

2009

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Recommended Citation

William T. Worster, *Competition and Comity in the Fragmentation of International Law*, 34 Brook. J. Int'l L. (2008).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol34/iss1/4>

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COMPETITION AND COMITY IN THE FRAGMENTATION OF INTERNATIONAL LAW

*William Thomas Worster**

INTRODUCTION

The international legal system encompasses a variety of legal norms, but the perceived increase in “fragmentation” of these norms has recently been seen as a problem for the system as a whole.¹ A few notable cases have highlighted the difficulties of a variety of tribunals reaching contradictory results. One example is the direct conflict between the decision of the International Court of Justice (“ICJ”) in the *Nicaragua* case² and the decision of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in the *Tadić* case.³ In *Tadić*, the ICTY took the position that the “effective control” test, as formulated by the ICJ for determining whether a foreign State is responsible for an internal civil war, was too demanding.⁴ Instead, the ICTY held that the foreign State need only have had “a role in organizing, coordinating, or planning the military actions of the military group.”⁵ Interestingly, the ICTY did not suggest that this test is *lex specialis* for international individual criminal responsibility, but, rather, that the ICJ’s “effective control” test should be displaced entirely.⁶

This conflict between the ICJ and the ICTY is hardly isolated.⁷ There is a perception that “courts in various countries are increasingly dissatis-

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1. For a commentator’s negative portrayal of “fragmentation,” see Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT’L L. 849, 849–50 (2004).

2. *Military and Paramilitary Activities (Nic. v. US)*, 1986 I.C.J. Rep. 64–65, ¶ 115 (June 27).

3. *Prosec. v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 116–45 (July 15, 1999).

4. *Id.*

5. *Id.* ¶ 137, at 59.

6. *Id.*

7. For example, the *MOX Plant* litigation comprises of a number of cases brought by Ireland against the United Kingdom regarding a nuclear reprocessing plant; these cases were litigated in several different fora and, notably, involved a conflict of jurisdiction. *See, e.g.*, *MOX Plant (No. 10) (Ir. v. U.K.)*, 41 I.L.M. 405 (Int’l Trib. L. of the Sea 2001);

fied with traditional rules [for resolving conflicts of jurisdiction and norms, considering them to be] inadequate in a modern, globalizing world.”⁸ Consequently, many writers have suggested forms of increased comity among international tribunals in order to combat the problems associated with fragmentation; indeed, locating harmonies among international legal regimes within a coherent international legal system appears to be the dominant trend.⁹ The proposals of Joost Pauwelyn¹⁰ and Yuval Shany,¹¹ as well as to some degree the work of the International Law Commission (“ILC”) on fragmentation,¹² are characteristic of the comity solution. Yet these perspectives dismiss, or at the very least, largely overlook, the benefits of competition among international tribunals. The international legal system need not identically reproduce a

MOX Plant (No. 3) (Ir. v. U.K.), 42 I.L.M. 1187 (Perm. Ct. Arb., 2003) [hereinafter PCA Mox Plant Case No. 3]; Dispute Concerning Access to Information Under Art. 9 of the OSPAR Convention (Final Award) (Ir. v. U.K.), 42 I.L.M. 118 (Perm. Ct. Arb., 2003). See also Nikolaos Lavranos, *The Mox Plant and Ijzeren Rijn Disputes: Which Court is the Supreme Arbiter?*, 19 LEIDEN J. OF INT'L L. 223 (2006) (discussing the need for a hierarchy amongst international courts and tribunals in order to avoid the fragmentation of international law).

8. Jay L. Westbrook, *International Judicial Negotiation*, 38 TEX. INT'L L.J. 567, 586 (2003). See also Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573, 574–75 (2005) (arguing that fragmentation is caused by treaty conflicts and that a new approach should be established to resolve these conflicts).

9. See Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 216 (2005) (“The most promising approach is to establish a set of common principles meant to harmonize the procedural means by which national courts adjudicate grave human rights violations.”).

10. See JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003) [hereinafter PAUWELYN, *CONFLICT*]; Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903 (2004) [hereinafter Pauwelyn, *Bridging*]; Joost Pauwelyn, *Going Global, Regional, or Both?: Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions*, 13 MINN. J. GLOBAL TR. 231 (2004) [hereinafter Pauwelyn, *Going Global*].

11. See YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2002); Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835 (2005).

12. See Int'l Law Comm'n, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.702 (July 18, 2006) (finalized by Martti Koskenniemi) [hereinafter ILC, July 18 Rep.]; Int'l Law Comm'n, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi) [hereinafter ILC, Apr. 13 Rep.].

domestic legal system, even if it were possible to do so. If we accept contradictions and disparities in different tribunals' conclusions as inherent in and perhaps even beneficial to international law, then conflicts related to fragmentation are not so objectionable. Competition among tribunals can itself serve as the coherence of the international legal system, albeit not in the unitary, constitutional form of harmonized norms that some may desire.

The argument that international tribunals should consider embracing competition among themselves proceeds in three stages. Part I discusses comity as a solution to conflicts emerging from fragmentation, in particular, the work of Joost Pauwelyn, Yuval Shany, and the ILC. Part II observes the reality of competition among tribunals, specifically discussing the viewpoints of Anne-Marie Slaughter, Yves Dezalay, and Bryant Garth. Part III assesses the drawbacks and benefits of competition, concluding that competition among tribunals can result in constructive diversity, rather than destructive fragmentation. International justice can be realized best not by developing new forms of comity or attempting to politically replace one regime with another, but, rather, by accepting the diversity of norms and tribunals in the system and allowing them to be subject to a kind of natural selection.

I. COMITY AS A SOLUTION

In weighing the benefits of increased comity and competition, the first inquiry is: what is meant by "comity"? As one scholar has noted, "[D]espite ubiquitous invocation of the doctrine of comity, its meaning is surprisingly elusive."¹³ Comity can mean anything from the foundation of international law to mere courtesy, from rules of jurisdiction to the discretion to decline a case.¹⁴

An example of comity serving as a rule of respect for the sovereignty and competence of another legal actor can be found in the *MOX Plant* cases.¹⁵ In these cases, the tribunal formed under the U.N. Convention on the Law of the Sea suspended its proceedings to provide the European Court of Justice ("ECJ") an opportunity to reach a decision on a pending application concerning issues similar to those the tribunal was confronting. The tribunal reasoned that that ECJ might be better suited to answer the questions at hand.¹⁶ There was no immediate threat of reaching a conflicting decision, just an initial conflict of jurisdiction. The tribunal

13. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 4 (1991).

14. See generally *id.*, at 44–54, 70–77.

15. PCA Mox Plant Case No. 3, *supra* note 7, ¶ 28.

16. *Id.* ¶ 29.

explained that the stay was required by the “mutual respect and comity that should [exist] between judicial institutions” deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes between them.¹⁷

A distinction can be made between a deferral under comity out of respect for another judicial body and a deferral under comity out of respect for a State generally.¹⁸ Some legal systems, however, have denied that comity is practiced out of international respect for another sovereign, instead explaining that it arises from a demand for substantive justice,¹⁹ which may encompass the principles of diplomatic or sovereign immunity,²⁰ or the recognition of foreign court judgments.²¹ For the purposes of this Article, the important distinction is whether the discretion exercised is one of legal principle or courtesy.

Comity is known in both common law and civil law countries.²² In general, common law systems practice comity as discretion,²³ whereas civil law systems are inclined to refute that comity is discretionary, arguing that exercising discretion would be an abuse of judicial power.²⁴ While civil law courts may reach similar results as their common law counterparts, they do so under legally binding principles, rather than by mere courtesy.²⁵ These principles of comity in civil law countries generally tend to be seen as principles of binding public international law,²⁶ a notion common law countries generally reject.²⁷ Common law countries, however, have historically maintained that the distinction between public and private comity is false.²⁸ Hersch Lauterpacht, for example, has de-

17. *Id.* ¶ 28.

18. See Upendra Baxi, *Geographies of Injustice*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 197, 205 (Scott Craig ed., 2001).

19. See Paul, *supra* note 13, at 44–54.

20. See *id.*

21. See *id.* at 2 (citing MARK JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 250 (1988)).

22. See *id.* at 44–54.

23. See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982).

24. See Paul, *supra* note 13, at 33. See also Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383 (criticizing the *forum non conveniens* principle as incompatible with European regulation).

