



**BEYOND FRAGMENTATION: ON INTERNATIONAL LAW'S  
INTEGRATIONIST FORCES**

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# Beyond Fragmentation: On International Law's Integrationist Forces

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*This article challenges the widespread scholarly assumption that international law is inevitably headed towards increasing fragmentation, resulting from the proliferation of international legal regimes, and particularly international tribunals. Addressing the concerns arising from states' receiving inconsistent guidance from different international legal regimes, I argue that such situations may in fact serve as catalysts for integration efforts on the part of states. Rather than remaining paralyzed in the face of normative conflict, states take a proactive, creative approach and try to reconcile their various international legal obligations, without forsaking their domestic agendas. Furthermore, states then strive to convince their peers as well as international monitoring bodies of their proposed solution. In doing so, they promote harmonization of international legal norms and integration among international law's different legal regimes. They thereby mitigate international law's fragmentation and its adverse effects.*

*Adopting a comprehensive plan to fight tropical diseases, Brazil came across an unexpected hurdle: its international trade obligations. Its ban on the importation of used and recycled tires, which serve as mosquito breeding sites, was challenged by its trading partners in both the Southern Common Market and the World Trade Organization. Unfortunately for Brazil, the two international tribunals rendered conflicting rulings and Brazil was thus forced to choose between disregarding one of the rulings, or abandoning its plan in order to comply with both. Brazil's story has been viewed as the epitome of the dangers of international law's fragmentation. Challenging this accepted narrative, this article uses Brazil's difficult situation to illustrate that its circumstances served in fact as a catalyst of efforts of international legal integration. Rather than becoming paralyzed or turning its back on international law, Brazil remained committed to its international legal obligations and proactively and creatively worked to reconcile them without giving up its domestic agenda.*

## I. 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 particularly international tribunals since the 1990s. Conceptualized as "fragmentation" of international law, this multiplicity of legal regimes and institutions has been seen as one of the

most vexing problems of international law.<sup>1</sup> One main concern has been that different regimes will issue inconsistent legal guidance, thereby jeopardizing international law's coherence and authority and 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 metaphors. While some scholars have viewed fragmentation as indicating the breakup of international law into a multitude of unconnected legal islands, others have suggested, confusingly, that it in fact refers to the increasing overlap between different international legal regimes which leads to unhealthy competition between them.

This article addresses a particular concern raised in fragmentation scholarship, according to which inconsistent guidance received from different international legal regimes places states in an impossible conflict, having to breach the binding norms of one regime or another. I argue, however, that such 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 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, states build bridges between international law's various legal regimes, to borrow the legal islands metaphor, and promote integration between international law's different regimes. They thereby mitigate international law's fragmentation and its adverse effects. Such efforts by states may sometimes also render the domestic law on the particular issue area normatively more in line with the governing norms of international law. This, however, is not the aspect of such efforts on which this article is focused.

The article thus calls into question a theoretical assumption that has fueled the fragmentation literature: that international law is likely to continue down a path of increasing fragmentation. While fragmentation is not likely 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.

The issuance of diametrically opposed rulings by the Southern Common Market (Mercosur) and the World Trade Organization (WTO) in the case of Brazil's regulation of tire imports has been suggested to be the epitome of the concerns arising from fragmentation.<sup>2</sup> Challenging the

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<sup>1</sup> See, particularly, the two symposia on the subject: one convened in 1998 at New York University Law School on the implications of the proliferation of international courts and tribunals and published as a special issue of the *Journal of International Law and Politics* in 1999, with a forward 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); and the other by Michigan Journal of International Law in 2004, under the title "Diversity or Cacophony? New Sources of Norms in International Law?", also published as a special issue with a forward by Bruno Simma, Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845 (2003).

<sup>2</sup> Julia Ya Qin, for instance, has described Brazil's situation as the "worst type of conflicts" arising from

common understanding of this case, this article shows that Brazil persistently strove to find a common ground between its different international obligations, one still compatible with its own domestic agenda. By ‘domestic agenda’ I refer to those policy goals that the state is committed to achieve, 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 of efforts of integration of international law; mitigating 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 paper’s contribution is thus threefold. First, the article’s novel claim about states’ response to fragmentation calls into question a widely held assessment that 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 case of Brazil 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 of working hard to uphold its international legal obligations and remaining 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 action as compliant or non-compliant with them, the article demonstrates how the rulings reverberate into domestic decision-making processes which strive to reconcile them. Such 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. It is, furthermore, necessary for appreciating the dynamics within international law which counterbalance international legal fragmentation.

The article proceeds as follows: Part II reviews the literature on fragmentation. The scholarship is abundant, and while it may facially appear to be centered on one central question, it deals, in fact, with several distinct issues.<sup>3</sup> These include the questions of fragmentation’s definition and its sources; its effects; the assessment of its harms or benefits; possible responses to it and its future trajectory. The article introduces each of these debates before centering on the last issue, to which it contributes: whether the future of international law is likely to be dominated by fragmentation.

Part III then proposes the argument that states in fact take a proactive, creative approach to conflicting international legal guidance and respond by attempting to identify a common ground

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fragmentation, 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 F.H. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010); *see also* Nikolaos Lavranos, *The Brazilian Tyres Case: Trade Supersedes Health*, 1 TRADE L. & DEV. 231 (2009), referring to “the tragic consequences” of the ruling by the WTO in the case of Brazil; Robert Howse posits 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”, Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L L. 9, 74 (2016).

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

which will also accommodate their own agendas. This is explained to arise from the structural overlap in the communities of different international legal regimes, as well as from states' reasonably anticipated activism in trying to comply with their various legal obligations. States' efforts consequently produce harmonization of rules across regimes and thus promote systemic integration and mitigate the fragmentation that prompted their action in the first place.

Part IV examines the case of Brazil's response to conflicting legal guidance. Brazil's plan to fight tropical diseases through, among others, a reduction in the imports of tires was scrutinized by tribunals of both Mercosur and the WTO, who came out with conflicting directives. Brazil was therefore apparently stuck between a rock and a hard place, having to choose between violating one international legal regime or the other – Mercosur or WTO – or otherwise forsaking its own health initiative. As I show, Brazil persistently sought ways to reconcile its different 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. Part V concludes.

## II. 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 in the past two decades, scholars have struggled to agree on how to define the phenomenon in a way that will accurately capture their resultant 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.<sup>4</sup>

Rather than defining fragmentation, scholars have often turned to two, somewhat opposed metaphors. According to the first metaphor with which scholars engaged, international law is breaking up into discrete legal islands with no bridge to connect them.<sup>5</sup> According to the second,

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<sup>4</sup> 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). As Peters recaps: “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”; William Burke-White, however, challenges both the characterization of current developments as fragmentation and its assessment as a negative phenomenon, a threat to the legal system. He argues that international law is in fact being transformed into a pluralist system, which, rather than undermining it, may in fact strengthen it, William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 963 (2003).

<sup>5</sup> Possibly, this metaphor served more as a strawman than a genuine argument seriously put forward. See Joost Pauwelyn's plea to refrain from allowing fragmentation to lead “to self-contained islands of international law, de-linked from other branches of international law”, Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903, 904 (2003); See, similarly, J. Greenwood's words: “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 (Republic of Guinea v. Democratic Republic of the Congo) (Declaration of J. Greenwood), 2012 ICJ Rep. 324 (June 19); Arguments have been made, however, that international law cannot be viewed as a unitary system. Andreas Fishcher-Lescano & Gunther Teubner, for instance,

international law is suffering from excessive overlap between the jurisdictions of an ever-increasing number of international organizations and legal regimes.<sup>6</sup> 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 its own systemic interests into it.<sup>7</sup> But scholars' disagreement does not end with choice of metaphor. Further debates have ensued around additional questions regarding fragmentation, including its 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 put forward varied suggestions as to the sources from which international legal fragmentation ensues. In this discussion, the line between the definition of 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.<sup>8</sup> 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.

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have claimed 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”, 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).

<sup>6</sup> As Benvenisti & Downs suggest, fragmentation is the “increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries”, Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596 (2007); *But see* their discussion of 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”, EYAL BENVENISTI & GEORGE W. DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY: THE ROLE OF NATIONAL AND INTERNATIONAL COURTS 9 (2017); *Also see* YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 73–74 (2003); Pauwelyn argues that fragmentation is not new. What is new is “the realization that the different fields or branches of international law necessarily overlap”, Pauwelyn, *supra* note 5, at 904; Trachtman argues that fragmentation arises when there are overlaps “between policy measures in the international legal setting”, Joel P. Trachtman, *Fragmentation, Synergy, Coherence, and Institutional Choice*, in THE FUTURE OF INTERNATIONAL LAW 217, 217 (2014); His favorite metaphor is “congestion”, *id.* at 226.

