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Rüdiger Wolfrum · Ina Gätzschmann (eds.)

International Dispute Settlement: Room for Innovations?

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Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

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Heidelberg, August 2012

Rüdiger Wolfrum
Ina Gätzschmann

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Panel IV: International Courts as Lawmakers

Abbreviations

AB	Appellate Body
AJIL	American Journal of International Law
AmUIntlLRev	American University International Law Review
AustralianYbIL	Australian Yearbook of International Law
BerkeleyJIL	Berkeley Journal of International Law
BIT	Bilateral Investment Treaty
BYIL	British Yearbook of International Law
CardozoLRev	Cardozo Law Review
ChicagoJIL	Chicago Journal of International Law
Chinese JIL	Chinese Journal of International Law
CIS	Commonwealth of Independent States
CIS EC	Economic Court of the Commonwealth of Independent States
CJEU	Court of the European Union
CornellILJ	Cornell International Law Journal
CTS	Command Treaty Series
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
DukeJComp&IL	Duke Journal of Comparative and International Law
ECOSOC	UN Economic and Social Council
ECR	European Court Reports
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
ELJ	European Law Journal
ETS	European Treaty Series
EurAsEC	Eurasian Economic Community
FAO	Food and Agriculture Organization of the United Nations

FinnishYbIL	Finnish Yearbook of International Law
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
GLJ	German Law Journal
HarvardILJ	Harvard International Law Journal
HRLJ	Human Rights Law Journal
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICSID Rev/FILJ	ICSID Review/Foreign Investment Law Journal
ICTY	International Criminal Tribunal for the former Yugoslavia
ILA	International Law Association
ILC Yb	Yearbook of the International Law Commission
ILM	International Legal Materials
ILOAT	Administrative Tribunal of the International Labour Organization
IMO	International Maritime Organization
Iran-US CTR	Iran-US Claims Tribunal Reports
ITLOS	International Tribunal for the Law of the Sea
JIntlArb	Journal of International Arbitration
JIEL	Journal of International Economic Law
JWT	Journal of World Trade
LJIL	Leiden Journal of International Law
LPICT	The Law and Practice of International Courts and Tribunals

MaxPlanck UNYB	Max Planck Yearbook of United Nations Law
MichiganJIL	Michigan Journal of International Law
MIT	Multilateral Investment Treaty
NetherlandsYbIL	Netherlands Yearbook of International Law
NordicJIL	Nordic Journal of International Law
North Carolina LRev	North Carolina Law Review
NYU JILP	New York University Journal of International Law and Politics
OAS	Organization of American States
OAU	Organization of African Unity
OJ C	Official Journal of the European Union (Information and Notices)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RdC	Recueil des Cours
RGDIP	Revue Générale de Droit International Public
RSDIE	Revue Suisse de Droit International et de Droit Européen
SCOR	Security Council Official Records
SCSL	Special Court for Sierra Leone
StanfordJIL	Stanford Journal of International Law
TexasILJ	Texas International Law Journal
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	UN Commission on International Trade Law
UNCLOS	UN Convention on the Law of the Sea
UNCTAD	UN Conference on Trade and Development
UNESCO	UN Educational, Scientific and Cultural Organization
UNGA	UN General Assembly
UNMIK	United Nations Interim Administration Mission in Kosovo

UNSC	UN Security Council
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
VJIL	Virginia Journal of International Law
WHO	World Health Organization
WLR	The Weekly Law Reports
WTO	World Trade Organization
YaleLJ	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Opening Address

*Rüdiger Wolfrum**

Also on behalf of Armin von Bogdandy, my colleague, I would like to welcome you at this seminar on 'International Dispute Settlement: Room for Innovations?'.

Let me briefly explain the objective of this seminar. This is not meant to be a seminar on dispute settlement as it is. We all know how international dispute settlement works. The title is 'Room for Innovation' with a question mark and I would very much appreciate if that could be the focus of that seminar. We have combined various aspects and for that reason, I hope that we are going to have some cross-fertilization for we are dealing with dispute settlement procedures, which normally are not dealt with in the same seminar.

We will start with WTO dispute settlement since this is, in my opinion, the most modern dispute settlement procedure. I hope we will appreciate its particularities and we should consider whether they indicate a trend to be pursued also in other procedures. In my view the involvement of the parties and the two stage procedure are of particular interest.

The next topic is dealing with advisory opinions. The reason for touching upon this issue and for giving it so much room is that advisory opinions have been marginalized in practice and perhaps underrated in literature. Recently the International Tribunal for the Law of the Sea has had some positive experience with that procedure.

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The third issue is dealing with 'Interaction between Counsel and International Courts and Arbitral Tribunals'. This is the topic so far hardly dealt with in seminars. Philippe Sands has distributed guidelines on that, which give already an indication in the way he is going to argue.

The topic on the lawmaking functions of international courts and tribunals is, maybe, a controversial issue. Under this topic we will have to deal with the question to what extent international courts or tribunals contribute to the progressive development of international law – which is significant – and whether this may be qualified as lawmaking. This is not only a semantic question but an issue entailing significant consequences such as the appropriate foundation of the legitimacy of international courts and tribunals.

The final presentation concerning 'Privatization of the Settlement of International Disputes' again has an innovative aspect. It will deal with the issue that many legal disputes between States are, in fact, disputes between a State and a private entity. As far as investment disputes are concerned procedural consequences have been drawn resulting in the privatization of the settlement of disputes.

Thereafter, I will try to summarize the discussion.

Panel I: What Makes the WTO Dispute Settlement Procedure Particular: Lessons to be Learned for the Settlement of International Disputes in General?

What Makes the WTO Dispute Settlement Procedure Particular: Lessons to be Learned for the Settlement of International Disputes in General?

*Presentation by David Unterhalter**

I want to examine the WTO dispute settlement system within the context of certain institutional norms which are traditionally captured under the concept of the rule of law. That is a concept having an imperfect fit in many international law settings. But I believe that there are a number of features of what we mean by the rule of law which constitute useful benchmarks against which to understand a system such as the WTO dispute settlement system. And I think it may be helpful to utilize those criteria for the purposes of seeing both the evolution of the WTO system, its limitations and challenges. Before I articulate a rough sense of what I take the rule of law to mean for the purposes of institutional benchmarking, it is, I think, worth saying something about where the WTO system of dispute settlement comes from. Its roots are in the GATT system. And that was fundamentally a system of dispute resolution by diplomatic means. It thus lacked many of the basic hallmarks of what we would understand by dispute settlement under a system of binding law. It was a system of elective recourse. It was not compulsory and it was non-binding. It was simply, by and large, an adjunct to the diplomatic efforts that were necessary and utilized for the purposes of bringing a dispute to an end. Its hallmarks were therefore voluntary, its outcomes were non-binding and it was an *ad hoc* system of dispute settlement, parasitic upon the larger diplomatic efforts to resolve disputes between members.

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It is from this background, unpromising I would suggest from a rule of law perspective that the WTO system has grown. If one then examines the WTO dispute settlement system, there really was, under the Uruguay Round, a hard break. Key aspects of the diplomatic tradition of dispute settlement under the GATT system were decisively broken. And for an important reason. The Uruguay Round negotiated so many important rights and obligations that it was considered important to have a dispute settlement system that was binding and in this way distinctive from the past. In order, then, to examine the WTO dispute settlement system in the light of where it has come from and consider the system in the light of rule of law criteria, let me articulate, in a very rough way, what I take the rule of law to mean for the purposes of this exercise.

Fundamentally, in my conception, and I think this is well understood, the rule of law consists of the following principles. Firstly, that there should be an institutional separation of powers – in domestic settings between the legislative, executive and judicial authorities. The judicial authority must have the attribute of independence. There must be some recognition of equality under the law and before the law. This requires that binding rules should apply to all. Adjudication must be compulsory rather than elective, and its outcome must be binding.

If one looks at these criteria and applies them to the old GATT system, the constitution of Panels was a matter of choice, they were constituted *ad hoc* to consider a particular dispute, their decisions were non-binding. They were, as I've described, simply an adjunct to a larger process of diplomatic settlement.

If we then consider the WTO dispute settlement system, I think one can see that there is a significant change. It is a rules-based system. It contains rights and obligations that are binding upon all members and the dispute settlement system ensures that this is so. The dispute settlement system is compulsory in nature; no member can avoid the adjudication that it entails, and its outcomes are enforceable by way of remedy. It is a two-tier system: Panels are constituted in the first place at the instance of the parties, but failing their agreement, at the instance of the Director General. There is a standing Appellate Body, to which all appeals lie. It is obliged to render decisions on all issues appealed. Critical to the process of institutional independence is the fact that those decisions are adopted by negative consensus, which means that the only circumstance in which adoption will not take place by the members of the WTO, is when the winning party decides not to support its own victory in the dispute settlement system.

There are also enforcement mechanisms and a history of substantial compliance with the outcomes of decision-making within the dispute settlement system. There is a regime of remedy and sanction for failure to implement the adopted decisions of binding adjudication. So one has in general terms a system where adjudication is compulsory, there are clear rules as to how that adjudication takes place, the outcomes are binding in a relevant sense and the consequences of failure to adhere to the outcomes are stipulated, and have measurable consequences for those who fail to adhere to the system. Judged therefore in a rough and ready way, one would say that this system has many of the attributes required under the rule of law.

But I want to suggest that the system also has its obvious limits and some of the stresses within the system are apparent and perhaps will become more so as time goes by, notwithstanding the substantial success that the system has achieved. I offer here just a few basic facts concerning this matter, which is that since 1995 there have been 414 disputes referred to the system. There have been some 219 Panels constituted, and some two-thirds of those matters have been referred to the Appellate Body. The Appellate Body has rendered close to 100 decisions in its 15 year lifespan. For some time, the WTO dispute settlement system was principally used by the larger trading nations who are members of the WTO. With time, more and more members have utilized the system, including the significant role now played by developing countries.

Let me move then to the respects in which the system, though having satisfied many of the attributes of the rule of law, nevertheless contains fissures. The first of them concerns the issue of independence. Whereas, the Appellate Body is a standing body which is appointed by the membership after a rigorous process of selection, the system depends upon Panels, as the adjudicators of first instance. And the Panels still bear considerable residues of the past. They are constituted *ad hoc*, they depend in the first place upon agreement between the parties and, failing that, by executive decision-making as to their composition. They are brought together simply for the dispute, they still quite frequently contain or are made up of diplomats who have other pressing calls upon their time. And it is probably fair to say that, in consequence, the influence of the Secretariat (the permanent WTO staff who assist Panels) upon the deliberations of the Panels may be considerable. As Panels have engaged with ever more complex cases, particularly in respect of their fact-finding function, the Panels are under-resourced. Panels lack the permanence required to secure institutional coherence.

The Appellate Body fares rather better on that score. It is, as I've indicated, a permanent body, it is appointed by the membership on the basis of a competitive selection process. It must be broadly representative of the membership. It is independent as a matter of design. But I would draw attention to a particular respect in which that design is flawed.

An Appellate Body member is appointed for a four year term of office, renewable at the instance of the members for a second term of four years. This does not cohere with a proper regard for the principle of independence. Tenure in office should never depend upon the favour of those who are subject to adjudication. I know of no Appellate Body member who has been influenced by the need to secure the consensus of all members to extend his or her term of office: but that depends upon their personal attributes and not institutional protection. There may very well be pressures that could be brought to bear and could conceivably be apprehended. So as to the criterion of independence, the system is adequate, but certainly, in my view, could be improved particularly, by moving towards a permanent system of panels as adjudicators of first instance. Further, Appellate Body members should be appointed to a single non-renewable term of office.

In respect of the other criteria which are fundamental to the rule of law I want to dwell in a little more detail on the separation of powers. The system of the WTO is under some stress. And it arises in a perfectly straightforward way. If one thinks of the WTO system as one might think of a domestic system of government, the following features are discernable. There is a legislative branch, which depends upon successive trade rounds being negotiated between the members, based upon a principle of consensus and a single undertaking. That has sometimes led to successful outcomes. But it is highly dependent upon a number of political contingencies and economic circumstances so as to bring about the right alignment of interests and the successful conclusion of a trade round. As we know, the Doha Round is now in its tenth year, and there seems little prospect, regrettably, that that is going to move forward any time soon. To some degree, of course, that is the result of the success of the system. It reflects the diffusion of economic power and the fact that the basis upon which trade rounds were dealt with in the past (essentially by way of agreement between Japan, the EU and the US) no longer leads to a confluence of interest. We live in a multi-polar world. That is I think a sign of success. But it also creates with it the great difficulty that to bring a trade round to fruition is hugely complex and difficult. This poses particular problems if one thinks about the institutional coherence of the WTO system. Because what it means is that an

essential check on adjudicative power is lacking. In a balanced system, authoritative interpretations that are the outcome of adjudication are subject to legislative change if those responsible for lawmaking decide that the outcome is wrong or undesirable and should no longer be adhered to for any of a number of reasons. Under the WTO system the Appellate Body renders interpretations of the covered agreements. Those are sometimes controversial, sometimes not. More and more attention is given to adjudication within the system. And the ability of the membership to change those outcomes is limited because of the difficulty of concluding the next trade round. This creates an asymmetry of decision-making within the WTO and as a result two things happen. The first is that more and more matters are litigated because there is simply little prospect of changing any outcome or moving forward any agenda through the legislative means of trade negotiation. And secondly, it means that ever greater attention is given to adjudication because members look to that part of the system to advance their interests. Adjudication in this form can give rise to considerable problems because members may consider adjudication to be far too powerful in the overall scheme of the WTO. And there is no quick fix for this problem.

Obviously, if a trade round were to be concluded, it would diminish the pressure placed on the adjudicative part of the system. But what needs to happen is to bring better alignment into the system. That may well require significant institutional change within the WTO and one which is of course entirely beyond the remit of its adjudicative functionaries. How that will happen is the subject of much discussion. One notion is that the Doha Round is simply too unambitious as to what it has put on the table and consequently, no one is sufficiently interested in bringing it to a conclusion. This seems unlikely, given how difficult it is proving to conclude the round on even limited issues. The second is that we need to be thinking about other ways of securing legislative action which do not depend upon a consensual principle as the only basis of coming to agreement. In consequence, various plurilateral alternatives and the like are much discussed. Whichever way this debate finally comes out, what is certain is that if adjudication remains the centrepiece of what the WTO does, then the system will be subject to considerable challenge. And one can, I think, already observe this. From time to time the argument is made to turn back the clock and return the WTO system to the old GATT system, to reassert the importance of diplomatic resolution of disputes and strip away many of the rule of law attributes which, at least in my conception, are qualities of the system. But that is

a necessary consequence of what happens when the institutional framework is out of balance in the way that I have described.

The second feature of the system dealing with separation of powers, which also needs to be addressed, is that the WTO has an underdeveloped executive function. And here, too, it means that there are two polarities of legislative and adjudicative authority, without executive decision-making that would allow for decision-making between significant legislative events. This would require a form of devolution of powers within the WTO system to make it more efficacious and balanced.

So these are some of the fundamentals of the WTO system and the problematic against which one has to understand the ability to preserve adjudication within the scheme of the rule of law.

I want very briefly to touch on two other areas which I think point to where the system is going and what might be controversial about it. One of the further consequences of the way in which the WTO system has developed is that the cumulative interpretations of the covered agreements by the Appellate Body and the Panels constitute a body of law that is now quite considerable. There is a well trodden debate as to the proper interpretive remit of the Appellate Body. Key to this debate is an understanding of what those who interpret the covered agreements are faced with when trying to bring coherence to negotiated texts. Whether the Appellate Body has been successful or not, I will let this audience judge. What plays out in the debates around interpretation is simply an echo of the issues around the legitimacy of adjudication within the system as a whole. So those who would speak for strict constructionism seek to hold to a narrow concept of fidelity to the text and the limited powers of adjudication that this entails. While those who affirm a wider context and a purposive interpretation of the texts would have the system operate with a much wider interpretative remit, so as to develop WTO law in a way that deviates significantly from *ad hoc* arbitration awards. One sees therefore, again, the articulation of political interest within the system borne out through debates around interpretation and the proper remit of interpretation. And that has one other consequence, which is that there have been considerable debates in two dimensions that are particular to this system of law. The first concerns the use of precedent. Now formally, of course, the WTO system has no *stare decisis* but as a matter of the discourse, there is unquestionably the use of authority of past decision-making as the means by which adjudication takes place. To articulate that practice as doctrine, if it is a doctrine, is highly controversial. Those who wish to see in the system the control by members over adjudication resist the notion of authority of

the cumulative force of decided case law. They would revert to the old system of the GATT, *ad hoc* decision-making simply to resolve a particular dispute between particular parties without any necessary consequence for the members as a whole. I believe that members do not generally adhere to this view of the jurisprudence of the WTO. Domestic laws are clearly refined by members in the light of the threat of decision-making under the WTO system, which is clearly adaptive conduct that recognizes the authoritative interpretations as they have been developed within the system. But here too, one sees the contestation between members as to how significant a role adjudication should have and how consequential the results of adjudication should be.

The last matter that I wanted to touch upon is innovation, which of course is itself a consequence of how one understands interpretation. Now plainly, it is not the role of WTO adjudication to make obligations for the parties in any way whatsoever. But that rather simple nostrum really doesn't engage the complexity of the matter. And it has played itself out in matters of procedure. There have been developments, again sometimes controversial, to secure within the system a procedural law that is innovative and meets the requirements of the system. The *amicus curiae* brief and the opening of proceedings, where parties are willing to allow it, are just two instances of procedural innovation. For some purposes then, there is a recognition of a competence to develop procedure. Yet this competence is not unbounded, and where the line is to be drawn raises much debate. Thus for example the need to accord the Appellate Body the power of remand is almost universally acknowledged but most members doubt that the Appellate Body enjoys the competence to accord itself this power.

So, *quo vadis*? And here I will conclude. The WTO system of dispute settlement has developed into a significant body of jurisprudence. It has been developed carefully and without excess, but certainly it is cumulatively significant and has had a major stabilizing effect on the system as a whole and in that sense, it has been successful. It is utilized significantly and its outcomes are generally adhered to. Whether the system can endure in its present form is the central question that I pose. And I would suggest that it is necessary to engage in institutional reform. That could have very different consequences, depending upon the premises from which the system is understood. For some, it would be to turn back the clock, to strip away the powers and reduce them in respect of the adjudicative functions of the WTO. In my view, and this is perhaps predictable, I would think that regressive and something which would

not do justice either to the system as a whole or the utility of the system for the stability of the world economy given its present fragile state. Nevertheless, there are those who argue that the WTO dispute settlement system is far too powerful, going way beyond what was originally contemplated. And then there are those who think that the system has all the essential ingredients of what is required, but needs to be stabilized, reformed in part, in respect of the Panels and elsewhere, but rebalanced above all. To rebalance the distribution of powers within the institution of the WTO as a whole is a task of great difficulty but great importance. It requires a re-think of the way in which the system legislates. This will allow adjudication to enjoy its proper place, free of the risk that those who claim that the adjudicative competence has too much power may settle that claim in the unstable currency of contested legitimacy.

*Comment by Georges Abi-Saab**

Dear Armin von Bogdandy, dear friends and colleagues,

I find myself in an awkward situation. I am supposed to comment on David Unterhalter's rich presentation. But as I did not know what he was going to say, I could not prepare a well structured and reasoned commentary. I shall therefore start by a general remark that came to my mind when I first read the title of our colloquium, before turning to comment, *en vrac*, on some of the points just made by David Unterhalter.

The theme of the colloquium that we were asked to address is 'International Dispute Settlement: Room for innovations'. I would have added an interrogation mark at the end; in other words, to ask: Is there room for innovations in this field, or are we reinventing the wheel all the time; be it under another name or in another guise?

I was asked to comment on a presentation concerning the WTO dispute settlement system: 'What makes [it] particular?' and whether there are any 'lessons to be learned' from it 'for the settlement of international disputes in general'.

The interrogation assumes that the WTO system is successful, to the point of inquiring about the reasons of its success and whether they can be transposed or emulated elsewhere, in other areas or fields of international law.

What are the possible causes or explanations of this impression or presumption of success of the WTO system? Why is it 'perceived' as successful, leading some to describe it as the most active or effective adjudicative system on the international level?

Surely not for its great technical or procedural prowess or innovations. For any cursory glance at the legal instrument that governs the functioning of the Dispute Settlement System (the DSU) leaves one with the impression of reading an archaic text of the early 19th century, rather that a modern adjudicative statute drafted at the threshold of the 21st century. Even the name given to it is rather odd: Not Statute, not even

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Agreement, as most of the other texts drafted at the same time in Marrakesh (though the whole lot was adopted as a 'single undertaking'); but 'Understanding' (Dispute Settlement Understanding : DSU)!

The text is written in loose non-technical language that strives often to describe what are simple procedural or legal concepts without always quite making it. It is also silent on some essential aspects of the adjudicative process, which one would expect to be regulated in such an instrument. For example, can anyone imagine a Statute of an adjudicative system where the word 'jurisdiction' does not figure; and which says nothing about evidence and proof? Of course, Panels and the Appellate Body (AB) could not avoid dealing with these matters, sometimes at the price of awkward elaborations. And in spite of the injunction to the organs of the system, in Art. 3 (2) of the DSU, that their 'recommendations and rulings […] cannot add to or diminish the rights and obligations provided in the covered agreements', the AB elaborated from scratch a set or rules on the burden of proof and administration of evidence.

Be that as it may, the rules on evidence and burden of proof introduced by the AB, if they can be called in one way an 'innovation' in the context of the WTO, as they brought something which was not provided for in the DSU (consisting of a reiteration of known classical rules on the subject), are not an innovation in the sense of this colloquium, as they do not add any new and innovative technique or instrument to our legal toolkit of dispute settlement.

If the WTO model does not provide us with any procedural or technical innovations but rather with another example of an archaic or primitive system of settlement or dispute, where then lies the cause or reason of its success, or at least the impression of success?

This reason is no secret. It is simply the age old recipe of 'compulsory jurisdiction'. Indeed, this is the only dispute settlement system on the international level covering a major sector of international relations that exercises automatic and compulsory jurisdiction over all members of the legal regime that comprises it. A regime to which subscribes (with the recent accession of Russia) all the major or significant trading powers of the world; including the US which does not accept to submit to automatic compulsory jurisdiction anywhere else on such important matters.

