rather than culminate in peaceful pluralism.

Like much else in the international legal system, legal change and development are generated in a diffuse and decentralized manner. My argument is that international legal integration is pushed forward not by any single, centralized actor but rather in a dispersed manner through the multiple actions of various actors.

A. *A Different Benchmark for Fragmentation*

When delineating the different fragments of international law, scholars often consider the international legal system from top to bottom. For instance, scholars study the various international tribunals, consider their subject matter jurisdiction and their *ratione personae* jurisdiction, and assess the possible conflicts that could arise between their norms or jurisprudence and those of other regimes.⁵⁸ This method of analysis is not invaluable: it serves as the basis for important observations, such as Lang’s argument that the WTO’s reluctance to apply general international law is particularly entrenched with respect to substantive law but may be less so with respect to secondary norms of public international law.⁵⁹

55. Burke-White, *supra* note 4, at 977 (defining a pluralist system as “one that accepts a range of different and equally legitimate normative choices by national governments and international institutions and tribunals, but it does so within the context of a universal system”).

56. *Id.*

57. Note that even Benvenisti and Downs acknowledge such counterforces, including efforts by weaker States, Benvenisti & Downs, *The Empire’s New Clothes*, *supra* note 6, at 620–23, as well as judges. Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 9 EUR. J. INT’L L. 59 (2009) (arguing that national courts have begun to act collectively through inter-judicial coordination, thus promoting a more coherent international regulatory apparatus).

58. See, e.g., SHANY, *supra* note 6, at 29–74.

59. These secondary norms include questions of attribution, countermeasures, customary rules

But the Venn diagram of the different international legal regimes does not have to be drawn along the lines of either tribunals' subject matter or their *ratione personae* jurisdiction. Instead of using these as benchmarks, I propose taking the communities of subjects whose conduct international legal norms aim to guide as the yardstick with which to delineate the different regimes. Once we adopt this bottom-up perspective, it becomes clear that international law's different legal regimes actually have a lot in common. In fact, they share highly similar groups of subjects. Such a shift in perspective reveals that many international legal subjects are members not of one but of multiple international legal regimes whose norms are simultaneously applicable to their actions. Thus, despite the multiplicity of international legal regimes, there is no parallel multiplicity of distinct communities of subjects. Rather, there is probably a large common core of subjects who make up the communities of most global legal regimes.

This systemic structure may explain, in part, why the concerns regarding fragmentation have not, to date, materialized: despite the proliferation of international legal regimes, their subject communities are highly integrated. This structure also suggests that international legal fragmentation is not inevitable. Instead, I argue that legal integration can be driven from below by international law's subjects.

Note that the term "communities of subjects" as used here is not synonymous with the "actors falling under a particular court's *ratione personae* jurisdiction" for two reasons. First, since not all international legal regimes have courts, addressing only courts limits the discussion considerably. Second, not all those whom I consider subjects have standing before such courts. As I explain below, I consider individuals, groups, organizations, and firms as included in international law's various communities of subjects.⁶⁰ I would capture in such communities, and define as a legal subject, any actor whose behavior certain international legal norms seek to guide.⁶¹ Standing before international tribunals aside, I submit that such actors could be important in generating responses to international legal norms and in finding ways to bridge different international legal regimes.⁶²

B. States as Agents of Integration

Subject communities can be explored at various degrees of specificity. A possible starting point for the discussion is to speak of States as members of the communities of various international legal regimes. Take, for instance, the World Health Organization (WHO), the WTO, and the Paris Agreement on climate

relating to treaty interpretation, customary evidentiary rules, and burden of proof. Lang, *supra* note 16, at 118.

60. Tamar Megiddo, *The Everyday Life of International Law: How International Law is Practiced within States* (June 2016) (unpublished JSD Dissertation, New York University School of Law) (on file with author).

61. Cf. Jeremy Waldron, *Self-Application*, (N.Y.U. Sch. of Law Pub. L. Research Paper Series, Working Paper No. 16-46, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848578.

62. Tamar Megiddo, *Methodological Individualism*, 60 HARV. INT'L L.J. (forthcoming Summer 2019).

change. These three regimes represent distinct subject matters, which, of course, have some substantive overlap. Only one—the WTO—has a court. But their similarities are striking when one recognizes the degree to which their subject communities overlap.

The WHO has 194 members, the Paris Agreement has 173 members, and the WTO has 164 members.⁶³ The WHO and Paris Agreement share 169 members, which is 97.7% of the Paris Agreement's membership and 84.4% of the WHO's membership. The overlap between the WTO's membership and that of the WHO (158 members) is 96.3% of the WTO's membership, and its overlap with that of the Paris Agreement (146 members) is 89% of the WTO membership. The three regimes share 143 members.⁶⁴ Imagine a Venn diagram in which both the Paris Agreement's subject community and the WTO's subject community, represented as circles, overlap almost entirely, with a slightly larger circle representing the WHO's subject community. The core of common members, represented in the overlap between the circles, is clearly considerable.

Let us assume that those 158 States who are members of both the WTO and the WHO take the guidelines of both regimes into account when constructing their own policies. To do so successfully, they need to find a hermeneutic solution that allows them to conduct their own affairs in exercise of their sovereign discretion while not conflicting with the binding (or exhortative, as I discuss *infra*) guidelines issued by the two organizations.

Furthermore, they likely wish for their compliance with those legal regimes to be recognized. They therefore need to successfully “sell” their particular hermeneutic solution to their peer community members as well as to the governing organs of said regimes. If successful in such efforts, the State engaging in them will have promoted not only the recognition of the legitimacy of its own agenda, but also harmonization between the guidelines of the different legal regimes. In other words, it will have furthered international legal integration.

Adopting hermeneutic solutions is not the only option States have for reconciling the different international regimes. A State could, alternatively, strike a political bargain that amends one or both regimes or successfully spread its particular manner of applying the regimes' norms so that other States follow and such widespread practice by additional States informs the future interpretation of the norms, among other options.⁶⁵

Further, this dynamic is not necessarily limited to the binding guidelines of

63. Note that “members” as used here follows the organization/convention's definition, and thus include non-State actors and non-U.N. members including Cook Islands, the European Union, Hong Kong, Niue, Macau, Palestine, and Taiwan. All data is derived from the organizations' websites and is updated as of January 2018. WORLD HEALTH ORG., *Alphabetical List of WHO Member States*, http://www.who.int/choice/demography/by_country/en (last visited Nov. 6, 2018); U.N. Framework Convention on Climate Change, *Paris Agreement – Status of Ratification*, http://unfccc.int/paris_agreement/items/9444.php (last visited Nov. 6, 2018); WORLD TRADE ORG., *Members and Observers*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 6, 2018).

64. See *supra* note 63 and accompanying text.

65. See Vienna Convention on the Law of Treaties, art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331.

the various international legal regimes. Soft law norms sometimes succeed in attracting a significant State following,⁶⁶ despite not being legally binding. States might choose to follow exhortative statements as well and strive to find the balance between these and other binding or non-binding norms of international law; again, in this case, the States would share these with their community of peers. States may, thus, similarly contribute to integrating hard and soft law norms, or to the harmonization of soft law norms across regimes.

Granted, it is probably not common practice for most States to thoroughly consider each and every contemplated policy's alignment with the full panoply of its international legal obligations. Most States would have neither the wish nor the resources to do so. Indeed, such practice might only stand to represent an ideal typical way in which States handle international legal fragmentation. This does not mean, however, that such contemplation of international law is never the case. When States are faced with a clear conflict between two sets of binding international legal norms, I argue that they often do consider how to find a common ground between them, and between the international norms and their domestic policy. I further argue that such consideration is not reserved for catastrophic clashes between norms, but might at times occur in response to mere misalignments between States' international legal obligations.