<sup>7</sup> Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 562–63 (2002); Koskeniemi & Leino describe fragmentation as a “kaleidoscopic reality in which competing actors struggled to create competing normative systems”, *id.* at 560.; *Also see* 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”); *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).

<sup>8</sup> Peters, *supra* note 4, at 1013–14.

Another suggestion points to the specialization of international legal regimes and the emancipation of individuals from states, both giving rise to political pluralism in the international system.<sup>9</sup> Some stress that fragmentation is not strictly a legal phenomenon but rather reflects the political and social fragmentation of the global society.<sup>10</sup>

A central argument made, however, is that fragmentation is state-driven. It is thus explained to be either a result of the fact that different groups of states establish different international regimes;<sup>11</sup> a representation of states' response to globalization,<sup>12</sup> 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."<sup>13</sup> Thus, according to Eyal Benvenisti and George Downs, powerful states employ various strategies that have the effect of promoting fragmentation.<sup>14</sup>

A somewhat different account is offered by Anne Peters and by Andrew Lang: here, fragmentation is generated not by states per se, but as a result of states' domestic struggles. According to Peters, fragmentation is a result of the fact that different issue areas are handled by different (uncoordinated) domestic authorities.<sup>15</sup> According to Lang, fragmentation is at least also due to domestic political struggles over regulatory measures which are projected internationally and, in the process, take on a different character and an even greater sensitivity.<sup>16</sup>

### C. Effects of Fragmentation

The literature lists various effects of international legal fragmentation, both positive and negative. As to the risks that it harbors, first and foremost is the refusal of 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

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

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

<sup>11</sup> Trachtman, *supra* note 6, at 224.

<sup>12</sup> Peters, *supra* note 4, at 1013–14.

<sup>13</sup> Benvenisti & Downs, *supra* note 6, at 625.

<sup>14</sup> 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, 609–15.

<sup>15</sup> Peters, *supra* note 4, at 1013–14.

<sup>16</sup> Andrew Lang, *Twenty Years of the WTO Appellate Body's 'Fragmentation Jurisprudence'*, 14 J. INT'L TRADE L. & POL'Y 116, 122 (2015) ("Crucially, in this process of projection, such disputes take on a different character. 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 to further their argument, 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 becomes even more difficult and sensitive, as its resolution now seems to implicate a broader hierarchy of values and objectives of the international community - or perhaps even the incremental constitutionalisation of international law").

international legal system.<sup>17</sup> A second, connected concern is that the lack of hierarchical relationship between institutions leads to conflict of legal rules, lack of clarity and loss of predictability.<sup>18</sup> These in turn jeopardize the authority of international law.<sup>19</sup> Contrary to these concerns, the International Law Commission's (ILC) report on fragmentation concludes 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."<sup>20</sup>

Gerhard Hafner explains that the concerns regard, among others, situations in which questions arise as to which substantive rule to apply, which may result in a conflict of obligations incumbent on a state. Further, he notes that conflict of secondary norms might lead to forum shopping (made possible by the prevalence of fora); that solutions reached in the context of one regime are not necessarily applicable to others or to the universal system and thus may even undermine further the homogeneous development of international law and engender legal uncertainty; and finally, that they undermine the authority and reliability of international institutions and international law.<sup>21</sup>

Benvenisti and Downs argue, moreover, that fragmentation "sabotages the evolution of a democratic and egalitarian international regulatory system and [undermines] the normative integrity of international law"<sup>22</sup> by: (1) restricting cross-issue coalitions, making it harder for weaker states to join forces; (2) enabling powerful states' abandoning or threatening to abandon fora that are not sympathetic to their interests or positions, as made possible by institutional competition; and finally, (3) obscuring fragmentation's own origin as a calculated strategy by the powerful.<sup>23</sup>

Fragmentation is also claimed to give rise to favorable results. Among others, it has been suggested that regime specialization and flexibility reflect the needs of the international community today; that more compliance with international law is to be expected as a result; that fragmentation accommodates the plurality of the positions of states, and that it could develop international law by arriving at a common denominator.<sup>24</sup> The phenomenon, generally, has been framed by some scholars – opting to reject the pejorative term<sup>25</sup> "fragmentation" – as reflecting, rather, "pluralism."<sup>26</sup> It has even been suggested that "fragmentation may be a necessary and important growing pain that attends the international legal system's maturation."<sup>27</sup>

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<sup>17</sup> 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 & POL. 791, 796–97 (1998); Pauwelyn, *supra* note 5, at 904.

<sup>18</sup> Dupuy, *supra* note 17, at 796–97.

<sup>19</sup> Hafner, *supra* note 9, at 856–58.

<sup>20</sup> Rep. of the Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, 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]; *Also see* Simma's observation that, so far, the various courts and tribunals have shown great caution not to contradict each other Simma, *supra* note 1, at 846; Anne Peters, *The Refinement of International Law*, 15 INT'L J. CONST. L. 671 (2017).

<sup>21</sup> Hafner, *supra* note 9, at 856–58.

<sup>22</sup> Benvenisti & Downs, *supra* note 6, at 596–98.

<sup>23</sup> *Id.* at 596–98.; BENVENISTI & DOWNS, *supra* note 6, at 7.

<sup>24</sup> Hafner, *supra* note 9, at 859–60; Trachtman, *supra* note 6, at 230.

<sup>25</sup> Peters, *supra* note 4, at 1011.

<sup>26</sup> Burke-White, *supra* note 4, at 963.

<sup>27</sup> Anthony J. Colangelo, *A Systems Theory of Fragmentation and Harmonization*, 49 N.Y.U. J. INT'L L. & POL. 1, 7 (2016); *See similarly, generally*, Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A*

## D. Possible Responses to Fragmentation

Two primary approaches have been suggested with which 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.<sup>28</sup>

Another popular suggestion regards an interpretive principle of coherence or harmonization which assumes the unity of the international legal system and determines that proper interpretation requires striving to understand its various legal texts as compatible with each other.<sup>29</sup> 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*.<sup>30</sup> Anthony Colangelo suggests, in addition, a “presumption of catholicity,” according to which decision makers are urged “to use all international legal sources available to resolve disputes and [which] acts as a bulwark against parochial or idiosyncratic interpretations unmoored from, and unguided by, the full spectrum of international legal materials.”<sup>31</sup> A second set of suggested responses is political. These include promoting structural hierarchy<sup>32</sup> or establishing sufficiently powerful institutions that will impose such hierarchy.<sup>33</sup> One suggestion is to establish 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.<sup>34</sup> Justices of the International Court of Justice, among others, have suggested that this role should be fulfilled by the International Court of Justice.<sup>35</sup> This proposal, however, has not been broadly endorsed, and neither such body nor such pyramid of hierarchy of international tribunals presently exists.

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*Reflection of the Growing Strength of International Law or Its Fragmentation*, 25 MICH. J. INT'L L. 929 (2004).

<sup>28</sup> Koskenniemi, *supra* note 20, at 248–49.

<sup>29</sup> Koskenniemi and Leino, *supra* note 7, at 574; Hafner, *supra* note 9, at 861.

<sup>30</sup> 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; *Also see* 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).

<sup>31</sup> Colangelo, *supra* note 27, 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.

<sup>32</sup> Trachtman, *supra* note 6, at 231–44.

<sup>33</sup> Koskenniemi & Leino, *supra* note 7, at 575.

<sup>34</sup> *See* Kingsbury, *supra* note 1, at 693.

<sup>35</sup> Dupuy, *supra* note 17, at 801.; *Also see* comments by J. Greenwood & J. Cançado Trindade quoted in *supra* note 5 & *infra* note 43.

Another suggestion made is to recognize and embrace the dominant status occupied by the World Trade Organization's dispute settlement system.<sup>36</sup> Another yet it to seek defragmentation through linkages struck via political negotiation and bargaining.<sup>37</sup>

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.”<sup>38</sup>

### E. The Future Trajectory of International Legal Development

Many scholars agree that international law has always been fragmented,<sup>39</sup> even if its fragments were broken along different lines.<sup>40</sup> At the same time, many agree that in order to diagnose fragmentation, one must assume that the international legal system is, in fact, a single system.<sup>41</sup> Martti 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.”<sup>42</sup> Judges at the International Court of Justice have suggested that the international legal system is not only a single system, but in fact a unified one.<sup>43</sup>

This rosy picture of the international legal system's present 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.<sup>44</sup> 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.”<sup>45</sup> Joel Trachtman concurs.<sup>46</sup> Lang, too, struggles to imagine how the current dynamic of fragmentation might change in the

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<sup>36</sup> Trachtman, *supra* note 6, at 237.