That is the main reason for the success or rather the apparent highly active and effective character of the WTO Dispute Settlement System. But there is another more sub-terranean reason which may come as a sur-

prise to many, given the widely held view of the WTO as an unrelenting juggernaut weeding or leveling out all national specificities and non-economic concerns in the service of economic globalization. This reason is that, paradoxically, the dispute settlement system is highly respectful of the sovereignty of member States. Or is it the strategy epitomized in the title of Goldsmith's masterpiece 'She stoops to conquer'; flattering and massaging sovereignty in order better to erode it? Be that as it may, the System handles with great care the sensitivity of the litigants; particularly the loosing side. It is true that the system is much more constraining than its predecessor under the GATT, where consensus of the 'Contracting Parties', including the two (or more) litigants was needed to adopt a panel report. Now, such a consensus is needed to set it (or an AB's report) aside. Otherwise, the Dispute Settlement Body (DSB) is automatically obliged to adopt the report once it is put on its agenda. Thus, as David Unterhalter said, we have passed from requiring a 'positive' consensus for adoption, to a 'negative' or 'reverse' consensus for setting the report aside. In other words, we have passed from a purely consensual system (which I technically characterize as 'conciliation') to a genuinely adjudicative one. But what is its outcome? What does the aggrieved party get in the final analysis? It is a mere finding of non-conformity of the contested measure with its author's obligations under the covered agreements, what in French administrative law and European law is called *constatation de manquement*. Plus a recommendation requesting the faulty party to put its legislation or practice in conformity with its obligations; without specifying any further; a mere obligation of result, leaving to it the choice of means. Moreover, the process is quite elaborate and lengthy in terms of time. A complaining party has to request (bilateral) consultations, then go through a multilateral phase within the DSB before requesting the constitution of a Panel, whose report would be automatically adopted by the DSB, unless it (or part of it) is appealed (or set aside by 'consensus' which never happened).

Then the implementation of the recommendation or *mise en conformité* is left in the hands and at the discretion of the faulty party. If the remedial action taken by this party is considered insufficient or mere 'window dressing' by the complaining party, it can raise a so-called 'Article 21.5 non-compliance Claim', which has to go again through the whole cycle, though theoretically with shorter time limits. Even after the exhaustion of all these steps, the faulty party, invoking practical or constitutional difficulties, etc., can try to buy out its illegal posture by offering the complaining party some other compensation, (supposedly as a

stop-gap or temporary measure, as it remains under 'surveillance'; which is a rather soft follow-up procedure). There is no compensation, however, for harm already suffered up to that point of time. It is only for the future, until compliance is effected.

Only if, after all that, the faulty party persists on maintaining its non-conform measures, and no agreement on compensation is reached, is the ultimate stage of sanction reached. But again it is not a sanction that coerces the faulty State to do anything it does not want to do. It is only a kind of controlled retaliation or counter-measure procedure, whereby the DSB authorizes the aggrieved party to suspend specific concessions up to a certain level that the DSB considers as commensurate with the injury caused by the continuing non-compliance; provided of course that the aggrieved party has something to withhold from the faulty party.

This is then the gist of my introductory remark: the apparent success of the system can by no means be attributed to its procedural and technical ingenuity and innovations of which it is quite innocent, but to its compulsory jurisdiction and its soft-handling of the sovereignty of the Members.

I should, however, mention one exception. It is an innovation that is not found in the DSU, but was totally invented by the AB: the 'Exchange of views'. It is to be recalled that each case is examined by a division of three out of the seven members of the AB, who are chosen at random according to a secret formula, so that neither the parties to the dispute nor the AB members know beforehand who would be sitting on the division. The exchange of view is a stage in the proceedings introduced just after the oral hearings by the division of three. The remaining four AB members are convened to Geneva, and after examining the full record of written and oral pleadings, they provide their views and discuss the issues with the division members, then leave them to take the decision for which they only are responsible as the signatories of the report. But they have benefited from the insights of the other members. Moreover, in this way, all AB members have a thorough knowledge of every case as if they had sat on it, which maximizes the consistency and cohesion of the jurisprudence. This is the one innovation I found most useful and worthy of emulation.

Turning to some of the points raised by David Unterhalter, I would like first to comment briefly on the issue of the division of labour or separa-

tion of powers as well as the relationship between the legislative, i.e. political, and the adjudicative components within the WTO system.

One has first to recall how and why the dispute settlement system evolved from a form of conciliation under the GATT to genuine adjudication in the WTO. The GATT started as a stop-gap agreement, between a limited number of like-minded – mainly Western developed – States, over a limited sector of international trade, basically in manufactured goods. Disputes between the members of this closed circle or club were settled on the basis of collective recollections of what was initially agreed upon in a discreet and confidential manner and with the accord of all concerned.

By the time it transmuted into the WTO, almost 50 years later, its membership had vastly expanded, including States from North and South; East and West; developed, developing and less or least developed; and those who were not in Marrakesh in 1994 strove hard to join the Organization, including great powers like China and Russia. The ambit of the regulation was also vastly extended, covering in addition to trade in manufactures, the major sectors of international economic exchanges such as agriculture, services, intellectual property, etc.

It was the major trading powers, the same that initiated the GATT, particularly the USA, who did not want to enter into such a vast web of mutual obligations *vis-à-vis* a widely diverse group of nations without a strong guarantee of compliance; whence the strengthening of the dispute settlement system by reversing the role of consensus from being a requirement for the adoption of the reports to a requirement for setting them aside, thus rendering them binding for all intents and purposes; in addition to establishing the Appellate Body as a standing organ to control and stabilize the interpretation of the agreements.

Of course, the covered agreements themselves were negotiated mainly between the major trading powers and were thus most attentive to their interests; the rest having to take them as given, even where they considered them as not (or not sufficiently) responsive to their interests, if they wanted not to be left out. But once the new Dispute Settlement System started to function, and its inner logic and dynamics to work themselves out, in the form of more objective and judicial-like findings and interpretations, it became clear that regardless of the general orientation of the agreements, the small fry's reasoning can prevail once in a while over that of the main players. Whence the grumblings about the excessive judicialization of the system, the accusation of judicial activism, of filling gaps, and complaints about members of the AB taking themselves to be Supreme Court judges, particularly professors; better

to be replaced by 'Trade Diplomats', who know what they are talking about. These noises came particularly from the US, which pressed initially for the tightening of the system, reflecting second thoughts in the form of proposals aiming at pushing back the system on the Darwinian legal scale of evolution to the pre-adjudicative phase as in the old GATT, in a disguised manner.

In this respect of the relationship between the legislative or political and the adjudicative organs, one has to distinguish between tribunals of general jurisdiction as far as applicable law is concerned, i.e. tribunals called upon to apply international law in general, such as the ICJ, and adjudicative organs created as an integral part of a special regime. The WTO, or rather the ensemble of the Marrakesh instruments represent such a regime. Normatively, they cover a specific field, the law of international trade; not all of it; but since Marrakesh, large expanses of it. At the same time, they provide on the institutional level, as part and parcel of the same ensemble, as David Unterhalter has described, the legislative, adjudicative and executive components necessary for the functioning of the regime (keeping in mind that this categorization of functions is very approximate and only applies *mutatis mutandis* in the international law).

This makes for greater intimacy between the different functions and the institutional components, that does not exist for tribunals which are not part of a special regime. Sometimes the embrace is too close for comfort. Taking the example of the AB, if with the WTO the dispute settlement system has moved functionally from the pure conciliation model under the GATT to a genuine adjudicative one, this is not explicitly admitted in the DSU. Rather remnants of the GATT ideology linger on and are reflected in certain aspects of the procedure. Thus although a Panel or an AB report cannot be set aside except by consensus, it still has to be adopted, if only formally, by the DSB (the plenary). And the DSU adds that 'This [automatic] adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report' (Art. 17/14); which they abundantly and sometimes vehemently do, during the session in which the report is formally adopted; about two corridors away from the AB. Theoretically, the AB members are independent. But they are too close for comfort; and the echo cannot but resonate, though more in some ears than in others.

This brings me to the target of the occasional (not to say recurrent) criticisms in the political organs of the work of the AB, namely its interpretation of the agreements and the accusations of judicial activism, filling gaps, etc. Interpretation, by definition, adds something to what is

interpreted. How can one go from an abstract proposition, norm or principle to a concrete situation without adding something? It is like fleshing out a skeleton. There is always an increment, a 'value added', through the mental operation we call interpretation. But where does interpretation end and 'legislation' start? For me, the limit is what I call the 'horizon of prevision' or 'foreseeability'. Every general statement or proposition can lend itself to more than one rendering, at least on its penumbra, if not necessarily of its hard-core. But regardless of the interpretation one adopts, all the possible alternatives can be envisaged or foreseen under certain conditions or by following different lines of reasoning. Going beyond this horizon of prevision takes us into legislation. But as long as the adopted interpretation is logically and technically (i.e. following the canons of interpretation) envisageable, it is legally acceptable. Personally, I do not see how an adjudicative body can properly exercise its functions, if its interpretative discretion is limited beyond that. But that is exactly what some quarters would like to impose on the AB, which, apart from denying the necessary minimum of judicial independence, would thrust it into an untenable position. Let me explain why.

As I mentioned earlier, the WTO agreements cover many new areas which were not (or only scantly) covered under the GATT; and very controversial areas at that, such as agriculture, services and intellectual property. Sometimes they were covered by fudged formulations in order to pass. For example, the agreement on agriculture, with its many loopholes needing further elaboration, included what was called the 'peace clause', which kept disputes arising from that agreement out of the dispute settlement system for a certain period. Thus important agricultural problems which are crucial for the Third World were left exclusively for negotiations, i.e. to be solved b the political or legislative organs. But once the peace clause reached its term, and negotiations were not getting anywhere, at least since the late nineties (Seattle), the problems that could not be solved by negotiations flooded the dispute settlement system; disputes over cotton, sugar, etc. These disputes had to be decided on the basis of an agreement full of holes glossed or papered over by ambiguous, if not totally vacuous, formulae. But in the final analysis, the AB has to decide on them. It has to say 'yes' or 'no', but cannot simply say 'I don't know', i.e. declare a *non liquet*.

This brings me back to the disequilibrium resulting from the paralysis of the legislative (i.e. negotiating) arm, that diverts all the politically sensitive problems to the dispute settlement system and heightens the dilemma it has to grapple with. On the one hand, it is chastised for ac-

tivism and enjoined not to 'add to or diminish the rights and obligations provided in the covered agreements', by keeping to a strict literal interpretation of the text of these agreements (a current joke is that the *Shorter Oxford English Dictionary* is the most cited covered agreement in the AB reports). But, on the other hand, the texts of these agreements are often ambiguous or otherwise wanting. The AB is thus obliged to reach a decision on the basis of these imperfect texts, supposedly by hanging exclusively and desperately to their words, which are not always of much help, while having the political component breathing down its neck; an impossible situation to be in, or rather an impossible exercise of squaring the circle that cannot be performed without breaking out of it.

To conclude, one may ask, why – barring human ineptitude and professional incompetence – are the agreements cluttered with so much ambiguous or vacuous language? And the answer can be found, in my opinion, in the make-up of the WTO special regime.

Special regimes are generally modeled after what Wolfgang Friedman called 'the law of cooperation'. This is in contrast to 'the law of coexistence' reflected in classical international law, which aims at establishing peace between potentially antagonistic units, by enjoining them not to dabble with the territorial and functional jurisdictional ambits of each other; pure passive obligations of abstention that need no special organs for their implementation, hence inorganic law. By contrast, a special regime is created – following the logic of the law of cooperation – when there is a shared feeling or conscience of a common interest or value which cannot be promoted and protected, or adequately promoted and protected, except through a collaborative effort which imposes positive obligations on each participant to do his part, and calls for institutions to coordinate and supervise the implementation of these obligations. Thus, an essential part of any regime is the 'code of conduct' which lays down the general rules to be followed by all in order to realize the common interest or value, the 'public good' for the protection and promotion of which the regime was created. This code of conduct corresponds to what was called *traité-loi*, in contrast (according to an old distinction) to *traité–contrat*, which merely sanctions an exchange of benefits or considerations.

The WTO agreements are supposed to be *traités-loi*, laying down general rules applying uniformly to all members. But they include in addition many asides. For the Members accept the general rules generally. But some of these rules have what they consider as awkward corners for their particular interests. Whence the many reservations, special

situations or hypotheses, redundant enumerations and circumlocutions encountered throughout the agreements, whose *raison d'être* is not always apparent at first sight.

In other words, the *traités-loi* are heavily inlaid with mini elements of *traités-contrat*. In litigation, of course the bench has to be respectful of the agreement, of all points of the agreement. But what counts most for it is how the general rules work and how the agreement functions as a whole in a sustainable manner. For a party, however, what counts most is how far its particular interest is protected, even at the price of twisting the interpretation of the general rule. This is, in the final analysis, where lies the real source of tension.

Discussion

A. von Bogdandy: Dear colleagues, three points. David Unterhalter made a powerful call for more judicialization and for mainstreaming the WTO dispute settlement body, in particular the panels, with the international benchmark or best practice in international courts and tribunals. So we might discuss what that benchmark for the WTO system, in particular the panels, should be. That's the first very important topic in our conference.

The second point is your argument that the successful judicilization of the international sphere now calls for adequate politization. We have had the last 20 years that very important development of more law, more legalization and more judicialization. Now we start considering adequate forms of politization; this is a very important move.

The third point is on legal interpretation. You said we should more or less give up the idea that there are global standards how to construct. We have to develop specific standards of interpretation in light of that legitimatory setting.

To Georges Abi-Saab I want to ask what precisely you mean by stating that the strength of the system is its weakness.

G. Abi-Saab: Flexibility if you want.

A. von Bogdandy: Yes, but you put it also as a weakness. So in a way we have to be careful that if we make a court too strong we might destroy it.

The second point regards interpretation and the drafting of decisions. Three members of the Appellate Body are writing the decision, and I imagine a lively dispute. Then they give it to the other four members who have been outside of the struggles of writing the opinion, and these other members are called to give an input. I think that is a very important element for innovation: before a judgment comes out, but after the judges have struggled and fought over the text that there is some check whether the outcome of their struggle is really the best response to the case at hand or whether it should somehow amended.

G. Abi-Saab: The others are also judges.

A. von Bogdandy: They are judges but they have not been engaged in the fight over the opinion. So I think that are just some of the ideas that I've got out of these very interesting decisions and I am happy to open the discussion.

E. de Wet: David Unterhalter referred to the fact that there is a lack of coherence amongst panel members forming part of WTO dispute panels, due to the ad hoc nature of these panels. In addition, he noted that the WTO Secretariat tends to have too big an influence on the election procedure and this can lead to a (perceived) lack of independence. However, I am wondering why this process necessarily leads to less independence than the procedure in accordance with which the permanent Appellate Body is elected. After all, member State can have a significant influence on the election process of the Appellate Body, including the renewal of members' mandates. So what makes this process nonetheless more independent and reliable than the one by means of which panel members are elected? What type of procedure does he envisage that will ensure the independence of both elements of this procedure?

A. Aust: You've described an imperfect dispute settlement system. I am not a WTO expert, but I am an expert in international negotiations. And the WTO agreement was the result of very difficult negotiations. And what you seem to say is that you need to reform or renegotiate part of the treaty dealing with international dispute settlement. The second question is: Are the panels made up of lawyers or other experts? Are the chairmen of the panels lawyers? I know lawyers sit in the Appellate Body, but I don't know about the panels. I think they are not made of lawyers, economists etc., experts in the area.

As I see, in negotiations any agreement is virtually an impossibility. I think we are lucky to have it even though it's imperfect. Thank you.

H. Hestermeyer: I have too many questions to ask them all and will try to limit myself to a few points. First of all, could you say a few words on the role of the Appellate Body Secretariat in drafting decisions? Secondly, in terms of the WTO system as a model, I think one interesting example of integrating developing countries is the new Advisory Centre

on WTO law. It deserves to be mentioned as an approach to be followed also by investment arbitration. Finally, one comment on why I think it is difficult to regard the WTO as such as an example for other systems. To some extent, it is because of specifics of the economic sector. It is much easier to have a binding dispute settlement system in trade law because things are easily quantifiable and you are talking to actors who are very used to litigation whereas in other fields they are not. If it comes to retaliation, again amounts are easily quantifiable and where they are not, as is the case with cross-retaliation in the field of TRIPS, for example, the system breaks down, as we have seen in the bananas case where cross-retaliation was authorized but seemingly not implemented. Thank you.

D. Unterhalter: Let me deal firstly with the question of the panels versus the Appellate Body and the composition of panels and the like. The reason that I contrast the two is because I do think the difference between a standing body of persons – you occupy an office under conditions of four years and security for a period and can develop there an understanding of the system – is something very different from being brought together on an *ad hoc* basis with colleagues who you may have never met before and where this is simply an *ad hoc* arrangement. Your ability institutionally to put your stamp upon the decision is compromised and reduced and I therefore think there is a real difference. Panels also, if they are not appointed by the parties, are then appointed *ad hoc* by the Director General. So again, the link back to the membership and the like is attenuated to put it mildly. What I would think would make a great difference would be to have a permanent body of panelists, who have the same institutional continuity as the Appellate Body with the possibility of having *ad hoc* appointments if there was a need for a specific kind of competence. And I think that that would greatly improve the consistency and possibly even the quality of panel decisions and it would also redress some of the imbalances that obviously exist between those who advise the panels and the panels' ability to assert their sovereignty, as it were, over their decision-making. So institutionally, that seems important. And certainly, as an Appellate Body member, there is no question as to who controls what, because we are a permanent body and we decide. I'll come to the role of the Secretariat in a moment.

As to the question of who makes up the panel and whether that could be changed, panels are constituted by a mixture of competences. There are diplomats, there are lawyers, there are economists. They have quite a varied set of backgrounds and they are quite often, and increasingly,

appointed by the Director General on the basis partly who is available and partly what he thinks will make up the right composition for the case. I am not certain that the primacy of lawyers is always a prerequisite for effective decision-making. I mean certainly some lawyers are useful when there are questions of legal interpretation. But given that this is a branch of economic law, I frankly often have found engagements with non-lawyers to be quite as helpful in my experience, economists for example often make extremely competent lawyers. I'm not certain that lawyers always make particularly competent economists. So I'm not convinced that there is a problem about the kinds of competences you need to bring to bear. There is something to be said about the institutional independence and integrity of the panels. And that's the point that I've made.

As to the Appellate Body, and the last contribution that was made, the Advisory Centre is a wonderful institution that has proved to be enormously important in bringing cases for developing countries. And their work should be greatly expanded and their contribution hugely applauded and mimicked where appropriate.

As to the Secretariat's role in Appellate Body decisions, they are very much like clerks in the Supreme Court of the United States. They give huge assistance and they are an enormously talented group of lawyers. But because the Appellate Body is a standing body, we come to Geneva, we hear the cases and we decide the outcomes.

As to whether the model is better suited to trade law as opposed to other kinds of disputes, I'm not so certain that that's right, because many of the kinds of issues that we have to deal with, concern interpretive issues of law and fact that seem to me as a lawyer in other branches of the law to be very typical of the enterprise and it's not peculiar to trade law; I don't think so. It is a branch of economic law, undoubtedly, and maybe that lends itself to adjudication in this form. But I think much of the task is wholly familiar to those who adjudicate in many other international and domestic settings.

G. Abi-Saab: I'll just complete the answer to Anthony Aust's question. The great difference between panels and the Appellate Body is that for each panel you appoint a different set, and usually, the parties to the dispute appoint two. It's really very transient, usually trade diplomats are appointed. Rarely do they appoint a professor or somebody else. So that's the great difference with the Appellate Body, which is a standing organ. And of course, every four years you have to re-elect the Body,

but it's not in every case like in *ad hoc* arbitration, for example in ICSID cases.

I didn't say we have to renegotiate the DSU because if we renegotiate it now, we will get something much worse. What I said was that it was not done in the technical way we expect, because amazingly enough, the Marrakesh Agreements were rushed at the end. They were done by different groups, many of them didn't include lawyers. And there was no drafting committee. So we got a hodge-podge of agreements which even when treating the same subject-matter, do not always use the same terminology or the same adjectives, which creates great confusion. What is a 'serious injury'? How does it differ from 'material injury'? And so forth. Because they did not go through that final polish we are used to as lawyers. But, as David Unterhalter said, such defects have been largely taken care of through interpretation. How far can interpretation, however, go in this respect? There was nothing for example in the DSU about the onus of proof and the taking of evidence. The rules were laid down from scratch by the Appellate Body. Nobody said anything about this innovation: that the AB has gone beyond its mandate or beyond the horizon of foreseeability, i.e. of permissible interpretation. Is it because it was considered a mere question of procedure or rather because everybody somehow accepted the fact that there is a gap that had to be filled for the system to be able to function? But when you try to straighten the wrinkle elsewhere then you get wrinkled by the political organ.

About the role of the Secretariat David Unterhalter said what has to be said. The Secretariat in panels plays as very important role because in many cases, the members – or at least two – don't know and they are away. They don't stay there, they come for the case one day, while the Appellate Body is a standing organ.

The Advisory Centre is a very important thing. David Unterhalter said it but I have to say that I'm now a little bit drowned in ICSID cases, I cannot say much because the ICSID pope is here, Christoph Schreuer. Everything I say of course is not for his ears. But the problem of ICSID is the lawyers. I have five rooms full of boxes of useless files. They keep sending them, and poor developing countries have to hire big firms, American firms, or do the business themselves, like the poor Argentineans. They have about forty cases and most of them they treat themselves. And they lose a lot of them because what can they do with this flood of things, of innovation, of silly and futile arguments simply to make more hours, which they pay $800 per hour. That is the problem. And the third world countries are very, very prejudiced in this respect.

While in the Appellate Body, the Advisory Centre has ended that a little, and I have to say, I was on several cases before the International Court. There, the same as in the Appellate Body, nobody really floods you with so many useless materials as in ICSID cases. It's terrible, terrible. The means available are very important and the Advisory Centre provides a good solution to the problem. I hope it will be followed elsewhere.

The generalization of the system and the specificity of economic law, it's not only economic law because ICSID is also economic law. And many things could be done there. But I mentioned the fact that these special regimes are based on the law of co-operation. Why don't we have a tighter system about environmental law? I'll tell you why. Because in trade, the big players were interested, they perceived at one point that they had a common interest. And somehow they impose it on the others. I mentioned that earlier. In environmental law, this is not true. The big players don't perceive the common interest in the same way. It's the small ones who want to push the big ones. So I think that is the question; where you get sufficient consensus between those who can impose a system on the others or at least make it so attractive to them that they would accept it although they may consider it a little bit unfair to them. Then you can move ahead. And I think that something like that could work. But not so much the specificity of economics. I don't think so. But as far as ICSID goes, I think there is a lot to be learned from the WTO experience. Thank you.