25. See Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003 (2006); Paul, *supra* note 13, at 32.

26. See Paul, *supra* note 13, at 28.

27. See Maier, *supra* note 23.

28. See Paul, *supra* note 9, at 25–26 (discussing how leading European scholars in the nineteenth century did not see a distinction between the private and the public and “ar-

nied comity to be a binding principle of public international law, and instead argued it to be a matter of respect among sovereigns.²⁹

Thus, it is clear that there is no simple definition for comity and that because of these differences between legal cultures, the criteria for invoking comity vary widely among national jurisdictions. Some believe a tribunal must examine the interests of the forum while keeping in mind its role as a facilitator of interfora questions and resolver of conflicts within the international legal system.³⁰ Others criticize considering interstate political relations and demand that a tribunal simply apply its law without regard to these issues.³¹

Despite the difficulty of defining comity, it appears to be a way for injecting international politics directly into a tribunal's considerations that is separate from the "mechanical" act of legal interpretation.³² Given the flexible and broad notion of comity, it might best be described "[a]s a bridge . . . meant to expand the role of public policy, public law, and international politics in [the judiciary]."³³ The results of applying comity or quasi-comity principles of law can be similar, notwithstanding various interpretations; a court uses these principles to defer to another sovereign regarding certain issues, but not others, based on a balance struck between competing policies.³⁴ As a result, any use or advocacy of comity must be an assertion of some extralegal policy choices.

gued in varying degrees that private international law derived from public international law," but noting that in the United States, a private/public distinction did exist.)

29. See HERSCH LAUTERPACHT, *INTERNATIONAL LAW* 43–46 (E. Lauterpacht ed., 1970); Hersch Lauterpacht, *Allegiance, Diplomatic Protection and Jurisdiction Over Aliens*, 9 *CAMBRIDGE L.J.* 330, 331 (1945).

30. See Jenny S. Martinez, *Towards an International Judicial System*, 56 *STAN. L. REV.* 429, 478 n.193 (2003); Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade*, 27 *U. PA. J. INT'L ECON. L.* 273 (2006). See also Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 *N.Y.U. J. INT'L L. & POL.* 753, 774–79 (1999) ("In international economic law, 'cooperation among international courts' has been recognized as an important tool for promoting an international 'community of law.'").

31. See Maier, *supra* note 23, at 288.

32. See Paul, *supra* note 13, at 54–56.

33. *Id.* at 7.

34. See *id.* at 2 ("Comity is a ready explanation for much of what courts do in public and private international law. In the name of comity, U.S. courts often recognize and enforce foreign judgments or limit domestic jurisdiction to hear claims or apply law, even where foreign law is contrary to U.S. law or policy. Guided by notions of comity, courts consider competing foreign and domestic interests.").

Regardless of its nature, comity is often conceived as part of a coherent field of international law.³⁵ One's perspective on the nature of the international legal system informs not only how comity is applied, but also how it is best applied. If one sees the international legal system as a coherent whole (or a system with the objective of forming a coherent whole), then one's policy choice is to place emphasis on the integrity of the system. After all, comity is a way for one legal actor to defer to another.³⁶ However, if one does not see a coherent whole, but rather, independent, competing legal actors, a system "mostly of erratic blocks and elements as well as different partial systems,"³⁷ what kind of comity should be exercised?

A. Joost Pauwelyn's View

Joost Pauwelyn has made an effort to bring together public international legal rules while still recognizing the differences among nations and their respective freedom to refuse to defer to others' rules. He draws general conclusions for international tribunals from the World Trade Organization ("WTO"). Finding that the WTO must contemplate the entire corpus of international law,³⁸ he creates the metaphor of "inter-connected islands": legal orders, of which the WTO is one, that are self-contained to some degree, but also regard each other through their connections in general international law.³⁹ With this expression, he describes a fairly coherent international legal system respected by tribunals, regardless of their specialty; although they may conflict over jurisdiction, they do not seek to impose differing legal norms.⁴⁰

Pauwelyn defines conflict more broadly than two situations demanding two distinct outcomes. For him, certainly, the notion of a conflict includes situations in which one outcome demands a violation of the

35. *But see id.* at 8–9 ("[T]he peculiar strain [of comity] that developed in the classical doctrine of comity in the United States resulted in part from the incoherence of the doctrine itself. This incoherence is both traceable to, and well represented by, the Supreme Court's opinion in *Hilton v. Guyot*, which is the most commonly cited statement of comity in U.S. law.").

36. Westbrook, *supra* note 8, at 579.

37. Hafner, *supra* note 1, at 850. *See also* William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 964 (2004) (discussing the fragmented nature of international law discourse).

38. PAUWELYN, CONFLICT, *supra* note 10, at 440 ("The thrust of [this] book [is] to portray WTO law as part of the wider corpus of public international law.").

39. *See* Pauwelyn, *Bridging*, *supra* note 10.

40. *See id.*

other,⁴¹ but his definition also includes situations involving a conflict between an obligation and a right,⁴² which is not a particularly narrow reading of the meaning of conflict. He also finds it important to distinguish between a direct, facial conflict of norms and a conflict of norms that arises only from the interpretive and implementation process.⁴³

Having identified the kinds of conflicts he will address, Pauwelyn then proposes rules for resolving conflicts of jurisdiction and norms by referring to already existing rules of public international law. For example, he looks to explicit conflicts clauses, *lex posterior* and *lex specialis* rules, and the laws on state responsibility.⁴⁴ In other work, he discusses *forum non conveniens*, *res judicata*, abuse of process, and *lis alibi pendens*⁴⁵ as additional existing methods in international law to resolve conflicts of jurisdiction. Some conflicts result in the invalidity of one of the norms; others result in the priority of one norm over the other.⁴⁶ A tribunal may only find a true conflict if the usual methods of international law for dealing with conflicts fail.

One argument against such an approach—namely, using the WTO as a guideline for other tribunals—is that the WTO Dispute Settlement Understanding (“DSU”) specifically accepts general international law as an interpretive tool,⁴⁷ whereas other bodies may not. In particular, *ad hoc* arbitral tribunals, or national courts hearing disputes with an international character, do not necessarily accept the entire corpus of general international law.⁴⁸ Although one could argue that the DSU’s endorsement of

41. PAUWELYN, CONFLICT, *supra* note 10, at 175–76 (“Essentially, two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other.”).

42. *Id.* at 171–72, 178–88.

43. *Id.* at 176.

44. *Id.* at 327–43.

45. See Pauwelyn, *Going Global*, *supra* note 10.

46. PAUWELYN, CONFLICT, *supra* note 10, at 178–88.

47. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 401, 33 I.L.M. 1125, art. 3 (1994) [hereinafter DSU]; Appellate Body Report, *U.S.—Standards for Reformulated and Conventional Gasoline*, ¶ 17, WT/DS2/AB/R (Mar. 20, 1996) (holding that the DSU Article 3.2 requires WTO agreements to be interpreted in accordance “with customary rules of interpretation of public international law”).

48. For a discussion on *ad hoc* tribunals, see, for example, ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 127 (4th ed., 2004). “The reference to ‘such rules of international law as may be applicable’ (as, for example, in the Washington Convention), or to ‘the relevant principles of international law’ (as in the Channel Tunnel Treaty) [helps] remind us that it is not the whole *corpus* of law, but only certain specific rules of law that are likely to be relevant in any given

general international law as an interpretive guideline⁴⁹ suggests that the rules of the Vienna Convention on the Law of Treaties (“Vienna Convention”) would not apply without it, the contrary argument could also be made: the DSU codifies what should have been understood before its formation. In fact, the WTO Panel in *Korea—Measures Affecting Government Procurement* stated that the purpose of the DSU provision was to resolve the issues stemming from the pre-WTO era when adjudicators under the General Agreement on Tariffs and Trade (“GATT”) failed to follow the customary rules of treaty interpretation properly.⁵⁰

Moreover, the WTO’s acceptance of general international law is phrased in terms of using the law to guide the interpretation of the WTO Agreements, not to impose additional obligations independent from, or superior to, the Agreements.⁵¹ It is clear from the terms of the DSU itself that general international law is a valid interpretive tool, but the DSU does not indicate that non-WTO obligations may be transported into the WTO context.⁵² There is no support in the text of the WTO Agreements for applying a non-WTO defense against a WTO obligation. If Pauwelyn finds that such defenses may be entertained, there would appear to be no similar prohibition against a WTO tribunal hearing the merits of a non-WTO claim as well. Furthermore, as Bruno Simma has observed, “[T]he exclusion or modification through a ‘self-contained regime’ or ‘normal’ secondary rules which leads to a ‘softening’ of the legal consequences of wrongful acts should not easily be presumed.”⁵³ Accordingly, Pauwelyn’s conclusion that the WTO should be a model for international tribunals generally may be unwarranted.