<sup>37</sup> *Id.* at 244–50.

<sup>38</sup> BENVENISTI & DOWNS, *supra* note 6, at 6.

<sup>39</sup> Pauwelyn, *supra* note 5, at 904.

<sup>40</sup> Koskenniemi, *supra* note 20, at 15; Dupuy, *supra* note 17, at 792.

<sup>41</sup> Simma, *supra* note 1, at 847; ILC Fragmentation Report, *supra* note 20, at 23; Rep. of the Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Conclusions)*, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, 407–423, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (July 18, 2006); *But see* Hafner, who claims that international law is not presently a homogenous system, Hafner, *supra* note 9, at 850.

<sup>42</sup> Koskenniemi & Leino, *supra* note 7, at 560.

<sup>43</sup> ICJ J. Antônio Augusto Cançado Trindade has opined that a systemic outlook has been flourishing in recent years, Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) (Separate Opinion of J. Cançado Trindade), 2014 ICJ Rep. 226, ¶¶ 25–26 (Mar. 31); J. Greenwood has, moreover, stated that “[i]nternational 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.

<sup>44</sup> Fischer-Lescano & Teubner, *supra* note 5, at 1004.

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

<sup>46</sup> Trachtman, *supra* note 6, at 227–28.

short or even medium term.<sup>47</sup> Benvenisti and Downs estimate that the likelihood that the trend towards fragmentation will be reversed is “relatively poor.”<sup>48</sup> And, although she is generally skeptical about the fragmentationist scare,<sup>49</sup> Peters recognizes that fragmentation bears some risks and opines that unless it is channeled by constitutional principles and procedures,<sup>50</sup> international law’s “unity, harmony, cohesion, order, and – concomitantly – the quality of international law as law” are in peril.<sup>51</sup>

In contrast, Yuval Shany points out, compellingly in my view, that “[w]ith the benefit of some 20 years of hindsight, it appears that some of the rumors about the death of legal coherence and jurisdictional order as a result of the proliferation of international judicial bodies might have been premature.”<sup>52</sup> Peters, too, eventually bids “farewell to fragmentation” and declares that it is time to “bury the f-word.”<sup>53</sup> Tomer Broude asserts that fragmentation has been “normalized”, its grand questions dissipated, “as if they were never asked.”<sup>54</sup>

Taking these observations as its point of departure, the following part III asks what accounts for the failure to materialize of the grave forecasts attributed to fragmentation, and what the implications are, if any, for our assessment of the future trajectory of international law. As I argue, concerns arising from fragmentation, while not unjustified, ought to be somewhat alleviated due to the moderating influence of the system’s parallel integrationist dynamics which I now describe. Such dynamics might also support careful skepticism regarding fragmentation’s likelihood of gaining the upper hand in the struggle between the two competing trends.

### III. International Law’s Integrationist Forces

It is a widely-held assessment that international legal fragmentation is inevitably destined to increase. I submit, however, that when faced with conflicting guidance from international legal regimes, states adopt a proactive, creative approach and try to reconcile their various obligations. To be recognized as indeed compliant with all their obligations, states further have to 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 are important drivers of harmonization of rules across regimes and consequently of systemic integration. They therefore have a moderating effect on international legal fragmentation and its adverse effects. While such efforts are also likely to render domestic law more in line with governing international law, this is not the focus of my argument. Rather, my focus is on the consequent strengthening of normative coherence between international law’s different legal regimes.

Such practice by states has both structural and agential aspects worth highlighting. As I elaborate further below, the structure of the international legal system is such that the communities of

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<sup>47</sup> Lang, *supra* note 16, at 123.

<sup>48</sup> Benvenisti & Downs, *supra* note 6, at 628.

<sup>49</sup> Peters, *supra* note 20.

<sup>50</sup> Peters, *supra* note 4, at 1014.

<sup>51</sup> *Id.* at 1015.

<sup>52</sup> Yuval Shany, *International Human Rights Bodies and the Little-Realized Threat of Fragmentation*, HEB. UNI. JERUSALEM LEG. RES. PAP. NO. 16-06, 2 (2016), <https://papers.ssrn.com/abstract=2722663> (last visited Dec 22, 2016).

<sup>53</sup> Peters, *supra* note 20, at 2.

<sup>54</sup> 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).

subjects of its various legal regimes overlap considerably and particular subjects are therefore under systemic pressure to conform to more than one set of norms and guidelines. By “subjects” I refer to those actors whose actions the particular international regime’s norms aim to guide. Subjects could therefore be said to be incentivized systemically to find a common ground between their different commitments so as to be able to plan and execute actions and policies that are compatible with all.

In addition, international law’s subjects, states as well as people, are not submissive, passive actors who freeze at any appearance of conflicting guidance from different international legal regimes. Rather, these are more often proactive, determined agents, who operate in multiple ways, whether legal, political-diplomatic, economic and others, to reach equilibrium so that they are able to navigate between 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.”<sup>55</sup> His conclusion is that the emerging system is likely to be “neither fully fragmented, nor completely unitary”, but rather a pluralist system.<sup>56</sup>

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.<sup>57</sup> I submit that such counterforces ought to generate some skepticism regarding forecasts of increasingly dominant fragmentation of international law. As opposed to Burke-White, however, my suggestion is that it is a struggle between the system’s fragmentationist and integrationist forces that is likely to characterize the system in the future, rather than its culmination, as he suggests, in peaceful pluralism.

As 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 looking 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.<sup>58</sup> This method of analysis is not invaluable: it serves as

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<sup>55</sup> 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”).

<sup>56</sup> *Id.* at 977.

<sup>57</sup> Note that even Benvenisti & Downs acknowledge such counterforces, including efforts by weaker states, Benvenisti & Downs, *supra* note 6, at 620–23; and 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).

<sup>58</sup> SHANY, *supra* note 6, at 29–74.

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.<sup>59</sup>

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 to take 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 are members in 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 – and is – driven from below: by international law’s subjects.

Note that “communities of subjects” or “subject communities” as used here are not synonymous with “those actors falling under a particular court’s *ratione personae* jurisdiction.” First, because not all international legal regimes have courts, and addressing only courts limits the discussion considerably. Second, because 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.<sup>60</sup> I would capture in such communities and define as a legal subject any actor whose actions certain international legal norms seek to guide.<sup>61</sup> Right of standing before international tribunals aside, I submit that such actors could be important in generating responses to international legal norms and furthermore in finding ways to bridge between different international legal regimes.

## **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 change (PA). 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 much more striking when one recognizes the degree to which their subject communities overlap.

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<sup>59</sup> Such as questions of attribution, countermeasures, customary rules relating to treaty interpretation, customary evidentiary rules and burden of proof, Lang, *supra* note 16, at 118.

<sup>60</sup> Tamar Megiddo, *The Everyday Life of International Law: How International Law is Practiced within States* (unpublished JSD Dissertation, New York University School of Law, 2016).

<sup>61</sup> *Cf.* Jeremy Waldron, *Self Application*, Working Paper No. N.Y.U. SCH. OF L. PUB. L. RES. PAP. SER. NO. 16-46, 16–17 (2016), [http://www.biu.ac.il/law/cjdl/master\\_class/Waldron%20II%20-%20SelfApplication.pdf](http://www.biu.ac.il/law/cjdl/master_class/Waldron%20II%20-%20SelfApplication.pdf).

The WHO has 194 members; the PA has 173 members and the WTO 164 members. The WHO and PA share 169 members, which comprise 97.7% of the PA's membership and 84.4% of the WHO's membership. The overlap between the WTO's membership with that of the WHO (158 members) comprises 96.3% of the WTO's membership and its overlap with that of the PA (146 members) comprises 89% of its membership. 143 members are common to all three regimes.<sup>62</sup> Imagine a Venn diagram in which both the PA's subject community and the WTO's subject community, represented as circles, overlap almost entirely with the slightly larger circle of the WHO's subject community. The core of common members, represented as 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 which would, on the one hand, allow them to conduct their own affairs in exercise of their sovereign discretion, and on the other hand, not conflict with those binding (or exhortative, as I discuss below) guidelines issued by the two organizations.

They would likely wish, further, 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 the said regimes. If successful in such efforts, the state engaging in them has promoted not only the recognition of the legitimacy of its own agenda, but also harmonization between the guidelines of the different legal regimes and thus has furthered international legal integration.