A. Reinisch: My question is also related to the flood of information that you receive. A few years ago, the acceptance of amicus curiae briefs was hailed as a new device to have private parties and their 'voices' before the WTO. Subsequently, it seemed that a certain soberness returned and the usefulness of amicus briefs was questioned. Now, my question is less a legal one than one from a practical viewpoint, since it is very hard to judge from the outcomes, from the Panel and Appellate Body reports, to what extent they are actually taken into account. I still think that they may have some implication. Just your personal view: to what extent do you find them useful or rather tedious like the lawyers' submissions in ICSID cases?

H. Tichy: I have a question to Georges Abi-Saab. I was very interested in your description of the consultation system inside the Appellate

Body, and I would like to hear more about it. Where did the inspiration come from? And do you think it's a model for other courts?

G. Abi-Saab: About *amicus curiae*: I consider this as much ado about nothing, really. But it raises an important question. Which is the role of third parties? I wouldn't go into all that, but in fact, what happened reflects what I said about massaging sovereignty. States are there. They know that their sovereignty is being eroded by every obligation they accept. I mean not formally, i.e. that in theory you exercise your sovereignty by accepting an obligation; but in fact you are putting yourself under control in an area in which you were not controlled before. That is how it is. Amazingly enough, it's the Third World countries that are against *amicus curiae*. I would have thought, coming from a Third World country myself, that it is in their interest to have *amicus curiae*. The whole thing also raises another problem in all systems of adjudication, which is what to do with third parties. In arbitration, we now speak about intervention in arbitration. I remember when Rudolf Bernhardt did his report for the *Institut de Droit International*, we had a lot of discussion on that. There is a new third party as in almost all cases there is a community interest. But who speaks for the interest of the international community? In most of the cases, there is this dimension. And in the absence of an Avocat Général for the international community, it is the judge who considers that he has to play that role. But if a judge interjects a community interest in what is perceived by the parties as a transactional agreement, they say, 'you have gone beyond your mandate'. And it is a very important part of our subject today. In the seventies and the eighties, there was a song 'Who speaks for the trees'. Who speaks for the international community in these cases? And as I said, in the WTO, it raises the problem of non-trade concerns. The Appellate Body has done great work, I have to make a little propaganda for my group. The Appellate Body has done great work in giving space to public interest, but it is one of the reasons why it is very strongly attacked, not by all, but by some. So I agree on the principle, but I don't agree specifically on the *amicus curiae* because you know, we read all *amicus curiae*, and then we say, we haven't seen it or we don't admit them. They don't bring anything new to what the parties have said because they don't have access to the briefs of the parties. So they say things which are really very well known to the panels. It's not that, what really counts. But I agree that we need something here to represent the public interest in international adjudication and we don't have it.

About the exchange of views: This was really a judicial innovation. It's not in the DSU, it is the Appellate Body, and at the beginning it was out of precaution, let's say, because it was a new exercise, and the AB members were very close to each other, the first generation. I was in the second generation. And I coincided with most of the first generation except for two. They were very close and they wanted really to get reassurance from those other members of the Appellate Body who were not there, but the real objective result is that every member knows everything. But it is not a drafting committee. In fact, it is just after the oral hearing, before the drafting starts. The Division, which heard the case up to that point, deliberates a little bit, and then the others come, the deliberation continues and then the others leave to the three who have sat on the case to start writing and so forth. So it's really a stage before drafting. Thank you.

D. Unterhalter: Let me be very brief. As to the exchange of views, I must say that when I went on to the Appellate Body, I found this a rather novel concept because it seemed an odd situation that the parties had not had the opportunity and oral argument to interact with some of the persons who were going to offer views on the ultimate decision. I have however become a great supporter of the system as perhaps is inevitable when you participate in it. For this reason: there is a clear demarcation of those who are charged with making the decision, which is the three members of the division. The others simply offer views, particularly on some of the systemic features of the decision that could have an influence for the jurisprudence of the WTO as a whole. And so you clearly get the benefit of a number of minds brought to bare on the subject, but there is no question and this division is very, very clearly respected by those who are not on the division and those who are on the division. It is for the three to decide as they see fit at the end of the day, informed by the useful observations made by their colleagues, but in no way is any of that determining. It is perhaps an oddity, but it has certainly proved its utility within the system as a whole.

Just briefly on the *amicus*: The great controversies surrounding its adoption have simply not yielded the fruit that one had hoped for, in a way. Because it's underutilized, partly because of the limits of private participation in this way. But there are undoubtedly interests that could usefully be articulated through a better use of the *amicus* system. And to date, however, the use of the system and the contributions are simply underwhelming. They are either saying the obvious or they are off-point. This does not mean, however, that they could not be used with

greater efficacy. Partly, I suspect because the system has become widely used and third parties in particular use the opportunity to come and say their piece before the panel and the Appellate Body. There is perhaps a greater representation of interests simply through WTO members. But it's by no means exhaustive of all the interests that could be articulated. But to date, the procedural innovation that we brought out has simply not yielded a very significant substantive contribution through that procedure.

Panel II: Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?

Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?

Presentation by Rüdiger Wolfrum

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I. Introduction

An advisory opinion given by an international court or tribunal is an authoritative but, in principle, non-binding statement or interpretation of international law. To use advisory opinions as a means to clarify a legal issue is not of recent origin. It should be recalled that pursuant to Art. 14 of the Covenant of the League of Nations, the Permanent Court of International Justice (PCIJ) was not only called upon to render judgments but was entrusted with the competence to give an advisory opinion on any dispute or any point submitted to it by the Council or the Assembly.[1]

The institution of the advisory procedure was maintained for the International Court of Justice (ICJ) albeit with a reformulated task – further elaborated by the Court's jurisprudence – and an increased number of potential applicants.[2] Under Art. 65 of the ICJ Statute two different categories of advisory opinions are to be identified, a third one is based upon particular international agreements.[3]

Also other legal regimes provide for the possibility to give an advisory opinion. These procedures are different in objective and scope. They are the UN Convention on the Law of the Sea, the European Convention on Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the Protocol to the African Charter on Human and Peoples' Rights establishing the African Human Rights Court. Therefore, speaking of advisory opinions means speaking of dif-

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[1] Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 195. The first drafts of the Covenant included no provision on advisory opinions. With the view to provide a mechanism for the interpretation of the Statute the French delegation proposed to include such a competence to deal with 'any issue with regards to the interpretation of the Covenant'. After a controversial discussion the above mentioned formula was included in the Covenant not, however, in the Statute of the Court (see T.M. Ndiaye 'The Advisory Function of the International Tribunal for the Law of the Sea' [2010] 9 Chinese JIL 565 paras 8–9); for an analysis of Art. 14 of the Covenant of the League of Nations and the jurisprudence of the Permanent Court of International Justice see J.A. Frowein and K. Oellers-Frahm 'Article 65' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *The Statute of the ICJ: A Commentary* (OUP Oxford 2006) paras 1–5.

[2] For a comparison of the procedures under Art. 14 of the Covenant of the League of Nations and Art. 65 of the ICJ Statute see Frowein and Oellers-Frahm (note 1) paras 6–8.

[3] For details see below p. 40 et seq.

ferent procedures; caution is requested to borrow from one to the other.

The UN Convention on the Law of the Sea (Convention)[4] as well as the Rules of the International Tribunal for the Law of the Sea (Rules of the Tribunal)[5] provide for the competence of the Seabed Disputes Chamber and the Tribunal as such to render advisory opinions. They have been tailored upon the procedures of the ICJ. One may *cum grano salis* identify three different procedures for the Law of the Sea Tribunal: Advisory opinions of the Seabed Disputes Chamber requested by the Assembly or the Council of the International Seabed Authority according to Art. 191 of the Convention; advisory opinions delivered by the Seabed Disputes Chamber in the context of commercial arbitration (Art. 188 (2) of the Convention); and advisory opinions rendered by the Tribunal as a whole in accordance with Art. 138 of the Rules of the Tribunal. The procedure is different for each of them.[6]

Further, according to Art. 64 of the American Convention on Human Rights[7] the Inter-American Court of Human Rights (IACtHR) can give advisory opinions regarding the interpretation of the American Convention on Human Rights. Here again, several categories of procedures are to be identified.[8]

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[4] United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) (1982) 21 ILM 1261.

[5] Rules of the Tribunal (as amended on 17 March 2009) Doc. ITLOS/8 <http://www.itlos.org/start2_en.html> (7 February 2011).

[6] A. Aust 'Advisory Opinions' (2010) 1 Journal of International Dispute Settlement 123–51.

[7] American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José).

[8] For details see below. The advisory jurisdiction of the Inter-American Court of Human Rights is intensively analyzed by J. Calidonio Schmid 'Advisory Opinions on Human Rights: Moving beyond a Pyrrhic Victory' (2006) 16 DukeJComp&IL 415–55. See also K.J. Keith *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Sijthoff Leyden 1971); D. Pratap *The Advisory Jurisdiction of the International Court of Justice* (Clarendon Press Oxford 1972); T. Buergenthal 'The Advisory Practice of the Inter-American Human Rights Court' (1985) 79 AJIL 1; J.E. Alvarez 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) 38 TexasILJ 405; J.M. Pasqualucci 'Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law' (2002) 38 StanfordJIL 241.

Compared to the international courts and tribunals the advisory jurisdiction of the European Court of Human Rights (ECtHR) is limited. It may give an advisory opinion on a legal question put to the Court by the Committee of Ministers concerning the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[9] The European Court of Human Rights has so far received three requests and declined one for the lack of jurisdiction.[10]

The African Court of Human and People's Rights has a broad advisory jurisdiction. The Court may render advisory opinions on 'any legal matter relating to the Charter or any other relevant human rights in-

[9] Art. 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

[10] In May 2004, the Committee of Ministers of the Council of Europe requested the Court, under Art. 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to give an advisory opinion on the matter raised in Recommendation 1519 (2001) of the Parliamentary Assembly of the Council of Europe, concerning 'the co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights', and the implications for States which had ratified both Conventions. ECtHR 'First Decision on Court's Competence to Give an Advisory Opinion' (Press release issued by the Registrar, 2 June 2004) <http://www.echr.coe.int/ECHR/EN/hudoc> (12 January 2011); ECtHR 'Annual Activity Report 2002' (Grand Chamber) <http://www.echr.coe.int/NR/rdonlyres/5CD0E552-0D28-4A95-B335-6DB669C7E078/0/2002GrandChamberactivityreport.pdf> (12 January 2011). The Court stated that Art. 47(2) sought to exclude the Court's jurisdiction on the legal questions submitted to it where the Court may be called in the future to address in its 'primary judicial function' the examination of the admissibility or merits of concrete cases. As applied to the case before them, the Court noted it was possible that the procedure under the CIS Convention might later have to be examined in a substantive application to determine whether it was a 'procedure of international investigation or settlement'. Therefore, the Court held that the request for an advisory opinion was not within the Court's competence as defined in Art. 47 of the Convention; ECtHR *Advisory Opinion on Certain Legal Questions concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights* (Grand Chamber, 12 February 2008); ECtHR *Advisory Opinion on Certain Legal Questions concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights (No. 2)* (Grand Chamber, 22 January 2010).

strument provided the subject matter of the opinion is not related to a matter being examined by the African Commission'.[11]

Historically several international bodies, including the Bureau of the Universal Postal Union, the International Commission for Air Navigation, and the League of Nations Advisory and Technical Committee for Communication and Transit had the statutory authority to issue advisory opinions.[12] These bodies had no judicial but rather a technical character and the scope of any advisory opinion given necessarily would have been limited.

The views on the suitability of advisory opinions are quite controversial. Some argue that advisory proceedings are less controversial than contentious proceedings since States are not parties to a conflict. They do not have to defend a particular position, although they might do so and they are, so it is said, – at least formally – assistants to the court or tribunal in question. As Judge Buergenthal has put it in respect of the Inter-American Court of Human Rights: '[…] an advisory opinion […] does not stigmatize a government as a violator of human rights […], however, it makes the abstract legal issue perfectly clear for any government wishing to avoid of being held in violation of international legal obligations'.[13] In essence advisory opinion procedures are particularly suitable to clarify a disputed point of law. The proponents of this view may refer to the possibility of States to voice their views in the written and oral proceedings.[14] Others take a different view. They see with concern that the ICJ is increasingly giving advisory opinions on highly political issues and they fear that this may undermine the dispute settlement process based upon the consent of States necessary for the

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[11] Art. 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) (1999) 20 HRLJ 269.

[12] M.O. Hudson *The Permanent Court of International Justice, 1920-1942* (MacMillan New York 1943) 484/5.

[13] 'Address by Judge Thomas Buergenthal before a Special Session of the OAS Permanent Council' (3 December 1986) <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/4/pr/pr8.pdf> (20 January 2011) 130.

[14] For example, States have participated in the hearings on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* (22 July 2010) ICJ Doc. 2010 General List No. 141.

Court to deal with contentious cases.[15] For example the United States have argued in the *Nuclear Weapons* case[16]:

> 'The question presented is vague and abstract, addressing complex issues which are the subject of consideration among interested States and within other bodies of the United Nations which have an express mandate to address these matters. An Opinion of the Court regard to the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an Opinion has the potential of undermining progress already made or being made on this sensitive subject, and, therefore is contrary to the interests of the United Nations Organization'.[17]

This paper will argue that advisory opinions are a suitable – perhaps even a logical – mechanism to clarify questions of a legal nature in situations governed by multilateral rather by reciprocal or a net of reciprocal obligations.

II. The Various Procedures – An Overview

1. Procedure before the International Court of Justice

a. Jurisdiction

The competence of the International Court of Justice to give an advisory opinion is based upon Art. 65 (1) of the ICJ Statute which contains a cross reference to the UN Charter. The provision states:

> 'The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'.

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[15] Aust (note 6) 147.

[16] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226.

[17] Ibid. Written Statement of the United States (20 June 1995) 1–2; going into the same direction United Kingdom (16 June 1995) paras 2.23–2.45; France (20 June 1995) paras 5–9; Finland (13 June 1995) paras 1–2; The Netherlands (16 June 1995) paras 6–7; Germany (20 June 1995) 3–6.

It has been argued that the corresponding Art. 96 of the UN Charter and Art. 65 of the ICJ Statute do not fully match since the former does not clearly indicate whether the ICJ has discretionary power as to whether to give an advisory opinion.[18] The relevant Art. 96 of the UN Charter reads:

> 'a. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
>
> b. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities'.

One should take into consideration, though, that Art. 96 of the UN Charter only deals with the question who may request an advisory opinion whereas Art. 65 of the ICJ Statute provides for the competence of the ICJ and establishes under which condition it may do so.

The UN Charter distinguishes between advisory opinions requested by the UN General Assembly or the UN Security Council on the one side and other organs and Specialized Agencies of the United Nations on the other.

In both cases a formal request is necessary. Equally in both cases the body or organization must be authorized to request an advisory opinion. The authorization of the UN General Assembly and of the UN Security Council is contained in Art. 96 of the UN Charter. The other bodies or organizations require an authorization from the UN General Assembly; their competence is thus a derived one.

It is for the Court to verify that the UN organ or the organ of the organization having filed the request for an advisory opinion was authorized to do so and that the decision on the request in the proper procedure for such a decision. This means the Court has to scrutinize whether the internal law was properly applied. In the *Wall* advisory opinion[19] and in advisory opinion on the *Unilateral Declaration of Independence of the Kosovo*[20] the Court deals in detail with the procedure used by the UN General Assembly. This jurisprudence of the ICJ is to

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[18] Frowein and Oellers-Frahm (note 1) para. 30.

[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. 136 (145–48).

[20] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14).

be interpreted that the Court does not consider itself able to act on a request which was not adopted in the proper procedure.[21]

Art. 96 (1) and (2) of the UN Charter both refer to legal questions on which only an advisory opinion may be requested. This question may be an abstract one or one which is pending between two or more States.[22] This is recognized in the Rules of the Court whose Rule 102 (3) provides for the appointment of a judge *ad hoc* in the case that an advisory opinion is requested on a question 'actually pending between two or more States'. The Rules of the ICJ were inspired by an equivalent provision for the PCIJ applicable to advisory opinions, proposed by Judge Anzilotti in 1927, which was providing that, on a question relating to an existing dispute between two or more States, Art. 31 of the PCIJ Statute relating to the maintenance of national judges and the appointment of *ad hoc* judges should apply. It is evident from this provision that there is no clear cut line between cases to be dealt with in contentious cases and advisory opinions and that one can hardly argue that a request for an advisory opinion should be denied since such dispute was to be dealt within a contentious case. No such priority for contentious cases exists. It is rather for the Court in such cases to make use of its procedural rules with the view to ensure that those States whose interests are involved receive the procedural means to protect their interests in the proceedings. The ICJ went into this direction by giving the Kosovo and Serbia more time in the hearing in the proceedings of the Advisory Opinion *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.[23]

This limitation of the competence of the ICJ to give advisory opinions on legal questions – as opposed to a political question – is a matter of consequence. As far as the interpretation of the notion 'legal question' is concerned the ICJ has taken a rather flexible approach. It has remarked on several occasions that questions 'framed in terms of law and raising problems of international law […] are by their very nature susceptible of a reply based on law'.[24] One may safely say, considering the jurisprudence of the ICJ that there is a clear presumption that questions phrased as legal questions are to be considered as such. But even in

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21 Frowein and Oellers-Frahm (note 1) para. 19.

22 Pratap (note 8) 126 et seq.

23 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14).

24 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep. 12 para. 15.

these cases where a question is formulated as a legal question it is for the Court to ascertain whether the question is just phrased as a legal one but *de facto* constitutes primarily a political question since it is – as stated frequently by the ICJ – for the Court to establish its jurisdiction. Although this seems to be in principle the view of the ICJ it is rather unlikely that it will dismiss a request for an advisory opinion formulated as a legal question on the grounds that it constitutes *de facto* a political question. The Court has stated more than once that even if the question has a political aspect – which will be normally the case as far as questions of the UN General Assembly or the UN Security Council are concerned – this does not deprive it of the character as a legal question.[25]

It is evident that the competence of the International Court of Justice to give an advisory opinion upon the request of Specialized Agencies or other organs of the UN than the UN General Assembly or the UN Security Council is restricted. The ICJ has so far once declined to accept an advisory opinion on the ground that it did not have jurisdiction. In the Advisory Opinion requested by the WHO on the *Legality of the Use by a State of Nuclear Weapons in an Armed Conflict*[26] the Court held that it had no jurisdiction to accede to the request. Although the WHO was authorized to request an advisory opinion and the question asked was a legal one the Court denied that the question was arising within the scope of the activities of WHO as required under Art. 96 (2) of the UN Charter.

In spite of the wider scope of Art. 96 (1) of the UN Charter as far as requests of the UN General Assembly or the UN Security Council is concerned the Court has considered whether the questions raised was serving the UN General Assembly in performing its functions. This particular issue came up in the Advisory Opinion concerning *Kosovo*. The Court did not establish the dogmatic background for such a limiting interpretation of Art. 96 of the UN Charter. It merely stated:

> 'While paragraph 1 of Article 96 confers upon the General Assembly the competence to request an advisory opinion on "any legal

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[25] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep. 166 para. 14; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 41, quoting from *Legality of the Threat or Use of Nuclear Weapons* (note 16) para. 13.

[26] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep. 66 (71–72).

> question" the Court has sometimes in the past given certain indications as to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the General Assembly […]' .[27]

In the proceedings it had been argued that due to Art. 12 of the UN Charter the UN General Assembly lacked the competence to request an advisory opinion concerning the Kosovo since that issue, including the declaration of independence had been on the agenda of the UN Security Council. However, the Court emphasized the general competence of the UN General Assembly to discuss 'any matters within the scope of the present Charter' in accordance with Art. 10 of the UN Charter and distinguished between the competence of the UN General Assembly to make recommendations which in fact is limited under Art. 12 (1) of the UN Charter and the request for an advisory opinion.[28]

Several other objections have been voiced in the proceedings against the Court giving an advisory opinion such as that the question was historic, abstract or academic. The Court has dismissed them all pointing out that it may give an advisory opinion on any legal question.[29]

Finally, the Court has more than once emphasized that no consent of those States is needed whose interests may be affected by the advisory opinion. This approach was confirmed, amongst others, in the *Namibia*,[30] the *Western Sahara*,[31] the *Privileges and Immunities*[32], the

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[27] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14) para. 21. A justification may be gained from H. Kelsen *The Law of the United Nations* (Stevens London 1950) 546 who argues that such limitation is inherent – no organ can go beyond the functions assigned to it – and hence the limitations in paragraph 2 were redundant.

[28] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14) para. 24; this issue had been left open in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 16.

[29] See, for example, *Western Sahara* (note 24).

[30] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep. 16 paras 23–24.

[31] *Western Sahara* (note 24) para. 30.

[32] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion)* [1989] ICJ Rep. 177.

Wall[33] and in the *Kosovo*[34] case. Mostly the Court dealt with the lack of consent – if invoked – under its jurisdiction as well as under its discretionary power. The gist of the argument that no consent is required in all these cases which relied on earlier statements of the Court, was that the advisory opinion was not binding and was meant for guidance to the organ or organization having requested the advisory opinion, only.[35] This does not fully reflect the political realities. Although technically the advisory opinion is not binding it has in reality as will be indicated later quite some relevance in practice. The reasoning of the Court clearly shows its intention not to restrict its jurisdiction in this respect being fully aware that advisory opinions may have a hybrid character. Although serving the interests of the organ having requested an advisory opinion in the first place it may help in overcoming an actual legal dispute amongst States as the possibility for the States concerned to appoint *ad hoc* judges shows. Apart from that the Court has indicated that the lack of consent may be taken into account when the judicial propriety to give an advisory opinion is considered.[36]

b. Discretion

The Court has frequently emphasized that having jurisdiction does not mean it is obliged to exercise it.[37] The Court has stated this discretion-

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[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 47.

[34] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14).

[35] The Court stated in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion) (First Phase)* [1950] ICJ Rep. 65 (71): 'The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent giving an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it'.

[36] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 47.

[37] Ibid. para. 44.

ary power is meant to protect the integrity of the courts juridical function and its nature as a principle juridical organ of the United Nations.[38] One may wonder whether this is a convincing explanation of the discretionary power the Court enjoys since other courts and tribunals are obliged to render an advisory opinion. Does that mean their judicial function is not worth protecting? Apart from that such interpretation of the discretionary power seems to indicate that the organs or organizations which have the right to request an advisory opinion from the ICJ are not considered being sufficiently aware of the judicial function of the Court. It is rather to be assumed that such discretionary power exists so as to enable the Court to honor the competences of the UN General Assembly and of the UN Security Council and to achieve through that a 'balance of power'. It should be taken into account that the Court may use its discretionary power in several ways; it may refrain from giving an advisory opinion *in toto* but it may – and this is the more likely option – refrain from answering certain questions or parts thereof. To that extent the discretionary power of the Court is a flexible mechanism to steer clear from infringing into the competences of the organs or organizations concerned or the interests of particular States.