C. Non-State Actors as Agents of Integration

The discussion becomes infinitely more interesting when the level of abstraction does not pause at State borders but also includes the workings of non-State actors within and across borders. By "non-State actors," I refer to any agent who is not a State, including individuals, groups, and organizations both within and outside a government bureaucracy.⁶⁷ Considered thus, one can see that the real work of squaring together international legal regimes' directives is done through what could be described as a process of deliberation, in which a large number of individual actors take part. Deliberation in this context connotes a certain societal give-and-take, the exchange of information and reflections between different actors, both within and outside the formal administration of the State.

Clearly, the first actors that come to mind when considering sub-State engagement with international norms are State officials. One could presume that squaring together domestic law and international law is part of the everyday work of policy-makers and bureaucrats whose area of responsibility is covered by international norms, standards, and organizations. When I discuss the State's work to try to find ways to square together its different obligations, it should be obvious that it is people—politicians, civil servants, and government lawyers—who actually debate the various courses of action and execute the one chosen. It is also such people who then work to present the State's position to other States and to international organizations. Often, in the process, they also engage with people outside the bureaucracy—businesspeople, civil society activists,

66. JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 257–68 (2005).

67. For a more detailed discussion, see Megiddo, *supra* note 62, pts. III, IV.

journalists, academics, constituents, etc.—and receive their input.

So, if we could simply replace “States” with “State officials,” why is it so important to take this extra step? I argue that an important part of the story can only be captured by looking inside the States, and, furthermore, by looking outside the formal administration at the engagement by individual people who are not State officials with international law.⁶⁸

As Jeremy Waldron explains, most implementation of legal norms results from people’s self-application of norms:

[U]sually, and long before any officials get involved, individuals have the task of applying norms to themselves A norm is formulated, enacted, and publicized. Individuals take note of what it says: they note the conditions of its application and the consequences that are supposed to follow when those conditions obtain. And the individuals apply the norm accordingly to their own behavior as appropriate.⁶⁹

While Waldron refers to people in a municipal legal system, the same principle applies to international law: people, who may operate on behalf of States or in an independent capacity, consider the conditions for the application of international legal norms, weigh various ways of implementation, and apply the norms to the best of their ability. As I argue elsewhere,⁷⁰ in international law, individuals, businesses, and organizations apply norms to their own or their States’ behavior, depending on the norm.

Much of the time, individuals’ application of international law is done in their capacity as State officials and on behalf of the State. At other times, however, non-official individuals demand certain actions from the State. The April 2017 March for Science⁷¹ on Washington D.C. is one example of non-officials’ involvement in demanding, among other things, that their State meet its international undertakings. At still other times, individuals may be able to, figuratively speaking, step into the State’s shoes in order to comply with its obligations in its stead. A prime example is the creation of the United States *We Are Still In* movement. Following President Donald Trump’s decision to withdraw from the Paris Agreement, members of this coalition—including U.S. states, cities, businesses, universities, faith groups, and tribal communities representing over half of the U.S. economy—pledged to cut their fossil-fuel emissions to ensure that the United States meets its commitments under the Agreement.⁷² They propose, in effect, to comply with the United States’

68. *Id.*

69. Waldron, *supra* note 61, at 1. He goes on to explain:

In a few instances, officials (or sometimes bystanders or competitors or others affected by the behavior in question) might decide to challenge an individual’s self-application of the norm. That is when the matter might come before a court; that is when a judge might have to decide on an authoritative application and apply sanctions or failures of individual application or misapplication by individuals. In most cases, however, there is no challenge, no second-guessing, and no need for authoritative intervention. Each individual applies the law to his or her own situation and that is that.

Id. at 1.

70. Megiddo, *supra* note 67.

71. See MARCH FOR SCIENCE, <https://marchforscience.com> (last visited Nov. 6, 2018).

72. “WE ARE STILL IN” DECLARATION, <https://www.wearestillin.com/we-are-still-declaration> (last visited Dec. 4, 2018); BLOOMBERG PHILANTHROPIES, AMERICA’S PLEDGE 29 (2017),

undertakings in its stead. Sub-State non-official actors thus can and do engage with international law directly and independently from the State.

Obviously, people working within or outside State administrations might not always be aware of the full extent of international norms and standards applicable to their area of responsibility. They might also sometimes knowingly choose not to comply or promote compliance with some of them. In some instances, it might take years and a ruling of an international tribunal against a State for some of its authorities to even learn of the State's obligations, let alone its breach of them.⁷³

D. Future Trajectory Forecasts

The dynamics described above represent an important force in the international legal system that works to mitigate fragmentation and offset its effects. If States and people are subject to multiple, overlapping legal regimes, and they are therefore systemically incentivized to promote international legal integration, we might infer that those forces of fragmentation, so worrisome to some scholars, are challenged. Without determining the magnitude of this challenge and the degree to which it is successful in mitigating fragmentation, we can at least assume that these integrationist dynamics have contributed to the "little mayhem that has actually happened so far"⁷⁴ as a result of fragmentation. They may, therefore, justify cautious skepticism of scholars' grim predictions concerning the domination of fragmentation as international law continues to develop. An ongoing struggle between the fragmentationist and integrationist forces of international law seems more likely.

The WTO dispute settlement mechanism, and especially its Appellate Body, is a particularly interesting framework against which to consider a claim about integrationist forces. The Appellate Body is often described as a reclusive court which refuses to apply non-WTO law, at least in its substantive rulings.⁷⁵ Whether this is because of "institutional myopia and normative closure" or the Appellate Body's cautious judicial sensibility,⁷⁶ it remains an important, exceptionally powerful judicial body that can hardly be called a beacon of international legal harmonization.⁷⁷ The WTO is, therefore, the setting in which integration is perhaps least likely to occur, which makes it the most insightful context to study integrationist efforts. As I now illustrate, we can expect integration to occur not only top-down from the WTO itself but also bottom-up due to efforts by its community of subjects.

<https://www.bbhub.io/dotorg/sites/28/2017/11/AmericasPledgePhaseOneReportWeb.pdf>.

73. The Brazil case is one example in which officials from the Ministry of Environment explained that they only learned about the MERCOSUR litigation after the tribunal issued its ruling. Fabio C. Morosini, *The MERCOSUR and WTO Retreaded Tires Dispute: Rehabilitating Regulatory Competition in International Trade and Environmental Regulation*, 170 n.559 (Soc. Int'l Econ. Law, Working Paper No. 42/08, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154710.

74. Shany, *supra* note 52, at 2.

75. See Lang, *supra* note 16, at 117.

76. *Id.* at 117 (rejecting the former and endorsing the latter characterization).

77. See Qin, *supra* note 2, at 624–27 (proposing that the WTO should adopt a judicial policy to avoid creating conflicts with prior decisions of regional trade agreements).

The following Part provides an in-depth analysis of Brazil's response to the conflicting guidance it received from the WTO and MERCOSUR. This Part illustrates the Article's claim that States respond to normative incoherence between different international legal regimes by proactively seeking to remedy it. Arguably, Brazil's various attempts to reconcile its international obligations teach us as much—or perhaps even more—about its orientation to its international obligations as we may learn from its ultimate successes or failures.

