Reports of its Death have been Greatly Exaggerated:
On Fragmentation and International Law's Integrationist Forces

Tamar Megiddo

Research Proposal

Submitted in support of application for

GlobalTrust Post-Doctoral Fellowship, AY 2016-7

The project I propose to undertake as a GlobalTrust post-doctoral fellow offers a novel analysis of a phenomenon that has been vexing international law scholars for the past two decades: the fragmentation of international law. The project aims to argue as well as illustrate empirically that the scholarly concerns regarding international law's breakup into discreet legal regimes are overstated and that there exist in international law systemic forces that work to counter the forces of fragmentation. The argument offered relies on a structural feature of the international legal system: the fact that its supposedly fragmented different legal regimes actually operate in shared, overlapping communities. To paraphrase on Benvenisti's global high-rise metaphor,[1] my argument is that eventually, all international legal regimes apply to and speak to the same tenets: and further, not only to the states that are represented as the apartment owners, but also to their actual individual, human inhabitants.

My project shares the Sovereigns as Trustees framework's premise: the existence of a global, mutually-accountable community of people. Whereas Benvenisti's model's reliance on this premise is reflected in his argument that sovereigns are therefore also accountable (to an extent) to non-citizens, my proposed project builds on it when arguing that the joint membership in this community gives rise to integrationist forces in international law.

This proposed project contributes to the GlobalTrust Research Project by similarly arguing that individual states are connected and accountable to their co-members in the international legal community – other states as well as their inhabitants. Whereas Benvenisti's trusteeship model argues that states owe a duty of consideration to humanity, and not only to their own citizenry, this project argues that states conduct themselves in a manner that reflects a commitment to their community and co-members. The structural features of international law pressure states to remain committed to this global community and they view themselves as accountable to it, even though it encompasses broader circles than strictly their own citizenry.

***

Exacerbating international law's existing reputation of uncertainty, the past two decades have brought a surge in scholarly attention to international law's fragmentation. And yet, not only is the exact definition of fragmentation still debated, but also the correct identification of its sources, the correct evaluation of the phenomenon's harms or benefits and whether or not it is likely to continue to characterize international law's development.

Whereas some scholars define fragmentation as the gap created by the breakup of international law into discrete legal islands, others understand it to consist of an increasing overlap between different specialized international legal regimes,[2] each seeking to enhance its own influence at the expense of others.[3] Fragmentation is sometimes viewed as a product of intentional rigging of the international legal system by powerful states,[4] at other times it is suggested to in fact be indicative

[1] Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 295 (2007).

[2] See, respectively, *Id.* at 597.; Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903, 904 (2003).

[3] Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Int'l Law Comm'n, 15 (2006); 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, 997 (2003).

[4] Benvenisti and Downs, *supra* note 1 at 599, 609–15; Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 579 (2002).

of international law's increasing pluralism and enhanced democratic nature.[5] Finally, scholars express concerns over the increased opportunities afforded by fragmentation for manipulative forum shopping, primarily by powerful states,[6] and over the confusion and uncertainty arising from conflicting judicial interpretations, among others.[7] These concerns intensify even further if fragmentation is expected to increase over time.

The proposed project takes as a point of departure the claim that international law is today fragmented, setting aside the first three sets of issues and venturing directly into the final topic, that of the future trajectory of international law's development. The project's research question is whether international law is indeed likely to be increasingly fragmented. It thus challenges the prevalent assumption underlying the scholarship and questions the concerns that fragmentation seems to arouse. The project's hypothesis, in a nutshell, is that *there exists in international law an important structural feature that gives rise to significant integrationist forces that challenge, and may offset the forces driving its fragmentation*.

The argument offered is a structural argument. Its premise is that a legal system is identified and defined by the community in which it operates. Therefore, although they may appear to cater to different interests, issues, or publics, *international law's different legal regimes in fact operate in communities that are identical or that overlap greatly*. The World Trade Organization (WTO) and the World Health Organization, for instance, operate in practically the same communities, which they share to a greater or a lesser degree with other international legal regimes.

Building on previous work undertaken as part of my doctoral dissertation, I argue that these communities are not made up solely of states, but rather also of people, those whose action is sought by the legal system or who have the capacity to practice the law. These communities include, therefore, state officials as well as private individuals, such as social society activists but also such as factory owners and workers, consumers and academics and others. This structural feature of overlapping communities across legal regimes serves as glue holding together the different spheres of international law,[8] and giving rise to strong integrationist forces in it.

How is integration furthered as a result of the structural overlap in communities? The argument here builds on a second presumption: *each state can plausibly be assumed to generally wish to follow its international obligations, or at least not to be caught in breach of them*. A state's "wish" is here used as shorthand for saying that it is likely that certain actors within the state, often coupled with actors outside the state, advocate that state policies and actions should be rendered compatible with the state's obligations and that, across issue areas and time they can reasonably be expected to succeed more than actors promoting the opposite agenda. I view such processes as akin to public deliberations or negotiations between different actors who debate, within the state, about its

[5] Koskenniemi and Leino, *supra* note 4 at 553, 579.