Reconciling the regimes is not limited to hermeneutic solutions. A state could strike a political bargain that amends one or both regimes, or successfully spread its particular manner of applying the regimes' norms so that such widespread practice by additional states will inform the future interpretation of the norms, among others.<sup>63</sup>

Further, this dynamic is not necessarily limited to binding guidelines of the various international legal regimes. Soft law norms sometimes succeed in attracting significant state following,<sup>64</sup> despite not being legally binding. States might choose to follow exhortative statements as well, likewise striving to find the balance between these and other, binding or non-binding norms of international law and again sharing these with their community of peers. States may thus similarly contribute to integrating hard law 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 of states' handling international 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

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<sup>62</sup> Note that "members" as used here follows the organization/convention's definition, and thus include non-state actors and non-UN members including Cook Islands, the European Union, Hong Kong, Niue, Macau, Palestine and Taiwan. All data is derived from the following organizations' websites and is updated to January 2018. [http://www.who.int/choice/demography/by\\_country/en/](http://www.who.int/choice/demography/by_country/en/); [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php); [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>63</sup> Vienna Convention on the Law of Treaties, art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331.

<sup>64</sup> JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 257–68 (2005).

argue, they often do consider how to find a common ground between them and how to reconcile the domestic policy being pursued with these obligations. Furthermore, such consideration is not reserved for catastrophic clashes between norms and might at times occur over mere misalignment of states' policies and their international legal obligations.

### C. Non-State Actors as Agents of Integration

I argue, moreover, that the discussion becomes infinitely more interesting when the level of abstraction does not pause at state borders, but rather includes the working 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.<sup>65</sup> Considered thus, one could see that the real work of squaring together international legal regimes' different 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 working to find ways to square together its different obligations, it should be obvious that it is people – politicians, civil servants, 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. Possibly, in the process, they also engage people outside the bureaucracy and receive their input: businesspeople, civil society activists, media people, academics, constituents etc.

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, to the engagement with international law by individual people who are not state officials.<sup>66</sup>

As Waldron explains, most implementation of any law results from self-application of norms by people:

[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.<sup>67</sup>

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<sup>65</sup> For a more detailed discussion, see Tamar Megiddo, *Methodological Individualism* (work in progress).

<sup>66</sup> *Id.*

<sup>67</sup> 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

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 international legal norms' application, weigh various ways of implementation and apply the norms to the best of their ability. As I argue elsewhere,<sup>68</sup> 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, individual actions take the form of demanding certain actions from the state. The April 2017 March for Science<sup>69</sup> on Washington D.C. is one example of non-officials' involvement in demanding, among others, that their state meets 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 United States (U.S.) Paris Accord coalition. Following President Donald Trump's decision to withdraw from the Paris Accord, members of this coalition, including U.S. states, cities, businesses, universities and faith groups representing over half of the U.S. economy have pledged to cut their fossil-fuel emissions to ensure that the U.S. meets its commitment under the Accord.<sup>70</sup> They propose, in effect, to comply with the U.S.' undertakings in its stead. Sub-state non-official actors thus can, and do engage 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 choose knowingly not to comply or promote compliance with them. In some instances, it might take years and a ruling of an international tribunal finding against the state for some of its authorities to even learn of the state's obligations, or of its breach of them.

#### 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, consequently, that those forces of fragmentation, so worrisome to some scholars, are challenged. Without presuming to calculate the volume of this challenge and the degree to which it is successful in mitigating fragmentation, integrationist dynamics could be assumed to have at least contributed to the "little mayhem that has actually happened so far"<sup>71</sup> as a result of fragmentation. They may therefore, further, justify cautious skepticism with respect to scholars' grim predictions concerning fragmentation's dominating international law's future development. An ongoing struggle between international law's fragmentationist and integrationist forces seems more likely.

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individuals. In most cases, however, there is no challenge, no second-guessing, and no need for authoritative intervention. Each individual applied the law to his or her own situation and that is that", *id.* at 1.

<sup>68</sup> Megiddo, *supra* note 65.

<sup>69</sup> March For Science, <https://satellites.marchforscience.com/>.

<sup>70</sup> *America's Pledge* AMERICA'S PLEDGE, 29 (2017), <https://www.bbhub.io/dotorg/sites/28/2017/11/AmericasPledgePhaseOneReportWeb.pdf>.

<sup>71</sup> Shany, *supra* note 52, at 2.

The following Part IV provides an in-depth analysis of Brazil's response to receiving conflicting guidance from the WTO and Mercosur. It illustrates the article's claim, made in this part, that states respond to normative incoherence between different international legal regimes by proactively seeking to remedy it. Undertaking a thorough case study is helpful in order to trace the various attempts of Brazil at achieving this goal, which arguably teach us as much, or even more about its orientation in respect of its international obligations than its ultimate successes or failures.

The choice to focus on a single case study should not be understood to suggest that there are no other examples of the dynamics described above. In fact, there is no reason to assume that Brazil is an outlier. The systemic incentives existing in the international legal system and its subjects' agential capacities analyzed in the preceding discussion indicate that the opposite is probably the case. It might therefore be helpful to briefly point to additional examples, in order to alleviate the concern that Brazil's case is a unique or exceptional occurrence.

Another example of the dynamic suggested above, played out again in the WTO context, may be found in the case of the so-called "Banana wars". In this case, the EU engaged in prolonged and exacting efforts to bring its preferential trade agreements on the importation of bananas with former European colonies in Africa, the Caribbean and the Pacific (ACP) in line with its Most-Favored Nation commitments under the WTO. The preferential conditions were historically promised to ACP states in the Lomé Conventions,<sup>72</sup> but had to be reconsidered pursuant to the establishment of the World Trade Organization in 1995, which obliged the EU to provide equal treatment to all members of the WTO. Following almost two decades of negotiation with ACP states on the one hand, and Latin American states and the US, on the other hand, such efforts finally culminated in the 2010 Geneva Convention on Trade in Bananas, ending almost 15 years of the EU's breach of repeat trade tribunals' rulings on the matter.<sup>73</sup>

But such dynamics are not limited to the trade context. In a different context, one might similarly point to the UK's use of diplomatic assurances to avoid breaching its international human rights obligations when extraditing individuals to other countries. One case, eventually culminating in the European Court of Human Rights' (ECtHR) ruling in *Babar Ahmad v. UK*, provides an example. There, the US sought extradition from the UK of several terrorism suspects including the infamous Abu Hamza, based on the two countries' bilateral extradition treaty. Nonetheless, the US' practice of torture and its harsh criminal punishments, including the death penalty and life imprisonment without parole, with long periods spent in solitary detention, rendered such extradition difficult on account of the UK's international law obligations. The UK is committed to an absolute ban on the death penalty and is further obliged under international and European human rights law to refrain from refoulement of individuals to a place where they face risk of torture. The UK therefore sought and received assurances from the US that it shall not 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 it viewed as posing a real risk of a violation of the individuals' human rights.<sup>74</sup> The UK further had to contend itself that their punishment, if convicted, would not amount to torture or cruel, inhuman or degrading treatment

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<sup>72</sup> Fourth ACP-EEC Convention, Dec. 15, 1989, 1925 U.N.T.S. 1.

<sup>73</sup> Eckart Guth, *The End of the Bananas Saga*, 46 J. WORLD TRADE 1 (2012); Appellate Body, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (Sept. 25, 1997).

<sup>74</sup> *Babar Ahmad and Others v. UK* (2010) 51 E.H.R.R. 9, (Admissibility), ¶¶ 21, 100.

contrary to its international law obligations. Moreover, on application from the persons requested to be extradited to the ECtHR, the UK had to successfully convince the Court that the assurances it obtained from the US and the prospected punishments likely to be imposed on the applicants were indeed sufficiently respectful of their human rights.<sup>75</sup>

#### IV. Breeding Conflicts: The Case of Brazil

The outbreak of the Zika epidemic in Brazil in 2015<sup>76</sup> brought the *Aedes aegypti* mosquito to the headlines, and with it, a renewed awareness of the danger posed by waste tires. When improperly discarded, as is often the case in Brazil, water accumulates in tires and they thus provide a perfect damp, dark breeding site for disease-carrying mosquitos.<sup>77</sup> In addition to the threats they pose to human health, improperly discarded tires are further associated with environmental risks due to toxic and mutagenic emissions resulting from tire fires and the release (“leaching”) of toxic materials from stockpiled tires into the environment.<sup>78</sup>

As part of its struggle against dengue, yellow fever and malaria, in 2000 Brazil embarked on a comprehensive plan to improve the management of tires, which sought, as a central goal, to reduce the overall number of tires present in the country. Brazil therefore introduced a ban on the importation of used and retreaded (recycled) tires, opting to import only new tires which have longer lifespans.<sup>79</sup> The ban was placed by a regulatory act, Portaria SECEX 8/2000.<sup>80</sup> In addition to the ban, Brazil adopted various measures aimed at encouraging domestic retreading of tires and managing tire waste effectively.<sup>81</sup>

In what follows I present the dual challenges that were brought against Brazil’s plan, in the framework of two international legal regimes, Mercosur and the WTO. As shortly explained, in the conclusion of the WTO proceedings, Brazil found itself in a bind – seemingly required to violate the decision of one international tribunal or another – or to abdicate its plan. However, as I show, Brazil persistently strove to find creative solutions which would allow it to reconcile the two legal regimes incumbent on it – and do so without having to give up its domestic agenda.