III. BREEDING CONFLICTS: THE CASE OF BRAZIL

The 2015 outbreak of the Zika epidemic in Brazil brought the *Aedes aegypti* mosquito to the headlines⁷⁸ and, with it, a renewed awareness of the dangers posed by waste tires. When improperly discarded, as is often the case in Brazil, water accumulates in tires, providing a perfect damp, dark breeding site for disease-carrying mosquitos.⁷⁹ In addition to the threats they pose to human health, improperly discarded tires are further associated with environmental risks due to the toxic and mutagenic emissions that result from tire fires as well as with the leaching of toxic materials from stockpiled tires into the environment.⁸⁰

In 2000, as part of its fight against dengue, yellow fever, and malaria, Brazil embarked on a comprehensive plan to improve the management of tires, with the central goal of reducing the overall number of tires in the country. Brazil introduced a ban on the importation of used and retreaded (recycled) tires, opting to import only new tires that have longer lifespans.⁸¹ The ban came into effect by means of a regulatory act, Portaria SECEX 8/2000.⁸² In addition to the ban, Brazil adopted various measures aimed at encouraging the domestic retreading of tires, and the effective management of tire waste.⁸³

Two challenges were brought against Brazil's plan under two international legal regimes, MERCOSUR and the WTO. At the conclusion of the WTO proceedings, Brazil found itself in a bind: seemingly forced to either violate the decision of one of the international tribunals or to abdicate its domestic policy. However, as I show, Brazil persistently strove to find creative solutions that would allow it to reconcile its obligations under the two legal regimes—without having to give up its domestic agenda.

78. See *One Year into the Zika Outbreak: How an Obscure Disease Became a Global Health Emergency*, WORLD HEALTH ORG. (May 5, 2016), <http://www.who.int/emergencies/zika-virus/articles/one-year-outbreak/en>.

79. See *Integrated Mosquito Management for Aedes Aegypti and Aedes Albopictusi Mosquitos*, CENTERS FOR DISEASE CONTROL & PREVENTION (Feb. 2, 2018), https://www.cdc.gov/zika/vector/integrated_mosquito_management.html; see also Sonia Shah, *How Foreclosed Homes and Used Tires Can Threaten Public Health in the Age of Zika*, WASH. POST (July 29, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/07/29/how-foreclosed-homes-and-used-tires-can-affect-public-health-in-the-age-of-zika>.

80. See Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶¶ 7.53-7.93, WTO Doc. WT/DS332/R (circulated on June 12, 2007) [hereinafter *Brazil Tyres Panel Report*].

81. See *id.* ¶¶ 7.126-7.130.

82. See *id.* ¶¶ 2.9, 2.13.

83. See *id.* ¶¶ 7.131-7.142.

A. The MERCOSUR Challenge

The first challenge to Brazil's import ban was brought by Uruguay, which in 2001 initiated proceedings in a binding arbitral tribunal under the auspices of the regional common market, MERCOSUR, to which both countries are members. Uruguay challenged Brazil's Portaria SECEX 8/2000, a regulation which prohibited the issuance of import licenses for used and retreaded tires.⁸⁴ A previous Brazilian regulation, issued in 1991, had prohibited the issuance of import licenses for used tires but did not—Uruguay claimed—also prohibit the licensing of imports for retreaded tires.⁸⁵ In practice, Brazil had allowed for the importation of retreaded tires in the intervening period between 1991 and 2000. Therefore, Uruguay argued, the regulation issued in 2000 introduced a new prohibition on trade, contrary to the Treaty of Asunción⁸⁶ and MERCOSUR Common Market Council decision 22/2000, which prohibit all MERCOSUR members from establishing new restrictions on trade.⁸⁷

Brazil argued, in response, that its 1991 ban on used tires, which was part of a broader prohibition on the importation of used goods into the country, already included a prohibition on the importation of retreaded tires. Retreaded tires are indeed used tires, Brazil stressed. While acknowledging that retreaded tires had been allowed de facto into the country after 1991, Brazil argued that the oversight had occurred because its computerized system of foreign trade depended on the self-characterization of importers as to the nature of the good—either used or new—for which the import license was requested. By failing to duly register retreaded tires as used goods, importers had been able to circumvent the import prohibition. Therefore, the 2000 regulation did not establish a new prohibition on trade but made explicit an already existing prohibition.⁸⁸

Brazil's defense was solely that it did not break the rule on introducing new restrictions on trade. It did not defend its regulation as an exception to this rule on the basis of Article 50 of the Treaty of Montevideo, which allows for certain exceptions, including for the “[p]rotection of human, animal and plant life and health.”⁸⁹

In 2002, the MERCOSUR tribunal upheld Uruguay's claims.⁹⁰ It rejected Brazil's claim with respect to the interpretation of its 1991 regulation and held that Portaria SECEX 8/2000 modified the previous regulatory framework which had allowed for the importation of retreaded tires, given that Brazilian authorities had in practice considered retreaded tires to be distinct from both “new” and

84. Uru. v. Braz, Sistema de Informacion Sobre Comercio Exterior (Jan. 9, 2002), http://www.sice.oas.org/Dispute/mercosur/laudo6_s.asp (Braz.) [hereinafter MERCOSUR Arbitral Award].

85. *Id.* (classified, respectively, under Subheadings 4012.10, 4012.20 of the MERCOSUR Common Nomenclature (NCM)).

86. Treaty establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 2140 U.N.T.S. 257.

87. Brazil Tyres Panel Report, *supra* note 80, ¶ 2.13.

88. *Id.*

89. Treaty of Montevideo, art. 50(d), Aug. 12, 1980, 1329 U.N.T.S. 225.

90. MERCOSUR Arbitral Award, *supra* note 84.

“used” tires, and had not prohibited their importation. The tribunal held, further, that Brazil was estopped from instating the ban after having acquiesced to the importation of retreaded tires for over a decade.⁹¹ In the aftermath of this ruling, Brazil introduced an exemption to its import ban that allowed for the importation of remolded tires (a certain retreading method) from MERCOSUR countries.⁹²

B. *The WTO Challenge*

In 2005, the European Communities (EC) challenged the tire import ban under the WTO framework. The EC claimed that the import ban constituted a prohibition of trade, forbidden by the 1994 General Agreement on Tariffs and Trade (GATT 1994).⁹³ The EC further argued that the ban could not be characterized as a justified exception to the rule⁹⁴ because it had been applied in an arbitrary and unjustifiable manner given that Brazil allowed: (1) the importation of retreaded tires under the MERCOSUR exemption and (2) the importation of used tires under numerous court injunctions obtained by Brazilian retreaders despite the ban.⁹⁵ The EC argued that the ban could therefore not be held to be necessary to protect human life and health⁹⁶ but was rather “adopted with the objective of protecting the manufacturers of new and retreaded tyres located in Brazil.”⁹⁷ According to the EC, the ban failed to even contribute to the protection of human life and health,⁹⁸ and it would not lead to a reduction in the accumulation of waste tires.⁹⁹

In its submissions to the WTO, Brazil did not dispute that its ban was a restriction on trade but rather argued that it was justified as an exception to the rule since it was adopted in order to protect human life and health.¹⁰⁰ It further claimed that the MERCOSUR exemption could be rendered compatible with WTO law since MERCOSUR qualifies as a customs union under GATT 1994 Article XXIV.¹⁰¹

The WTO panel held that Brazil’s ban was provisionally justified under the exception contained in the GATT 1994’s Article XX(b), which allows for the adoption of policies “necessary to protect human, animal or plant life or health.”¹⁰² In examining further whether the measure was applied consistently with the chapeau of Article XX,¹⁰³ the panel concluded that the exemption issued

91. *Id.*

92. The exemption was first introduced in Portaria SECEX 2/2002 and later incorporated into Portaria SECEX 14/2004. Brazil Tyres Panel Report, *supra* note 80, ¶¶ 2.14-2.15. MERCOSUR countries were also exempted from the reach of financial penalties. *Id.* ¶ 2.16.

93. *Contra* General Agreement on Tariffs and Trade, art. XI, § 1, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

94. *Id.* art. XX.

95. Brazil Tyres Panel Report, *supra* note 80, ¶¶ 4.301, 4.311, 4.325.

96. *Id.* ¶ 4.41.

97. *Id.* ¶ 4.45.

98. *Id.* ¶ 4.49.

99. *Id.* ¶ 4.57.

100. *Id.* ¶¶ 4.3-4.4.