In practice the ICJ has never refused to give an advisory opinion requested by the UN General Assembly and it has done so only in respect of one request from a Specialized Agency. This decision, however, was based upon the lack of jurisdiction rather than an exercise of discretionary power. Only the Permanent Court of International Justice has once dismissed a request for an advisory opinion, namely in the *Eastern Carelia*[39] case using its discretionary power. Although this may be considered a particular situation it may be worth taking cognizance of the reasoning. The Council of the League, at the instance of Finland, had asked for an Opinion as to the obligations of the Soviet Union under the Treaty of Dorpat. The Soviet Union which was not a member of the League challenged the competence of the Court and declared it would not participate in the proceedings. The Court cited 'a fundamental principle […] of the independence of States':

> 'it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States ei-

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[38] *Status of the Eastern Carelia (Advisory Opinion)* PCIJ Series B No. 5, 29; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (note 25) para. 24; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) paras 44–45.

[39] *Status of the Eastern Carelia* (note 38).

> ther to mediation or arbitration, or to any other kind of peaceful settlement'.[40]

In fact, it was not the lack of competence the Court wanted to address – otherwise it would have been dealt with under the rubric of jurisdiction – but the lack of competence of the requesting organ, the League Council.[41]

The ICJ has pointed out that the advisory jurisdiction is not a form of juridical recourse but it is a competence of the Court to assist the UN General Assembly or the UN Security Council or other Bodies of the UN in carrying out their activities.[42] This interpretation of the meaning of an advisory opinion is quite relevant since it means that the advisory opinion is given to the organ having requested it and the political motives of individual States having initiated such request or having argued such a request are without relevance.[43] The Court does not expect that the organ requesting the advisory opinion to substantiate why and for what reason it is going to be used for as long as it is established that such request falls within the competence of the organ. Nor does the Court consider it competent to substitute its assessment of the usefulness of the opinion requested for that for the organ that seeks such opinion.[44]

In the Advisory Opinion dealing with the Kosovo the Court considered in detail whether it should use its discretionary power to refuse the request for an advisory opinion on the ground that the issue had been dealt with by the UN Security Council. The Court declined this by referring to the wide ranging power of deliberation of the UN General Assembly.[45]

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[40] Ibid. 27.

[41] See the detailed analysis of Sir K. Keith 'The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections' (1996) 17 AustralianYbIL 39 (43 et seq.).

[42] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14) para. 33.

[43] This has been made quite clear in the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* (note 16) para. 16.

[44] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 62.

[45] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14) paras 33 et seq. and subsequently re-

c. Advisory Opinions Provided for in Other International Agreements

According to the Headquarters Agreement between the United States and the United Nations the Arbitral Tribunal established therein as a means for a settlement of disputes, the two parties shall have regard to the opinion of the ICJ where this opinion has been requested.[46] In the Convention on the Privileges and Immunities of the United Nations it is stated that a request shall be made for an advisory opinion on any legal question involved and that the opinion given by the Court shall be accepted as decisive by the parties.[47] Advisory opinions relating to the review of the ILO Administrative Tribunal (ILOAT) are binding.[48] The reason for such particularity may be seen in the limited scope of the advisory jurisdiction of ICJ in this respect.

This type of advisory opinion is somewhat neglected in literature although it gives evidence to the fact that advisory opinions may be used for the final settlement of legal disputes.

2. Procedure before the International Tribunal for the Law of the Sea/ the Seabed Dispute Chamber

a. Seabed Disputes Chamber

aa) Jurisdiction

As indicated in the introduction, the Seabed Disputes Chamber as well as the International Tribunal for the Law of the Sea both have the competence to give advisory opinions. Whereas the competence of the Seabed Disputes Chamber is set out in Art. 191 and Art. 159 (10) of the

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ferring to the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 30.

[46] UNGA Res. 169 (II) 'Agreement between the United Nations and United States of America regarding the Headquarters of the United Nations' (31 October 1947) GAOR 2nd Session Resolutions 91, Art. VIII Section 21(b).

[47] UNGA Res. 22 (I) 'Convention on the Privileges and Immunities of the United Nations' (13 February 1946) Resolutions adopted by the General Assembly during the first part of its first session, from 10 January–14 February 1946 (A/64) 25, Art. VIII Section 30.

[48] Statute of the Administrative Tribunal of the International Labour Organization (adopted and entered into force 9 October 1946) (ILO Geneva 1947), Art. XII.

Convention, the competence of the Tribunal is only contained in Art. 138 of the Rules of the Tribunal.

As far as the Seabed Disputes Chamber is concerned one may distinguish three different procedures. Art. 159 (10) of the Convention provides that upon written requests addressed to the President of the Assembly of the International Seabed Authority by at least one fourth of its members for an advisory opinion on the conformity with the Convention or a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the Law of the Sea Tribunal to give an advisory opinion thereon. No vote will be taken upon the proposal before the Authority pending the receipt of the advisory opinion.

Additionally according to Art. 191 the Assembly and the Council of the Seabed Authority may request an advisory opinion on legal questions arising within the scope of their activities.[49] It is to be noted that the wording of Art. 191 of the Convention resembles the one of Art. 65 (2) of the ICJ Statute which means that the Assembly's and Council's competence to request an advisory opinion are limited compared to the competence of the General Assembly and the Security Council of the United Nations. This reflects the limited mandate of the International Seabed Authority compared to the one of the United Nations. It is not for the Assembly or the Council of the International Seabed Authority to request an advisory opinion on other matters than those related to activities in the area.

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[49] On 25 February 2010 the International Seabed Authority published a draft revised Agenda with the 16th Session of the Council (International Seabed Authority 'Provisional Agenda of the Council' [25 February 2010] ISBA/16/C/L.1/Rev.1). This new agenda item was entitled 'Proposal to seek an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea pursuant to article 191 of the United Nations Convention on the Law of the Sea on matters relating to the responsibility and liability of sponsoring States'. A note verbal was also sent to member States and observers of the Authority notifying them of the change. This has led to a request for an advisory opinion which was submitted to the Registry of the International Tribunal for the Law of the Sea on 11 May 2010. The Advisory Opinion *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)* ITLOS Case 17 was delivered 1 February 2011 <http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=17&lang=en> (3 February 2011).

Art. 191 of the Convention makes it quite clear that the Seabed Disputes Chamber has to ascertain whether it has jurisdiction to give an opinion on an issue as requested. This involves a twofold test namely whether the request is on an issue falling within the competence of the Seabed Authority in general and into the competence of the requesting organ, the Assembly or the Council.

As the Assembly – according to the wording of the Convention the supreme organ of the Authority to which the other principal organs are accountable[50] – has broad powers and functions it is hard to imagine that an issue concerning deep seabed activities would not fall in the competence of the Assembly.[51] The competences of the Council are somewhat more limited. The Council is the executive organ of the Authority. It has the power to establish, in conformity with the Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question on matter within the competence of the Authority. The competences of the Council have been further strengthened by the Implementation Agreement on the Application of Part XI of the Law of the Sea Convention.[52] Considering its competences it is equally unlikely that a request for an advisory opinion dealing with deep seabed matters will be deemed not come 'within its activities' and thus not to meet the requirements of Art. 191 of the Convention.

Although Art. 191 of the Convention speaks of any legal question this does not mean that the Seabed Disputes Chamber may only consider abstract questions. In that respect the situation is identical to the one of the ICJ in respect of requests for advisory opinions under Art. 65 of the ICJ Statute. This is reflected in Art. 130 (2) of the Rules of the Tribunal. It obliges the Chamber to consider whether the request for an advisory opinion relates to legal question pending between two or more parties. If the Chamber so determines, the rules concerning the maintenance of national judges and appointment of *ad hoc* judges apply. This rule is based upon Art. 102 (3) of the Rules of the ICJ. In effect, this brings

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50 Art. 160 (1) of the Convention.

51 Ibid.

52 Annex to UNGA Res. 48/263 'Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982' (17 August 1994) UN Doc. A/RES/48/263.

such advisory proceedings close to contentious cases.[53] As already indicated when discussing the advisory opinions before the ICJ such possibility may be considered as alleviating the dividing line between contentious cases and advisory opinions. However, in respect of legal disputes between States concerning deep seabed activities an additional consideration has to be borne in mind. Although the Seabed Disputes Chamber has a monopoly concerning the decision on such legal disputes the access to the Seabed Disputes Chamber is limited.[54] This may increase the readiness to seek advisory opinions.

In establishing its jurisdiction the Seabed Dispute Chamber has to ascertain that the request was decided in the correct procedure. The Seabed Disputes Chamber followed in this respect the jurisprudence of the ICJ which in the *Wall* Advisory Opinion deals in detail with the procedure used by the UN General Assembly.[55] Since it is for the international court or tribunal concerned to establish its jurisdiction it cannot refrain from looking into the internal law of the organ submitting the request.[56]

Art. 191 of the Convention refers to a 'legal question', the term being used also in Art. 65 of the Statute of the International Court of Justice. Therefore one may assume that the Seabed Dispute Chamber may follow the jurisprudence of the International Court of Justice concerning the interpretation of this term. However one should notice in this context that the competence of the Seabed Disputes Chamber as of the Tribunal is limited compared to the one of the ICJ. Whereas the ICJ applies international law the Seabed Disputes Chamber as well as the Tribunal applies, according to Art. 293 of the Convention, the Convention and international law not incompatible with the Convention. This

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53 J.L. Jesus 'Article 130' in P. Chandrasekhara Rao and P. Gautier (eds.) *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Nijhoff Leiden 2006) 377.

54 See Art. 187 of the Convention.

55 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) 145–48.

56 This issue was taken up in the written statements of the United Kingdom of Great Britain and Northern Ireland (29 July 2010) and Mexico (17 August 2010) in the proceedings of the International Tribunal for the Law of the Sea, Advisory Opinion *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area* (note 49). The Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) deals with this issue in paras 29–33.

means *de facto* that the Convention establishes a legal hierarchy with the Convention and related implementations agreements on top of the pyramid followed by other rules of international law – treaty law as well as customary law and general principles – under the condition they are not incompatible with the Convention. This means the interpretation of the term 'legal question' must be interpreted on this basis. One may wonder whether Art. 189 of the Convention further limits the competence of the Seabed Disputes Chamber. This provision provides that the Tribunal shall not substitute its discretion for that on the Authority. Considering that an advisory opinion is not binding it is doubtful whether giving an advisory opinion can be considered to be able to substitute a decision of the International Seabed Authority.

bb) Admissibility

It is to be noted that different from the International Court of Justice the Seabed Dispute Chamber has no discretionary power as to give an advisory opinion. Art. 191 of the Convention uses the word 'shall' where Art. 65 of the ICJ Statute speaks of 'may'. Certainly the ICJ has, so far, not used its discretionary power to dismiss a request for an advisory opinion, in the contrary it has made it quite clear that, unless exceptional circumstances exist, it will admit a request for advisory opinion if it has jurisdiction. Thus, the ICJ enjoys some flexibility. For the Seabed Disputes Chamber the situation is more complicated, according to the wording of Art. 191 of the Convention it lacks such flexibility. As several written statements have pointed out in the oral proceedings on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area* before the Chamber it is not under an absolute obligation to give an advisory opinion.[57] One may consider situations, though, where it would be advisable for the Seabed Disputes Chamber to decline a request for an advisory opinion. This however does not fall under discretionary powers but rather under admissibility. In the Advisory Opinion *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area* the Seabed Disputes Chamber touched upon these issues leaving it open whether the Chamber may decline a request.[58] Nevertheless, one may wonder about

[57] See Written Statements (note 56).

[58] *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area* (note 49) paras 43–45.

the rationale of Art. 191 of the Convention to provide for an obligation of the Seabed Disputes Chamber to give an advisory opinion. This sheds a light on the function the Seabed Disputes Chamber is meant to play. The Seabed Disputes Chamber is the guarantor for upholding the rule of law in respect of deep seabed mining and in that respect its function is to be likened to the one of a constitutional court or the European Court of Justice. In fact some of the procedural rules pertaining to the Seabed Disputes Chamber were positively or negatively influenced by the example of the European Court of Justice.

cc) Procedural Rules

As Art. 130 (1) of the Rules of the Tribunal indicate the Seabed Disputes Chamber shall use, to the extent to be considered applicable, the procedural rules on contentious cases. This provision is modelled on Art. 40 (2) of the ICJ Statute. The provision attempts to assimilate, to the extent possible, the procedures to be followed by the Seabed Disputes Chamber in dealing with an advisory opinion to those of the Statute and the Rules applicable in contentious cases before the Seabed Disputes Chamber and the Tribunal. As already indicated this follows the example of the ICJ which again had recourse to the Statute of the PCIJ.[59] Which of the procedural rules are to be applied is an open question and responses thereto may only develop in practice. However, some rules are set out in the rules dealing with advisory proceedings.[60]

b. Tribunal for the Law of the Sea

The competence to give an advisory opinion for the Tribunal rests in Art. 138 of the Rules. It reads:

> '(1) The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
>
> (2) A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.

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[59] For details see Jesus (note 53) 376.

[60] Arts 130–37 of the Rules of the Tribunal.

(3) The Tribunal shall apply *mutatis mutandis* articles 130 to 137'.

Paragraph 1 describes who may request such an advisory opinion and under which condition. It establishes at the same time the jurisdiction of the Tribunal to give an advisory opinion. It is to be noted that under Art. 138 (1) of the Rules of the Tribunal the latter has a discretion as to whether to accept such request or not. This deviates from Art. 191 of the Convention and is closer to the approach taken by Art. 65 of the ICJ Statute.

It has been discussed whether this rule fully conforms to the Convention. In literature the provisions of Art. 288 (2) of the Convention and those of Art. 21 of the Statute of the Tribunal have been invoked to justify the advisory jurisdiction of the International Tribunal for the Law of the Sea.[61] This has been questioned by others.[62] The probably most convincing answer to this question is that Art. 138 of the Rules establishes a consensual solution. If the jurisdiction of international courts and tribunals is based upon the consensus of the parties concerned there is no reason to deny them to establish an additional jurisdiction.

The conditions set by Art. 138 of the Rules of the Tribunal for submitting a request constitute a high threshold which makes it rather unlikely that States may use this option. States or international organizations – not necessarily only States Parties to the Convention – considering filing an request for an advisory opinion must first conclude an international agreement (within the meaning of the Vienna Convention on the Law of Treaties) related to the purposes of the Convention. This could be an agreement on fisheries or on the protection of the marine environment. But it could be also an agreement on the filing of a request for an advisory opinion to the extent it identifies the questions to be raised. This agreement has to specifically provide for the submission of such a request and it must identify a body – not necessarily an organ – to file such request.

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[61] Jesus (note 53) 393–94; You, Ki-Jun 'Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited' (2008) 39 Ocean Development and International Law 360–71.

[62] T.M. Ndiaye 'The Advisory Function of the International Tribunal for the Law of the Sea' (2010) 9 ChineseJIL 565 para. 61.

c. Procedure under Art. 188 of the Convention

The procedure under Art. 188 of the Convention is not flagged as an advisory opinion although one may qualify it as such. The objective of this procedure is to ensure that the monopoly of the Seabed Disputes Chamber to interpret the legal deep seabed regime should not be infringed. This procedure covers the following scenario, namely a legal dispute concerning the interpretation or application of a contract between parties to the contract submitted to binding commercial arbitration. When such dispute also involves a question of the interpretation of Part XI (including the Annexes III and IV) of the Convention with respect to activities in the Area the question shall be referred to the Seabed Disputes Chamber for ruling. The arbitral tribunal shall render its award in conformity with the ruling of the Seabed Disputes Chamber which means, in other words, this ruling is binding.

d. Critique

The drafters of the UN Convention on the Law of the Sea were rather reluctant to entrust the Tribunal, including the Chamber for Deep Seabed Disputes, with competences to give advisory opinions equivalent to the ones of the ICJ. Considering the expertise of the Tribunal the reason for such reluctance is difficult to understand since the ICJ is competent to give advisory opinions on law of the sea matters if such requests are filed in accordance with Art. 65 of the ICJ Statute. For example International Maritime Organization (IMO) and Food and Agriculture Organization of the United Nations (FAO) may use such opportunity. It would have been a matter of consequence to entrust international organizations such as FAO and IMO with the right to request advisory opinions from the Tribunal. However, this still is pursuing a conservative course. One could have considered entrusting the Meeting of States Parties – in particular the Meeting of States Parties of the UN Convention on the Law of the Sea – with the competence to file requests for advisory opinions considering that they necessarily deal with legal matters in performing their functions. The same is true for the Continental Shelf Commission which equally in formulating its recommendations has to interpret the Convention which means it has to deal with legal issues.

3. Procedure before the Inter-American Court of Human Rights

The jurisdiction of the Inter-American Court of Human Rights concerning advisory opinions is governed by Art. 64 of the American Convention on Human Rights. Art. 64 provides:

> '1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
>
> 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments'.

The purpose of the Court's advisory opinion is 'to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the Inter-American system to carry out the functions assigned to them in this field'.[63] According to the legislative history of Art. 64 of the American Human Rights Convention it was the intention to define the advisory jurisdiction of the Inter-American Court of Human Rights in the broadest terms possible.[64]

One may, from the wording of Art. 64 of the Convention, deduce that there are three categories of advisory procedures differing somewhat in objective.

As already indicated all member States of the Organization of American States (OAS) and all the organs listed in the applicable section of the OAS Charter have standing under Art. 64 of the American Convention to request an advisory opinion of the Inter-American Court. This means that the jurisdiction of the Court *ratione personae* is much broader than it is for the Permanent Court of International Justice or the International Court of Justice or the European Court of Human Rights and the Law of the Sea Tribunal. Only the African Court on Human and Peoples' Rights will have a broader jurisdiction *ratione*

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[63] *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights) (Advisory Opinion OC-1/82)* IACtHR Series A No. 1 (24 September 1982) para. 25.

[64] Ibid. para. 17.

personae since the Organization of African Unity (OAU), OAU member States, any OAU organ and any African organization recognized by the OAU is authorized to request an advisory opinion.

There are differences concerning the jurisdiction *ratione materiae* and concerning the procedure.

What is remarkable is that any OAS member State has a right to request an advisory opinion even if that particular State is not a State Party to the American Human Rights Convention. Organs authorized to request advisory opinions are the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission of Human Rights, the General Secretariat, the Specialized Conferences and the Specialized Organizations. However their competence to request an advisory opinion is limited to 'their spheres of competences'. According to the jurisprudence a question in the field of competence of an OAS organ is one in which that entity has a 'legitimate institutional interest'.[65] This limitation is the equivalent to the notion of 'within the scope of their activities' referred to in Art. 96 (2) of the UN Charter. The meaning of these two categories of procedure is to provide for a coherent interpretation of as well as other human rights treaties. The reasons why requests are filed may differ. States may want an interpretation to guide them in their implementation of their human rights commitments; they may also seek such advice to induce other States to more effectively apply the Convention or the human rights agreement concerned. The organs in question may seek the advice to better perform their functions or to criticize member States.

Further a member State to the OAS also has the right under Art. 64 (2) of the American Convention to request an advisory opinion as to whether its domestic laws are compatible to the American Convention and other treaties. The objective of this procedure is different from the ones mentioned so far. It is meant to assist member States to better implement their human rights commitments. A request under Art. 64 (2) must be made by the organ in power to speak for the State on the international plane.[66] The wording clearly establishes that no State may use

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[65] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75) (Advisory Opinion OC-2/82)* IACtHR Series A No. 2 (24 September 1982) para. 14.

[66] In *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica (Advisory Opinion OC-4/84)* IACtHR Series A No. 4 (19 January 1984) a committee of the legislative assembly that was empowered to

that procedure to seek an opinion on other States' domestic law. There is no obligation for a State though to seek such an advisory opinion. However, the possibility exists that the Human Rights Commission, for example, may request such an advisory opinion. This has happened in *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*[67] dealing with the application of the death penalty by Peru. The Court held that the Commission on Human Rights had the right to request such advisory opinion under Art. 64 (1) whereas Peru held that this was a circumvention of Art. 64 (2).

It is for the Court to decide whether the organ in question acts within his field of competence. The Court stated that the Inter-American Commission on Human Right has an absolute right to request advisory opinions on the American Convention.[68] When the Commission, however, requests an opinion concerning other treaties it is required to explain its interests.

Ratione materiae the Court's advisory jurisdiction covers three areas: questions concerning the interpretation of the American Convention, including associated Protocols, questions relating to the interpretation of other treaties concerning the protection of human rights in American States and thirdly requests as to whether the States domestic laws are compatible with the American Convention or other treaties on Art. 60 (2).

III. The Procedure for Delivering an Advisory Opinion

The ICJ and the Seabed Disputes Chamber use more or less the same procedure delivering an advisory opinion. For the ICJ the *Advisory Opinion Accordance with International Law of the Unilateral Declara-*

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study amendments to the Costa-Rican Constitution initially submitted a request to the Court. The Court however did not deal with the matter until the Minister of Foreign Affaires filed the formal request.

[67] *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights) (Advisory Opinion OC-14/94)* IACtHR Series A No. 14 (9 December 1994).

[68] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)* (note 65) para. 16.

tion of Independence in Respect of Kosovo may serve as an example. The UN Secretary-General officially communicated to the ICJ the decision taken by the UN General Assembly to submit a request for an advisory opinion formulated in Resolution 63/3 of 8 October 2008. In accordance with Art. 66 (2) of the ICJ Statute notice of the request for an advisory opinion was given to all States entitled to appear before the Court. In accordance with Art. 66 (2) of the ICJ Statute the Court decided that the United Nations and its Member States would have the right to furnish information on the question and fixed the time-limit within which written statements might be submitted on the question. The Court set a further time-limit within which States and organizations having presented written statements might submit written comments on the other written statements in accordance with Art. 66 (4) of the ICJ Statute. The Court finally decided that the authors of the Declaration of Independence were considered likely to be able to furnish information on the question and decided to invite them to make written contributions to the Court within the set time-limits.[69] 36 Member States and the authors of the Declaration of Independence filed written statements or a written communication, respectively, 14 Member States and the authors of the Declaration of Independence took advantage of the second round of written statements. The Member States of the UN and the authors of the Declaration of Independence were informed that they could present oral statements or comments, regardless of whether or not they had submitted written statements. The Court heard oral statements from 28 Member States and the authors of the Declaration of Independence. The hearing started with the oral statement of the Republic of Serbia to be followed by the statement of the authors of the Declaration of Independence followed by the Member States of the UN in the alphabetical order according to the French names of the States concerned.