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.<sup>82</sup> Whether this is so for reasons of “institutional myopia and normative closure” or rather the Appellate Body’s characteristic cautious and restrained judicial

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<sup>75</sup> Babar Ahmad and Others v UK (2012) 56 E.H.R.R. 1 (Merits).

<sup>76</sup> *One Year into the Zika Outbreak: How an Obscure Disease Became a Global Health Emergency*, WORLD HEALTH ORGANIZATION, May 5, 2016, <http://www.who.int/emergencies/zika-virus/articles/one-year-outbreak/en/>.

<sup>77</sup> *Integrated Mosquito Management*, CENTER FOR DISEASE CONTROL, [https://www.cdc.gov/zika/vector/integrated\\_mosquito\\_management.html](https://www.cdc.gov/zika/vector/integrated_mosquito_management.html) (last updated Jan. 9, 2017); Sonia Shah, *How Foreclosed Homes and Used Tires Can Threaten Public Health in the Age of Zika*, WASH. POST (July 31, 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/>.

<sup>78</sup> Panel Report, Brazil – Measures Affecting Imports of Retreaded Tyres, ¶¶ 7.53-7.93, WT/DS/332/R (June 12, 2007) [Hereinafter Brazil Tyres Panel Report].

<sup>79</sup> *Id.* at ¶¶ 7.128-31.

<sup>80</sup> *Id.* at ¶ 2.8.

<sup>81</sup> *Id.* at ¶¶ 7.128-31.

<sup>82</sup> Lang, *supra* note 16, at 117.

sensibility,<sup>83</sup> it remains an important, exceptionally powerful judicial body that can hardly be termed the beacon of the efforts of international legal harmonization.<sup>84</sup> The WTO is therefore the setting in which integration is perhaps least likely to emerge, which of course makes it the most interesting context in which to examine integration efforts. As I now illustrate, integration can be expected to be driven not only top down – by the WTO – but also from below.

### A. The Mercosur Challenge

The first challenge to Brazil's import ban was brought by Uruguay, who in 2001 initiated the convening of a binding arbitral tribunal under the auspices of the regional common market of which both countries are members, Mercosur. Uruguay challenged Brazil's Portaria SECEX 8/2000, which prohibited the issuance of import licenses for used and retreaded tires.<sup>85</sup> A previous 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 of retreaded tires.<sup>86</sup> In practice, Brazil had allowed for the importation of retreaded tires in the intervening period between 1991-2000. Therefore, Uruguay argued, the regulation issued in 2000 introduced a new prohibition on trade, contrary to the Treaty of Asunción and Mercosur Common Market Council decision 22/2000 which require all Mercosur members not to establish new restrictions on trade.<sup>87</sup>

Brazil argued in response that its 1991 ban on used tires, 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, it stressed. While acknowledging that retreaded tires have been allowed, *de-facto*, into the country after 1991, Brazil attributed that to the dependence of its computerized system of foreign trade on the self-characterization of importers as to the nature of the good for which an import license is requested as either used or new. By failing to duly register their retreaded tires as used goods, importers have been able to circumvent the import prohibition. Therefore, the 2000 regulation did not establish a new prohibition on trade, but rather made explicit an already existing prohibition.<sup>88</sup>

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

In 2002 the Mercosur tribunal upheld Uruguay's claims.<sup>90</sup> 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, since

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<sup>83</sup> Lang rejects the former and endorses the latter characterization, *id.* at 117.

<sup>84</sup> See Qin's proposition that it should adopt a judicial policy to avoid creating conflicts with prior decisions of regional trade agreements, Qin, *supra* note 2, at 624–27.

<sup>85</sup> Classified under Heading 4012 of the Mercosur Common Nomenclature (NCM), Report of the MERCOSUR Ad Hoc Arbitral Tribunal, *Import Prohibition of Remolded Tires from Uruguay* (Jan. 9, 2001) [in Spanish], [http://www.sice.oas.org/Dispute/mercotur/laudo6\\_s.asp](http://www.sice.oas.org/Dispute/mercotur/laudo6_s.asp) [Hereinafter Mercosur Arbitral Award].

<sup>86</sup> Classified under NCM Subheadings 4012.20 and 4012.10, respectively, *id.*

<sup>87</sup> Brazil Tyres Panel Report, *supra* note 78, at ¶ 2.13.

<sup>88</sup> *Id.* at ¶ 2.13.

<sup>89</sup> Treaty of Montevideo, art. 50(d), Aug. 12, 1980, 1329 U.N.T.S. 225 (entered into force Mar. 18, 1981).

<sup>90</sup> Brazil Tyres Panel Report, *supra* note 78, at ¶ 2.13.

Brazilian authorities have in practice considered retreaded tires to be distinct from both “new” and “used” tires and did not prohibit their importation. The tribunal held, further, that Brazil is estopped from instating the ban after having acquiesced to the importation of retreaded tires for over a decade.<sup>91</sup> In the aftermath of this ruling, Brazil introduced an exemption from its import ban which allowed for the importation of remoulded tires (a certain retreading method) from Mercosur countries.<sup>92</sup>

## B. The WTO Challenge

In 2005 the ban was challenged by the European Communities (EC) in the framework of the WTO. The EC claimed that the import ban constituted a prohibition of trade, forbidden by the 1994 General Agreement on Tariffs and Trade (GATT 1994).<sup>93</sup> The EC argued further that the ban cannot be characterized as a justified exception to the rule<sup>94</sup> since it is applied in an arbitrary and unjustifiable manner, when Brazil allows: (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.<sup>95</sup> The EC argued that the ban therefore cannot be held to be necessary to protect human life and health,<sup>96</sup> and that it was rather “adopted with the objective of protecting the manufacturers of new and retreaded tyres located in Brazil;”<sup>97</sup> fails to even contribute to the protection of human life and health,<sup>98</sup> and will not lead to reduction of the accumulation of waste tires.<sup>99</sup>

Brazil did not dispute that its ban is a restriction of trade but argued that it is justified as an exception to the rule – by being adopted in order to protect human life and health.<sup>100</sup> It claimed, further, that the Mercosur exemption can be rendered compatible with WTO law since Mercosur qualifies as a customs union under GATT 1994 Article XXIV.<sup>101</sup>

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

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<sup>91</sup> Mercosur Arbitral Award, *supra* note 85.

<sup>92</sup> The exemption was first introduced in Portaria SECEX 2/2002 and later incorporated into Portaria SECEX 14/2004, Brazil Tyres Panel Report, *supra* note 78, at ¶¶ 2.14-2.15, Mercosur countries were further excluded from the reach of financial penalties, *id.* at ¶ 2.16.

<sup>93</sup> Contrary to article XI:1 of the General Agreement on Tariffs and Trade, Apr. 15, 1994, 1867 U.N.T.S. 187 [Hereinafter GATT 1994].

<sup>94</sup> Under Article XX of the GATT 1994, *id.*

<sup>95</sup> Brazil Tyres Panel Report, *supra* note 78, at ¶¶ 4.301, 4.311, 4.325.

<sup>96</sup> *Id.* at ¶ 4.41.

<sup>97</sup> *Id.* at ¶ 4.45.

<sup>98</sup> *Id.* at ¶ 4.50.

<sup>99</sup> *Id.* at ¶ 4.57.

<sup>100</sup> *Id.* at ¶¶ 4.3-4.4.

<sup>101</sup> *Id.* at ¶ 7.449.

<sup>102</sup> *Id.* at ¶ 7.215.

<sup>103</sup> Which reads “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...”, article XX to the GATT 1994, *supra* note 93.

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

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 unjustifiable<sup>109</sup> and constituted a disguised restriction on trade in breach of Brazil’s obligations under WTO law.<sup>110</sup> The panel exercised judicial economy with respect to the qualification of Mercosur as a customs union.<sup>111</sup>

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 – bears no rational connection to the legitimate aim pursued by the ban, and it even goes against it. It held, further, that the Mercosur exemption constituted arbitrary and unjustifiable discrimination and a disguised restriction on trade, regardless of its minor effect.<sup>112</sup> 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.<sup>113</sup> The Appellate Body, too, avoided ruling on Mercosur’s qualification as a customs union.<sup>114</sup>

The Appellate Body has moreover 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 does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.”<sup>115</sup> The Appellate Body thus seems to attempt to downplay the appearance of a collision between WTO law and Mercosur law and rather stress their commonalities. The apparent conflict between the decisions of the judicial bodies of the different regimes is depicted as an accident,<sup>116</sup> and the responsibility for it is removed from the

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<sup>104</sup> Brazil Tyres Panel Report, *supra* note 78, at ¶¶ 7.288-7.289.