101. *Id.* ¶ 7.449.

102. *Id.* ¶ 7.215.

103. The Article reads:

following the MERCOSUR tribunal award was not “arbitrary or unjustifiable,”¹⁰⁴ nor a “disguised restriction on international trade.”¹⁰⁵ In so holding, the panel took into account, among other factors, the low volume of remolded tires imported under the exemption, which did not jeopardize Brazil’s whole policy,¹⁰⁶ and the GATT 1994’s acceptance of regional free trade agreements and customs unions.¹⁰⁷ Brazil’s taking into account its other non-WTO international legal obligations as well as its attempt to comply with all of its obligations, were considered by the panel to be relevant factors in assessing the reasonableness of its choice of policy.¹⁰⁸

The panel found, however, that the large volume of used tires imported despite the ban under court injunctions obtained by Brazilian retreaders did undermine Brazil’s overall program. For this reason, it found that the ban was unjustifiable¹⁰⁹ and constituted a disguised restriction on trade in breach of Brazil’s obligations under WTO law.¹¹⁰ The panel exercised judicial economy with respect to the qualification of MERCOSUR as a customs union.¹¹¹

The WTO Appellate Body took a much more radical approach to Brazil’s attempt to meet its MERCOSUR obligations. It held that Brazil’s rationale for the MERCOSUR exemption—wishing to comply with the MERCOSUR tribunal decision—bore no rational connection to the legitimate aim pursued by the ban and that it even went against it. It further held that the MERCOSUR exemption constituted arbitrary and unjustifiable discrimination and a disguised restriction on trade, regardless of its minor effect.¹¹² The Appellate Body reached a similar conclusion regarding the importation of used tires under court injunctions. The ban was thus held to be both an arbitrary and unjustifiable discrimination and a disguised restriction on trade.¹¹³ The Appellate Body also avoided ruling on MERCOSUR’s qualification as a customs union.¹¹⁴

Moreover, the Appellate Body expressed its bewilderment that Brazil did not attempt to defend itself before the MERCOSUR tribunal with Article 50(d) of the Treaty of Montevideo, which is equivalent to GATT 1994’s Article XX(b). It concluded that “the discrimination associated with the MERCOSUR exemption [did] not necessarily result from a conflict between provisions under

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .

GATT 1994, *supra* note 93, art. XX.

104. Brazil Tyres Panel Report, *supra* note 80, ¶¶ 7.288-7.289.

105. *Id.* ¶ 7.354.

106. *Id.* ¶¶ 7.288-7.289.

107. *Id.* ¶ 7.284.

108. *Id.* ¶¶ 7.279-7.281.

109. *Id.* ¶ 7.306.

110. *Id.* ¶ 7.349.

111. *Id.* ¶ 7.456.

112. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 239, WTO Doc. WT/DS/332/AB/R (Dec. 3, 2007) [hereinafter *Brazil Tyres Appellate Body Report*].

113. *Id.* ¶¶ 246, 251-52.

114. *Id.* ¶ 256.

MERCOSUR and the GATT 1994.”¹¹⁵ The Appellate Body thus seems to have attempted to downplay the appearance of a collision between WTO law and MERCOSUR law and instead stressed their commonalities. The apparent conflict between the decisions of the judicial bodies of the different regimes was depicted as an accident,¹¹⁶ and the responsibility for it was removed from the Appellate Body and attached to Brazil itself for failing to litigate wisely before the MERCOSUR panel.¹¹⁷

C. Fragmentation Versus Integration

Brazil’s predicament at the conclusion of the WTO proceedings seemed severe. On the one hand, it had secured an important victory by convincing both the WTO panel and the Appellate Body of the legitimacy of its policy goal and its overall program. On the other hand, it faced two conflicting—and binding—rulings by independent international judicial bodies, which required it to revise a central pillar of its plan. The scenario seemed to embody the dark prophecies made regarding fragmentation.

The stark majority of academic literature on this case focuses on this point in time and stops following the story after it.¹¹⁸ Few have considered the actual process by which Brazil attempted to reconcile its various international legal obligations. However, this part of the story is even more illuminating because it teaches us the most about legal fragmentation and how actors handle it.

Brazil responded by trying to meet all the conflicting demands imposed on it. As suggested in Part II, Brazil did not prioritize one set of international legal obligations over the other but rather remained committed to its various international legal obligations. While stressing its intention to comply with the Appellate Body’s recommendations and rulings, Brazil’s immediate response revealed an instinctive commitment to all its international obligations, noting that “removing the [MERCOSUR exemption] and restoring the original *erga omnes*

115. *Id.* ¶ 234.

116. The Appellate Body’s assumption may be somewhat cast into doubt by the result in concomitant litigation under the MERCOSUR framework between Uruguay and Argentina on an identical complaint. Argentina did raise the environmental defense but that was rejected “due to a lack of legal authority establishing clear criteria for the invocation of the exemption.” The MERCOSUR Permanent Review Court held further that Argentina acted exclusively for the protection of its own domestic industry. Marie Wilke, *Litigating Environmental Protection and Public Health at the WTO: The Brazil-Retreathed Tyres Case*, 1 INT. CENT. TRADE & SUSTAIN. DEV. INF. NOTE 1 (2010), https://www.files.ethz.ch/isn/139109/case_brief_brazil_tyres_v51.pdf; see also Fabio C. Morosini, *The MERCOSUR Trade and Environment Linkage Debate: The Disputes Over Trade in Retreathed Tires*, 44 J. WORLD TRADE 1127, 1144 (2010).

117. There seems to be a consensus among the officials that I have interviewed and in scholarship by Brazilian authors on the tire import ban episode that the MERCOSUR loss was not a carefully plotted exercise orchestrated by Brazil but a genuine attempt to defend itself before the arbitral tribunal that failed. See, e.g., Morosini, *supra* note 73 (quoting officials from the Ministry of Environment who explained that the MERCOSUR litigation was not brought to their attention in real time).

118. See, e.g., Chad P. Bown & Joel P. Trachtman, *Brazil – Measures Affecting Imports of Retreathed Tyres: A Balancing Act*, 8 WORLD TRADE REV. 85 (2009); Lavranos, *supra* note 2; Morosini, *supra* note 112; Ernst-Ulrich Petersmann, *Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit Grave Injustice*, 8 L. & PRAC. INT’L CTS. & TRIBUNALS 329 (2009); Geert van Calster, *Faites Vos Jeux —Regulatory Autonomy and the World Trade Organisation After Brazil Tyres*, 20 J. ENVTL. L. 121 (2008).

application of the import ban on retreaded tyres would not be a viable option because it would conflict with the current MERCOSUR rules as interpreted by the MERCOSUR Tribunal.”¹¹⁹ Brazil was also not willing to easily give up on its comprehensive plan.¹²⁰

In fact, even prior to the conclusion of the WTO proceedings, efforts were underway on several fronts to address and reconcile the various international legal demands pressed upon Brazil. Within Brazil, different actors deliberated and negotiated over the appropriate course of action. In this process, fragmentationist tendencies existed alongside integrationist ones, both driven by powerful advocates. The outcome—the degree of Brazil’s compliance with its different international legal obligations—resists easy classification. At the same time, the process itself reveals a great deal about how various actors within Brazil regard international law.