An additional critique of Pauwelyn’s perspective is that integrating WTO law into substantive nontrade international law may go against the intent of the parties to the WTO and may be counterproductive to achieving the human rights and environmental objectives that Pauwelyn appears to endorse. The parties to the WTO presumably negotiated the Agreements with the intent of establishing a self-contained regime, allowing the terms of the Agreements to be interpreted in the light of

dispute.” *Id.* For a discussion on national courts, see, for example, *Medellin v. Texas*, 128 S.Ct. 1346, 1361–62 (2008) (holding that the Vienna Convention on Consular Relations, though it was adopted as a treaty, was not incorporated into U.S. law by implementing legislation, which would provide a mechanism for direct enforcement).

49. See DSU, *supra* note 47, art. 3.2, at 1227.

50. Panel Report, *Korea—Measures Affecting Government Procurement*, ¶ 7.96, WT/DS163/R (May 1, 2000).

51. DSU, *supra* note 47, art. 3.2, at 1227.

52. *Id.* art. 1(1), at 1227.

53. Bruno Simma, *Self-Contained Regimes*, 16 NETHERLANDS Y.B. OF INT’L L. 111, 135 (1985).

general international law, while refusing to grant competence to hear non-WTO law matters, as defenses or otherwise.⁵⁴ The political trade-offs of such negotiation should not be dismissed lightly: “by establishing ‘self-contained regimes,’ States contract out of the general rules on the consequences of treaty violations on the expectation that these regimes will work to their *mutual* benefit.”⁵⁵ The parties may have specifically intended certain outcomes, either by limiting the competence of the organization or even by making the organization entirely ineffective.⁵⁶ This perspective does not imply that nontrade goals are irrelevant for the development of WTO law, since the negotiators of the WTO Agreements could have intended trade liberalization as one vehicle for reducing poverty and otherwise improving global welfare⁵⁷ (even though it might impact the environment adversely). Moreover, Pauwelyn’s proposal risks undermining the WTO regime. If decisions are based on agreements outside the WTO’s specific competence, they may be less likely to be complied with, as Member Parties may view those decisions as less legitimate and may bring their claims to the WTO less frequently.

One of the fundamental points Pauwelyn makes is the right to “contract out” of existing norms while still maintaining respect for international law already in force, even if a negotiated treaty does not.⁵⁸ This deference includes the obligation to apply pre-existing norms in a forum, but within the limits of the tribunal’s competence. For example, the WTO must apply other norms as defenses, although it is not competent to enforce the norms themselves.⁵⁹ A possible illustration of the WTO applying this kind of rule might be Ernst-Ulrich Petersmann’s proposal for the WTO to acknowledge its members’ human rights obligations.⁶⁰

54. Francesco Francioni, *WTO Law in Context: The Integration of International Human Rights and Environmental Law in the Dispute Settlement Process*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 143–45 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., Cambridge Univ. Press, 2006). *See also* WORLD TRADE ORG. INFO. & MEDIA RELATIONS DIV., *UNDERSTANDING THE WTO* (3d ed. 2007), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

55. Simma, *supra* note 53, at 136.

56. *See* Martinez, *supra* note 30, at 469.

57. *See generally, e.g.*, Sandra E. Black & Elizabeth Brainerd, *Importing Equality?: The Impact of Globalization on Gender Discrimination*, 57 *INDUS. & LAB. REL. REV.* 540 (2004) (examining the impact of globalization on gender discrimination in manufacturing industries).

58. PAUWELYN, *CONFLICT*, *supra* note 10, at 37–40, 212–18.

59. *See id.* at 228–36.

60. Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE* 29, 70 (L. Burgi et al. eds., 2005).

Interestingly, Pauwelyn's conclusion is that, in a conflict, many international legal norms may result in the nonapplication of WTO law.⁶¹ Essentially, he believes that since all international legal norms apply (unless contracted out), there really is no conflict.⁶² The difficulty with this argument is that, while States may "contract out," it is not entirely clear that the WTO Agreements establishing the rules of trade liberalization "contracted out" of the rules otherwise governing the interactions of States. While it is assumed that the rules of general international law apply before all tribunals unless specifically exempted from application, just the opposite could be argued: the WTO is a tribunal whose competence is deliberately limited to the WTO Agreements.⁶³

This argument is based on Pauwelyn's interpretation of the WTO obligations as "reciprocal," rather than "integral," as might be expected in a multilateral treaty.⁶⁴ In contrast, though, Pauwelyn interprets other international obligations as truly "integral" and thus owed *erga omnes*.⁶⁵ Conveniently, "reciprocal" obligations may be modified between the parties, regardless of other multilateral partners' opinions, whereas "integral" obligations may not.⁶⁶ The happy result is that "integral" treaties concluded *before* the WTO Agreements, such as some human rights treaties, remain in force and are not modified by the WTO Agreements. However, "integral" treaties concluded *after* the WTO Agreements *can* modify those obligations. This is problematic because although the WTO tribunals may issue decisions aimed at the withdrawal of the offending provisions, they do not have the authority to order their withdrawal; instead, compensation may be awarded if a State chooses to continue main-

61. PAUWELYN, CONFLICT, *supra* note 10, at 490–92. See also Pauwelyn, *Bridging*, *supra* note 10, at 911.

62. Pauwelyn, *Bridging*, *supra* note 10, at 915–16 ("Especially before a particular court or tribunal, it is important to include *all* international law binding between the parties as part of the *applicable* law, even if the *jurisdiction* of the adjudicator is limited to a given treaty (say, WTO covered agreements). If all courts and tribunals follow this approach, it would mean that, although they may have *jurisdiction* to examine different claims, in doing so they would apply *the same law*. Hence, in theory, no conflicts should arise.").

63. See, e.g., *European Communities—Measures Affecting the Importation of Certain Poultry Products*, ¶ 79, WT/DS69/AB/R (July 13, 1998) (adopted July 23, 1998) (holding that a separate bilateral agreement between the parties was not a WTO agreement within the WTO's competence).

64. See PAUWELYN, CONFLICT, *supra* note 10, at 69–88. For an overview of the distinction between "reciprocal" and "integral," see *id.* at 52–88.

65. See, e.g., *id.* at 74–75 (characterizing the Genocide Convention and European Communities' treaties as "integral").

66. See *id.* at 53.

taining those measures.⁶⁷ Such possibility demonstrates that States have some freedom to violate the WTO Agreements, albeit in violation of a moral obligation to comply.⁶⁸ This interpretation is also troublesome because conflicts between tribunals' jurisdiction and jurisprudence might be subject to a classification of the conflict, regardless of whether the obligation in question is "integral" or "reciprocal," or whether it is a prohibition or a right. Although Pauwelyn observes that the interpretation of treaties evolves,⁶⁹ he does not acknowledge that the classification of norms might similarly evolve.

An even larger problem with Pauwelyn's view is his assumption that existing rules of public international law (which provide options for managing conflicts) apply to certain kinds of conflicts. As previously discussed, even this concept is plagued with a variety of interpretations. In cases of "inherent normative conflicts,"⁷⁰ there may not be agreement on the normative force of explicit conflicts clauses, and on *lex posterior* and *specialis* rules, among other conflict resolution techniques.

Curiously, Pauwelyn also acknowledges the general benefit of decentralized competition, noting that "multiple proceedings may actually be helpful as long as each tribunal stays within the limits of its jurisdiction and defers to the other tribunal when it comes to deciding matters falling within that tribunal's jurisdiction,"⁷¹ as "different conclusions based on the same law . . . may even have positive side effects: [t]hrough competition the best interpretation is likely to surface."⁷² However, his general approach is not one of true competition among tribunals, but of promoting a constitutionalizing process.

In sum, Pauwelyn's version of comity appears to be a legal one in the civil law tradition, not an overtly discretionary pursuit of policy objectives. In reality, however, Pauwelyn is advocating for the primacy of human rights obligations over WTO law as a political end in itself, not as the result of the objective application of rules of interpretation. He proposes a rather radical restructuring of the relationships among international tribunals, as well as a radical restructuring of their competence,

67. DSU, *supra* note 47, art. 22(2), at 1239.

68. This moral obligation is articulated in the Vienna Convention, which notes that under *pacta sunt servanda* "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

69. Pauwelyn, *Bridging*, *supra* note 10, at 907.

70. Kalypso Nicolaidis & Joyce L. Tong, *The Continuing Debate Over New Sources of International Law*, 25 MICH. J. INT'L L. 1349, 1372 (2004).

71. Pauwelyn, *Going Global*, *supra* note 10, at 295.

72. Pauwelyn, *Bridging*, *supra* note 10, at 916.

although he relies on existing rules of international law, selecting certain legal objectives such as effectiveness, and techniques such as *lex posterior*. By selecting objectives and techniques that do not appear to reflect policy choices, he brings extra-WTO issues into the fold and constitutionalizes the WTO within the international legal system.