<sup>105</sup> *Id.* at ¶ 7.354.

<sup>106</sup> *Id.* at ¶¶ 7.288-7.289.

<sup>107</sup> *Id.* at ¶ 7.284.

<sup>108</sup> *Id.* at ¶¶ 7.279-7.281.

<sup>109</sup> *Id.* at ¶ 7.306.

<sup>110</sup> *Id.* at ¶ 7.349.

<sup>111</sup> *Id.* at ¶ 7.456.

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

<sup>113</sup> *Id.* at ¶¶ 246, 251-52.

<sup>114</sup> *Id.* at ¶ 256.

<sup>115</sup> *Id.* at ¶ 234.

<sup>116</sup> The Appellate Body’s assumption may be somewhat cast into doubt by the result in parallel litigation concomitantly held 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*

Appellate Body and even attached to Brazil itself, for failing to litigate wisely before the Mercosur panel.<sup>117</sup>

### C. Fragmentation v. Integration

Brazil's predicament at the conclusion of the WTO proceedings seems severe. On the one hand, it has 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, however, it is faced with two conflicting – and binding – rulings of international judicial bodies which require it to revise a central pillar of its plan. This scenario seems to embody every dark prophecy 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.<sup>118</sup> Few have considered the actual process on which Brazil embarked in its attempt to reconcile its various international legal obligations. It is this part of the story, however, which I submit is most illuminating and which teaches us most about legal fragmentation and how actors handle it.

Brazil's response to its predicament is to try to rise up to the challenge and strive to meet all the demands thrust upon it, simultaneously. While stressing in no uncertain terms its intention to comply with the Appellate Body's recommendations and rulings, Brazil's first reaction reveals an instinctive commitment to all its international obligations, noting that "removing the [MERCOSUR exemption] and restoring the *erga omnes* 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."<sup>119</sup> It is also not willing to easily give up on its comprehensive plan.<sup>120</sup>

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*Protection and Public Health at the WTO: The Brazil-Retreaded 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](https://www.files.ethz.ch/isn/139109/case_brief_brazil_tyres_v51.pdf); Also see Fabio C. Morosini, *The MERCOSUR Trade and Environment Linkage Debate: The Disputes over Trade in Retreaded Tires*, 44 J. WORLD TRADE 1127, 1144 (2010).

<sup>117</sup> There seems to be a consensus among the officials that I have interviewed and in scholarship by Brazilian authors on the tyre 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., Fabio C. Morosini, *The MERCOSUR and WTO Retreaded Tires Dispute: Rehabilitating Regulatory Competition in International Trade and Environmental Regulation*, note 559 and accompanying text SIEL WORK. PAP. NO. 42/08 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1154710](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154710) (quoting officials from the Ministry of Environment who explained that the Mercosur litigation was not brought to their attention in real time).

<sup>118</sup> See, e.g., Chad P. Bown & Joel P. Trachtman, *Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act*, 8 WORLD TRADE REV. 85 (2009); Lavranos, *supra* note 2; Morosini, *supra* note 116; Ernst-Ulrich Petersmann, *Administration of Justice in the World Trade Organization*, 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).

<sup>119</sup> Report of Arbitrator under Article 21.3(c), *Brazil - Measures Affecting Imports of Retreaded Tyres*, ¶ 16, WT/DS332/16 (Aug. 29, 2008) [Hereinafter Brazil Tyres 21.3(c) Arbitration].

<sup>120</sup> "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", "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", Status Report by Brazil (First), *Brazil - Measures Affecting Imports of Retreaded Tyres*, 4, WT/DS332/19 (Mar. 10, 2009) [Hereinafter Brazil's First Status Report].

In fact, even prior to the conclusion of the WTO proceedings, efforts were underway in several directions 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 the regard for international law among various actors within Brazil.

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 – and when that attempt failed – by other means, including seeking to amend Mercosur norms in a manner which would achieve such compatibility.<sup>121</sup> Other actors, however, called for preferring one regime over another. And whereas some suggested that Brazil give up its import ban in response to the challenges from its trading partners, still others insisted that the ban can be maintained while also complying with Brazil’s international legal obligations.<sup>122</sup>

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 inter-ministerial working group had managed the WTO proceedings from their inception, hoping to render them unnecessary.<sup>123</sup> The group included representatives of the MRE,<sup>124</sup> the Foreign Trade Chamber (CAMEX)<sup>125</sup>, the Ministry of Trade & Industry, the Ministry of Environment, the Ministry of Health, the General Advocacy of the Union (AGU) and the President’s Chief of Staff.<sup>126</sup> The

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<sup>121</sup> Video Conference Interview with Ambassador Luciano Andrade, former Head of MRE Dispute Settlement Unit (Sept. 12, 2017) [Hereinafter Andrade interview].

<sup>122</sup> 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, Environment Minister Maria Silva strongly pushed for the ban to be defended before the WTO, on environmental grounds, in internal debates where CAMEX officials suggested that the ban be withdrawn due to the EC challenge, Phone interview with Ambassador Flavio Marega, former Head of MRE Dispute Settlement Unit (Sept. 7, 2017) [Hereinafter Marega interview].

<sup>123</sup> For a detailed overview of Brazil’s approach to engaging international trade disputes and the emergence of a domestic epistemic trade community, see Gregory Shaffer, Michelle Ratton 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).

<sup>124</sup> 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 3 pillar model on which the government relies in its international trade policy: (1) a WTO Dispute Settlement Unit at the MFA; (2) Brazil’s WTO Mission in Geneva; (3) the Private sector, including law schools, *id.* at 171; “The Dispute Settlement Unit provides a central contact point for affected businesses, trade association and their lawyers regarding foreign trade problems.” The unit works with other MRE units and with other ministries with specialized knowledge of issues raised, as well as with the WTO Geneva Mission and with outside legal counsel, *id.* at 174.

<sup>125</sup> “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 formalized 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”, Shaffer, Sanchez Badin & Rosenberg, *supra* note 123, at 173.

<sup>126</sup> Marega interview, *supra* note 122; Phone Interview with Marcelo Varella, formerly economic advisor to the

working group had formal and informal contact with members of the Congress, non-governmental organizations (NGOs) and, indirectly, tire industry associations and actors.<sup>127</sup>

As opposed to other cases which Brazil litigated before the WTO,<sup>128</sup> in this case, private sector companies did not fund the government's private legal counsel. Instead, the government independently hired counsel, the Washington DC law firm of Sidley Austin. The government has also actively reached out to civil society for support, among others, by way of making publicly available, in English as well as in Portuguese, its written and oral submissions to the WTO, and meeting with NGOs.<sup>129</sup> The working group had informal ties with several NGOs.<sup>130</sup> *Amicus curiae* briefs were filed with the WTO panel by Humane Society International and by a coalition of Brazilian organizations. These briefs were subsequently adopted by Brazil who notified the panel that it shall include them as part of its exhibits.<sup>131</sup> One NGO is even reported to have dumped a truck-full of used tires in front of the WTO Geneva headquarters on the first day of the proceedings, for enhanced impact.<sup>132</sup>

The Brazilian tire industry is divided into two main groups. New tire manufacturers, who are Brazilian subsidiaries of big multinational corporations,<sup>133</sup> appear to benefit from the import ban on retreaded tires, which grants them access to a greater market share once the volume of retreaded tires is decreased.<sup>134</sup> Local Brazilian retreaders<sup>135</sup> might also appear to benefit from a ban on the importation of competitive retreaded tires. They were, however, highly dependent on the importation of cheap European used tires, also covered by the ban, as raw materials. Retreaders were thus worst hit by the ban, and consequently they were the ones who obtained multiple court injunctions under which used tires continued to be brought into Brazil.<sup>136</sup>

Brazilian retreaders were led by BS-Colway, whose CEO Francisco Simeão voiced the threat of significant job losses if the industry were to lose its cheap raw material. This threat is thought to have carried significant weight in the retreaders' dealings with both Congress and the President.<sup>137</sup> Members of Congress are also reported to have been lobbied quite aggressively by

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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 (Sept. 19, 2017) (on file with author).

<sup>127</sup> Marega interview, *supra* note 122; Varella interview, *supra* note 126; Andrade interview, *supra* note 121.