As one high-ranking official in Brazil’s Ministry of Foreign Relations (Ministério das Relações Exteriores or MRE) explained in an interview, some of the officials involved in handling the WTO case believed that both regimes could be reconciled and were working to find solutions in that direction. This was done first by trying to convince the WTO of the compatibility of the MERCOSUR exemption with WTO rules by suggesting that MERCOSUR qualified as a customs union. When that attempt failed, they sought other means, including seeking to amend MERCOSUR norms in a manner that would achieve such compatibility.¹²¹ Other actors, however, called for preferring one ruling over the other. Whereas some suggested that Brazil give up its import ban in response to the challenges from its trading partners, others insisted that the ban could be maintained while also complying with Brazil’s international legal obligations.¹²²

The first action to address the MERCOSUR-WTO conflict was embarked on, domestically, in response to the EC’s complaint initiating the process at the WTO. An interministerial working group managed the WTO proceedings from their inception, hoping to render them unnecessary.¹²³ The group included

119. Award of Arbitrator under Article 21.3(c), *Brazil - Measures Affecting Imports of Retreaded Tyres*, ¶ 16, WTO Doc. WT/DS332/16 (Aug. 29, 2008) [hereinafter *Brazil Tyres 21.3(c) Arbitration*].

120. Status Rep. by Brazil, *Brazil - Measures Affecting Imports of Retreaded Tyres*, ¶ 4, WTO Doc. WT/DS332/19 (Mar. 10, 2009) [hereinafter *Brazil’s First Status Report*] (“The Brazilian Government has been actively working with the objective of reinforcing and strengthening the effectiveness of Brazil’s comprehensive strategy to deal with waste tyres.”).

121. Video Conference Interview with Ambassador Luciano Andrade, former Head of MRE Dispute Settlement Unit (Sept. 12, 2017) [hereinafter *Andrade interview*].

122. Marcelo Dias Varella, *Implementing DSB Reports: An Analysis Based on Brazil’s Retreaded Tires Case*, 32 WIS. INT’L L.J. 699, 718 (2014) (describing the disagreement between different executive officials). Reportedly, in internal debates where CAMEX officials suggested that the ban be withdrawn due to the EC challenge, Environment Minister Marina Silva strongly pushed for the ban to be defended before the WTO on environmental grounds. Phone Interview with Ambassador Flavio Marega, former Head of MRE Dispute Settlement Unit (Sept. 7, 2017) [hereinafter *Marega interview*].

123. For a detailed overview of Brazil’s approach to engaging international trade disputes and the emergence of a domestic epistemic community on trade, see Gregory Shaffer, Michelle Rattton Sanchez Badin, & Barbara Rosenberg, *The Transnational Meets the National: The Construction of Trade Policy Networks in Brazil*, in *LAWYERS AND THE CONSTRUCTION OF TRANSNATIONAL JUSTICE* 170 (Yves Dezalay & Bryant Garth eds., 2013).

representatives of the MRE,¹²⁴ the Foreign Trade Chamber (CAMEX),¹²⁵ the Ministry of Trade and Industry, the Ministry of Environment, the Ministry of Health, the General Advocacy of the Union (AGU), and the President's Chief of Staff.¹²⁶ The working group had formal and informal contact with members of the Congress, nongovernmental organizations (NGOs), and, indirectly, tire industry associations and actors.¹²⁷

The Brazilian government hired private legal counsel to represent it before the WTO¹²⁸ and actively reached out to civil society for support.¹²⁹ Several domestic and international NGOs filed amicus briefs with the WTO panel, and Brazil adopted them as part of its exhibits.¹³⁰ One NGO is even reported to have dumped a truck full of used tires in front of the WTO's Geneva headquarters on the first day of the proceedings.¹³¹

Brazilian retreaders voiced the threat of significant job losses if the industry were to lose its cheap raw material due to the import ban. This threat is thought to have carried significant weight in the retreaders' dealings with both Congress and the President.¹³² This may also explain the impasse reached in 2005 in

124. Recurrent WTO challenges have led Brazil's government to rely on outside legal and technical-economic assistance. This spurred private sector involvement, leading to a three-pillar model on which the government relies on its international trade policy: (1) a WTO Dispute Settlement Unit at the MRE; (2) Brazil's WTO Mission in Geneva; and (3) the private sector, including law firms. *Id.* at 171. "The Dispute Settlement Unit provides a central contact point for affected businesses, trade associations and their lawyers regarding foreign trade problems." *Id.* at 174. The unit works with other MRE units and ministries with specialized knowledge of issues raised as well as with the WTO Geneva Mission and outside legal counsel. *Id.*

125. *Id.* at 173 ("Brazil has attempted to co-ordinate ministry views through an inter-ministerial body, the Chamber of Foreign Trade (CAMEX) In order to participate effectively in CAMEX, ministries have invested in developing WTO expertise CAMEX includes a formalised body which also provides a focal point for the private sector . . . to address trade negotiation and dispute-related issues. CAMEX is part of the Government Council of the Presidency and consists of six ministers, assisted by a secretariat.").

126. Marega interview, *supra* note 122; Telephone Interview with Marcelo Dias Varella, former economic advisor to the Brazilian presidency (Aug. 1, 2017) [hereinafter Varella interview]. Although officials involved with the group seem to have perceived it as a formal working group, the MRE does not consider that it was so, as a reply from the MRE to an Access of Information request notes. Formal Response from Ministério das Relações Exteriores to Inaê Oliveira (Sept. 19, 2017, 9:44 AM) (on file with author).

127. Marega interview, *supra* note 122; Varella interview, *supra* note 126; Andrade interview, *supra* note 121.

128. Cf. Shaffer, Sanchez Badin & Rosenberg, *supra* note 123, at 197.

129. *Id.* at 196; Marega interview, *supra* note 122.

130. Brazil Tyres Panel Report, *supra* note 80, ¶ 1.8. The coalition included the Association of Combats against POPs (ACPO); the Association for the Protection of the Environment Cianorte (APROMAC); the Center for Human Rights and Environment (CEDHA); Conectas Human Rights; Global Justice; Law for a Green Planet Institute; and the Center for International Environmental Law (CIEL).

131. Marega interview, *supra* note 122.

132. Varella, *supra* note 122, at 719; see also Catarina Scortecci, *BS Colway Ameaça Fechar em 1º Fevereiro* [BS Colway Threat Close on February 1st], FOLHA DE LONDRINA (Oct. 22, 2007), <http://www.folhadelondrina.com.br/economia/bs-colway-ameaca-fechar-em-1-fevereiro-620423.html> (reporting that, following a visit to the city where BS Colway's headquarters reside in October 2007, President Lula da Silva committed himself personally to look after the tyres issue, and quoting BS Colway director, Francisco Simeão, saying that although there was no unanimous opinion among the federal government, they had received favorable signals); Marc Antoni Deitos, *O Contencioso Internacional do Comércio de Pneumáticos – Politização da Política Externa e Internacionalização da Política Doméstica* [International Litigation for Tires – Politicization of Foreign Policy and Internationalization of Domestic

attempts to legislate a national system of sustainable management of tires, in anticipation of the WTO proceedings.¹³³

With this bill hung up in Congress, the problem of court injunctions remained a pressing issue. Yet only a clear ruling by the Federal Supreme Court could undo *res judicata* decisions of lower courts and thereby halt the flow of used tires into the country and provide legal certainty on the issue henceforth.¹³⁴ Consequently, in September 2006, Brazil's president filed a complaint with the Court, asking it to declare unconstitutional all judicial decisions and judicial interpretations allowing the importation of used tires of any kind.¹³⁵ The complaint did not ask the Court to rule on the MERCOSUR imports, but, as I explain below, the Court's ruling affected these as well.

The Court held public hearings for the case in June 2008, after the WTO Appellate Body's ruling was adopted. A variety of stakeholders were invited to speak at the hearing, including government officials as well as representatives from NGOs and from the retreaded tire industry. At least two of the experts who testified referred expressly to the WTO decision.¹³⁶

The Court's decision, reported by the current president of the Court, Justice Carmen Lucia, was finally adopted in a ten to one decision, on June 24, 2009.¹³⁷ The Court declared unconstitutional all forms of importation of used and retreaded tires, including imports from MERCOSUR.¹³⁸ Such imports were held to be in violation of the constitutional rights to health and to an ecologically-balanced environment, which trump, in the circumstances of the case, the constitutional freedom of enterprise.¹³⁹

Nonetheless, the full impact of the Court's decision was not immediately clear. The ambiguity was not aided by the fact that the written decision was made available only three years later in 2012. In the Brazilian government, too, some actors were unsure what was to be done. The AGU therefore issued a "*parecer*," a binding, formally published legal opinion¹⁴⁰ clarifying that, following the

Policy] (2010) (unpublished Masters Dissertation) (on file with author) (discussing the history of the retreaders' lobbying in Congress).