The procedure of the Inter-American Court of Human Rights for advisory opinions resembles the one of the ICJ. Here, too, written statements are invited by the Court[70] from the Member States of the Organization of American States as well as from the organs referred to in

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[69] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Order of 17 October 2008)* [2008] ICJ Rep. 409.

[70] In accordance with Art. 52 of the Rules of Procedure of the Court (as approved 28 November 2009) <http://www.corteidh.or.cr/reglamento_eng.cfm> (20 Feburary 2011).

Chapter X of the Charter of the OAS that might have an interest in the matter. In the Advisory Opinion *Restrictions to the Death Penalty*[71] communications were received from five States and several organs. Further, the Court accepted *amici curiae* briefs from NGOs and universities. At the public hearing some States made oral statements. On the request for an Advisory Opinion on *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law* [72] several States organs, NGOs and individuals submitted written or oral statements.

The Seabed Disputes Chamber is seized with a request for an advisory opinion.[73] In organizing its hearing it followed in general the practice of the ICJ. The Chamber rendered the Opinion on 1 February 2011.

On 6 May 2010 the Council of the International Seabed Authority adopted a decision (ISBA/16/C/13), by which it decided to request an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. The text of the Decision was transmitted to the Chamber by a letter from the Secretary-General of the Authority. The questions, generally speaking, called for an interpretation of the rules governing the responsibilities and liability of States sponsoring persons and entities with respect to activities in the Area. By an Order of 18 May 2010 the President of the Chamber decided that the International Seabed Authority and the organizations invited as intergovernmental organizations to participate as observers in the Assembly of the Authority were considered likely to be able to furnish information on the questions submitted to the Chamber. States Parties to the Convention, the International Seabed Authority and the intergovernmental organizations referred to were invited to submit written statements on the questions submitted to the Chamber. Altogether twelve States, the International Seabed Authority as the initiator of the request and two organizations, one of them the International Union for the Conservation of Nature took advantage of this opportunity and submitted written statements. Also a statement of Greenpeace and the

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[71] *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights) (Advisory Opinion OC-3/83)* IACtHR Series A No. 3 (8 September 1983).

[72] *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law (Advisory Opinion OC-16/99)* IACtHR Series A No. 16 (1 October 1999).

[73] *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area* (note 49).

World Wide Fund for the Conservation of Nature was received. In the light of Art. 133 of the Rules of the Tribunal, the statement was not included in the case file but was placed on the website of the Tribunal. Some oral statements referred to it later. Member States of the Convention and the organizations referred to were also invited to make oral statements in the hearing. Twelve States and organizations[74], not having submitted a written statement, made use of this opportunity. The hearing started with the oral statement of the International Seabed Authority which was allotted more time than most of the others. Also Nauru, the initiator of the request occupied quite some time. The oral statements differed considerably in style and content. Some reiterated the written statement or focused on one or several aspects of the written statements. Some commented on the written statements or even on the oral statements delivered earlier.

IV. Relevance of Advisory Opinions: Some Preliminary Observations

Advisory opinions were in fashion in the period of the League of Nations. The Permanent Court of International Justice gave 29 judgments on contentious matters and 27 advisory opinions. One explanation for this comparatively high figure is – the International Court of Justice, so far, has delivered 25 advisory opinions (one still pending) amongst them only one initiated by the UN Security Council – that the organs of the League, in particular its Council, were inclined to shift the burden of taking decisions to the Court.[75] The Permanent Court of International Justice had discretion as the ICJ to give an advisory opinion and has denied to render one namely on *Eastern Carelia*.[76]

As far as the International Court of Justice is concerned most of the requests for rendering an advisory opinion have been made by the UN General Assembly or bodies established by it. Two have been made by the UN Economic and Social Council (ECOSOC) and one by the UN Security Council. The Specialized Agencies of the UN which have, on the basis of their constituent instruments, the right to seek an advisory

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[74] International Seabed Authority, Intergovernmental Oceanographic Commission and International Union for the Conservation of Nature.

[75] Aust (note 6) 129.

[76] *Status of the Eastern Carelia* (note 38).

opinion have made little use thereof. UNESCO and IMO have each requested one advisory opinion, the World Health Organization (WHO) has requested two of which one was declined.[77] Assessing this praxis of the ICJ from the point of view of jurisdiction and admissibility one has to state that unless the Court found it had no jurisdiction[78] it used its discretionary power always to accede to the requests. As far as the Inter-American Court of Human Rights is concerned it has given most advisory opinions requested.

The advisory opinions rendered differ significantly as far as their substance is concerned; this is due to mandate of the court or tribunal in question.

The broadest competences rest in this respect with the UN General Assembly or the UN Security Council. This is matched by the advisory jurisdiction of the ICJ regarding requests from these two organs.

The mandate of the Court is limited, though, in respect of advisory opinions coming from organs of the United Nations and Specialized Agencies. This reflects their more limited functions. Therefore one may say the jurisdiction *ratione materiae* of the ICJ to give an advisory opinion corresponds to the functions entrusted to the international organization in question. This limitation is the most relevant safeguard against the ICJ using its advisory jurisdiction in a way not commensurate to the object and purpose of the advisory procedure namely to assist the organization or organ in the performance of its functions.[79] That the ICJ is conscious of this restriction is to be seen when the Court dismissed the request for an Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[80] submitted by the WHO.

The mandates of the other courts or tribunals which have the competence to give an advisory opinion are *ab initio* more limited. This is equally but a matter of consequence; all these courts or tribunals have been established by a particular international treaty and are mechanisms to settle disputes under and interpret this particular treaty regime. Accordingly, the European Court of Human Rights may give an advisory

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77 Figures provided for by Aust (note 6) 130.

78 Ibid. 131.

79 This function of advisory opinions has frequently been underlined by the Court.

80 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (note 26).

opinion on a legal question put to the Court by the Committee of Ministers concerning the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the several protocols to it. The Inter-American Court of Human Rights can give an advisory opinion regarding the interpretation of the American Convention on Human Rights and other Human Rights treaties. The Seabed Disputes Chamber according to Art. 191 of the Convention shall give an advisory opinion at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Also the competence of the Seabed Disputes Chamber under Art. 188 (2) of the Convention[81] is to give an interpretation of Part XI of the Convention and the competence of the Tribunal to render an advisory opinion under Art. 138 of the Rules is limited to the interpretation of the Convention.

But it is not only the objective of advisory opinions to render assistance to organizations, organs or States. Advisory opinions also have the function directly or indirectly to settle disputes among States. Otherwise the rules of the ICJ as well as of the Tribunal providing for the possibility to appoint judges *ad hoc* would have no justification. In that respect the rules of the PCIJ were somewhat more leading than the ones of the ICJ or the Law of the Sea Tribunal respectively.

It is difficult to give a founded assessment of the relevance of advisory opinions. The practice of the Inter-American Court of Human Rights seems to be encouraging in this respect. For example, the Inter-American Court of Human Rights having been requested by Mexico on the question whether the Vienna Convention on Consular Relations requires an arresting State to inform detained foreigners that they had the right to confer with their national consuls gave an affirmative interpretation of the Convention.[82] In consequence thereof the US Department of State disseminated a handbook to all local, state and federal law enforcement departments in the United States explaining the importance of compliance with the required procedure.[83]

Another example where the relevance of an advisory opinion was clearly demonstrated is the reaction of the Supreme Court of Israel in

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[81] See above p. 55.

[82] *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law* (note 72).

[83] Pasqualucci (note 8) 242.

the *Mara'abe case*.[84] In that case the Supreme Court considered the obligations that were placed on Israel in the *Construction of a Wall Opinion*.[85] At the end the Supreme Court did not follow the reasoning of the ICJ, nevertheless it gave this reasoning credit.

Finally, the ICJ Advisory Opinion in the *Unilateral Declaration of Independence of the Kosovo* resulted in a General Assembly Resolution which politically had a positive effect upon the relationship between Serbia and the Kosovo.

To conclude it seems that the relevance of advisory opinions may exceed or at least equal the one of judgments in contentious cases. This is due to two factors, namely that advisory opinions do not artificially reduce a legal dispute to a matter of bilateral relations. This may also be due to the non-binding, nevertheless authoritative character of advisory opinions.

V. Conclusions, Advantages, Disadvantages

In the following an attempt will be made to highlight the pros and cons of advisory opinions.

1. Wide Participation of States and of International Organizations and Entities such as the Kosovo

One clear advantage of advisory opinions lies in its procedure. It allows a wide participation of States and it seems to be the practice of the international courts or tribunals concerned not to limit such participation. The International Tribunal for the Law of the Sea provided for the possibility of a participation of international and even non-governmental organizations. The ICJ allowed the Kosovo to participate not being a member of the UN. States and entities consider themselves as assisting the court or tribunal in question and these take such contributions seriously as can be seen from the reasoning. What in fact develops is a dis-

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[84] *Mara'abe v. The Prime Minister of Israel (Judgment of 15 September 2005)* Supreme Court of Israel 45 (2006) 202.

[85] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19).

course between the States and the entities and the court or tribunal in question. The interpretation of the legal norm under consideration is – in the ideal case – the outcome of an embracing process.

Such process has a positive bearing upon the acceptability and thus upon the legitimacy of advisory opinions.

2. Adequateness for Multilateral Agreements

The possibility to involve all interested States or entities in the deliberative process of interpreting an international agreement or customary international law is commensurate to the multilateral nature of such agreements and customary international law. All member States are interested in the interpretation. The rigid rules for intervention in contentious cases do not allow them to voice their views beside the views of the parties to the conflict. Contentious cases in which such agreements are being interpreted thus create an artificial bilateralism which does not correspond to the multilateral character of the instrument in question. For example, the question whether a right of a detainee exists under the Vienna Convention on Consular Relations to consult a consul of one's own nationality is not only an issue between Mexico and the United States[86] or Germany and the United States[87] but an issue of concern to all member States of the Vienna Convention on Consular Relations. There was no room to other States Parties of the Vienna Convention on Consular Relations to intervene. There was, however, the possibility for other States to voice their views in the procedure of the Advisory opinion before the Inter-American Court of Human Rights.

3. Lack of Consent

Other than for contentious cases advisory opinions do not depend upon the consent of States even if their legal position is being considered. They cannot block a dictum of the court or tribunal. This has been frequently emphasized in international jurisprudence. This was

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[86] *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep. 12.

[87] *LaGrand (Germany v. United States of America) (Judgment)* [2001] ICJ Rep. 466.

underlined by the Inter-American Court of Human Rights in the Advisory Opinion OC-3/83.[88]

In contentious cases the exercise of the Court's jurisdiction ordinarily depends upon a preliminary and basic question, involving the State's acceptance of or consent to such jurisdiction. If the consent has been given, the States which participate in the proceedings become, technically speaking, parties to the proceedings and are bound to comply with the resulting decision of the Court. By the same token, the Court cannot exercise its jurisdiction.

None of these considerations is present in advisory proceedings. There are no parties in the sense that there are no complainants and respondents; no State is required to defend itself against formal charges, for the proceeding does not contemplate formal charges; no judicial sanctions are envisaged and none can be decreed. All the proceeding is designed to do is to enable OAS Member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American States.

The Court recognizes, of course, that a State's interest might be affected in one way or another by an interpretation rendered in an advisory opinion. For example, an advisory opinion might either weaken or strengthen a State's legal position in a current or future controversy. The legitimate interests of a State in the outcome of an advisory opinion proceeding are adequately protected, however, by the opportunity accorded it under the Rules of Procedure of the Court to participate fully in those proceedings and to make known to the Court its views regarding the legal norms to be interpreted and any jurisdictional objections it might have (Art. 52 of the Rules of Procedure).

4. Urgent Procedure

Advisory procedures are considered urgent procedures. They are given preference in the jurisprudential activities of the international court or tribunal concerned. Apart from that, the international courts or tribunals are only called upon to rule on legal not on factual matters. This allows to concentrate on the legal questions and no possibility exists to

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[88] *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)* (note 71).

avoid answering legal questions due to factual circumstances – a not uncommon policy.

5. Disadvantage: Not Binding – Does it really Make such a Difference?

How shall a court deal with the legal analysis if faced with the same legal question in a contentious case – the same problem may come up in subsequent contentious cases. The major disadvantage of advisory opinions is their non-binding character. One may wonder whether this really matters. The enforceability of international judgments is limited and their implementation depends very much upon their acceptability. In that respect the difference between judgments and advisory opinions undeniably exist but is more of theoretical but of practical relevance.

In conclusion one may argue that advisory opinions in comparison to judgments in contentious cases may gain the same relevance as non-binding international norms in comparison to hard law. In particular concerning the interpretation of multilateral agreements they may – at least in early stages of a dispute and if no factual issues are controversial – become a substitute for contentious cases.

*Comment by Pierre-Marie Dupuy**

The question which was put to us was: are advisory opinions a suitable alternative for the settlement of international disputes? And it seems that Rüdiger Wolfrum answered today a quite different question, which is: are advisory opinions able to provide the international community with a clarification, or even more a normative development, as far as the international rule of law is concerned? The first question approaches the advisory opinions as an alternative mean for the settlement of international disputes (not necessarily limited to inter-State disputes); the second, instead, deals with the normative potential of advisory opinions as compared to judgments. This is a very interesting issue which is nonetheless distinct from the previous one even if the two of them are or may be, from case to case, interconnected. That being said, keeping in mind the question as it had been put to us by the organizers of this symposium, I shall structure my comments in two brief parts.

The first one will deal with the comparison between advantages and disadvantages of the advisory opinion as compared to contentious jurisdiction. The second one will raise the issue of the lessons which might be drawn from the actual practice of the Court.

I. Advantages and Disadvantages of Advisory Opinions

As far as advantages and disadvantages are concerned, Rüdiger Wolfrum already raised the essential points and I shall simply add the following.

I see personally three main features which could plead in favour of opting for an advisory proceeding instead of a contentious one: a) it is an open procedure; b) it may have under certain conditions an important political potential and c) it has in several respects more procedural flexibility than the contentious proceedings.

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As far as the open feature of the procedure is concerned *ratione materiae*, the ICJ is entitled to deal with every legal question submitted to it; it is in this respect relevant to distinguish between such an almost open-ended jurisdiction and the more restrictive one exercised by specialized courts.[1] *Ratione personae*, as already pointed out by Rüdiger Wolfrum, this type of proceedings is open to the participation of every UN member State without any specific pre-recognition of the Court's jurisdiction (contrary to what is requested under Art. 36 of the ICJ Statute with regards to the contentious jurisdiction). Also, as demonstrated by some of the advisory opinions delivered by the Court over the last twenty years – here, I think in particular of the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996)[2], the Court may receive, at least through the channel of the UN General Assembly, questions at the origin of which non-State actors, i.e. in this case, important non-governmental organizations (NGOs), are in reality to be found.

This is connected to the second feature mentioned above, which is the political potential of advisory opinions as they may make it possible to raise and discuss some highly delicate issues, although such a discussion rests before the ICJ on purely legal grounds. One thing is for the Court, as it constantly does[3], to limit its jurisdiction to the treatment of the legal dimension of the issues raised by the question, a case law which provides us, as Jean d'Aspremont has clearly stated in his interesting paper[4], with some guidance as to the delimitation of the boundary between the political and the legal spheres; another is to notice that

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[1] For a recent illustration, with reference to the power of the UN General Assembly to ask for an Advisory Opinion 'on any legal question', see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* (22 July 2010) ICJ Doc. 2010 General List No. 141 paras 21–22.

[2] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226.

[3] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 1) para. 27: 'Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law'. Cf. *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep. 155.

[4] See below p. 271 et seq.

an advisory opinion issued by the ICJ, precisely because it is restricted to the legal aspects of a more complex matter, does in itself represent a political fact which may impact upon the evolution of the situation at stake. The ICJ opinions, such as the one concerning the construction of the Wall by Israel in Cisjordania in blatant violation of a number of its cardinal international legal obligations (2004)[5], was dealt with by the Court quite in a straightforward way. It is fair to recognize that in this case, the Court did not escape its responsibilities and treated the different legal aspects of the issue with precision and clarity, even if one may still discuss or criticize one or the other aspect of the motivations put forward in this Opinion. The latter unfortunately also demonstrates the very limited political impact of such a judicial stance if the overall political context within which it takes place is not favourable.

Whatever that may be, if, on the contrary, these conditions were to be met in other situations in the future, there still would be the possibility for an advisory opinion issued by the main judicial organ of the United Nations to help in creating a new course of action.

The third advantage of an advisory opinion, very much linked with the previous one, as it also deals with the distinction between law and politics, is its procedural flexibility. Indeed, the Court is empowered to reformulate the question raised in the request if the latter is considered as being confusing or not precise enough; such an initiative is properly not feasible within the contentious jurisdiction of the Court, as for it is entirely dependent on the free will of the parties.

One could add that advisory opinions are able to cover disputes which are not inter-State in their very essence. In that respect, the *Western Sahara* case[6] is a good example (as the Sahraouian people, if accepted as distinct from that of Morocco, is and was, at the time of the 1975 Advisory Opinion, in a pre-State situation) as well as the very complex *Kosovo* case. Advisory opinions may equally be issued with regard to situations directly involving interest of States that would otherwise never accept to defer their dispute to the Court under its contentious jurisdiction. They then provide a solution to overcome the consent of the litigating State or States; here again, one may think of South Africa at the

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[5] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. 136.

[6] *Western Sahara (Advisory Opinion)* [1975] ICJ Rep. 12.

time of the *Namibia* case (1971)[7] or of Israel with regard to the *Construction of a Wall* (2004).

It is true that advisory opinions are not binding, at least for States. The question is rather then to determine whether such a non-binding effect represents an advantage or a disadvantage. It might prove to be an advantage if we refer to what Georges Abi-Saab said this morning about what he called in an interesting way the 'massage' of sovereignty! The Court *indicates* only to the States the proper behaviour to adopt in order to comply with the law; it does not make it compulsory. The Court states what the law is; it does not impose it on the parties. It informs the actors about their legal obligations; it does not sanction them for having infringed these obligations.

It is also true that the lack of compulsory authority may also prove to be quite disadvantageous. Now, let's turn to the practice of the Court to assess the level of accuracy of these considerations.

II. The Practice of the Court

To make a long story covering 25 opinions issued from 1947 to 2010 short, one may try to classify the advisory opinions of the ICJ in, at least, three categories.

In a first category of cases, the ICJ stands plainly as the judicial organ of the UN endowed with the power of clarifying the law of the United Nations on the basis of the UN Charter, conceived in these cases as the true Constitution of the Organization without belonging necessarily to the 'constitutionalist' school of law.[8] It comes as no surprise that the most frequent cases falling into this category were to be found during the first two decades of the history of the UN itself. Let's analyze for instance the Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations* (1947)[9], the Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United*

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[7] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep. 16.

[8] See P.-M. Dupuy 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 Max Planck UNYB 1.

[9] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep. 57.

Nations (1949)[10], the one dealing with the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954)[11], or the Opinion on *Certain Expenses of the United Nations* (1962).[12] They are all very rich in terms of interpretation of the 'constitutional law' of the UN and for some of them, in particular the 1949 Opinion on *Reparation for Injuries*, we have not finished yet to elaborate on the audacious vision of the Court when dealing with the crucial question of international legal personality as applied to the UN itself and other entities. This was really a most imaginative, creative and inspiring advisory opinion as far as the theory of subjects of international law is concerned.

Nevertheless, it should not necessarily be expected that the Court faces in the near future an opportunity to issue again such kind of opinions. The latter are indeed relatively few and their number has decreased in the history of the Court; this may be explained, in particular, by the fact that the first twenty years of the UN constituted a period during which the political tensions among the Member States gave rise to a series of contradictory interpretations of some of the main provisions of the UN Charter for which it was necessary for the Court, almost acting as a Constitutional Court, to give the true significance.

The second category of advisory opinions would be composed of answers to issues of general international law. As stated earlier with regard to the 1949 Opinion on *Reparation for Injuries*, every question considered by the Court in the framework of advisory proceedings may raise issues of general international law. Still, some questions submitted to the Court are specifically dealing with general international law; this was for instance the case in 1950 with the request for an advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[13] where the Court was able to enunciate the new leading principles governing the validity, opposability and effects of reservations. Another case belonging to that second category is the 1996 Opinion on the Legality of the *Threat and Use of Nuclear*

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[10] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep. 174.

[11] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep. 47.

[12] *Certain Expenses of the United Nations* (note 3).

[13] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep. 15.

Weapons[14], a much criticized and debatable case.[15] As far as I am concerned, I have always argued that it was quite an interesting case indeed as it gave an opportunity to the Court to pronounce itself on the connection between *lex specialis* and general international law as well as on the notion of 'intransgressible' principle of humanitarian law as compared to a peremptory norm of international law, and to use almost in an ironical way the notion of 'fundamental rights of every State to survival' in the context of the use of nuclear weapons.[16] In that respect, I would agree entirely with my friend and colleague Rüdiger Wolfrum when he affirms that an advisory opinion may prove to be extremely useful for the interpretation of general international law rules.

A third category does exist, on the reality of which the participants to this symposium were most probably invited to pay a specific attention, as its very title asks the question whether advisory opinions are 'a suitable substitute to contentious cases'. As often, one could say: 'the answer is "yes", but by the way, what is the question?'. If advisory opinions are mainly perceived in their dimension of jurisdictional acts providing the Court with an opportunity to elaborate on the meaning and scope of international law norms, the answer to this question may then be positive, as previously discussed, keeping in mind that, precisely because of the absence of compulsory effect, the Court may, from time to time, be incited to issue *obiter dicta* more easily than in the specific context of contentious cases.

Nevertheless, if advisory opinions are foreseen from another perspective, namely as possible substitutes to judgments (as the title referred to above seems to invite us to think) then, on the basis of the Court's practice, the answer can only remain extremely careful. Let's think in particular of the *Western Sahara*, the *Wall in Palestine* and the *Kosovo* Opinions. In terms of settlement of inter-State disputes, the very issue lying – quite evidently – behind the question asked to the Court, the result reached in each of the three cases is not necessarily very convincing. The Western Sahara dispute between Morocco and Algeria (not to speak of Mauritania) was hardly settled by the 1975 Advisory Opinion[17] of the Court and serious tensions are still now easily discernible

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[14] *Legality of the Threat or Use of Nuclear Weapons* (note 2).