B. Yuval Shany's View

Yuval Shany also recommends a form of comity to increase the effectiveness of international dispute settlement.⁷³ He suggests mechanisms for resolving conflicts of jurisdiction, not conflicts of obligations. These mechanisms include increased comity (i.e., the conservative exercise of jurisdiction based on respect) and the harmonization of conflict rules.⁷⁴ Whereas Pauwelyn offers pre-existing rules of public international law to resolve normative conflicts, Shany transports private international law's jurisdictional conflict rules into the sphere of public international law. These jurisdictional conflict rules embrace concepts such as *forum non conveniens*, *res judicata*, and *lis alibi pendens*.⁷⁵ In later work, Shany also proposes *abus de droit* to prevent parties from taking advantage of alternate fora in bad faith, by forum shopping or otherwise.⁷⁶ Although Shany acknowledges that various legal actors are independent of one another, he, like Pauwelyn, views international law as a coherent system whose dangerous conflicts need only be "solved" by clear rules.

One problem with Shany's analysis is that aspects of comity, especially the concepts of *forum non conveniens* and bad faith, are highly discretionary.⁷⁷ Thus, they are a rather unpredictable tool for constructing an international legal system that is supposed to be able to resolve conflicts predictably. Shany identifies where consistent practice can be found for discretionary policy, such as with *lis alibi pendens* and *res judicata*, but also notes where it cannot.⁷⁸ Although he concedes that competition among fora may develop better, more harmonious policies (just as Pauwelyn appears to do), his definition of competing fora is narrow. Shany

73. See generally SHANY, *supra* note 11.

74. *Id.* at 266, 271.

75. See *id.* at 269–70.

76. See Shany, *supra* note 11, at 849.

77. See Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working*, 59 HASTINGS L.J. 241 (2007). See also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–08 (1947) ("The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. . . . [T]he doctrine leaves much to the discretion of the court to which plaintiff resorts.")

78. SHANY, *supra* note 11, at 269–71.

argues that tribunals are only in competition if they are likely to produce similar results on the same issue.⁷⁹ Yet, the “*lis alibi pendens* rule [and the *res judicata* requirement] . . . [do] not apply to courts of different national, regional, and worldwide legal systems unless such a prohibition has been explicitly provided.”⁸⁰

Despite Shany’s examples, increasing the degree of discretion for tribunals is an unlikely political goal. For example, as José Alvarez has observed:

At least some of the [North American Free Trade Agreement] parties appear to be having second thoughts about the scope of discretion that they have handed over to [International Convention on the Settlement of Investment Disputes] arbitrators and appear to be turning to interpretative statements ‘to take the power of decision away.’⁸¹

Judge Guillaume might add that in order to apply norms drawn from national courts, including *lis alibi pendens* and *res judicata*, the international legal system might also need to adopt rules of court hierarchy, as national court systems have done.⁸² Shany acknowledges that until more harmonized rules are developed, his conflict resolution policies appear very political. Many commentators have observed that tribunals are often very conscious of the appearance that they create law.⁸³ It seems strange for Shany to propose the development of rules by tribunals for the sake of legitimacy and effectiveness while worrying that the rules he proposes might appear to have been politically developed.

In contrast to Pauwelyn, Shany’s version of comity is more discretionary and more overtly policy laden, but, like Pauwelyn, his proposal is actually more radical than it might appear at first glance. Shany avoids being too controversial by limiting his scope to jurisdiction.⁸⁴ Furthermore, although tribunals might not be directly contemplating the substance of other self-contained regimes, they might reach the same outcomes by

79. *Id.* at 24–28.

80. Petersmann, *supra* note 30, at 365.

81. José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 *TEX. INT’L L.J.* 405, 417 (2003).

82. See Judge Gilbert Guillaume, Pres. of the ICJ, *The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order*, Speech to the 6th Comm. of the Gen. Assembly of the U.N. (Oct. 27, 2000), available at <http://www.icj-cij.org/presscom/index.php?p1=6&p2=1&pr=85&search=%22nagymaros%22>.

83. See, e.g., Alvarez, *supra* note 81, at 418 (“The possibility of political backlash is one reason that judges, and not merely international ones, are reluctant to admit that they are engaging in judicial lawmaking even though this is precisely what they are doing.”).

84. See SHANY, *supra* note 11, at 269–70.

simply sending cases away to competing regimes in a less regulated, discretionary atmosphere.

C. The View of the International Law Commission

The work of the ILC on the subject of fragmentation also lends some insight to this discussion of comity as a solution to the perceived problems with fragmentation. In the preliminary report on the matter, Martti Koskenniemi states: “[t]here is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives—they are ‘bargains’ and ‘package-deals’ and often result from spontaneous reactions to events in the environment.”⁸⁵ Nonetheless, he concludes, “International law is a legal system There are meaningful relationships between [norms] . . . [and i]t is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”⁸⁶

However, Koskenniemi argues elsewhere that any attempt to provide for a coherent international law system is largely a struggle of competing international law perspectives seeking to gain dominance over international law as a whole.⁸⁷ In light of this, it must be emphasized that the ILC’s use of the word “system” means only “that the various decisions, rules and principles of which the law consists do not appear not randomly related to each other . . . [and that] there is seldom disagreement that it is one of the tasks of legal reasoning to establish [relationships between them].”⁸⁸

Other authors also acknowledge this problem of competing legal perspectives, but simply argue for the particular values that their preferred regime offers.⁸⁹ The ILC itself recognizes this concern to some degree, mainly by questioning whether coherence in the international legal system is necessary for its own sake. While the ILC sees value in predicta-

85. ILC, Apr. 13 Rep., *supra* note 12, ¶ 34.

86. ILC, July 18 Rep., *supra* note 12, ¶ 14.

87. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Post-modern Anxieties*, 15 LEIDEN J. INT’L L. 553, 562 (2002).

88. ILC, Apr. 13 Rep., *supra* note 12, ¶ 33.

89. See Jan H. Dalhuisen, *Legal Orders and Their Manifestations: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 24 BERKELEY J. INT’L L. 129, 170–73 (2006) (arguing that it is important that “recognition standards [themselves be] of a higher, more universal nature to be truly meaningful, and not to reduce the recognition process merely to the will or sufferance of states,” but then admitting that “[n]aturally, it is only to be expected that in the recognition process there may be a preference for legal orders that recognize similar values, notions, and ideas as those prevailing in the recognizing legal order”).

bility, legal security, and equality, it does admit, “Coherence is . . . a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so.”⁹⁰

One of the important insights in the ILC’s work is its interpretation of conflict, which distinguishes between “conflicts within a regime” and “conflicts across regimes.”⁹¹ The Vienna Convention sees conflicts as subject-matter issues,⁹² but the ILC disagrees with this approach. For the ILC, conflict cannot merely be a matter of classifying subject matter, since no accepted classification scheme exists.⁹³ The ILC favors Pauwelyn’s broad definition of conflict, which encompasses frustration of purpose, over the narrow definition of two norms demanding incompatible results.⁹⁴ In addition, the ILC supports Pauwelyn’s perspective that “[w]hile the [DSU] limits the jurisdiction to claims which arise under the WTO covered agreements only, there is no explicit provision identifying the scope of applicable law.”⁹⁵

Significantly, the ILC concludes that fragmentation is not a threat to the international system, because whether conflicts reflect fragmentation or diversity “lie[s] in the eye of the beholder.”⁹⁶ Any complications that ensue are not “legal-technical ‘mistakes,’” but rather, a natural consequence of the way the legal order works in a pluralistic system that accommodates a variety of values.⁹⁷ Admittedly, the ILC’s work only discusses substantive conflicts, not the institutional conflicts that fragmentation also poses.⁹⁸ As a result, the ILC looks to the Vienna Convention, other rules of general international law such as *lex specialis*, *lex posterior*, and *jus cogens*, and the notion that international obligations may develop to resolve conflicts.⁹⁹ These techniques position various legal values against one another using a language that all lawyers can agree on and understand, thereby bringing legal closure to disputes. Perhaps such closure is what V.S. Mani contemplated when he wrote that international adjudication “endeavors to resolve the dispute—or at least

90. ILC, Apr. 13 Rep., *supra* note 12, ¶ 491.

91. *See id.* app. § 2.

92. *See id.* ¶ 22 (citing Vienna Convention on the Law of Treaties, *supra* note 68, art. 30).

93. *See id.* ¶ 22.

94. *See id.* ¶¶ 24–25 (citing PAUWELYN, CONFLICT, *supra* note 10).

95. *Id.* ¶ 45.

96. *Id.* ¶ 20.

97. *See id.* ¶ 16.

98. *See id.* ¶ 489.

99. *See id.* ¶ 18.

disposes it off from the juridical plane,"¹⁰⁰ or what Sir Robert Jennings meant when he distinguished between a dispute generally and the legal or justiciable aspects of the dispute.¹⁰¹ Thus, whether we call the dynamics of the international legal system "fragmentation" or "diversity" does not mean that lawyers cannot talk to each other and reach closure on the legal aspects of a dispute.