133. Deitos, *supra* note 132, at 214; Varella, *supra* note 122, at 719.

134. Andrade interview, *supra* note 121.

135. Initial Filing Coordination, *Arguição De Descumprimento De Preceito Fundamental 101*, 2 (Sept. 21, 2006) (Braz.), <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=181175#0%20-%20Peticao%20inicial> [hereinafter ADPF Complaint].

136. *Arguição de Descumprimento de Preceito Fundamental 101*, Annex III to the Rep. by Justice Carmen Lucia, S.T.F. (June 24, 2009) (Braz.), <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=629955> [hereinafter ADPF 101 Ruling].

137. Justice Marco Aurélio dissented on admissibility grounds. *Id.* at 217–19 (Lucia & Lewandowski, JJ.); *id.* at 270–74 (Mendez, J.); *see also* Status Rep. by Brazil, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/19/Add.4 (July 10, 2009).

138. Interestingly, Judge Lucia's clarification implied that she has changed her initial vote that allowed imports from MERCOSUR. SECRETARIA DE COMÉRCIO EXTERIOR [SECRETARIAT OF FOREIGN TRADE], Nota AGU/SGCT/ARL/No. 0257/2009, PROCESSO no.: 52100.002680/2009-18, PROCESSO JUDICIAL: ADPF NO. 101 (STF) [JUDICIAL PROCEEDINGS: ADPF 101], 13-15 (Aug. 6, 2009) [hereinafter PARECER].

139. *See* CONSTITUÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 170 (Braz.) (Istvan Vajda et al. trans.).

140. *See* Lei No. 73 [Law No. 73], art. 41, 10 de Fevereiro de 1993 [Feb. 10, 1993], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] [OFFICIAL DIARY OF THE UNION] de 11.02.1993 (Braz.) (establishing legal

Supreme Court's ruling, importation of used and remolded tires from MERCOSUR countries was now prohibited.¹⁴¹ Following this ruling, on August 28, 2009, the Secretary of Foreign Trade issued a new regulation, Portaria SECEX 24/2009, which prohibited the issuance of new licenses for the importation of used and retreaded tires irrespective of their origin.¹⁴² It was, therefore, the Supreme Court's ruling that forced the executive's hand in finally eliminating the MERCOSUR exemption.¹⁴³ Additionally, it seems that it was domestic constitutional law rather than the WTO ruling that served as the substantive impetus for the Court's ruling. Nonetheless, one cannot ignore the fact that the proceedings would not have been initiated had the EC not filed a complaint with the WTO, the WTO panel not singled out the court injunction problem, and the Appellate Body not ruled the way that it did. The Appellate Body's ruling was, in fact, discussed in the public hearing.¹⁴⁴

Brazil made several attempts domestically to reconcile its different international legal obligations with one another as well as with its domestic law. It is fair to say that it did not fully succeed. The Supreme Court's ruling effectively unraveled the government's attempt to comply with the MERCOSUR ruling by way of an exemption, establishing instead the blanket ban favored by the WTO. Nonetheless, embarking on these various efforts, Brazilian officials did not carelessly pick and choose among its international commitments but rather seriously engaged in attempts to reconcile them.

In addition to these domestic efforts, Brazil took another course of action on the multilateral international plane in an attempt to reconcile its different international legal obligations. In April 2008, following the adoption of the Appellate Body's decision, Brazil proposed to the Common Market Group (GMC) of MERCOSUR that an ad hoc working group be established to discuss a new regional policy for tires, hoping to create a framework more compatible with the WTO ruling. The GMC approved this proposal and established the working group in June 2008, giving it the mandate to prepare, by the end of 2008, a MERCOSUR policy for trade of retreaded and used tires.¹⁴⁵ The working group met but discovered it was unable to agree on a new regime proposal. Therefore, it did not submit a common policy proposal to the GMC as set forth in its mandate,¹⁴⁶ and Brazil eventually realized that this course of action was not a

basis for a *parecer*).

141. PARECER, *supra* note 138.

142. See Status Rep. by Brazil, *Brazil - Measures Affecting Imports of Retreaded Tyres*, ¶ 6, WTO Doc. WT/DS332/19/Add.6 (Sept. 15, 2009).

143. Varella interview, *supra* note 126; Andrade interview, *supra* note 121; PARECER, *supra* note 138.

144. ADPF 101 Ruling, *supra* note 136, at 173-77 (statements of Sec'y of Foreign Trade, Welber Barral and Ambassador Evandro de Sampaio Didonet).

145. MERCOSUR Grupo Mercado Común [MERCOSUR Common Market Group], *Creación del Grupo Ad Hoc para una Política Regional de Neumáticos Inclusive Reformados y Usados (GAHN)* [Creation of the Ad Hoc Group for a Regional Policy on Tires], MERCOSUR/GMC/EXT/Res. N° 25/08 (June 29, 2008), <http://www.sice.oas.org/Trade/MRCSRS/Resolutions/Res2508.pdf>; Brazil's First Status Report, *supra* note 120.

146. Email from Flavio Marega, Braz. Ambassador to Saudia Arabia, Ministério das Relações Exteriores [Ministry of Foreign Affairs], to Author (Sept. 20, 2017, 3:21 PM) (on file with author) [hereinafter Email from MRE].

viable one.¹⁴⁷ Although this effort also failed to reach its desired conclusion of finding common ground between Brazil's different international legal obligations, the fact that Brazil embarked on it indicates its fundamental commitment to reconcile these obligations and its reluctance to prioritize one over the other.

Another course of action that was available for Brazil was a bilateral international one: negotiating with Uruguay and offering trade concessions as compensation for eliminating the MERCOSUR exemption contrary to the MERCOSUR arbitral award. Serisur SA is a Uruguayan company that manufactured remolded tires primarily for the Brazilian market. The company suffered most of the impact of Brazil's ban on the importation of used and retreaded tires in 2000, and its plight led Uruguay to initiate the arbitral proceedings against Brazil in MERCOSUR.¹⁴⁸ In the fall of 2009, after Brazil's final elimination of the MERCOSUR exemption, Serisur was in a dire situation and was seriously contemplating closing its factory and firing its fifty-odd employees.¹⁴⁹

Some officials I interviewed said that Uruguay, and possibly MERCOSUR, "understood" that between the WTO and the Supreme Court's rulings, Brazil's hands were tied, and it could no longer comply with the MERCOSUR award.¹⁵⁰ An email from the MRE stresses that Uruguay did not further pursue the matter in MERCOSUR.¹⁵¹

Marcelo Dias Varella claims, however, that CAMEX, Brazil's Chamber of Foreign Trade, had resolved to discuss a deal on compensation with Uruguay following the Supreme Court decision.¹⁵² In an interview about his role as an economic advisor to the Brazilian presidency at the time, Dias Varella recalls such concessions granted in other economic sectors, although he notes that they were probably not formally framed as compensation.¹⁵³ I have been unable to obtain conclusive evidence of whether such concessions were indeed offered or accepted. Furthermore, although another MRE official I interviewed thought that it was likely that concessions had been made,¹⁵⁴ a third official I interviewed ruled out the possibility that Brazil compensated Uruguay.¹⁵⁵ Moreover, an email from the MRE notes that "no compensation was actually agreed." The email adds: "the fact is that there was no further questioning either by the EU in the WTO Dispute Settlement Body or by Uruguay under the Protocol of Olivos

147. *Id.*; Andrade interview, *supra* note 121.