<sup>128</sup> Shaffer, Sanchez Badin & Rosenberg, *supra* note 123, at 197.

<sup>129</sup> *Id.* at 196.

<sup>130</sup> Marega interview, *supra* note 122.

<sup>131</sup> Brazil Tyres Panel Report, *supra* note 78, at ¶ 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].

<sup>132</sup> Marega interview, *supra* note 122.

<sup>133</sup> Morosini, *supra* note 224, at note 545 and accompanying text. The multinationals include international brands such as Michelin, Pirelli, etc.

<sup>134</sup> *Id.* at note 547 and accompanying text.

<sup>135</sup> *Id.* at note 546 and accompanying text.

<sup>136</sup> *Id.* at notes 545-46 and accompanying text.

<sup>137</sup> Varella, *supra* note 122, at 719; Also see Catarina Scortecchi, *BS Colway Ameaça Fechar em 1º Fevereiro*, FOLHA DE LONDRINA, October 22, 2007, <http://www.folhadelondrina.com.br/economia/bs-colway-ameaca-fechar-em-1-fevereiro-620423.html> (a local newspaper reporting that, following a visit to the city where BS Colway's headquarters resides in October 2007, President Lula da Silva committed himself to personally look after the tyres issue. The article quotes BS Colway director, Francisco Simeão, saying that although there was no unanimous opinion among the federal government, they had received favorable signals).

the retreaders.<sup>138</sup> Such lobbying may explain the impasse reached in 2005 by attempts to legislate a national system of sustainable management of tires, in anticipation of the WTO proceedings.<sup>139</sup> With this bill hung up in Congress, the problem of court injunctions remained a burning issue. Resolving it, officials involved with the working group soon understood, could not happen fighting on a case by case basis: there were thousands of such cases, some of which had already been lost.<sup>140</sup> Only a clear ruling by the Federal Supreme Court could undo *res judicata* decisions of lower courts and provide the degree of legal certainty required.<sup>141</sup> Therefore, already in September 2006, shortly after the decision of the WTO panel in June and prior to the Appellate Body's consideration of the appeal, the AGU filed a complaint with the Supreme Court, on behalf of Brazil's President. The AGU asked the Court to declare unconstitutional all judicial decisions and judicial interpretation allowing the importation of used tires of any kind, including *res judicata* decisions.<sup>142</sup> The complaint argued that judicial decisions allowing the importation of used or retreaded tires, which often relied on the constitutional right to free enterprise,<sup>143</sup> violated the constitutional right to an ecologically balanced environment.<sup>144</sup> The complaint did not also ask the Court to rule on the Mercosur imports, but, as I explain below, the Court's ruling proved detrimental to these, as well.

The Court held public hearings with respect to the case in June 2008, already after the WTO Appellate Body's ruling was adopted. A variety of stakeholders were invited to speak at the hearing including government officials, and representatives of NGOs and the retreaded tire industry. At least two of the experts who testified referred expressly to the WTO decision.<sup>145</sup>

The Court's decision, reported by the now President of the Court, Justice Carmen Lucia, was finally adopted on June 24, 2009, in a 10:1 ruling, with the dissenting Justice Marco Aurélio disagreeing on admissibility grounds.<sup>146</sup> Upon being called to clarify her position by fellow Justice Ricardo Lewandowski, Justice Carmen Lucia confirmed that the ruling declares unconstitutional all forms of importation of used and retreaded tires, namely, including imports from Mercosur.<sup>147</sup> Imports of such tires 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.<sup>148</sup>

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<sup>138</sup> Varella, *supra* note 122, at 719; Also see Marc Antoni Deitos, *O Contencioso Internacional do Comércio de Pneumáticos – Politização da Política Externa e Internacionalização da Política Doméstica (Masters Dissertation)* 2010 at 91 (*on file with author*), on the history of ABIP's lobbying in Congress.

<sup>139</sup> Varella, *supra* note 122, at 719; Deitos, *supra* note 138, at 214.

<sup>140</sup> Varella, *supra* note 122, at 720.

<sup>141</sup> Andrade interview, *supra* note 121.

<sup>142</sup> Luiz Inacio Lula da Silva, *Arguição De Descumprimento De Preceito Fundamental 101 2* (Sept. 21, 2006) [in Portuguese], <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=181175#0%20-%20Peticao%20inicial> [Hereinafter ADPF Complaint].

<sup>143</sup> CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, art. 170 (Oct. 5, 1988).

<sup>144</sup> *Id.* art. 225.

<sup>145</sup> Dje nº 108 Divulgação, de 24 de Junho de 2009, Annex III to the report by Justice Carmen Lucia, S.T.F. *Arguição de Descumprimento de Preceito Fundamental 101*, de 4 de Junho de 2012 (Braz.), <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=629955> [Hereinafter ADPF 101 Ruling].

<sup>146</sup> *Id.* At 217-19 (J. Carmen Lucia & J. Ricardo Lewandowski), & 270-74 (J. Gilmar Mendez); Status Report by Brazil (Fifth), *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/19/Add.4 (July 10, 2009).

<sup>147</sup> Interestingly, J. Carmen Lucia's clarification implied that she has changed her initial vote which allowed imports from Mercosur, Secretaria de Comércio Exterior, Nota AGU/SGCT/ARL/Nº 0257/2009, PROCESSO nº: 52100.002680/2009-18, Processo Judicial: ADPF nº 101 (STF) (Aug. 6, 2009), at 13-15 [Hereinafter Parecer].

<sup>148</sup> FEDERAL CONSTITUTION, *supra* note 143, art. 170.

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. The Paraguayan Ambassador even wrote to the Court with a request to clarify whether the decision extends to remoulded tires as well.<sup>149</sup> 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 opinion clarifying the Supreme Court's ruling,<sup>150</sup> which stated that importation of used, including remoulded, tires from Mercosur countries is now prohibited.<sup>151</sup> It seems to have been following this opinion that the Secretary of Foreign Trade issued a new regulation, Portaria SECEX 24/2009, on August 28, 2009, which prohibited the issuance of new licenses for the importation of used and retreaded tires, irrespective of their origin.<sup>152</sup> It was therefore the Supreme Court's ruling that forced the executive's hand and required the final elimination of the Mercosur exemption.<sup>153</sup> It seems, further, that it was domestic constitutional law rather than the WTO ruling which served as the substantive impetus for the Court's ruling. Nonetheless, one cannot ignore the fact that the proceedings would not have been initiated but for the EC's complaint to the WTO and the WTO panel's decision, singling out the court injunction problem, and that the Appellate Body ruling was discussed in the public hearing.

In addition to its domestic efforts, another course of action taken by Brazil in an attempt to reconcile its different international legal obligations was on the multilateral plane. In April 2008, following the adoption of the Appellate Body decision, Brazil proposed to the Common Market Group (GMC) of Mercosur that an *ad hoc* Working Group would 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.<sup>154</sup>

Brazil submitted periodic status reports on its progress in achieving compliance with the WTO recommendations and rulings.<sup>155</sup> In its first report of March 2009, Brazil notified the WTO Dispute Settlement Body (DSB) of its initiation of the Mercosur working group.<sup>156</sup> The working

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<sup>149</sup> Luiz Gonzales Arias, Letter from Luiz Gonzales Arias, Ambassador of the Republic of Paraguay to Brazil to Dra. Carmen Lucia Antunes Rocha, Justice of the Supreme Federal Tribunal (June 25, 2009) (on file with author) (Brazil's Mercosur exemption for remoulded tyres also benefited Paraguay).

<sup>150</sup> Law no. 73/1993, art. 41 (Feb. 10, 1993).

<sup>151</sup> *Parecer*, *supra* note 147.

<sup>152</sup> Status Report by Brazil (Seventh), *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/19/Add.6 (Sept. 15, 2009) [Hereinafter Brazil's Seventh Status Report].

<sup>153</sup> Varella interview, *supra* note 126; Marega interview, *supra* note 122.

<sup>154</sup> MERCOSUR Grupo Mercado Común, *Creación del Grupo Ad Hoc para una Política Regional de Neumáticos Inclusive Reformados y Usados (GAHN)*, MERCOSUR/GMC/ EXT/Res. N° 25/08 (June 29, 2008) [in Spanish], <http://www.sice.oas.org/Trade/MRCSRS/Resolutions/Res2508.pdf>; Brazil First Status Report, *supra* note 120.

<sup>155</sup> Brazil was granted twelve months to bring its measures into compliance with the Appellate Body's recommendations and rulings, ending on Dec. 17, 2008, *Brazil Tyres* 21.3(c) Arbitration, *supra* note 51, ¶ 91; Brazil's failure to comply by that date was validated 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*, WT/DS332/18 (Jan. 9, 2009).