The ILC's work primarily focuses, like that of Pauwelyn, on existing rules to resolve conflicts. However, where Pauwelyn might propose a supposedly mechanical technique for definitively establishing superior norms without regard for the morality of the norms (although conveniently human rights norms do triumph), the ILC finds that the nature of the dispute resolution process in the international legal system is not so apolitical¹⁰² and that the perspective of each regime must be to regard its own norms as *lex specialis*.¹⁰³ While Pauwelyn might argue that there could be solutions to conflicts that a tribunal may discover, the ILC might argue that a solution does not exist prior to the dispute, but, rather, is formed through the process of assessing differing values and seeking closure.¹⁰⁴ In any event, neither party generally finds conflicts to be a threat to a system of international law perceived as integrated.

100. V.S. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 1 (Martinus Nijhoff Publishers 1980).

101. See Sir Robert Jennings, *Reflections on the Term 'Dispute,'* in ESSAYS IN HONOUR OF WANG TIEYA 401, 402–03 (Ronald St. John Macdonald, ed., 1994).

102. See ILC, Apr. 13 Rep., *supra* note 12, ¶ 35 ("Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose. . . . [S]ystemic thinking penetrates all legal reasoning . . . [and] may also be rationalized in terms of a *political obligation* on law-apppliers to make their decisions cohere with the preferences and expectations of the community whose law they administer."). See also David Kennedy, *The Nuclear Weapons Case*, in INTERNATIONAL LAW: THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 462, 466 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999) (finding an apparent contradiction in "judges who flaunt their fealty to positive law and an apolitical judiciary while remaining proud of their [political] engagement with the humanist issues of the day, of their national or cultural patriotism, even their participation in internationalist advocacy institutions of one or another stripe").

103. See ILC, Apr. 13 Rep., ¶ 410 ("Whether a rule's speciality or generality should be decisive, or whether priority should be given to the earlier or to the later rule depended on such aspects as the will of the parties, the nature of the instruments and their object and purpose as well as what would be a reasonable way to apply them with minimal disturbance to the operation of the legal system.").

104. See *id.* ¶ 20.

II. COMPETITION AS AN ALTERNATIVE TO COMITY

Competition is, of course, not the polar opposite of comity. Rather, it is a trend that can pull in the opposite direction, but not necessarily so. We might even consider competition as one kind of comity, that is, one kind of relationship among legal actors. If the international legal system is composed of independent legal actors, then fostering their independence may support the system. With each of these actors operating independently and in competition with each other, the problems associated with fragmentation can be effectively resolved.

Jan Dalhuisen has noted that

[i]n situations where the conflicting interests are such that there is competition between the international commercial and financial order and a state legal order, state courts in the countries most directly concerned will be mindful of their state's position, but even international arbitrators or state courts in other states may not be indifferent to this competition, although the outcome may not be the same.¹⁰⁵

John Dugard has observed that the ICJ was less frequently seized of disputes after its decision in the early *South West Africa* case, which emphasized more formalistic interpretive techniques, and then it successfully attracted disputants back to its facilities after shifting to a more purposive analysis in the *Namibia* case.¹⁰⁶

Pemmaraju Sreenivasa Rao has added:

Another stated reason for the formation of new tribunals is disenchantment with the decisions of the ICJ, but this explanation too is not a significant factor. After all, disenchantment with outcomes is not confined to the ICJ or to judicial tribunals in general; it is a feature common to most permanent institutional bodies.¹⁰⁷

In addition, the ICJ apparently sought to accommodate the United States and Canada in the *Gulf of Maine* case by constituting a special

105. Dalhuisen, *supra* note 89, at 170.

106. See generally John Dugard, *Namibia (South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future*, 11 COLUM. J. TRANSNAT'L L. 14 (1972) (thoroughly discussing the *Namibia* case and its impact on the ICJ's future).

107. Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation?*, 25 MICH. J. INT'L L. 929, 945 n.59 (2004) ("The disenchantment of developing countries with the court on account of its decisions in the South-West Africa cases (1962, 1966) and the Northern Cameroons case (1963) were mentioned for the establishment of the International Tribunal for the Law of the Sea.").

chamber of specific judges, due to the threat of the parties leaving the court for an *ad hoc* tribunal.¹⁰⁸

This reality of competition should not be overstated, since parties are not entirely free to choose any judicial or quasi-judicial forum for dispute resolution. However, this does not diminish the pressures of competition on tribunals of all stripes, and not just pressure from other judicial bodies. It has even been observed that an institution such as the International Criminal Court (“ICC”) “will need to compete, in highly charged political environments, to fill its docket.”¹⁰⁹ The apparent reluctance of the U.N. Security Council, Secretary General, and Member States to enforce the arrest warrants issued for certain indicted Sudanese individuals could suggest that the ICC is losing political influence as international actors seek alternate methods to resolve the dispute within the Sudan.¹¹⁰

In selecting a dispute resolution forum, there may be structural limitations (i.e., treaty language), a lack of personal or subject matter jurisdiction, or a lack of competence that limits the options for a particular forum. Nonetheless, parties, as sovereign entities, may always seek to resolve their differences through mediation, *ad hoc* arbitration, or one of the many alternative methods, for example, simple negotiation.¹¹¹ And, States often prefer judicial tribunals to nonjudicial, including preferring domestic processes to international.¹¹² Accordingly, the existence of Al-

108. See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 288 (7th rev. ed., Routledge 1997) (1970) (citing *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can./U.S.), 1984 I.C.J. Rep. 246, 252 (Oct. 12)).

109. Alvarez, *supra* note 81, at 420–21 (“Political pressures may force that Court to build bridges to, not supplant, the more ‘biased’ national venues for judging perpetrators of mass atrocities that many ICC advocates disparage. . . . [T]he ICC . . . will continue to depend . . . on the political will of states.”).

110. See The Secretary General, *Report of the Secretary-General on the Sudan*, U.N. Doc. S/2008/267 (Apr. 22, 2008); The Secretary General, *Report of the Secretary-General on the Sudan*, U.N. Doc. S/2008/64 (Jan. 31, 2008). These two documents report on the “overall situation in the country,” progress in implementing the Comprehensive Peace Agreement in the Sudan, and “the plans for disarmament, demobilization and reintegration,” but fail to mention the outstanding arrest warrants for former interior minister Ahmad Harun or Janjaweed militia commander Ali Kushayb issued by the ICC. *Id.* See also *Prosecutor v. Harun & Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest (Int'l. Crim. Ct., Apr. 27, 2007).

111. See, e.g., U.N. Charter, art. 33(1) (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”).

112. See Alvarez, *supra* note 81, at 416–19.

ternate Dispute Resolution (“ADR”) generally is enough to bring about competition among tribunals.

In addition to negotiation and other ADR methods, the structure and political nature of tribunals exerts competitive pressure. Observers have noted that the WTO, the North American Free Trade Agreement, and the ICJ are subject to intense political pressures such as the selection of favorable judges, bringing political cases to tribunals, and compliance with judgments¹¹³: “[p]olitics does not stop once a court is established and adjudication begins.”¹¹⁴ Thus, the pressures of competition can arise not only from direct conflicts of norms and jurisdiction, but also from the constitutive nature of tribunals and even the personal career objectives of the individual judges concerned. It must be recognized and accepted that various tribunals do compete with each other for legal authority, and that any effort to constitutionalize the international system, or otherwise establish norms for resolving conflicts, has a political result: the favoring of certain tribunals.

A. Anne-Marie Slaughter’s View

Anne-Marie Slaughter agrees that there is competition among courts, but her perspective is friendly. She denies a constitutional coherence to the international legal order,¹¹⁵ and presents instead a system of “fellow professionals in an endeavor that transcends national borders.”¹¹⁶ For Slaughter, competition is constructive: “[j]udges who are beginning to think of one another as participants in the same dispute resolution system are often less willing to defer to one another out of the comity of nations. . . . The result, paradoxically, is more dialogue and less deference.”¹¹⁷ However, she posits that through this sort of competition, “a distinct doctrine of ‘judicial comity’ will emerge: a set of principles designed to guide courts in giving deference.”¹¹⁸ It is somewhat unclear if her version of comity is discretionary or more rule-based, since she elsewhere argues in favor of “constrained independence” where tribunals are limited only by “structural, political, and discursive mechanisms,”¹¹⁹ which she poses

113. *See id.*

114. *Id.* at 415.

115. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191 (2003).

116. *Id.* at 193. *See also* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103 (2000).