[15] L. Boisson de Chazournes and P. Sands (eds.) *International Law, the International Court of Justice and Nuclear Weapons* (CUP Cambridge 1999).

[16] See P.-M. Dupuy 'Between the Individual and the State: International Law at a Crossroads?' in Boisson de Chazournes and Sands (note 15) 449–61.

[17] *Western Sahara* (note 6).

between the two States with regard to the Western Sahara issue. The Wall in Palestine is, to say the least, not more convincing, even for the authority of the Court the courage and determination of which are to be saluted in this case. As everyone knows, Israel simply did not take into account any of the very rich and interesting points of law including the relationship between *lex specialis* and *lex generalis*, humanitarian law, human rights and rights of people, the content and extent of the obligations of the occupying power, and so on. Israel simply ignored the whole of the ICJ's Advisory Opinion.

As far as *Kosovo*[18] is concerned, the story is still going on. It is true that Serbia made a declaration after the issuing of the opinion stating that it would take it into account; but this result was in fact achieved thanks to a visit of Guido Westerwelle, the Foreign Minister of Germany, who rushed to Belgrade after he heard that the Serbian Government was absolutely decided not to change its opinion about the situation of the Kosovo after the Opinion given by the ICJ. And he told them in substance: 'if you don't change your mind, you will never enter the European Union!'. I am not saying that the Court is necessarily to be blamed for the absence of actual impacts of its opinions related to the settlement of disputes. On the basis of its Statute, Serbia is not bound by the Opinion on Kosovo; one could even say that it is primarily Serbia itself, together with the countries that formulated the question submitted by the General Assembly to the Court which are to be criticized for not having been able to elaborate a more precise and constructive question.

Now, did the Court at least provide the most directly concerned actors as well as the international community with a substantial contribution as far as the legal rules and principles of reference are concerned, such rules and principles being potentially helpful to solve the many legal problems raised by the situation prevailing in Kosovo?

As we all know, there exist quite different views about this. One should of course not underestimate the difficulty of the task given to the Court on the basis, first, of the very restrictive formulation of the question put to it, and, second, of the delicate political background in which the Court had the primary duty not to get involved. Whatever the case may be, it seems possible, as Judge Simma and some others among his colleagues explicitly did[19] to regret that the Court did not say more about

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[18] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 1).

[19] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) (Declaration of Judge*

strictly legal issues, such as the possible legal grounds likely to be invoked in order to justify a unilateral declaration of independence; how to reconcile the rights of people with the territorial sovereignty of a State now that the time of decolonization has historically come to an end? One may also have the feeling of a somewhat confusing analysis of the way in which the members of the provisional institutions of the self-government of Kosovo acted without binding the body to which they belonged (although the very formulation of the question asked to the Court by the UN General Assembly showed that this organ did consider that the declaration of independence was attributable to the Provisional Institutions of Self-Government of Kosovo [PISG] itself). One could have also expected more from the Court on the interpretation of UN Security Council Resolution 1244[20], which gave guarantees on Serbia's territorial integrity. Finally, the Court neither made any statement covering Kosovo's statehood nor did it indicate the possible impact of recognition of Kosovo by third States.

One may answer that these issues were not raised by the question brought to the Court by the UN General Assembly. One may also say that they were definitely implied by it and that the Court simply left aside an opportunity to clarify the law as well as to contribute to the settlement of some tricky legal problems. It's a matter of judicial policy for which the Court itself is responsible, in the short, middle and long term.

In that respect I would be tempted to say that such kind of advisory opinions are not necessary self-serving for the Court itself in terms of its authority *vis-à-vis* the member States of the United Nations although some of them may have been happy to hear from it that, back to the *Lotus* Case, under modern international law, everything which is not forbidden is permitted!

In the *Kosovo* case, contrary to what it had done in the Opinion issued about the construction of a Wall, the Court has thought that it could take advantage of the restrictive formulation of the question it had to

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Simma) (22 July 2010) ICJ Doc. 2010 General List No. 141 para. 9: 'By reading the General Assembly's question as it did, the Court denied itself the possibility to enquire into the precise status under international law of a declaration of independence'.

[20] UNSC Res. 1244 (1999) (10 June 1999) SCOR 54th Year 32.

answer for issuing an opinion *a minima* of which only the future will say whether it was a good choice in terms of efficiency.

Thank you very much.

*Comment by Alena F. Douhan**

Advisory Opinions of the Economic Court of the Commonwealth of Independent States: A New Means of Settlement of International Disputes in the Region?

The very notion of advisory opinions of international courts is complex and inconsistent. As J.B. Moore asserted with regard to the Permanent Court of International Justice 'no subject connected with the organization of [international courts] has caused so much confusion and proved to be so baffling as the question whether and under which conditions

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[they] shall undertake to give "advisory" opinions'.[1] Until the present, there has been very limited consensus on the nature, scope and effect of advisory opinions in international relations. Every element or characteristic of advisory opinions has caused, and still causes, heated debate. Until very recently it has even been questioned whether the advisory activity of international courts falls within their judicial function, since 'historically the function of the Courts has been to settle controversies between parties who have a real continuing adversary interest'[2] by means of decisions binding upon the parties.[3]

It is not, however, the purpose here to discuss in detail whether advisory opinions fall within the judicial function of international courts. This contribution, rather, seeks to establish whether interpretative decisions and advisory opinions of the Economic Court of the Commonwealth of Independent States (CIS EC) play a role in the settlement of international disputes in the region.

The impact of advisory opinions on international dispute settlement is sometimes considered in the international legal doctrine.[4] At the same time, the studies are mainly focused on the functions and practice of the International Court of Justice and stay silent as for regional courts.[5]

To determine the role of the CIS EC advisory opinions, this contribution will proceed in several steps. After considering the very notion of advisory opinions in international law, it will discuss in detail their intrinsic characteristics (mostly based on ICJ practice). The second part

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1 PCIJ 'The Question of Advisory Opinions: Memorandum by Mr. Moore, February 18th, 1922' PCIJ Series D No. 2, 383.

2 K.J. Keith *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Sijthoff Leyden 1971) 15–22.

3 J.G. Merrils *International Dispute Settlement* (3rd edn. CUP Cambridge 1998) 121.

4 P. Kovács 'Rather Judgement than Opinion? Or Can We Speak about the Third Type Judicial Procedure before the International Court of Justice?' (2004) XX Anuario de Derecho International 447 (460); M. Pomerance 'The Advisory Role of the International Court of Justice and Its 'Judicial' Character: Past and Future Prisms' in A. Muller, D. Raič and J.M. Thuranszky (eds) *The International Court of Justice: Its Future Role after Fifty Years* (Nijhoff The Hague 1997) 271 (272–75).

5 As one of very few works on the topic, see T. Buergenthal 'The Advisory Practice of the Inter-American Human Rights Court' in Inter-American Court of Human Rights *La Corte Interamericana de derechos humanos: Estudios y documentos* (Corte IDH San José 1999) 27.

of the contribution focuses on several aspects. First, it provides a brief overview of the specifics and challenges of the CIS legal database. Then it will pay some attention to the legal regulation and judicial practice of the CIS EC. Third, through the lens of characteristics of advisory opinions, it seeks to qualify interpretative decisions and advisory opinions of the CIS EC as advisory opinions of international courts. And finally, it seeks to assess the role of advisory opinions in the settlement of international disputes with emphasis given to CIS EC interpretative decisions and advisory opinions.

I. Advisory Opinion: Notions and Characteristics

1. Historical and Conceptual Background

The notion of an advisory opinion is neither new nor exceptional in international judicial practice.[6] Twenty seven advisory opinions[7] were given by the PCIJ pursuant to Art. 14 of the Covenant of the League of Nations.[8] Before that, the advisory function had been inherent in national courts.[9]

Presently, the constituent documents of both the ICJ and regional courts (European Court of Human Rights, Inter-American Court of Human Rights, African Court on Human and Peoples' Rights, CIS EC, European Court of Justice) endow them with advisory jurisdiction (the Charter of the United Nations, Art. 96[10]; the ICJ Statute, Art. 65 [11];

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6 For the history of advisory opinions, see e.g. Pomerance (note 4) 271.

7 See Publications of the Permanent Court of International Justice (1922–1946) Series B *Collection of Advisory Opinions* <http://www.icj-cij.org/pcij/series-b.php?p1=9&p2=2> (7 February 2011); Series A/B *Collection of Judgments, Orders and Advisory Opinions* <http://www.icj-cij.org/pcij/series-a-b.php?p1=9&p2=3> (7 February 2011).

8 Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 195.

9 M.M. Aliaghoub *The Advisory Function of the International Court of Justice 1946-2005* (Springer Berlin 2006) 14; S. Rosenne *The World Court: What it is and How it Works* (5th edn. Nijhoff Dordrecht 1995) 106.

10 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 805.

Protocol No. 2 to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1950], Art. 1[12], American Convention on Human Rights [1969], Art. 64[13]; 1998 Protocol to the African Charter on Human and People's Rights [1981], Art. 4[14], Constitution of the Economic Court of the Commonwealth of Independent States [1992], para. 5[15] (CIS EC Constitution), Treaty on Functioning of the European Union (TEU) , Arts 218 (11), 267.[16]

Despite some past and existing doubts about the judicial nature of advisory opinions[17], it is generally agreed that advisory opinions are given by international courts in the course of exercising their judicial functions.[18] The same idea was repeatedly upheld by the PCIJ and ICJ.[19] In

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[11] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

[12] COE 'Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Conferring upon the European Court of Human Rights Competence to Give Advisory Opinions' (opened for signature 6 May 1963, entry into force 21 September 1970) ETS No. 44.

[13] American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

[14] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) (1999) 20 HRLJ 269.

[15] Polozhenie ob Ekonomicheskom Sude Codruzhestva Nezavisimykh Gosudarstv, approved by the Agreement on the Status of the Economic Court of the Commonwealth of Independent States of 06 July 1992, *Sodruzhestvo*, 1992 (6).

[16] Treaty on the Functioning of the European Union (signed 13 December 2007, entered into force 1 December 2009) [2008] OJ C115/47.

[17] See e.g. Keith (note 2) 15–22; Merrils (note 3) 121.

[18] G. Griffith and C. Staker 'The Jurisdiction and Merits Phases Distinguished' in L. Boisson de Chazournes and P. Sands (eds) *International Law, the International Court of Justice and Nuclear Weapons* (CUP Cambridge 1999) 59 (67); R. Donner *International Adjudication: Using the International Court of Justice* (Suomalainen Tiedeakatemia Helsinki 1988) 119; K.J. Keith 'The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections' (1996) 17 AustralianYbIL 39 (42); Keith (note 2) 22–23; Aliaghoub (note 9) 117.

[19] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion)* [1960] ICJ Rep. 150 (153); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) (22 July 2010)*

the *Northern Cameroon* case the ICJ clearly stated that 'both the Permanent Court of International Justice and this Court have emphasized the fact that the Court's authority to give advisory opinions must be exercised as a judicial function'.[20] Moreover, when giving advisory opinions, the ICJ has constantly been mindful of its responsibilities as 'the principal judicial organ of the United Nations' pursuant to Art. 92 of the UN Charter.[21]

Although the advisory jurisdiction of international courts is a usual part of their judicial function, it is not, however, intrinsic to the status of a body as an international court. The powers to give advisory opinions are to be set forth in the constituent documents of a particular court.

2. Characteristics of Advisory Opinions

Constituent documents of international courts and tribunals contain neither the definition nor characteristics of advisory opinions. They usually confine themselves to the minimal set of rules concerning the advisory jurisdiction of a particular court. Meanwhile, characteristics of advisory opinions have been neglected in the international legal doctrine. An attempt to sort out specific features of advisory opinions has been made, e.g., by H. Thirlway and T. Buergenthal.[22] H. Thirlway, in the *Encyclopedia of Public International Law*, refers to the legal nature of the request; the frequent (but not obligatory) relevance to the current

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ICJ Doc. 2010 General List No. 141 para. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep. 16 (23); *Western Sahara (Advisory Opinion)* [1975] ICJ Rep. 12 paras 23–24, 32–33.

[20] *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)* [1963] ICJ Rep. 15 (30); on this problem see also Keith (note 2) 20–21.

[21] *See inter alia Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep. 166 para. 24; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal (Advisory Opinion)* [1982] ICJ Rep. 325 para. 22; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. 136 paras 44–45.

[22] H. Thirlway 'Advisory Opinions' (2006) in R. Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* <www.mpepil.com> (7 June 2011); Buergenthal (note 5).

international dispute; forwarding of requests by a defined class of international bodies rather than States; and the advisory rather than binding character of the opinion.[23] T. Buergenthal, analyzing the advisory function of the Inter-American Court of Human Rights, limits himself to the purposes of advisory opinions: 'to assist the American States in fulfilling their international human rights obligations'[24] and to articulate the general legal principles.[25] It is maintained here, however, that a determination of intrinsic characteristics of advisory opinions is necessary in order to be able to decide on their role in international dispute settlement.

Some basic guidelines can be derived from the wording of the ICJ Statute as well as from its practice: 1) ICJ has to act within the constraints of its constituent documents both as regards the subject matter and entitled applicants; 2) a request for an advisory opinion has to contain the exact statement of the question upon which an opinion is required; 3) advisory opinions are given on legal rather than political questions; 4) a request for an advisory opinion is often relevant to the existing dispute between States, between a State and UN organs and specialized agencies, or between a State and other subjects of international law; 5) when giving an advisory opinion the Court is to ascertain the applicable rules of international law; 6) the request for an advisory opinion can have some measure of abstractness; and 7) advisory opinions are not binding upon States.[26] Let me turn now to each of these in turn.

a. Applicants

Requests for advisory opinions can only be submitted by actors duly authorized by the court's constituent documents. Thus, it follows that the list of possible applicants may be different for every international court. As indicated in academic writings, drafters of the ICJ Statute took a negative attitude towards the possibility of allowing particular

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[23] Thirlway (note 22) para. 1.

[24] Buergenthal (note 5) 33.

[25] Ibid. 49.

[26] Art. 65 of the ICJ Statute; see also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* [1950] ICJ Rep. 65 (79); *Western Sahara* (note 19) para. 31; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) para. 47.

States to request advisory opinions from the ICJ independently.[27] Apparently only the UN General Assembly, the UN Security Council or other organs or specialized agencies of the UN duly authorized by the UN General Assembly may request advisory opinions of the Court (Art. 96 of the UN Charter). Regional courts *per contra*, due to their limited membership and specific jurisdiction, can give advisory opinions upon the request of international institutions and its member States (sometimes regardless of their non-recognition of contentious jurisdiction of a particular Court).[28]

b. Legal Nature of the Question

When a question is put before the ICJ, one or several States may claim that the nature of the dispute is political rather than a legal one and that therefore the Court has no jurisdiction over it (Art. 65 of the ICJ Statute limits its advisory jurisdiction to 'legal' questions). This question is particularly tricky because every international dispute always has important political aspects[29] and can sometimes even be viewed either as purely legal or purely political.[30]

The ICJ Statute does not explain which questions are 'legal' but some guidance can be found in the ICJ practice. In particular, the Court has assessed as 'legal' all questions which are 'framed in terms of law and rais[ing] problems of international law [..] are by their very nature susceptible of a reply based on law'[31]; issues of compatibility of any situation, fact or behavior with the relevant principles and norms of interna-

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[27] E. Hambro 'The Jurisdiction of the International Court of Justice' (1950-I) 76 RdC 121 (193, 196); B.A. Ajibola 'Dispute Resolution by the International Court of Justice' (1998) 11 LJIL 123 (125).

[28] Art. 64 (1) of the American Convention on Human Rights [1978]; para. 5 of the CIS EC Constitution (note 15); Arts 218, 267 of the TEU; Art. 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (note 14).

[29] A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (OUP Oxford 2006) 1409; see also Griffith and Staker (note 18) 64.

[30] Keith (note 2) 50–62.

[31] *Western Sahara* (note 19) para. 15; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 19) para. 25.

tional law[32] and questions formulated in abstract terms requiring the interpretation of a treaty provisions.[33] The ICJ thus asserted that the existence of political aspects does not deprive a question of its 'legal' character.[34]

The task of regional courts is often, indeed, much easier. Their advisory jurisdiction is usually more specific and includes the interpretation of legal norms, and also how they correspond to the constituent documents of a particular organization or other international legal principles and norms (Art. 64 (1) of the American Convention on Human Rights; Para. 5 of the CIS EC Constitution; Art. 1 (1) of Protocol 2 to the European Convention on Human Rights).

c. Relationship to International Disputes

It is often asserted that most of the advisory opinions of the PCIJ and ICJ related to actual international disputes.[35] It is true that no actor will

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[32] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226 para. 13; see also Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1408–09; Aliaghoub (note 9) 56–57.

[33] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep. 57 (61).

[34] *Conditions of Admission of a State to Membership in the United Nations* (note 33) 61–62; *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Rep. 4 (6–7); *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep. 151 (155). See also *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (note 21) para.14; *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 13; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) para. 27.

[35] Keith (note 2) 23–25; see e.g. *German Settlers in Poland (Advisory Opinion)* PCIJ Series B No. 6; *Access to German Minority Schools in Upper Silesia (Advisory Opinion)* PCIJ Series A/B No. 40; *Minority Schools in Albania (Advisory Opinion)* PCIJ Series A/B No. 64; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26); *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note 19); *Western Sahara* (note 19); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 19). In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) Israel argued that the subject matter of the request concerned the dispute between Israel and Palestine and 'more properly belonged before the Court in a contentious case'

intend to request an advisory opinion on a purely hypothetical question. It is asserted here, however, that not every situation causing a request for an advisory opinion really constitutes an international dispute, which is viewed as a specific disagreement on a point of law or fact between two subjects of international law expressly advancing conflicting claims and assertions.[36] When no specific claim or complaint has been openly advanced, one can speak about the controversy that can give rise to a conflict/ dispute.[37]

Due to the relevance of questions put before the ICJ to the existing disputes or controversies, the issue of the consent of involved States has repeatedly been invoked by States in the PCIJ and ICJ practice.[38] The only known case when the Court declined the request for an advisory opinion due to the lack of consent of all relevant States dates back to 1923 (*Status of Eastern Carelia*).[39] The ICJ, however, insists that con-

(ibid. para. 56). See also Fr.R.J. Araujo 'Implementation of the ICJ Advisory Opinion – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?' (2004) 22 Boston University International Law Journal 349 (361–63); I. Seidl-Hohenveldern 'Access of International Organizations to the International Court of Justice' in Muller, Raič and Thuranszky (note 4) 189.

[36] In *Mavrommatis Palestine Concessions (Greece v. Great Britain) (Jurisdiction)* PCIJ Series A No. 2 (11), which is universally viewed as constituting a starting point for defining what an international legal dispute is, the Permanent Court of Justice defined a dispute as 'a disagreement on a point of law or fact, a conflict of legal views or interests between two persons'. An open claim by one party and an open rejection of this claim is already sufficient for the ICJ to recognize the existence of an international dispute. See also R.B. Bilder 'An Overview of International Dispute Settlement' in M.E. O'Connell (ed) *International Dispute Settlement* (Ashgate Aldershot 2003) 3 (6); M.N. Shaw *International Law* (6th edn. CUP Cambridge 2008) 1068–69; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections)* [1996] ICJ Rep. 595 para. 29; *Certain Property (Liechtenstein v. Germany) (Preliminary Objections)* [2005] ICJ Rep. 6 para. 25; Pomerance (note 4) 299–303.

[37] Shaw (note 36) 1068; Merrils (note 3) 463.

[38] *Status of the Eastern Carelia (Advisory Opinion)* PCIJ Series B No. 5, 29; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26) 71; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note 19) para. 101; *Western Sahara* (note 19) paras 12, 21, 24–34; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) paras 46–47.

[39] On this issue see also Keith (note 2) 89–95.

sent of the States involved is not entirely relevant in the advisory proceedings and only 'compelling reasons' could lead the Court to a refusal to give an opinion on this ground.[40]

d. Abstractness of Advisory Opinions

The approach of States towards the scope and exactness of questions submitted to the ICJ for advisory opinions has always been twofold. Some States and writers have maintained that the ICJ was not entitled to deliver advisory opinions related to the disputes existing between States in the absence of their consent, and that therefore the request for an advisory opinion could only be abstract.[41] Others, on the contrary, have questioned the authority of the Court to deliver advisory opinions with regard to any abstract questions.[42] The issue of abstractness of the request for an advisory opinion has been repeatedly considered by the PCIJ and ICJ. They both have repeatedly declined objections regarding the lack of authority to give an opinion as concerns abstract questions.[43]

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[40] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO (Advisory Opinion)* [1956] ICJ Rep. 77 (86); *Certain Expenses of the United Nations* (note 34) 155; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note 19) 27; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (note 21) 183; *Western Sahara* (note 19) paras 24–30; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion)* [1989] ICJ Rep. 177 paras 37–38; *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 14.

[41] Pomerance (note 4) 313.

[42] See e.g. written statements of States in the *Legality of the Threat or Use of Nuclear Weapons* (note 32); United States of America, Written Statement 1–7; United Kingdom, Written Statement paras 2.23–2.45; France, Written Statement paras 5–9; Finland, Written Statement 1–2; Netherlands, Written Statement paras 6–13; Germany, Written Statement para. 2 (b). See also Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1410.

[43] See e.g. *Certain German Interests in Polish Upper Silesia (Germany v. Poland) (Merits)* PCIJ Series A No. 7 18–19; *Western Sahara* (note 19) para. 19; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26) 71; *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 15; *Conditions of Admission of a State to Membership in the United Nations* (note 33) 61; see also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep. 47 (51); *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note

Moreover, the allocation of the authority to request advisory opinions only to UN organs and specialized agencies promotes a further degree of abstractness. It guarantees that the question submitted for interpretation to the ICJ will be of a comprehensive rather than bilateral character.[44]

Although the abstractness of the request for an advisory opinion provides some advantages including the remoteness from the particular international dispute, no direct effect on the rights, duties and sovereignty of involved States, broader jurisdiction and flexibility of the court itself[45], it should, however, be upheld that the term 'abstract' is not to be understood as purely hypothetical, unclear or vague.[46] International courts are not academic institutions. It is thus asserted by the ICJ itself, as well as maintained in the legal doctrine, that a general reply goes beyond the judicial function of the Court. Such an opinion would only serve to confuse the issue and would not advise the requesting organ in respect of the problem which it faced.[47]

Meanwhile, in order to give a well-grounded advisory opinion, a court must be aware of facts and circumstances underlying the request. Although a court can make an inquiry into details of the underlying situa-

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19) para. 40; *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 15; Hambro (note 27) 166.