148. MERCOSUR Arbitral Award, *supra* note 84.

149. CÁMERA DE INDUSTRIAS DEL URUGUAY [INDUSTRY CHAMBER OF URUGUAY], SÍNTESIS DE PRENSA [PRESS SUMMARY], 26 DE NOVIEMBRE DE 2009, <http://www.ciu.com.uy/innovaportal/v/31306/1/innova.front/26-noviembre-2009-jue.html> (last accessed Nov. 6, 2018) (citing *Trabas en Comercio [Trade Fairs]*, EL PAÍS [THE COUNTRY] A14 (Nov. 26, 2009)); *Serisur Posterga Inicio de Actividad [Serisur Delays Start of Activity]*, EL PAÍS [THE COUNTRY] (Feb. 2, 2009).

150. Marega interview, *supra* note 122.

151. Email from MRE, *supra* note 146.

152. Varella, *supra* note 122, at 722.

153. Varella interview, *supra* note 126.

154. Andrade interview, *supra* note 121.

155. Marega interview, *supra* note 122.

(MERCOSUR's Dispute Settlement Understanding) on the subject."¹⁵⁶

It thus remains a question whether any trade understandings between Uruguay and Brazil included concessions as compensation for Brazil's elimination of the MERCOSUR exemption. Either way, the power asymmetry between Uruguay and Brazil must be recalled in this context. Compensating Uruguay would rectify, to an extent, Brazil's violation of the MERCOSUR arbitral award. It would also further indicate that Brazil was attentive to its obligation towards Uruguay as a consequence of the MERCOSUR award and sought to find another way to mitigate the apparent discrepancy between the award and the WTO rulings and recommendations. It would therefore indicate, once more, Brazil's commitment to all its international obligations and its efforts to reconcile them.

Brazil submitted to the WTO Dispute Settlement Body (DSB) periodic status reports on its progress in achieving compliance with the Appellate Body's rulings and recommendations.¹⁵⁷ In its seventh status report of September 15, 2009, Brazil notified the DSB that the issuing of new licenses for the importation of used and retreaded tires was now prohibited, irrespective of their origin. The *erga omnes* application of the ban had thus been restored. "Brazil is therefore in full compliance with the DSB recommendations and rulings in this dispute," the report stated.¹⁵⁸ The EC did not dispute Brazil's submission and the DSB subsequently stopped monitoring the matter.¹⁵⁹ Uruguay, too, did not challenge Brazil on its new policy in MERCOSUR.¹⁶⁰

In conclusion, the Appellate Body's decision, which placed Brazil in a bind, served as a catalyst for various processes of trial and error, domestically as well as internationally—multilaterally and possibly bilaterally. Rather than becoming disillusioned with fragmented international law, Brazilian officials actively sought ways to reconcile their domestic law and various international obligations. Instead of turning its back on its trading partners, Brazil strove to create a new regional trade regime for tires. Rather than disengaging from the world and insisting on the inviolability of sovereign discretion, Brazil embraced its commitment to the international legal system and to its peers. It opted for more, not less, law, and for more, not less, international law.

This mobilization of Brazil and the different people involved in its policy making, and their orientation towards finding a common ground between the different demands placed upon the country, are the crux of this story. Note that while some of Brazil's actions are easily classified as "legal," others are perhaps

156. Email from MRE, *supra* note 146.

157. See, e.g., Status Report by Brazil, *supra* note 137. This process took longer than initially expected. Brazil was granted twelve months to bring its measures into compliance with the Appellate Body's recommendations and rulings ending on December 17, 2008. *Brazil Tyres 21.3(c) Arbitration*, *supra* note 120, ¶ 91. Brazil's failure to comply by that date was addressed by a Procedural Agreement arrived at between itself and the EU. Understanding between Brazil and the European Communities Regarding Procedures under Article 22 of the DSU, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS322/18 (Jan. 9, 2009).

158. Brazil Status Report, *supra* note 137, at 6.

159. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 25 September 2009*, WTO Doc. WT/DSB/M/274, 9-10 (Nov. 23, 2009); Email from MRE, *supra* note 146.

160. Email from MRE, *supra* note 146.

more aptly described as diplomatic or political—for example, the attempt to negotiate for a change in MERCOSUR’s tire trade regime, which would have altered Brazil’s obligations pursuant to the MERCOSUR tribunal’s award. Any attempt to negotiate compensation with Uruguay was also diplomatic or political. Whether and to what degree Brazil succeeded in its attempts is not an unimportant question, but it is a separate one. I submit that the process, the orientation, the attempt, and not just the result, are worth noting.¹⁶¹

The pressures that stem from the international legal system, fragmented though the system may be, worked to drive Brazil to create more international law, and more international law-compliant domestic law, and to find ways to mitigate its different and conflicting international legal obligations. Brazil did not buckle under the pressure, nor did it remain static. Instead, it took a proactive, determined stance and fought to protect its own agenda.

Note that the WTO Appellate Body did not instruct Brazil on how to implement its rulings. In accordance with its practice, the Appellate Body’s recommendations were limited to requesting Brazil to bring its law, “found . . . to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.”¹⁶² The various organs of the WTO involved in adjudicating and monitoring the case similarly deferred to Brazil to determine the appropriate measures that would make its law compatible with its WTO obligations, without taking a stand on how it should be done. As a result, Brazil’s reconstructed policy—banning the importation of all used and retreaded tires; negotiating a new tire regime for MERCOSUR; and possibly negotiating compensation vis-à-vis Uruguay—reflects a new balance that Brazil was testing out with the DSB and the EC, as well as with its MERCOSUR partners. As the EC made no further protest to this new state of affairs, as the DSB removed the case from its monitoring agenda, and as Uruguay did not challenge the reinstated import ban in MERCOSUR, Brazil’s efforts can be presumed to have succeeded, without Brazil paying the price of relinquishing its important policy goals.

D. Additional Examples

There is no reason to assume that Brazil is an outlier in its commitment to observe its various international legal obligations even when they are rendered inconsistent in certain contexts. The systemic incentives that exist in the international legal system and its subjects’ agential capacities analyzed in Part II suggest that the opposite is probably the case. In this Section, I briefly point to additional examples to show that Brazil’s case is not an exceptional occurrence.

Another example, played out again in the WTO context, can be found in the case of the so-called “Banana wars.”¹⁶³ With the establishment of the European Common Market, and pursuant to the Lomé Convention,¹⁶⁴ the EU

161. Robert Howse & Ruti Teitel, *Beyond Compliance*, 1 GLOBAL POL’Y 127 (2010).

162. Brazil Tyres Appellate Body Report, *supra* note 112, ¶ 259.

163. For a good overview, see Eckart Guth, *The End of the Bananas Saga*, 46 J. WORLD TRADE 1 (2012).

164. Fourth ACP-EEC Convention, Dec. 15, 1989, 1925 U.N.T.S. 1 (1996); Guth, *supra* note 163,

granted highly preferential terms to banana imports from former European colonies in Africa, the Caribbean, and the Pacific (ACP). Latin American banana-exporting countries protested and initiated two separate proceedings before GATT panels in 1992 and 1993. Both panels held that the preferential treatment afforded to ACP countries was a breach of the EU's obligations under the GATT to provide equal treatment to all its trading partners.¹⁶⁵ However, the EU was able to block the adoption of these rulings due to the pre-WTO GATT rules which required a consensus vote for the adoption of panel reports. These rules allowed any party, including the losing party, to block the adoption of panel reports.¹⁶⁶