117. Slaughter, *supra* note 115, at 194.

118. *Id.*

119. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 901 (2005).

in opposition to the theory that “the only effective international tribunals are ‘dependent’ [less ideological] tribunals.”¹²⁰ Slaughter’s perspective suggests that her vision of comity is quite different from Pauwelyn’s.

Slaughter presumes that through friendly competition, some kind of international law of comity (or similar constitutionalizing solution to address conflicts) will emerge. Slaughter’s theory assumes that conflicts are destructive and that, at some point, international law may be able to rid itself of conflicts. The reality is that conflicts are more likely to be a permanent fixture, but may serve a constructive purpose in themselves.

B. Yves Dezalay and Bryant Garth’s View

Yves Dezalay and Bryant Garth extensively discuss tribunal competition in connection with ADR’s propensity to attract business¹²¹ and the diffusion of law into new jurisdictions.¹²² They are particularly interested in how certain laws compete with others to govern legal outcomes,¹²³ and the spread of American norms, which have competed with and pushed aside European norms.¹²⁴ In fact, the competition they see goes so far as to offer competing definitions of arbitration/mediation.¹²⁵ Dezalay and Garth have also noted that the competitive atmosphere in international law has intensified, transporting considerations of the market into the law,¹²⁶ and that in terms of maintaining legitimacy and social relevance, this might be a healthy updating of the law and legal dispute resolution.¹²⁷

Dezalay and Garth’s observations seem accurate. Like Slaughter, they acknowledge the reality of competition and acknowledge that it has nor-

120. *Id.* (citing Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 8, 27 (2005)).

121. See Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 L. & SOC. INQ. 285, 287 (1996).

122. YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002).

123. See *id.*

124. Yves Dezalay & Bryant G. Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice out of the Competition for Transnational Business Disputes*, in YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 33, 39 (1996) (“As is the case for the entire field of business law, the Anglo-American model of the business enterprise and merchant competition is tending to substitute itself for the Continental model of legal artisans and corporatist control over the profession.”).

125. See Dezalay & Garth, *supra* note 121, at 292.

126. *Id.* See also Mauricio García-Villegas, *Comparative Sociology of the Law*, 31 L. & SOC. INQUIRY 343 (2006).

127. See Dezalay & Garth, *supra* note 121, at 308–10.

mative effects. Also like Slaughter, their observations are stated as fact (though not without a hint of sadness for the passing of the old order) and are emblematic of the new normative system supplanting the old. ADR has been, as a field, historically dominated by Europeans, and it is now becoming increasingly dominated by Americans. As such, Americans will bring their own norms with them, pushing out the older, European ones. Competition continuously produces newer, and possibly more relevant and fair, norms.

III. THE DRAWBACKS AND BENEFITS OF COMPETITION

A. Drawbacks of Competition

Competition among tribunals has led some to criticize tribunals or individual judges for making themselves attractive as decision makers,¹²⁸ and highlight the drawbacks posed to the international legal system. Forum shopping is almost always identified as one of the more serious threats, criticized for providing parties opportunities to select a tribunal based on “access to the court, the procedure followed, the court’s composition, . . . its power to make certain types of order[,] . . . [or] the case-law . . . [that] happens to be more favourable to certain doctrines, concepts[,] or interests.”¹²⁹ More specifically, “[t]he particular procedures involved may . . . influence the application of substantive domestic or foreign law and the outcome of disputes.”¹³⁰ Also cited as drawbacks are parallel litigation (often linked to litigation costs),¹³¹ the development of a more litigious international environment,¹³² and a “risk of conflicting judgments,”¹³³ especially by courts with differing expertise and competence.¹³⁴ Even more grave, the fragmentation of the law could accelerate

128. See Dezalay & Garth, *supra* note 124; Guillaume, *supra* note 82.

129. Guillaume, *supra* note 82, ¶ 13.

130. Petersmann, *supra* note 30, at 282.

131. *Id.* at 358 (“As the very broad scope of WTO law overlaps with numerous other international and regional agreements, cooperation among international and national courts becomes ever more important for maintaining the rule of law and reducing transaction costs, particularly in international relations among producers, investors, traders, and consumers.”).

132. See SHANY, *supra* note 11, at 77–78.

133. Guillaume, *supra* note 82, ¶ 15 (“Systems of national law have for long had to deal with [the problems associated with contradictory decisions]. They have solved them by two methods: on the one hand, the development of a clear hierarchy among courts, on the other, the formulation of rules on litispendency and *res judicata*.”).

134. *Id.* ¶¶ 16–17, 23.

and increase destabilizing forces, threatening the international rule of law¹³⁵ and thereby endangering legal certainty itself.¹³⁶

B. Benefits of Competition

These criticisms, leaning on a theory of a coherent international legal system, presuppose that competition has only drawbacks: they do not give due regard to potential benefits. What is problematic about a party forum shopping, especially a sovereign State that has constructed the very tribunal it now wishes to seize, even if it affects the kind of justice reached? As Ernst-Ulrich Petersmann observes, "Forum shopping and multiple litigations have become frequent in the legally and institutionally fragmented international law of human rights."¹³⁷ Petersmann continues by noting that

[w]hereas forum shopping in private international commercial law may seriously inconvenience private parties attacked against their will in distant fora applying foreign law, respondent parties in intergovernmental litigation usually have the resources to defend themselves in international courts whose jurisdiction they have voluntarily accepted.¹³⁸

In fact, we might argue that forum shopping is, in essence, what States have always done when they have created new arbitral tribunals or claims commissions for disputes. Not content with the decisions or perhaps even the kind of justice they might receive at one tribunal, States create others, ones they perceive to be more fair, often referring to them as possessing "better expertise" or as being "more specialized."¹³⁹ It cannot be forgotten that in international law, as opposed to domestic legal systems, a tribunal only has jurisdiction by state consent.¹⁴⁰ If forum shopping is considered a problem, then the solution would be to prohibit

135. *Id.* ¶ 27.

136. See ILC, Apr. 13 Rep., *supra* note 12, ¶ 52.

137. Petersmann, *supra* note 30, at 283.

138. *Id.* at 360.

139. See, e.g., Hafner, *supra* note 1, at 861; Firew Kebede Tiba, *What Caused the Multiplicity of International Courts and Tribunals?*, 10 GONZ. J. INT'L. L. 202 (2006). See also Press Release, Secretary-General Hopes More and More Parties Will Make Use of International Tribunal for Law of the Sea, U.N. Doc. SG/SM/7477/ SEA/1684 (July 3, 2000).

140. See CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 69 (2003) ("If agreement or consent is permitted to be the basis of jurisdiction of a [domestic] tribunal, such as an arbitral tribunal, related to the legal system, it is because it is expressly and exceptionally permitted to be so by the law of the land. In any case such a tribunal is ultimately controlled in one way or another by a national tribunal whose jurisdiction is not based on consent of the parties to the dispute but on the legitimate law of the land.").

States from creating any new tribunals, perhaps even ones on a bilateral or regional basis. This is not only a conceptually difficult task, but also practically impossible to accomplish.

As for multiple litigations, Pauwelyn interestingly comments:

[The burden of] adjudicating the same dispute before two different tribunals does not necessarily amount to wasteful duplication. In case each of the two tribunals deals with clearly distinct matters—such as a WTO or [South African Development Community] panel dealing with trade-related claims and [International Tribunal for the Law of the Sea] with matters related to the law of the sea or conservation—multiple proceedings may actually be helpful as long as each tribunal stays within the limits of its jurisdiction and defers to the other tribunal when it comes to deciding matters falling within that tribunal’s jurisdiction.¹⁴¹

Accordingly, even if the pressures on a party to defend multiple suits were a valid concern, others have observed that it is already acceptable for persons to be subjected to parallel or conflicting laws as an inherent aspect of globalization.¹⁴²

Competition among tribunals might lead to better decisions. A court may not be required to follow another’s jurisprudence, but the risk of another forum reaching a contrary result and potentially embarrassing the tribunal might encourage a more careful weighing of issues. A tribunal may not be seized of a similar dispute again, and thus may not have the opportunity to refine its jurisprudence on a given issue; judges might also lose opportunities for career-advancing positions if their decisions come into disrepute. In addition, a State faced with truly conflicting decisions from two or more tribunals, that is, decisions requiring an act that breaches another obligation, must make a choice and violate one regime in order to follow the other. It is doubtful that any tribunal would want to be seen as imposing less important decisions that are less likely to be followed, and therefore, a tribunal may tailor its judgments to avoid forcing a State to make such a decision.