[44] Questions arising from the interpretation of bilateral arrangements (contrary to multilateral issues or matters of universal concern) are usually excluded from the scope of advisory jurisdiction of the ICJ because of their primary concern of bilateral relations. See in particular *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) para. 49; *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 12. See also Kovács (note 4) 450; Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1412–13.

[45] See *inter alia* Keith (note 2) 71.

[46] According to the *Webster's Third New International Dictionary* 'abstract' could be viewed as 'considered apart from any application to a specific object or specific instance' or as 'impersonal'. P.B. Gove (ed.) *Webster's Third New International Dictionary* (Encyclopaedia Britannica Chicago 1981) Vol. I *A to G* 8. M.O. Hudson views abstract questions as purely hypotherical, M.O. Hudson *The Permanent Court of International Justice 1920–1942: A Treatise* (MacMillan New York 1943) 497.

[47] *Legality of the Threat or Use of Nuclear Weapons* (note 32) para.15; *Legal Consequences of the Continued Presence of South Africa in Namibia (Separate Opinion of Judge Onyeama)* [1971] ICJ Rep. 144 (144–45); *Western Sahara (Separate Opinion of Judge Petrén)* [1975] ICJ Rep. 104 (108); see also Keith (note 2) 65; Pomerance (note 4) 286, 314; Griffith and Staker (note 18) 68–69.

tion itself[48], a question put before it by a request for interpretation, nevertheless, is not to be general or hypothetical. An application is supposed to make clear the facts, norms or situations to be considered or taken into account by the Court. I would therefore support a statement made by M.M. Aliaghoub, that a balance between abstractness and elements of factuality should be present in any request for an advisory opinion.[49]

The principle of significant abstractness remains valid for the essence and wording of advisory opinions themselves. It comes from the very nature and purpose of advisory opinions (to provide a guideline rather than to settle an international dispute[50]), that despite the exercise of its judicial function by a court when giving advisory opinions, as well as the existence of the controversy or a dispute related to requests, questions submitted for advisory opinions can not be handled in an equal manner to those in contentious cases.[51]

As a result, in order to render an opinion an international court has to ascertain the existence or absence of applicable legal principles and norms[52], and explain how they are to be applied. The latter could involve the court's statement on powers, rights and duties of relevant ac-

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48 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note 19) 27; *Western Sahara* (note 19) paras 17–18.

49 Aliaghoub (note 9) 63.

50 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note 19) para. 32; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep. 15 (19); *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 15. This approach has also been accepted by UN institutions, see e.g. UNGA Res. 1731(XVI) 'Administrative and Budgetary Procedures of the United Nations' (20 December 1961); UNGA Res. 3292(XXIX) 'Question of Spanish Sahara' (13 December 1974); UNGA Res. 42/229 B 'Report of the Committee on Relations with the Host Country' (2 March 1988). See also Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1410.

51 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep. 73 (97).

52 *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 105; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 19) 43–44; *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep. 128 (143).

tors[53], as well as provide an abstract guideline for all States and institutions that face similar situations.

e. Legal Force of Advisory Opinions

It is universally recognized that advisory opinions are not binding upon either the parties of the relevant dispute (because no dispute is formally brought to the Court and no parties stand before it[54]) or on the requesting institutions.[55] The non-binding character of advisory opinions derives from their very nature and purpose – to assist 'the UN organs in the performance of their functions'[56] by the means of an authoritative legal advice or guideline in respect to their actions.[57] The ICJ has repeatedly maintained that advisory opinions are given not to the States, but to the requesting organ.[58]

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[53] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep. 174 (187–88); *Competence of the General Assembly for the Admission of a State to the United Nations* (note 34) 10; *International Status of South-West Africa* (note 52) 144; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26) 77; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (note 50) 28–30; *Competence of the General Assembly for the Admission of a State to the United Nations* (note 33) 65.

[54] See also Keith (note 2) 195; Donner (note 18) 112.

[55] See also S.K. Kapoor 'Enforcement of Judgments and Compliance with Advisory Opinions of the International Court of Justice' in R.P. Dhoralia and B.C. Nirmal (eds) *International Court in Transition* (Chugh Allahabad 1994) 300 (312); Seidl-Hohenveldern however asserts that opinions are binding upon the requesting institutions – see Seidl-Hohenveldern (note 35) 191; Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1415.

[56] See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26) 72.

[57] See also *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights) (Advisory Opinion OC-1/82)* IACtHR Series A No. 1 (24 September 1982) para. 25; Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1403, 1410.

[58] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26) 71; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (note 50) 19; *Judgments of the Administrative Tribunal of the ILO* (note 40) 86; *Certain Expenses of the United Nations* (note 34) 155; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (note 40) 189; *Legality of the Threat or*

It is nevertheless maintained in this contribution that such an approach to advisory opinions is too formalistic. In practice, even the ICJ in its very carefully phrased opinions admitted that some effects of advisory opinions could go 'beyond the scope attributed to it by Charter'.[59] It is generally agreed in the international legal doctrine that because of the high authority of international courts, their opinions, although formally non-binding, have important effects on the development of international law, the activity of requesting institutions and the legislation of member States[60] and could also have a precedential value equal to that of a judgment.[61]

Publicists agree that UN organs and specialized agencies always have taken due account of the findings of the Court when deciding the matter before it, and have mostly acted in accordance with them.[62] As noted above, international courts in their advisory opinions ascertain the existence or absence of international legal norms and explain how they are to be implemented. The *Construction of the Wall* case could be an illustrative example. The ICJ without imposing directly any obligations over States and UN organs, ascertained their duties in accordance with international law.[63] Hence it follows that activity which conforms to the Court's conclusions is legal, but activity contrary to them is not. States can thus rely on the Court's expertise and apply countermeasures to the latter activity, and cannot claim illegality towards the former.[64]

These all bring me to some general conclusions about the nature and characteristics of advisory opinions:

Use of Nuclear Weapons (note 32) para. 14; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) para. 64.

[59] *Judgments of the Administrative Tribunal of the ILO* (note 40) 82.

[60] Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1415; Buergenthal (note 5) 49, 59.

[61] This position is, in particular, maintained by Pomerance (note 4) 273; Kapoor (note 55) 312.

[62] See also Aliaghoub (note 9) 116–17; Keith (note 2) 205–21; Rosenne (note 9) 110.

[63] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) 201–02. This advisory opinion has been considered in details by Kovács (note 4) 455–56; Araujo (note 35) 382–97.

[64] For the analysis of legal consequences of advisory opinions see also Buergenthal (note 5) 1416, 1419.

1. Advisory jurisdiction of international courts falls within their judicial function.
2. Jurisdiction to give advisory opinions is not intrinsic to the status of a body as an international court. The competence of a court to give advisory opinions is to be expressly set forth in its constituent documents.
3. Advisory opinions are given on legal questions. The scope of advisory jurisdiction is defined by the constituent documents of a particular court.
4. Requests for advisory opinions are always relevant to the existing international dispute or controversy.
5. Both the request for an advisory opinion and an opinion itself should maintain a balance between abstractness and factual accuracy.
6. The purpose of the advisory opinion is to provide legal guidance for the requesting actor and in practice also for member States of a particular organization, as to the existence/absence of legal norms in a particular case, the proper behavior, etc.
7. International courts are judicial rather than legislative organs.[65] They are entitled neither to create new international legal norms nor to impose any obligations upon the States in the course of their advisory function. At the same time, if a court ascertains the existence of applicable treaty or customary norms, both requesting institutions (States) and other members of organizations (organs of this organization) will be bound by their relevant norms, due to their binding nature.

II. Advisory Opinions of the CIS Economic Court

1. CIS Legal System

Before turning to the role of advisory opinions of the CIS EC, let me provide some background on the complexity of the CIS legal system.

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[65] See A. Boyle and C.M. Chinkin *The Making of International Law* (OUP Oxford 2007) 266–68.

Today, 19 years after the establishment of the Commonwealth of Independent States (CIS)[66], a complicated, multi-layer and often conflicting network of international organizations and inter-State entities has been created in the region. Due to the existence of multiple organizations and inter-State institutions with concurrent membership and similar competence, legal regulation of particular matters is often replicated and fragmentary.

The CIS is presently the most representative international organization in the region[67] with relatively broad subject competence. At the same time, the CIS organizational and legal framework is still very uncertain, confusing and fragmentary. To evaluate this point, the following problems are to be mentioned:

1. The system and legal status of the CIS organs are uncertain and contradictory with relatively low participation levels.[68]
2. Legal regulation in different areas of co-operation is currently rather considerable but the level of participation is, however, not that high. More than 29 per cent of adopted documents have been recognized as void after the inventory in 2008–2009.[69] 57.7 per cent of CIS documents, which were supposed to be either ratified or accepted through some other internal

[66] The CIS has been established in accordance with Soglashenie o Sozdanii Sodruzhestva Nezavisimykh Gosudarstv (Agreement on the Establishment of the Commonwealth of Independent States [CIS Agreement] [8 December 1991]) (1992) 1 Sodrizhestvo; Protokol k Soglasheniu o Sozdanii Sodruzhestva Nezavisimykh Gosudarstv [Protocol to the CIS Agreement] [21 December 1991]) (1992) 1 Sodruzhestvo; Alma-Atinskaya Deklaratsia [Alma-Ata Declaration] [21 December 1991]) (1992) 1 Sodruzhestvo; Ustav Sodruzhestva Nezavisimykh Gosudarstv [CIS Statute] [22 January 1993]) (1993(1)) 9 Sodruzhestvo).

[67] There are currently 11 member States (Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, Ukraine).

[68] According to information of the Legal department of the CIS Executive Committee, there are currently 82 organs in the CIS incl. 7 statutory organs and 75 organs of sectoral cooperation. There are also 9 bodies with unclear status, which stay in some conjunction with the CIS. Information about CIS organs are available at <http://cis.minsk.by/page.php?id=2374> (8 June 2011).

[69] According to information of the Legal department of the CIS Executive committee, 1925 documents have been adopted by CIS organs in the period from December 1991 to June 2010. 566 of them (29.4 per cent) became invalid after the inventory of 2008–2009; see <http://cis.minsk.by/page.php?id=8926> (8 June 2011).

procedure, came into force for more than half (6 of 11) of member States (38.4 per cent of documents adopted in 2001–2010). 15.4 per cent (25.4 per cent correspondingly) of the above acts came into force for only 2 or 3 CIS member States.[70]

3. Until the present no clear decision-making process exists within the CIS.[71] Some decisions are taken by means of signature and provide for either ratification or certain internal procedures, or the notification that no internal procedure is required.[72] Some of these decisions correspond to qualifying criteria set forth by Art. 2 of the Vienna Convention on the Law of Treaties of 1969.[73] As a result, it is hardly possible to distinguish between international treaties, acts of the Council of the Heads of States and acts of the Council of the Heads of Governments.[74]

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[70] Information on Fulfillment of Internal Procedures as for Documents Adopted within CIS 1991–2010 is available at <http://cis.minsk.by/page.php?id=8926> (8 June 2011).

[71] According to Art. 23 of the CIS Statute and Rule 16 of the Rules of Procedure (O Pravilakh Protsedury Soveta Glav Gosudarstv, Soveta Glav Pravitelstv, Soveta Ministrov Inostrannykh Del I Ekonomicheskogo Soveta SNG, Reshenie Soveta Glav Gosudarstv SNG [On the Rules of Procedure of the Council of the Heads of States, Council of the Heads of Governments, Council of the Ministers of Foreign Affairs, CIS Economic Council, Decision of the CIS CHS (Rules of Procedure)] of 22 October 2002, *Sodruzhestvo* 41 2002(2)), decisions of CIS main organs are taken by consensus. In practice they are signed by the representatives of States and sometimes are also ratified. According to para. 7 of the Decision of the CHG of 2 April 1999 'O Sovershenstvovanii I reformirovanii sisttemy organov SNG' (On the Perfection and Reformation of the Structure of CIS Organs) of 2 April 1999, *Sodruzhestvo*, 31 (1999(1)), decisions of CIS statutory organs are binding for States parties to these decisions and only for them.

[72] More than 296 of 1353 valid decisions: <http://cis.minsk.by/page.php?id=8926> (8 June 2011).

[73] Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[74] According to the Rule 16 of the Rules of Procedure 'Highest organs of the CIS could take within their competence statements, addresses and protocol decisions. During the sessions of the abovementioned organs, international treaties are concluded. Decisions are taken in the sphere of institutional law'. See also I.A. Barkovskij *Pravotvorchskaia Deiatelnost' Sodruzhestva Nezavisimykh Gosudarstv* (Norm-creating activity of the Commonwealth of Independ-

4. Due to the mutually exclusive provisions of legal documents on the norm-creating process within the CIS, and their incomparability with standards of institutional law, it is currently impossible to distinguish between institutional and operational acts of the CIS. Decisions in both spheres are sometimes taken by the minority of states (e.g. by 2 or 3 of 11) and come into force, but are obligatory only for those States which voted for them[75].
5. A vast number of documents adopted within the CIS is rather general and fragmentary.
6. As a result, a lot of discrepancies appear. Therefore, there is a clear need for legal advice of some authoritative judicial body or some effective mechanisms of settlement of the existing disputes and discrepancies.

2. Non-inherent Right to Interpret – Historical Background on the CIS Economic Court's Right to Interpret

The CIS EC was established in 1992,[76] shortly after the disintegration of the Soviet Union, with the purpose of settlement of economic disputes between newly independent States (Art. 5 of the Agreement on the Measures to Ensure an Accounting between Enterprises of CIS

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ent States 2007) 89; I.A. Barkovskij 'Specifics of the CIS Legal Acts' (2004(4)) Belarusian Journal of International Law and International Affairs <http://evolutio.info/index.php?option=com_content&task=view&id=710&Itemid=55> (8 June 2011); I.A. Korolev 'Problems Sootnozhenija Pravovykh Aktov Gosudarstv-Uchastnikov SNG I Reshenij Organov SNG' (Problems of Relation of the Legal Acts of the CIS member States and Decisions of CIS Organs) (1995(2)) State and Law 3; V.P. Kirilenko, I.V. Mishal'chenko 'Pravo Sodruzhestva Nezavisimykh Gosudarstv v. Sisteme Mezhdunarodnogo Prava' (Law of the Commonwealth of Independent States in the International Legal System) (2003(3)) Moscow Journal of International Law 109 (114).

75 There are no provisions about the required number of supporting States. However, the fact that States do not sign a decision doesn't preclude it from being taken and coming into force (Art. 23 of the CIS Statute).

76 Soglashenie o statuse Economicheskogo Suda Sodruzhestva Nezavisimykh Gosudarstv (Agreement on the Status of the CIS Economic Court) of 6 July 1992 (1992(6)) Sodruzhestvo 6.

States[77]). In fact, it was designed as a substitute for the USSR Supreme Economic Court.[78]

Constituent documents endow the CIS EC with rather limited jurisdiction. In accordance with Art. 32 of the CIS Statute and para. 3 of the Constitution of the CIS EC,[79] the Court is entitled to settle disputes between the States parties to the CIS EC Agreement 'concerning the fulfillment of economic obligations arisen from international agreements, acts of the CIS Council of the Heads of States, Council of the Heads of Governments and other CIS Institutions; as well as concerning the compliance of CIS acts adopted on economic matters to the agreements and other acts adopted within the CIS'. Any other disputes could be considered by the Court upon the agreement of parties.

Due to the narrow jurisdiction of the CIS EC and unwillingness of CIS member States to submit their disputes for international adjudication,[80] in the period of 1994 to 2010 only eleven applications for dispute settlement had been submitted to the CIS EC. In five cases the Court found that it had no jurisdiction either *ratione personae*[81] or *ratione materiae*.[82]

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77 Soglashenie o merach po obespecheniu uluchshenia raschetov mezhdu khozyajstvennymi irganizatsiami stran uchastnits Sodrozhestva Nezavisimykh Gosudarstv (Agreement on the Measures to Enhance Payments between entities of the CIS Member States) of 15 May 1992 (1992(5)) Sodruzhestvo 5.

78 For the history, functions, procedures and activity of the CIS EC in detail see A.F. Douhan (et al.) *Ekonomicheskij Sud Sodruzhestva Nezavisimykh Gosudarstv: 15 Let* [The Economic Court of the Commonwealth of Independent States: 15 Years] (Kovcheg Minsk 2008).

79 Confirmed by the CIS EC Agreement.

80 Presently no CIS member State has recognized compulsory jurisdiction of the International Court of Justice on the basis of Art. 36 of the ICJ Statute – ICJ 'Declarations Recognizing Jurisdiction of the Court as Compulsory <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (8 June 2011); only 6 member States are currently members of the Agreement on the CIS EC Status – CIS Economic Court history <http://www.sudsng.org/about/history/> (8 June 2011).

81 Orders No. 01–1/4–2000 of 20 December 2000, No. C–1/8–96 of 9 April 1996, No. 01–1/3–2000 of 7 July 2000; No. 01–1/5–03 of 19 November 2003; CIS Economic Court Archives (2010).

82 Order No. C–1/16–96 of 6 February 1996; CIS Economic Court Archives (2010).

If the CIS EC were only entitled to settle international economic disputes, the proponents of its ineffectiveness would be right. Constituent documents of the Court, however, endow it with a competence to interpret 'provisions of international agreements, CIS acts and legal acts of the former USSR in the period of their mutual application' upon requests of State authorities, Supreme Economic Courts of CIS member States, and CIS institutions (Art. 32 of the CIS Statute; para. 5 of the CIS EC Constitution). Neither the CIS Statute nor the CIS EC Constitution provide any guideline regarding the procedure and form of interpretative acts. These issues are clarified in the Regulations of the Court.[83] According to Chapter 6 of the Regulations, the CIS EC, in response to the request for interpretation, can take an interpretative decision or an advisory opinion (paras 127 and 143). As for August 2010, the CIS EC has considered 89 requests for interpretation, took 59 decisions, 25 advisory opinions and 14 orders interpreting earlier decisions and advisory opinions.[84]

3. CIS Economic Court Acts as Advisory Opinions

Whereas the CIS EC takes different acts upon requests for interpretation, I intend now to look at them through the lens of characteristics discussed in the first part of this contribution, to determine whether interpretative decisions and advisory opinions of the CIS EC can be viewed as advisory opinions of an international court.

a. Jurisdiction

In accordance with its constituent documents and provisions of other treaties the CIS EC is empowered to interpret provisions of international treaties, acts of CIS institutions, legal acts of the former USSR mutually applied by the CIS member States (para. 5 of the CIS EC Constitution; Art. 32 of the CIS Charter), international treaties concluded within the Eurasian Economic Community (EurAsEC), acts of EurAsEC institutions (Art. 13 (3) of the Statute of the EurAsAC

[83] Reglament Ekonomicheskogo Suda Sodruzhestva Nezavisimykh Gosudarstv (Regulations of the CIS EC) <http://www.sudsng.org/download_files/docs/regl_2010.pdf> (8 February 2011).

[84] Survey of the CIS EC practice <http://www.sudsng.org/database/sudobzor/> (8 June 2011); CIS EC Archive (2010).

Court[85]), constituent documents of the Customs Union (of Belarus, Russia and Kazakhstan), Acts of the Customs Union's institutions (Art. 13 (4) of the Statute of the EurAsEC Court).[86]

b. Applicants

Requests for interpretation can be submitted only by duly authorized institutions. They are: State authorities and Supreme economic courts of CIS and EurAsEC (as concerns EurAsEC and Customs Union issues) member States, CIS institutions, the Interstate Council, the Interparliamentary Assembly and Integration Committee of EurAsEC (para. 5 of the CIS EC Constitution; Art. 13 (3) Statute of EurAsEC Court).

c. Legal Question

According to its constituent and other documents, the CIS EC is only entitled to interpret provisions of international treaties and acts taken by international institutions that constitute, as clearly asserted by the

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[85] Statut Suda Evrazijskogo Economicheskogo Soobschestva (Statute of the Court of the Eurasian Economic Community), Decision of the EurAsEC Interstate Council No. 502 (5 July 2010) CIS EC Archives (2010).

[86] In accordance with Arts 1, 3 of the Agreement between the Commonwealth of Independent States and Eurasian Economic Community on the Endowment of the CIS Economic Court with Functions of the EurAsEC Court (3 March 2004), CIS EC acts as the EurAsEC Court. See Soglashenie mezhdu Sodruzhestvom Nezavisimykh Gosudarstv I Evrazijskim Ekonomicheskom Soobschestvom o Vypolnenii Ekonomichskim Sudom SNG Funktsij Suda EvrAzES (Agreement between the CIS and EurAsEC on the Fulfillment by the CIS EC of the EurAsEC Court's Functions) (3 March 2004) *Electronic Legal Database Konsul'tant Plus: Belarus'. Technologiia 3000*. Interpretation of acts of the Customs Union can be currently done intermediately through the functions of the EurAsEC Court. The CIS Economic Court is planned to be expressly endowed with this sanctions as soon as the corresponding protocol comes into force. See Proekt Protokola o Vnesenii Izmenenij v. Soglashenie o Vypolnenii Ekonomicheskom Sudom SNG Funktsij Suda EvrAzES (Draft Protocol on Amendment of Agreement on the Endowment of the CIS EC with Functions of the EurAsEC Court), Annex to the Decision of the EurAsEC Interstate Committee No. 502 (5 July 2010); Archives of the CIC EC (2010).

ICJ, 'legal' questions.[87] This basically means that the scope of the CIS EC advisory jurisdiction is narrower than that of the ICJ. At the same time this narrower competence makes the task of the CIS EC easier. The CIS EC is not to decide whether the question is legal or political. The appropriateness of the subject matter of the request can not be the question of interpretation as well.[88]

d. Existence of an International Dispute

A wide range of requests for interpretations has been related to existing disputes between CIS member States or between States and CIS institutions.[89] Other requests for interpretations have arisen from controversies between the CIS member States and/or CIS institutions, *inter alia* as concerns the uniform application of legal acts adopted within the CIS. In particular, a significant number of requests in social and economic matters have been submitted by CIS institutions after multiple complaints from individuals and legal entities about the ambiguous and contradictory interpretation of particular treaties and CIS acts, their non-uniform implementation and application by member States.[90]

e. Abstractness of the Request

A request for an interpretation is to contain the exact statement of the question to be answered by the CIS EC (para. 117 of the CIS EC Regu-

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[87] *Competence of the General Assembly for the Admission of a State to the United Nations* (note 34) 61; *Legality of the Threat or Use of Nuclear Weapon* (note 32) para. 13; see also Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1408–09; Aliaghoub (note 9) 56–57.