<sup>156</sup> Note that Brazil had already notified a WTO arbitrator of this fact in August 2008, but then assessed that the working group would already present its results to Mercosur's highest body, the Common Market Council (CMC) for approval in December 2008. Things have apparently not turned out as it had forecasted, *Brazil Tyres* 21.3(c) Arbitration, *supra* note 51, ¶18.

group met but discovered it was unable to agree on a new regime proposal. It therefore did not submit a common policy proposal to the GMC as set forth in its mandate.<sup>157</sup> Brazil finally realized that this course of action was not a viable one.<sup>158</sup> And indeed, there is no further discussion of its progress in any of Brazil's subsequent status reports to the DSB.

Another course of action that was available for Brazil was bilateral: engaging Uruguay and offering trade concessions in compensation for eliminating the Mercosur exemption, contrary to the Mercosur arbitral award. Serisur SA is a Uruguayan company which had manufactured remoulded tires primarily for the Brazilian market. This company suffered most of the impact of Brazil's ban of the importation of used and retreaded tires in 2000, and its plight led Uruguay to initiate the arbitral proceedings against Brazil in Mercosur.<sup>159</sup> In the fall of 2009, after Brazil's final elimination of the Mercosur exemption, Serisur was in a dire situation, seriously contemplating closure of the factory and firing its 50-odd employees.<sup>160</sup>

Some officials I have 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.<sup>161</sup> An email from the MRE stresses that Uruguay did not further pursue the matter in Mercosur.<sup>162</sup>

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.<sup>163</sup> In an interview about his role as an economic advisor to the Brazilian presidency at the time, he recalls such concessions granted – in other economic sectors – although they were probably not formally framed as a compensation, he notes. I have been unable to obtain conclusive evidence whether such concessions have indeed been offered or accepted. Further, although another MRE official I interviewed thought that it was likely that concessions have been made, a third official interviewed rules out the possibility that Brazil compensated Uruguay and 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 (MERCOSUR's Dispute Settlement Understanding) on the subject."<sup>164</sup>

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 be a further indication that Brazil was minded to its obligation towards

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<sup>157</sup> MRE, Email received via Ambassador Flavio Marega (Sept. 20, 2017) (on file with author) [Hereinafter Email from MRE].

<sup>158</sup> *Id.*; Andrade interview, *supra* note 121.

<sup>159</sup> MERCOSUR Arbitral Award, *supra* note 85.

<sup>160</sup> *Trabas en Comercio*, EL PAÍS A14 (Nov. 26, 2009), cited in Camera de Industrias Del Uruguay Website, <http://www.ciu.com.uy/innovaportal/v/31306/1/innova.front/26-noviembre-2009-jue.html>; *Serisur Posterga Inicio de Actividad*, EL PAÍS n.p. (Feb. 2, 2009).

<sup>161</sup> Marega interview, *supra* note 122.

<sup>162</sup> Email from MRE, *supra* note 157.

<sup>163</sup> Varella, *supra* note 122, at 722 (although I have been unable to locate the CAMEX resolution he cites as a source for this claim).

<sup>164</sup> Email from MRE, *supra* note 157.

Uruguay as a consequence of the Mercosur award and sought to find a way to mitigate the apparent discrepancy between the award and the WTO rulings and recommendations.

In its fifth status report of July 10, 2009, Brazil notified the DSB of its Supreme Court's ruling. The EC subsequently noted that Brazil has not yet rectified its discrimination with regard to the Mercosur exemption. The DSB took note of the statements and agreed to readdress the matter in its next meeting.<sup>165</sup> In its seventh status report of September 15, 2009, Brazil noted, among others, that according to a new regulation introduced, Portaria SECEX 24/2009, the issuing of new licenses for the importation of used and retreaded tires is prohibited, irrespective of their origin. The *erga omnes* application of the ban has thus been restored. "Taken together", the report notes, "the Supreme Court ruling and Portaria SECEX 24/2009 eliminated the aspects of the application by Brazil of its import ban on retreaded tyres that had been considered inconsistent with trade disciplines by the Appellate Body. Brazil is therefore in full compliance with the DSB recommendations and rulings in this dispute."<sup>166</sup>

In the DSB's next meeting, on September 25, 2009, Brazil restated that it considers itself now fully in compliance with the DSB's recommendations and rulings. The EC did not dispute Brazil's submission, but noted that it was in the process of reviewing Brazil's claim of compliance. The DSB took note of the statements. It did not, as it had in the past, decide to revert to this matter at its next regular meeting.<sup>167</sup> This is the last discussion of the case by the DSB, and the EC did not seek to dispute Brazil's contention that it was in compliance with its obligations nor did it seek to have this question assessed by a panel in accordance with Article 21.5 of the Dispute Settlement Understanding.<sup>168</sup> Uruguay, too, did not challenge Brazil on its new policy in Mercosur.<sup>169</sup>

In conclusion, the bind in which Brazil found itself following the Appellate Body's decision served as a catalyst for various processes of trial and error, domestically, as well as multilaterally, and possibly bilaterally. Rather than turning disillusioned with fragmented international law, Brazilian officials actively sought ways to reconcile its domestic law and its various international obligations. Rather than 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, their orientation towards finding a common ground between the different demands placed upon Brazil are the crux of this story. Note that while some of Brazil's actions are easily classified as "legal", others are perhaps more aptly described as diplomatic or political. Such is its 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. Such would be any attempt to negotiate compensation with Uruguay. Whether and to what degree Brazil succeeded in its attempts is not an unimportant

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<sup>165</sup> Dispute Settlement Body, *Minutes of Meeting held on 20 July 2009*, WT/DSB/M/271, 11-12 (Sept. 25, 2009).

<sup>166</sup> Brazil Seventh Status Report, *supra* note 152, at 6.

<sup>167</sup> Dispute Settlement Body, *Minutes of Meeting held on 25 September 2009*, WT/DSB/M/274, 9-10 (Nov. 23, 2009).

<sup>168</sup> Email from MRE, *supra* note 157; Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 1869 U.N.T.S. 401.

<sup>169</sup> Email from MRE, *supra* note 157.

question, but it is a separate one. I submit that the process, the orientation, the attempt, are highly worth noting and assessing, rather than merely the result.<sup>170</sup>

The pressures ensuing from the international legal system – fragmented as it may be – nonetheless 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. It 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 – and this is its practice – did not instruct Brazil how it should implement its rulings. Its recommendations were limited to requesting Brazil to “bring its measure, found [...] to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.”<sup>171</sup> The various organs of the WTO involved in adjudicating and monitoring the case likewise all 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. As a result, Brazil’s eventual reconstructed policy – banning the importation of used and retreaded tires including under court injunctions and eliminating the Mercosur exemption; negotiating a new tire regime for Mercosur; and possibly negotiating compensation vis-à-vis Uruguay – reflects a new balance that it was testing out with the DSB and the EC, as well as with its Mercosur partners. As the EC made no further protest with respect to this new state of affairs; as the DSB removed the case from its monitoring agenda; and as Uruguay did not challenge it in Mercosur, Brazil’s attempt can be presumed to have succeeded, and it did not pay the price of relinquishing its important policy goals.

## V. Conclusion

Concerns over the fragmentation of international law have dominated the discourse in the field 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 the article demonstrates, rather than merely a manifestation of fragmentation’s woes, the conflicting guidance Brazil received from Mercosur and the WTO launched efforts of harmonization. Brazil’s response support two important insights about the international legal system. First, that the simultaneous demands posed by different legal regimes to their subjects can also 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, that 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 progressively 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, I submit that states often go to

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<sup>170</sup> Robert Howse & Ruti Teitel, *Beyond Compliance*, 1 GLOB. POL’Y 127 (2010).

<sup>171</sup> Brazil Tyres Appellate Body Report, *supra* note 112, at ¶ 259.

great lengths to avoid doing so.<sup>172</sup> Moreover, their deliberation on how to avoid breach of their international obligations and their trial-and-error 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 counterbalance fragmentation, to an extent, and that such struggle between international legal fragmentation and international legal integration is likely to continue, since both the structural incentives and the agential capacities that drive integration efforts at present are likely to continue to obtain in the future.

Finally, the article's process-minded, bottom-up approach is key in revealing, contrary to the received view, that Brazil in fact sought a solution to the conflict of international norms, trying to find a common ground. Such methodological outlook exposes a wealth of formerly unnoticed circumstances in which international law may influence domestic decision making, including both pre-, and post-rendering of international judicial decisions, as well as previously overlooked actors who take part in domestic deliberations.

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<sup>172</sup> Howse and Teitel, *supra* note 170.