In the recent *Kadi* and *Yusuf* cases before the Court of First Instance of the European Communities (“Court of First Instance”), although no *jus cogens* concerns were held to be at issue, the court suggested that some form of conflict with the decisions of the U.N. Security Council might be possible over *jus cogens* issues, and that it could not defer to the Security Council in such a case.¹⁴³ Since the issues did not rise to the level of *jus*

141. Pauwelyn, *Going Global*, *supra* note 10, at 295.

142. See Nicolaïdis & Tong, *supra* note 70.

143. Case T-315/01, *Kadi v. E.U. Council*, 2005 E.C.R. II-3649; Case T-306/01, *Yusuf & Al Barakaat Int’l Found. v. E.U. Council*, 2005 E.C.R. I-17.

cogens, one might wonder why the Court of First Instance bothered to devote analysis to a potential conflict with the Security Council, and whether it was merely the court's political assertion of the primacy of human rights norms. While on appeal to the ECJ, the Advocate General suggested that the ECJ could not defer to the Security Council's command—a command that would demand a violation of human rights law—and the ECJ subsequently agreed with that opinion.¹⁴⁴ Human rights campaigners might applaud the ECJ for remaining within its competence and not giving decisive weight to Security Council decisions, but they might also decry the WTO for failing to step outside its competence to consider human rights obligations. Forcing a State to choose between honoring its obligations to the European Communities or to the Security Council may lead both the ECJ and the Security Council to reach more considered judgments in the future.

The improvement of tribunals through competition need not be so confrontational. For example, some observers have noted that a kind of comity through competition, perhaps just what Slaughter hopes for, has developed between the ECJ and European Court of Human Rights (“ECHR”), which “has markedly increased the quality of Luxembourg’s jurisprudence, in that the latter cites and examines Strasbourg case-law explicitly, rather than making elliptical assertions of fundamental rights compliance.”¹⁴⁵ Furthermore, the methods of analysis used by one tribunal might embolden another to improve its approach, particularly if those two tribunals compete with one another. It has been observed that the WTO Dispute Settlement Body applies more aggressive and “stricter standards of judicial review compared to the more deferential ‘margin of appreciation’ doctrine applied by human rights courts [and that

144. For the Advocate General’s opinions, see Case C-402/05 P, *Kadi v. E.U. Council, et al.*, 2008 E.C.R. I-39; Case C-415/05 P, *Al Barakaat Int’l Found. v. Council of the E.U., et al.*, 2008 E.C.R. I-11. Shortly before publication of this Article, the ECJ issued its opinion in the joined cases and indeed agreed with the Advocate General’s opinion that the municipal effects of the Security Council’s resolution must comply with EU human rights standards. Joined Cases C-402/05 P and C-415/05 P, *Kadi & Al Barakaat Int’l Found. v. Council of the E.U., et al.*, ¶¶ 285–330 (Sept. 3, 2008), available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>. The ECJ’s reference to the case law of the ECHR should be noted. *Id.*

145. Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights*, 6 HUMAN RIGHTS L. REV. 87, 129 (2006). It is to be noted that the ECJ sits in Luxembourg and the ECHR sits in Strasbourg. The Court of Justice of the European Communities, <http://curia.europa.edu/> (last visited Nov. 2, 2008); European Court of Human Rights, <http://www.echr.coe.int/echr/index.htm> (last visited Nov. 2, 2008).

competing jurisdictions among courts . . . may contribute to improving the quality and overall consistency of judicial reasoning.”¹⁴⁶

Indeed, Upendra Baxi has written about the failure of arbitration panels to consider human rights issues in reaching decisions,¹⁴⁷ but this criticism could be an argument in favor of more competition among tribunals. The argument would proceed as follows: if a matter were settled by an arbitration panel that ignored human rights issues, that settlement should not preclude another competing court from pronouncing a judgment on the human rights aspects of the same matter. This lack of preclusion might discourage parties from excluding human rights matters from the arbitration panel’s competence, since those matters might be dealt with by another court in the future anyway. Thus, the decision itself would consider the entirety of the legal issues at stake and might present a better chance of compliance.

Competition might also make for better courts in and of themselves. Increased comity, as a solution, may sacrifice the benefits of self-contained regimes to realize a kind of unobtainable desired coherence in international law. However, courts do a better job of improvement when they themselves are the agents of change. Many have noted that “most international judicial bodies operate in ‘splendid isolation,’ . . . with little, if any, regard for the jurisprudence of other international tribunals.”¹⁴⁸ Judge Guillaume has observed, though, that “[e]very judicial body tends—whether or not consciously—to assess its value by reference to the frequency with which it is seised.”¹⁴⁹ David Kennedy has also remarked that “the Court is one cultural and political institution among others, crafting its decision to enhance its legitimacy and pull towards compliance.”¹⁵⁰ Accordingly, losing work to competing tribunals might suggest to a tribunal that it should improve. Although strictly writing about international commercial arbitration, Yves Dezalay and Bryant Garth’s observation has relevance here:

Competition among key actors and groups . . . serves to construct legal legitimacy[;] . . . the competitive battles that take place within it are

146. Petersmann, *supra* note 30, at 366 (citing MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION (2003) (exploring the alternate standards of review in WTO dispute resolutions)).

147. See Baxi, *supra* note 18, at 198–99.

148. Petersmann, *supra* note 30, at 283.

149. See Guillaume, *supra* note 82, ¶ 14.

150. Kennedy, *supra* note 102, at 464. See also *id.* at 466 (“And the sophisticated commentators were quick to see the wisdom of the Court’s manoeuvre—for the Court also manoeuvres, worries about its legitimacy, its allies and enemies in the game of mutual political regard.”).

fought in symbolic terms among moral entrepreneurs. Battles fought . . . build careers and markets for those who are successful in this competition, and they build the legitimacy and credibility of international legal practices and international institutions.¹⁵¹

In support of this observation, Dezalay and Garth cite as an example the waning of the dispute market presence that the International Chamber of Commerce once offered to new arbitral institutions seeking to attract disputants as clients.¹⁵² It has also been mentioned that the continuing Doha reassessment by the Member States—that is, their reassessment of the effectiveness of the WTO DSU—is likely to strengthen the tribunal.¹⁵³

Turning to the diversity of tribunals, this diversity permits parties to select the tribunal most likely to produce a certain outcome because of the application of certain norms. This diversity is also beneficial in that it permits parties to select a tribunal more insulated from undesirable politics or corruption.¹⁵⁴ Accordingly, the fairness of tribunals is oft-cited as a reason that some States prefer ADR.¹⁵⁵

In a similar manner, another benefit of competition might be increased transparency.¹⁵⁶ Competition provides an incentive to produce decisions that will be followed,¹⁵⁷ and thus, gives courts an incentive to be perceived as fair. It is frequently noted that the ICJ decision in *Nicaragua* may have been mostly to blame for the U.S. backlash against the court.¹⁵⁸

151. Dezalay & Garth, *supra* note 124, at 33.

152. *Id.* at 44 (“This rapid expansion of the market of arbitration naturally awakened new appetites. The ICC thus found itself more and more in competition with new arbitral institutions aiming at such or such segment of this very diverse market.”).

153. See Petersmann, *supra* note 30.

154. See *id.* at 359 (“The rule-oriented WTO dispute settlement system clearly mitigates power disparities in international relations and helps governments limit power politics inside their countries[, for example], by limiting protectionist abuses of trade policy discretion in favor of rent-seeking interest groups by requiring independent judicial remedies inside countries like China that did not have such legal institutions prior to WTO membership.”) (internal parentheses omitted).

155. See Betty Southard Murphy, *ADR's Impact on International Commerce*, 48 DISP. RESOL. J. 68 (1993).

156. Dezalay & Garth, *supra* note at 124, at 49 (“[I]t is partly a matter of introducing competition in a market that was strongly cartelized. . . . But it is even more essential and also more difficult to introduce a minimum of transparency in a community of specialists characterized by personal relations so complex and so entangled that the interdict access to this market by nonspecialists.”).

157. See Christopher R. Drahozal, *Contracting Out of National Law*, 80 NOTRE DAME L. REV. 523, 524 (2005).

158. See Alvarez, *supra* note 81, at 417–18.

Since state compliance is still dependent on state cooperation,¹⁵⁹ States may be more inclined to comply with judgments that are reached by courts perceived as fair. Similarly, in the context of arbitration, Christopher Drahozal has argued that “[c]ompetition to be selected by parties gives arbitrators a stronger incentive than public court judges to enforce the provisions of the parties’ contract, including the parties’ contractual choice of law.”¹⁶⁰ Drahozal suggests that such reasoning might also be applicable to courts.¹⁶¹ Accordingly, competition, transparency, and the need for decisions that spur compliance with the law might motivate tribunals to develop in a fair and noncorrupt way. International constitutionalization and the comity proposals of Pauwelyn and Shany may not offer this benefit.