[6] Benvenisti and Downs, *supra* note 1 at 599.

[7] See, 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'Y 791, 795–797 (1998) (discussing the pros and cons of fragmentation); As well as Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 856–60 (2003); Koskenniemi and Leino, *supra* note 4 at 554–55; and Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845 (2003); Also see the review of literature by Benvenisti and Downs, *supra* note 1 at 597.

[8] Cf. Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L POL'Y 1049 (2011).

appropriate policy and refer in deliberation, among others, to international legal obligations incumbent on the state.

Since different, fragmented bodies of international law apply to states, every so often their directives are expected to conflict. The argument is that in such cases, *a state is pressured to find ways to square international legal regimes' conflicting directives together so that it can satisfy all of them*. The solutions may vary, and may include hermeneutic solutions or political negotiations and compromises. The solution, like the problem, is not purely legal, but also political and social. States arrive at such solutions through processes of public deliberation as discussed above, with different individual actor advocating for their preferred outcome.

Finally, *for the state's solution to work it must "market" it to the applicable legal regimes and to its peers. If successful, the state has thus contributed to developing international law and to harmonizing its different legal regimes*.

In order to illustrate this mechanism and the integrative structural feature of international law, the project studies the WTO case of *Brazil Tyres*. At first blush, this case seems to be the perfect example for the fact of, and the dangers of fragmentation. As my study reveals, however, it in fact serves as an excellent example for the structural forces that drive systemic integration and offset international legal fragmentation.

The facts of the case are roughly as follows: Brazil promulgated a comprehensive plan to reduce the accumulation of waste tyres since these provide an ideal breeding site for disease-carrying mosquitoes, especially in tropic climate areas such as its own.[9] Tyres can be retreaded (recycled) only once. Their life cycle is therefore commonly divided into four stages: new – used – retreaded – waste. Used tyres were imported into Brazil for the purpose of their retreading and reuse. Retreaded tyres were also imported. However, retreaded tyres have much shorter lifespans than new tyres and therefore, many more used and retreaded tyres must be imported in order to satisfy local demand when compared with new tyres (since they cannot be retreaded again), and they produce twice as much the amount of waste tyres.[10]

One of the central pillars of Brazil's plan was a ban on the importation of used and retreaded tyres.[11] The purpose of the ban was to reduce the amount of waste tyres produced and so to decrease the health risk that they produce. The ban was considered crucial for the overall reduction of the number of tyres entering Brazil, and was also intended to encourage local retreading of new tyres once their first lifespan has run out, which would lead to their optimal use (the importation of new tyres was not banned). In addition to the ban, Brazil adopted various measures aimed at encouraging domestic retreading of tyres and managing tyre waste effectively.

However, Brazil found itself in conflict. A tribunal of MERCOSUR, the Southern Common Market in which Latin American countries are members, instructed it to allow the importation of retreaded tyres from MERCOSUR countries. When Brazil followed MERCOSUR's directive and introduced a MERCOSUR exemption to the ban, the WTO Dispute Settlement Body found this exemption to be a

[9] Panel Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WTO Doc. WT/DS332/R (June 12, 2007), at recitals 7.53–7.93.

[10] *Id.* at 7.115–7.148.

[11] The chief concern in this regard was Brazil's already endemic prevalence of dengue, yellow fever and malaria. Additional concerns had to do with toxic and mutagenic emissions resulting from tyre fires and the release ("leaching") of toxic materials from stockpiled tyres into the environment.

violation of Brazil's treaty obligations, in a case brought by the European Communities[12], a big importer of tyres into Brazil.

One could view this state of affairs as the ultimate illustration of the dangers of international law's fragmentation. Brazil is told that it cannot implement a plan aimed at removing some very serious health risks. It is stuck between a rock and a hard place, having to choose between violating one international legal regime or the other – MERCOSUR or WTO – or forsaking its own health initiative. And yet, it is exactly the bind in which Brazil finds itself that demonstrates the structural pressure on states to find ways to mediate between their different obligations while maintaining their own agenda, and to successfully market their solutions to the international legal system and to their peers. This pressure, I argue, is a significant force pushing towards the integration of the international legal system.

Note that balancing and mitigating between the conflicting directives of jointly applicable legal regimes can be achieved in various ways. We are not talking only about hermeneutic solutions or norm conflict rules, although these are clearly part of the picture.[13] Instead, political negotiations and compromises, such as those obtained by securing linkage to the relevant parties' relations in the context of other legal regimes, and including negotiations occurring even after the rendering of judicial decisions are probably also prevalent. Another route can be through generating public pressure on an adversary state by creating reputational concerns for it, or cooperating with civil society organizations operating within the other state to generate domestic political pressure. One can think of other alternatives.