Following the establishment of the WTO and its new dispute settlement system in 1995, a third complaint was filed, this time also joined by the United States (representing the interests of U.S.-based multinational corporation Chiquita, which operates in many Latin American countries), Mexico, Honduras, Guatemala, and Ecuador.¹⁶⁷ The panel and Appellate Body's findings of the EU's breach of WTO rules were adopted under the new system, which no longer required consensus.¹⁶⁸ The United States and Ecuador were subsequently authorized to retaliate against the EU up to the annual sum of approximately USD \$200 million,¹⁶⁹ although it seems that only the United States actually followed through.¹⁷⁰

In the years following the ruling, the EU engaged in prolonged and exacting efforts to bring its preferential trade agreements with ACP countries in line with its WTO commitments. Doing so was not an easy endeavor, as the EU's banana regime was itself the product of intense negotiations among EU countries whose interests were not aligned with each other. Furthermore, eliminating the preferential treatment posed the risk of effectively pushing small-scale ACP banana growers out of the EU market due to the fierce competition posed by the powerful Latin American banana industry.¹⁷¹ Following almost two decades of negotiation with ACP States on the one hand, and Latin American States and the United States on the other hand, such efforts finally culminated in the 2010 Geneva Convention on Trade in Bananas. After almost fifteen years of breaching

at 3-4.

165. See Report of the Panel, *EEC - Import Regime for Bananas*, GATT Doc. DS32/R (June 3, 1993); Report of the Panel, *EEC - Import Regime for Bananas*, GATT Doc. DS38/R (Feb. 11, 1994).

166. Mauricio Salas & John H. Jackson, *Procedural Overview of the WTO EC-Bananas Dispute*, 3 J. INT'L ECON. L. 145, 148 (2000).

167. Request for Consultations by Guatemala, Honduras, Mexico, and the United States, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS16/1 (Oct. 4, 1995).

168. See Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (Sept. 9, 1997).

169. Decision by the Arbitrators, *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration Under Article 22.6 of the DSU*, WTO Doc. WT/DS27/ARB/ECU ¶ 170 (Mar. 24, 2000); Decision by the Arbitrators, *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration Under Article 22.6 of the DSU*, WTO Doc. WT/DS27/ARB ¶ 8.1 (adopted Apr. 9, 1999).

170. See Sivan Shlomo Agon, *Non-Compliance, Renegotiation and Justice in International Adjudication: A WTO Perspective*, 5 GLOBAL CONSTITUTIONALISM 238, 246 (2016); see also Guth, *supra* note 163, at 6.

171. See Shlomo Agon, *supra* note 170, at 245.

trade tribunals' rulings on the matter,¹⁷² EU countries finally managed to bring their obligations under the EU single market agreements and the Lomé Convention in line with GATT/WTO law.

Such dynamics are by no means limited to the trade world. In a human rights context, one can point to the United Kingdom's use of diplomatic assurances to avoid breaching its international human rights obligations when extraditing individuals to other countries. A landmark case in this context is the European Court of Human Rights' (ECtHR) 1989 ruling in *Soering v. United Kingdom*.¹⁷³ Based on their bilateral extradition treaty, the United States requested that the United Kingdom extradite a German national convicted in absentia by a court in Virginia for capital murder. The United Kingdom is committed to an absolute ban on the death penalty and is obliged under international and European human rights law to refrain from sending individuals to a place where they face risk of torture (non-refoulement). In an attempt to fulfill its international obligations in the extradition treaty as well as under human rights law, the United Kingdom sought and received assurances from the United States that it would neither seek nor impose the death penalty on Mr. Soering. However, despite these assurances by the federal government, Virginia authorities declared that they would seek the death penalty. Mr. Soering consequently claimed that his right to not suffer torture or inhuman or degrading treatment or punishment under Article 3 of the European Convention on Human Rights would be violated if he were extradited. He relied on two bases for this claim: first, the insufficient assurances by the United States to not impose the death penalty and second, the harsh conditions on death row. The ECtHR upheld these claims and ruled that extradition to the United States would violate Mr. Soering's Article 3 rights.

The 2013 case of *Babar Ahmad v. United Kingdom*, provides another example. There, the United States sought extradition from the United Kingdom of several terrorism suspects, including the infamous Abu Hamza. The United States' practice of torture and its harsh criminal punishments—including the death penalty and life imprisonment without parole, with long periods spent in solitary detention—once again rendered such extradition difficult on account of the United Kingdom's human rights obligations. The United Kingdom therefore sought and received assurances from the United States that it would neither seek nor carry out the death penalty on the individuals in question. It further sought and received assurances that the persons extradited would not be designated enemy combatants, tried before military courts, or subjected to extraordinary rendition, which the United Kingdom viewed as posing a real risk of a violation of the individuals' human rights.¹⁷⁴ The United Kingdom further had to be satisfied that, if convicted, the punishment would not amount to torture or cruel, inhuman, or degrading treatment contrary to its international law obligations. Moreover, on application to the ECtHR by the persons requested to be extradited,

172. See Guth, *supra* note 163, at 27.

173. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), 11 E.H.R.R. 439 (1989).

174. *Babar Ahmad v. United Kingdom* (2010) 51 E.H.R.R. 9 (Admissibility), ¶¶ 21, 100.

the United Kingdom had to successfully convince the Court that the assurances it obtained from the United States and the punishments likely to be imposed on the applicants were indeed sufficiently respectful of their human rights.¹⁷⁵

In both of the extradition examples, the United Kingdom invested efforts to reconcile its obligations originating from the bilateral extradition treaty with the United States with its obligations under European and international human rights law.

CONCLUSION

Concerns over the fragmentation of international law have dominated international law discourse for over two decades. Yet this Article shows that the assumption that lies at the heart of the debate is flawed. Rather than endure conflicting legal rules, actors in the international arena strive to reconcile them, if only in order to push forward their own agendas.

As this Article demonstrates, the conflicting guidance Brazil received from MERCOSUR and the WTO has in fact launched efforts of harmonization. Brazil's response reinforces two important insights about the international legal system. First, the simultaneous demands that different legal regimes pose to their subjects can serve as a catalyst for cross-regime integration. Brazil's attempt to amend MERCOSUR law to better accord with the WTO's interpretation by way of negotiating a new trade regime on tires is a direct example of such effect. Second, subjects of international law should not be presumed to be passive, submissive, or paralyzed by the difficulties—genuine as they are—arising from inconsistent legal guidance. Brazil actively tested various courses of action in an attempt to appease all international legal demands while also maintaining its own program. It operated domestically, multilaterally, and possibly bilaterally, recalibrating its course as it progressed.

The assumption that persistently increasing fragmentation of international law is inevitable is, therefore, called into question. States do not off-handedly dismiss their international obligations. While they might eventually breach one conflicting norm or both, States often go to great lengths to avoid doing so.¹⁷⁶ Moreover, States' deliberations on how to avoid breaching their international obligations and their trials and errors are of central importance in evaluating the forces driving international legal fragmentation and its likelihood of dominating international law's future. I argue that States' efforts, at least to an extent, counterbalance fragmentation, and that such a struggle between international legal fragmentation and international legal integration is likely to continue. This is the case since both the structural incentives and the agential capacities that drive integration efforts at present are likely to continue to exist in the future.

Finally, the Article's process-minded, bottom-up approach is key in revealing that, contrary to the commonly-held view, Brazil did seek a solution to the conflict of international norms. It tried to find a common ground between

175. *Babar Ahmad v. United Kingdom* (2012) 56 E.H.R.R. 1 (Merits).

176. Howse & Teitel, *supra* note 161.

them. This perspective is therefore helpful in exposing additional circumstances, presently overlooked, in which international law influences domestic decision making—both before and after international judicial decisions are made. It further demonstrates the participation of a variety of non-State actors—government officials, NGO activists, industry actors—in domestic deliberations over whether and how international law is to be implemented domestically.