In fact, attempting to constitutionalize international courts might ignite an even more combative fragmentation among tribunals. For example, Kalypso Nicolaïdis and Joyce Tong argue that the Westphalian project was essentially one aimed at destroying hierarchies and establishing horizontal equality.¹⁶² Indeed, managing legal tensions with conflict rules that require comity might place certain tribunals or their norms in a more vertical position; this position might actually increase intertribunal hostility,¹⁶³ and any friendliness that Slaughter sees among horizontal tribunals might be lost. States exercising their sovereign prerogatives might gravitate to more *ad hoc*, bilateral tribunals that apply alternative equitable solutions rather than solutions drawn from the strict corpus of international law, all of which will generate even more conflicting international norms. Failure to embrace decentralized norm building might exacerbate the fragmentation of international law, which frustrates advocates of a constitutionalized, international legal system.

In addition to better tribunals and better decisions, increased competition could make for better justice. For example, if a particular tribunal becomes more popular, is this not an endorsement by the parties that they regard the court as achieving justice? Judge Guillaume finds the increased competition among courts as a risk that “[could lead c]ertain courts . . . to tailor their decisions so as to encourage a growth in their caseload, to the detriment of a more objective approach to justice. Such a

159. *See id.*

160. Drahozal, *supra* note 157, at 524; Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 79, 106–07 (2000).

161. *See, e.g.*, Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469 (1998).

162. Nicolaïdis & Tong, *supra* note 70, at 1371–72.

163. *See id.*

development would be profoundly damaging to international justice.”¹⁶⁴ Bruno Simma has also noted that “the exclusion or modification through a ‘self-contained regime’ of ‘normal’ secondary rules [could lead] to a ‘softening’ of the legal consequences of wrongful acts.”¹⁶⁵ But if competition may produce more carefully crafted decisions—decisions largely perceived as fair and more accurately reflective of the law made by States for States—then is this development not in pursuit of justice?

CONCLUSION

In short, the fears of fragmentation may be overstated. First, there are forces opposing fragmentation such as interjudicial dialogue, common legal traditions, and harmonization, as well the application of many of the same rules of general international law.¹⁶⁶ Second, any threat to legal certainty posed by fragmentation does not appear particularly graver in the modern era than any preceding time period. These kinds of conflicts are simply part of the nature of the international legal system.¹⁶⁷ That being said, competition may, in fact, produce better norms. Drahozal has stated that “[t]he more choices of national law available to parties, the more likely they can find a national law that they prefer. Indeed, . . . contractual choice of law facilitates interjurisdictional competition, thereby further enhancing the choices available to the parties.”¹⁶⁸ Fragmenting norms could provide opportunities for better norms, particularly since differing legal traditions bring differing norms to adjudication, all of which may have their relative strengths.¹⁶⁹ In support of this, Nicolaïdis and Tong cite to the competition between the United States and EU countries to export their legal models, as well as the diversity in the legal

164. Guillaume, *supra* note 82, ¶ 14.

165. Simma, *supra* note 53, at 135.

166. See Burke-White, *supra* note 37, at 964, 974, 978. See also William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 755–61 (2003).

167. ILC, Apr. 13 Rep., *supra* note 12, ¶ 492 (“One principal conclusion of this report has been 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.”)

168. Drahozal, *supra* note 157, at 548–49.

169. See Trevor C. Hartley, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, 54 INT'L & COMP. L.Q. 813, 814 (2005); Michaels, *supra* note 25, at 1008 (“American law relies on broad standards of ‘fairness’ and ‘reasonableness’ that are applied in each individual case. This enables the judge to focus on achieving justice in individual cases even if it hampers predictability for the parties. European law, by contrast, uses hard and fast rules that are easier to apply and therefore more predictable but may lead to unjust results in individual cases.”).

models in Europe, which instills a normative power in these models.¹⁷⁰ This continual updating of law and legal dispute resolution is healthy for the law to maintain legitimacy while keeping up with social change.¹⁷¹ How popular courts weigh the need for equality, the right to a hearing, and so on might suggest a balance among principles that is the most just approach. Other tribunals may look to the decisions of more popular fora as examples of justice, and reform themselves and their image appropriately.

Changes in the substance of the law brought about by conflicts of norms and jurisdiction can be beneficial. Some academics have written about the evolution of certain rules due to competition for business, such as the role of party autonomy.¹⁷² Others have discussed the criticism made in regards to tribunals' applications of comity rules designed to resolve conflicts.¹⁷³ In addition, according to Petersmann, "The rule-oriented WTO dispute settlement system [has been cited as mitigating] power disparities in international relations."¹⁷⁴

Thus, increased competition may increase the diversity of legal norms and the legitimacy of the norms applied. As William Burke-White has articulated, the interaction of fragmenting and antifragmenting trends produces a pluralist legal order, which is more open to a variety of alternative norms.¹⁷⁵ The attractiveness of this theory is that there is an international legal system that is legitimate and effective because it strikes a balance between diversity and universality.¹⁷⁶ This diversity of legal norms "can be a source of normative power."¹⁷⁷ As the ILC has observed, "Even as international law's diversification may threaten its coherence, it does this by increasing its responsiveness to the regulatory context."¹⁷⁸

Any objection to the beneficial role of fragmentation is based on one's conception of justice and whether justice can be a democratic and com-

170. Nicolaïdis & Tong, *supra* note 70, at 1374–75.

171. See Dezalay & Garth, *supra* note 121, at 310.

172. See Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233 (2006).

173. See Westbrook, *supra* note 8, at 567.

174. See Petersmann, *supra* note 30, at 359.

175. Burke-White, *supra* note 37, at 978.

176. See *id.*

177. Nicolaïdis & Tong, *supra* note 70, at 1374 (noting the success of the EU political and legal model around the world, based partly on its underlying diversity in contrast to the American model, which is largely homogenous).

178. ILC, Apr. 13, Rep., *supra* note 12, ¶ 492.

petitive preference. If the *South West Africa* cases¹⁷⁹ at first lost work for, and then later brought work back to, the ICJ, then the latter decisions in this series can be regarded in one of two ways: merely a play for prestige, or a constructive acknowledgement that the international community thought that its prior decisions were wrong and did not do justice. With the deliberate adoption of the more purposive interpretation method described by Dugard,¹⁸⁰ the ICJ may be seen as reforming itself in order to better execute justice, notwithstanding the critical remarks of South Africa's *ad hoc* judge in the final *South West Africa* case regarding the justice achieved.¹⁸¹ Prior ICJ decisions had led some developing countries to view the court as a failure, and prefer the establishment of new dispute settlement tribunals, such as the International Tribunal for the Law of the Sea.¹⁸² Perhaps the recent increase in business for the ICJ shows that countries now regard the court as just, striking a balance between, on the one hand, the interests of States in retaining the role of sovereign consent in international law and, on the other hand, the international community's need to constrain States' freedom of action.

Of course, the opposite can be easily argued: justice is not popular. However, if international tribunals are created by States in order to do justice among them, then being recognized as the "most attractive" forum is evidence that a particular tribunal may have a better appreciation for justice. Petersmann has argued that "national and international courts do not yet constitute a coherent legal and judicial system,"¹⁸³ the word "coherent" being used in the sense of a single, legitimate, norm-producing system without internal inconsistencies. However, is this not a form of coherence if a system allows the best court, norm, or justice to survive? Fragmentation may not be a problem to be solved, but rather, a sign that the international legal system needs to consider a variety of legal norms.¹⁸⁴ As society's definition of justice evolves, so do many tribunals, not necessarily towards a top-down, constitutionalized, hierarchical system overseeing a coherent, unitary international legal order, or

179. See *South West Africa Cases (Ethiopia v. S. Afr. & Liberia v. S. Afr.)*, 2d Phase, 1966 I.C.J. Rep. 6 (July 18), available at <http://www.icj-cij.org/docket/files/46/4931.pdf>; *South West Africa Cases (Ethiopia v. S. Afr. & Liberia v. S. Afr.)*, Prelim. Objs., 1962 I.C.J. Rep. 319 (Dec. 21), available at <http://www.icj-cij.org/docket/files/46/4887.pdf>.

180. See Dugard, *supra* note 106, at 33–38.

181. See *South West Africa Cases (2d Phase)*, 1966 I.C.J. Rep. 68 (separate opinion of Judge Van Wyk, *ad hoc*), available at <http://www.icj-cij.org/docket/files/46/4939.pdf>.

182. See, e.g., Rao, *supra* note 107, at 945 n.59.

183. Petersmann, *supra* note 30, at 360.

184. See ILC, Apr. 13, Rep., *supra* note 12, ¶ 487 ("Even as the law may not go much further than require a willingness to listen to others, take [others'] points of view into account and . . . find a reasoned resolution at the end.").

for that matter towards a network of friendly, lending, and borrowing professionals. Instead, they may affirm a bottom-up, vigorous system where different legal actors compete for the best realization of justice.