Brazil clearly did not want to disregard the directive of either regime, nor did it want to forsake its health plan. It therefore had to find a way to square together its obligations under WTO and MERCOSUR, while also holding on to its health policy. How is such a solution formulated? Presumably, domestic deliberations were held on how to formulate Brazil's policy in the shadow of its various international obligations and in light of its health objectives. We can plausibly assume that individuals at Brazil's government ministries responsible for health or the environment, justice and foreign affairs, as well as domestic and transnational civil society organizations and business people who have a stake in the importation of tyres into Brazil, indigenous groups and others have engaged in some form of negotiation, each attempting to pull the balance of the final policy in the direction they favor.

The WTO – and this is its practice – did not instruct Brazil how it should implement the decision. The recommendation was limited to requesting Brazil to "bring its measure, found […] to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement."[14] The WTO thus deferred to Brazil to formulate the appropriate measures which will bring its law into compliance with its WTO obligations, without taking a stand on how this should be done.

In response to the pickle in which it found itself, Brazil came up with a creative solution that perhaps does push a little against the limits of the WTO decision, but not enough to arouse

[12] The European Union's legal name at the WTO at the relevant time.

[13] KOSKENNIEMI, *supra* note 3 at 247; Hafner, *supra* note 7 at 861 (arguing that the Vienna Convention on the Law of Treaties provides some guidance on norm conflict resolution, but that it is insufficient, although he seems to think the solution must be interpretive); Dupuy, *supra* note 7 at 801–02 (arguing that resolution is best achieved by the ICJ and jurisprudence).

[14] Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WTO Doc. WT/DS332/AB/R (Dec. 3, 2007), at recital 259.

confrontation, and it was apparently successful in "marketing" this solution to both the WTO and the EC. Brazil banned the importation of all used and retreaded tyres[15], significantly limited its MERCOSUR exemption and negotiated a new tyre regime for MERCOSUR. It then tested out this new package with the WTO and the EC. As the EC made no further protestation with respect to this new state of affairs, and as the WTO Dispute Settlement Body removed the case from its monitoring agenda, Brazil's attempt can be presumed to have succeeded, and it did not pay the price of relinquishing its important policy goal.[16]

The case study will be conducted through close textual reading of the WTO proceedings' documents, including the parties' communications from the earliest phase of consultation and until the final winding-down of the Dispute Settlement Body's monitoring of Brazil compliance; possibly also scrutinizing Brazil's written communications with MERCOSUR, and analyzing the compatibility of Brazil's various versions of its program to assess their responsiveness to the applicable legal regimes against their fidelity to Brazil's health objectives. It aspires to show Brazil's repeat attempts to square together its various obligations in a manner that will allow it to maintain its health program and to convince its interlocutors of the legitimacy and compatibility of the solutions it offers with its international obligations.

International law has always been fragmented.[17] It is likely to continue to be so. There are certainly forces pulling in the direction of increased fragmentation, and there are also, surely, those actors who do so because it serves them, and because they are proficient in finding ways to manipulate the system and rip the rewards of arbitrage between its different fora. We should not close our eyes to these sobering facts. But as this project aims to demonstrate, at least on some core issues such as health states will just keep on looking for ways to mediate appropriately between their policy objectives and their various international obligations. The international legal system's structure of multiple, overlapping communities injects a strong integrationist force into what otherwise may appear to be a balkanized system. This force challenges the system's fragmentationist tendencies and renders radical fragmentation unlikely. Rather, fragmentation is likely to continue to be challenged, and often offset, by those actors who have no choice but to find a way to integrate their state's various obligations under international law.

The project's contribution is twofold: first, in offering a novel approach and analysis to a problem that has preoccupied scholars of international law for the past 20 years. A second contribution of the project is in demonstrating the scholarly utility of analyzing international law in its human context and its operation within states and not only among states. As the project indicates, new and illuminating insights can be gained by widening the scope of scholarly research into international law's everyday life within states.

---

[15] Including under particular court injunctions, which posed as a standalone problem also cited by the EC in its claim (*Id.* at 7.290–7.349.).

[16] I want to qualify my reliance here on the EC's avoiding further litigation as indicative of its normative approval of Brazil's new policy and say that I would be hesitant to read this from inaction by many other states. The EC, however, is a wealthy and powerful member who does not hesitate to litigate before the WTO. I am thus more inclined to read its silence as acquiescence (although of course there may be behind-the-scenes dealings between the parties of which I am not aware). The EC had, it should be noted, never disputed the legitimacy of Brazil's objective to eliminate risks to health and to the environment, but rather criticized Brazil's choice of means and disputed that it was conducive to the goal.

[17] KOSKENNIEMI, *supra* note 3 at 15.