[88] Decision No. C–1/9–96 of 15 May 1996.

[89] See e.g. Decisions No. 14/95/C-1/7-96 of 14 March 1995; No. 11/95/C-1/4-96 of 25 March 1997; No. 01-1/1-02 of 24 June 2002; No. 01-1/6-03 of 11 March 2004; No. 01-1/2-05 of 2 March 2006, No. 01-1/4-06 of 5 June 2007; No. 01-1/1-02 of 24 June 2002; No. 01-1/7-08 of 13 June 2008; No. 01-1/9-08 of 16 September 2008; No. 01-1/1-06 of 10 August 2006; Advisory Opinion No. 01-1/2-2000 of 26 July 2000.

[90] See e.g. Advisory Opinions No. 01-1/3-08 of 20 April 2009; No. 01-1/2-08 of 6 February 2009; No. 01-1/1-09 of 28 September 2009;No. 01-1/2-09 of 3 February 2010; No. 01-1/2-2000 of 26 July 2000; Decisions No. 01-1/4-07 of 17 March 2008; No. 01-1/5-07 of 10 April 2008; No. 01-1/1-07 of 20 September 2007; No. 01-1/3-03 of 16 December 2003.

lations; Art. 26 (4) of the Statute of the EurAsEC Court). In view of the CIS EC competence, such question(s) should concern the interpretation of a particular legal norm, rather than to submit a dispute or a situation to the Court that by itself provides some abstractness. Moreover, due to the general unwillingness of CIS member States to submit disputes for international adjudication, they often try to distance themselves from the request and submit it through CIS institutions.[91]

At the same time, questions laid before the CIS EC are not purely hypothetical. As noted above, they are always relevant to international disputes or controversies. Applicants refer to the ambiguous understanding or application of a particular legal norm or norms by CIS member States or institutions;[92] the conflict between specific legal norms;[93] unclear or framework nature of regulation or particular legal norm.[94] All necessary materials are to be submitted together with the application (para. 5 of the CIS EC Constitution; Art. 26 (4) of the Statute of the EurAsEC Economic Court).

f. Legal Force of Interpretative Acts

Neither the constituent documents nor the Regulations of the CIS EC regulate the legal force of acts taken upon requests for interpretation. In view of the derivative nature of the CIS EC, it thus follows that interpretative decisions and advisory opinions of the CIS EC are not binding. Art. 26 (4) of the Statute of the EurAsEC Court clearly states that advisory opinions are recommendatory.

Historically the wording of CIS EC Regulations has been slightly confusing on this point. In particular, Regulations adopted in 1994 provided for the possibility to appeal both the interpretative decisions and

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[91] According to the information of the CIS EC Secretariat, 64 per cent of requests for interpretation have been submitted by CIS and EurAsEC Institutions <http://www.sudsng.org/database/sudobzor/> (8 June 2011).

[92] See e.g. Advisory Opinions No. 01-1/2-98 of 23 June 1998; No. 01-1/2-02 of 10 September 2002; No. 01-1/4-09 of 1 March 2010; Decisions No. 07-95 of 21 December 1995; No. 01-1/5-99 of 20 January 2000; No. 01-1/2-05 of 2 March 2006.

[93] Decision No. 01-1/2-06 of 21 February 2007; Order No. 01-1/4-08 of 10 February 2009.

[94] Advisory Opinions No. 01-1/6-06 of 22 March 2007; No. 01-1/3-07 of 9 November 2007; No. 01-1/5-09 of 22 March 2010.

advisory opinions to the plenary session of the Court;[95] this could be a relic of the USSR Supreme Economic Court, taken as a pattern for the CIS EC. As far as this approach was incompatible with the very notion of advisory opinions and undermined the authority of the CIS EC as an international court, it was excluded from the Regulations adopted in 1997 (which are still currently in force with amendments of 14 April 2010).

Despite the non-binding character of interpretative decisions and advisory opinions of the CIS EC, States and CIS institutions usually take due account of the conclusions of the Court. Several times the Court has been requested to interpret the very framework documents before CIS institutions and States could decide on their further steps, e.g. as concerns the status of associated members[96] or the process of drafting of international treaties within the CIS.[97]

g. Abstractness of Interpretative Decisions and Advisory Opinions

Acts taken by the CIS EC upon requests for interpretation are usually rather abstract. The Court does not attempt to impose any obligations on particular States. Usually it confines itself to answering the questions put before it, a statement of the relevant rules of international law and the way they are to be applied (e.g. '[…] relations are to be regulated […]'; 'the term […] is to be understood as […]'; 'in accordance with […] norm the following steps are to be taken […]'). The wording 'States should' despite its abstract nature has been used very rarely.[98] Due to the non-binding nature of interpretative acts, the CIS EC never prescribes any specific steps either to CIS member States or CIS institutions. Sometimes the CIS EC makes recommendations, which can be

[95] Interpretative decisions of the period 1994–1997 refer to the possibility to appeal within 1 month – 3 months term – see e.g. Decisions No. 07/95 of 21 December 1995; No. C-1/17-96 of 23 January 1997; No. C-1/12-96/C-1/18-96 of 21 January 1997; No. 13/95/C-1/6-96 of 28 February 1996; No. 05/95 of 30 May 1995.

[96] Advisory Opinion No. 01-1/6-06 of 22 March 2007.

[97] Advisory Opinion No. 01-1/3-07 of 9 November 2007.

[98] See e.g. Advisory Opinions No. 01-1/1-09 of 28 September 2009; No. 01-1/4-09 of 1 March 2010.

(as opposed to the relevant binding legal norms ascertained by the Court) easily ignored by States.[99]

h. Forms of Acts

According to the CIS EC Regulations two different types of acts can be taken in response to a request for an advisory opinion: interpretative decisions and advisory opinions (paras 127 and 143). This does not concern situations when the CIS EC acts as the EurAsEC Court. According to Art. 26 of the Statute of the EurAsEC Court, it can then take only advisory opinions.

Para. 127 of the Regulations stays silent concerning the moment when the form of an interpretative act is to be chosen. The Court's practice has, however, shown that it can be taken at any moment before the decision is announced. The Regulations also provide no guidelines concerning the difference between these acts. It only says that advisory opinions can be given both for the whole request and for any particular question.[100] The CIS EC in fact responds in the form of an advisory opinion when the question put before it has been too abstract or when a request concerns the interpretation of a document as a whole rather than of some particular legal norms, often with the use of universal legal norms and international legal doctrine in the absence of applicable CIS norms.

It seems, therefore, that invention of advisory opinions as a separate form of interpretative act has been developed with the intention of broadening the otherwise fairly limited advisory jurisdiction of the CIS EC. Both forms of interpretative acts are taken upon requests for interpretation; they give interpretations in response to the legal questions put before the Court, and the same rules are to be applied in the process of consideration (para. 127 of the CIS EC Regulations). Consideration of the characteristics of the CIS EC interpretative jurisdiction brings me to the conclusion that both interpretative decisions and advisory opinions of the CIS EC are advisory opinions as they are viewed in the world practice.

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[99] See e.g. Advisory Opinion No. 01-1/3-07 of 9 December 2007; Decisions No. 01-1/2-07 of 26 March 2008; No. 01-1/5-07 of 10 April 2008; No. 01-1/6-07 of 20 May 2008; No. 01-1/2-06 of 21 February 2007.

[100] See e.g. Decision No. C-1/19-96 of 15 May 1997 and Advisory Opinion No. C-1/19-97 of 15 May 1997.

i. Advisory Opinions as a Means of Settlement of International Disputes

As repeatedly asserted in the earlier parts of this contribution, a dispute or a controversy related to the questions put before an international court can always be found in any request for an advisory opinion. Therefore the question about the role of advisory opinions in the international dispute settlement is not of purely academic but rather of essential practical importance. It has been periodically debated in the international legal doctrine[101] but no clear answer has been given.

It has been generally maintained, including by the ICJ itself, that advisory opinions cannot be formally viewed as a means of international dispute settlement. The ICJ clearly stated in the *Legality of the Use of Threat of Nuclear Weapons* that 'the purpose of the [opinion] is not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion'.[102]

At the same time, despite its non-binding character, States and international organizations do always take due account of findings of international courts in advisory proceedings. As it had been claimed shortly after the establishment of the ICJ, advisory opinions have precedential moral value equal to those of the decisions in contentious cases.[103] By ascertaining facts (including the fact of the breach of particular legal norms[104]), as well as the existence or absence of applicable legal norms and clarifying the way of their application, they provide guidance for States and international organizations concerning the limits of their behavior in a particular situation or similar ones.[105] The view of the ICJ

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[101] P. Couvreur 'The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes' in Muller, Raič and Thuranszky (note 4) 83 (85, 113); Kovács (note 4) 460–63; K.H. Kaikobad *The International Court of Justice and Judicial Review: A Study of the Court's Powers with Respect to Judgments of the ILO and UN Administrative Tribunals* (Kluwer The Hague 2000) 120; Thirlway (note 22).

[102] *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 15.

[103] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion) (Separate Opinion of Judge Azevedo)* [1950] ICJ Rep. 79 (80); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion) (Dissenting Opinion of Judge Winiarski)* [1950] ICJ Rep. 89 (91).

[104] Kovács (note 4) 462.

[105] *Interpretation of Peace Treaties (Dissenting Opinion of Judge Winiarski)* (note 90) 97; *Interpretation of Peace Treaties (Dissenting Opinion of Judge Zoričić)* [1950] ICJ Rep. 98 (87).

about the failure of international commitments and the breaches of international law, as rightly noted by P. Kovács, can hardly be challenged.[106]

I therefore join those publicists who consider that advisory opinions, though not being formally binding and varying from judgments[107], are in essence not that far removed from them.[108] I would indeed maintain that the development of international law[109] is not the only contribution of advisory activity of international courts in international dispute settlement. Although not being directly aimed at dispute settlement, advisory opinions can nevertheless have a very significant mediated pacifying effect, through establishing facts of breaches of international law, ascertaining the existence of legal rights and obligations of States and international organizations in a particular or similar situations, determining the limits of legal behavior, especially in situations when legal regulation is rather framework or uncertain, and contributing to the development of international law so that it can prevent future disputes. Due to the fact that requests for advisory opinions can relate not only to existing disputes but also to controversies that may give rise to a dispute in future, I will express this idea in different words: advisory opinions of international courts do have a significant impact on the settlement of existing international disputes and the prevention of prospective ones.

4. CIS Economic Court's Interpretative Acts – Dispute Settlement Effect

The advisory activity of the CIS EC has been by now fairly extensive. From 1994 to 2010 the Court has considered 88 cases upon requests for interpretation from CIS organs and member States and one case upon request of the EurAsEC Inter-parliamentary Assembly. Due to the limited membership in the relevant organizations and also the caution of member States towards the advisory jurisdiction of the Court, it has

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106 Kovács (note 4) 460.

107 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (note 51) 97.

108 Kaikobad (note 101) 56; see also Aliaghoub (note 9) 120; Kovács (note 4) 460–63.

109 On this issue see Couvreur (note 101) 85, 113; Keith (note 18) 40.

never been involved in considering the profound legal issues that the ICJ has had. It has, however, provided interpretation on a series of issues important for shaping the CIS and the CIS legal system and promoting the rule of law between and within CIS member States. The outcome of the CIS EC 'advisory' activity can be summarized as the following:

The CIS EC ascertained rights and duties of the CIS and EurAsEC as international organizations;[110] interpreted CIS membership issues;[111] developed criteria for the qualification of inter-State entities established within the CIS;[112] advised on the status and powers of CIS institutions;[113] and CIS employees.[114] The Court interpreted several issues concerning the succession of assets and debts of the former USSR, non-military sea craft and Komsomol property.[115]

The CIS EC ascertained criteria for the qualification of legal acts as either international treaties or acts of CIS institutions[116] and qualified every act being subject to interpretation in every request laid before it. In a view of the uncertain character of documents issued within the CIS, it provided CIS institutions and member States with some guidelines in the area and has been used by them in the inventory, for the

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[110] Advisory Opinions No. 01-1/2-98 of 23 June 1998; No. 01-1/3-05 of 10 March 2006.

[111] Decisions No. 01/94 of 31 March 1994; No. 02/94 of 31 March 1994; Advisory Opinion No. 01-1/6-06 of 22 March 2007.

[112] Decisions No. 07/95 of 21 December 1995; No. 08/95 of 13 December 1995; No. 01-1/3-98 of 15 September 1998; No. 01-1/1-2000 of 27 June 2000; No. 01-1/5-04 of 31 January 2005.

[113] Decisions No. C-1/9-96 of 15 May 1996; No. C-1/17-6 of 23 January 1997; No. 01-1/7-97 of 30 January 1998; No. 01-1/7-07 of 13 June 2008; No. 01-1/9-07 of 16 September 2008; Advisory Opinion No. 01-1/4-05 of 18 April 2006.

[114] Decisions No. 01-1/2-2001 of 2 October 2001; No. 01-1/7-04 of 11 November 2005; No. 01-1/1-05 of 22 November 2005; No. 01-1/2-05 of 2 March 2006; No. 01-1/1-06 of 10 May 2006; Advisory Opinions No. 01-1/4-03 of 17 February 2004; No. 01-1/4-09 of 1 March 2010.

[115] Decisions No. 14/05/C-1/7-96 of 14 March 1996; No. C-1/10-96 of 22 May 1996; Advisory Opinion No. 10/95/C-1/3-96 of 23 May 1996.

[116] Decisions No. C-1/3-97 of 15 January 1998; No. 01-1/1-98 of 22 June 1998; Advisory Opinion No. 06/95/C-1/1-96 of 15 May 1996.

Single Register of the CIS legal acts, as well as when drafting the Convention on the Status of the CIS Legal Documents.[117]

The CIS EC interpreted issues on the validity of reservations to international treaties, in particular because of their incompatibility with the object and purpose of the treaty.[118] It helped to settle some disputes between the CIS member States and prevented new disputes, as far as multiple reservations made to international agreements concluded within the CIS (and sometimes even to decisions of CIS institutions) have often been incompatible with the purpose and object of the relevant treaty.

The CIS EC persistently declared its adherence to the principle *pacta sunt servanda* and advised on the methods of implementation of international obligations into national legislation.[119] Twenty two interpretative decisions and advisory opinions concerned social guarantees of individuals, e.g. retirement, health insurance, and migration issues.[120] These issues became extremely urgent because of repeated population migrations in the Soviet and post-Soviet periods, framework regulation within the CIS and conflicting national legislation of member States.

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[117] See para. 9.1. of the Plan of Action of the Concept of Further Development of CIS; Kotseptsia Dalnejshego Razvitia Sodruzhestva Nezavisimykh Gosudarstv, Plan Realizatsii Kontseptsii, Reshenie Soveta Glav Gosudarstv SNG (Concept of the Future Development of the Commonwealth of Independent States, Plan of Action) Decision of the CIS CHS (5 October 2007) *Electronic Legal Database Konsul'tant Plus: Belarus'. Technologiia 3000.*

[118] Decision No. 01-1/1-98 of 22 June 1998; Advisory Opinion No. 06/95/C-1/1-96 of 15 May 1996. T. Buergenthal sees this as a good example of preventive activity – Buergenthal (note 5) 43; *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts 74 and 75) (Advisory Opinion)* IACtHR Series A No. 2 (24 September 1982); *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights) (Advisory Opinion* OC-3/83) IACtHR Series A No. 3 (8 September 1983) para. 22.

[119] Advisory Opinions No. C-1/2-97 of 15 September 1997; No. 01-1/6-09 of 28 April 2010; Decisions No. C-1/3-97 of 15 January 1998; No. 01-1/2-01 of 2 October 2001; No. 01-1/2-03 of 24 June 2003.

[120] Decisions No. 13/95/C-1/6-96 of 28 February 1996; No. C-1/11-96 of 4 September 1996; No. 01-1/5-99 of 20 January 2000; No. 01-1/3-03 of 16 December 2003; No. 01-1/5-06 of 13 April 2007; Advisory Opinion No. 01-1/1-09 of 3 February 2010.

III. Conclusion

This contribution started with the question whether advisory opinions of international courts play any role in international dispute settlement. Despite the formal vagueness and abstractness of advisory opinions, the invariable aspiration of States to avoid any interference with their domestic policy and repeated objections over the ICJ advisory jurisdiction, in practice the answer is quite clear: yes, they do.

Indeed, advisory opinions are not designed to directly settle international disputes. They do it indirectly by establishing facts, breaches of international legal standards, ascertaining the existence or absence of international legal norms and imposing thereby constraints over the behavior of States, as well as through the impact they have on the development of international law and the promotion and protection of the rule of law in international relations. Those advisory opinions which relate to the controversies rather than to international disputes help to prevent the emergence of the latter.

The CIS EC is a relatively new international court that is not that well-known. It has rather limited subject competence. CIS member States are reluctant to submit their disputes for its consideration and sometimes even discuss perspectives for its liquidation.

At the same time the CIS legal system itself is of a rather framework and contradictory nature, that gives rise to the repeated controversies and disputes in the region. The approach of CIS member States to the CIS EC as an international court is not surprising. They are unwilling to submit their disputes to any form of international adjudication. In view of the existing advisory practice of the CIS EC, it may already be concluded that it has enough powers and authority to settle or prevent international disputes in different subject areas by the means of interpretation. Despite its limited competence and the cautious approach of the CIS member States, the Court currently appears to be the only feasible judicial institution for the settlement and prevention of international disputes in the region.

Discussion

A. von Bogdandy: Thank you for three excellent presentations with many interesting questions to discuss. Just to name some: we have had a powerful plea for the use of advisory opinions for the progressive development of international law and the plea to use more soft law instruments. And we also have the issue of whether the *Kosovo* Opinion has been successful or not.

T. Treves: Just a few observations. I have become actively involved in advisory opinions in the latest months as I am chairing the Sea Bed Disputes Chamber of the International Tribunal for the Law of the Sea in charge of delivering the first advisory opinion requested to that body. But of this Rüdiger Wolfrum has already spoken in his report.

I would like to make just a few very general observations which refer mostly to the International Court of Justice. In my view, the main reason for advisory jurisdiction is to compensate for the lack of ius standi of international organizations before the Court. While the Court is open only to States, international organizations are now protagonists of international life. They can somehow access the Court through the request of advisory opinions. In my view advisory opinions, read in that way, have performed quite well and they could further expand. What becomes more complicated is when advisory opinions become involved with States and their disputes. We cannot deny that, as shown very eloquently by Rüdiger Wolfrum, the applicable instruments permit this. In fact there are some disputes involving States that are submitted to the Court under the mask of an advisory opinion. There are even proposals to make the possibility for States to resort to advisory opinions more explicit. There are for instance – and here I include discussions concerning advisory opinions by the Law of the Sea Tribunal in its plenary composition – debates as to whether States or maybe little groups of States together, could request an advisory opinion. The proposal takes into consideration situations in which States don't dare to go to court for a real contentious case, or are prevented from doing so by cultural traditions diffident of the contentious approach to the settlement of disputes. I'm not sure this is a very wise course to pursue. Advisory opinions of course have a multilateral element, which can be very useful. I wonder, however, whether in many cases the idea of intervention

under Art. 63, intervention as of right, couldn't be a useful tool. Of course the fact that in this case the opinions are binding can be seen as a drawback.

In papers and interventions a long list of advantages of advisory opinions was developed. I would like to add one such advantage to the list. Advisory proceedings are more amenable to transparency than contentious cases. Indeed, the Rules of the Law of the Sea Tribunal as far as advisory opinions of the Sea Bed Disputes Chamber are concerned, make a contribution to that. All papers are available to everybody almost from the beginning. And if you look at the Law of the Sea Tribunal's website you will see what I mean.

One other element which has not been addressed very much apart from Rüdiger Wolfrum's report, is the question of discretion. I think the possibility for the ICJ to use its discretion in order not to accept to deal with a request for an advisory opinion is an underused tool. In the case most of the Advisory Opinions that have been heavily criticized, and I refer with approval to the remarks made by Pierre Dupuy, the undeniable difficulties underscored in the criticisms the opinions have received, could have been avoided by judicial restraint. In most advisory opinion cases before the Court, lawyers spend hours in explaining that the Court should not take the case. It has become almost a perfunctory ceremony, as they have never been followed since the Carelia case. So, in my view, the Court should exercise more generously its discretion by not taking up cases where it knows that the result can be dangerous or perhaps insignificant.

Y. Dinstein: Thank you very much, Mr. Chairman. I do not want to go into the very profound issue that Rüdiger Wolfrum mentioned *en passant*, namely, whether the legally binding can blend with the legally non-binding. As far as I am concerned, this is the equivalent of suggesting that the physical can blend with the metaphysical. The subject of soft law has recently become 'trendy', but I would caution against blurring the borderline between what is lawful and what is unlawful. In any event, the subject merits a full-scale discussion, and ought not to be treated lightly.

Let me focus, instead, on the theme before us. Do advisory opinions present a suitable alternative for the settlement of international disputes? Allow me to start with a counter-question: why are advisory opinions requested, in the first place, and why should a court of law comply with the request?

Obviously, there are exceptional instances in which the advisory opinion procedure is eminently useful and even indispensable. The best illustration that I can think of is the *Reparation for Injuries Advisory Opinion* of 1949. Remember the factual background. A dispute arose between a State (Israel) and the Secretary-General of the United Nations as to the competence of the Organization to bring an international claim against a Government, with a view to obtaining reparation for damages sustained by its agents in circumstances entailing State responsibility. What alternative modality existed for settling the dispute? After all, no contentious case could be envisaged before the International Court of Justice, since only States can be parties to such litigations. Even arbitration would have been useless if the United Nations lacked the competence to institute the proceedings. The long and the short of it was that the mechanism of seeking an advisory opinion from the Court as regards the legal standing of the Organization was the only practicable solution to a thorny problem. Indeed, once the Court pronounced that the United Nations possessed an international legal personality, and that it was vested with the capacity to bring international claims, the dispute was promptly settled in an amicable fashion.

Unfortunately, an advisory opinion of this category is the exception rather than the rule. Generally speaking, advisory opinions are sought and obtained in contexts where their usefulness is, to say the least, debatable. It will not be unjustified to ask ourselves what might be the reasons triggering recourse to the advisory opinion procedure. In my opinion, in most instances, one of three rationales lies behind the move to make use of this technique. Let me call them (i) stimulus; (ii) *deus ex machina* and (iii) false shortcut.

The first inducement to take the path of an advisory opinion, the one that I call stimulus, exists when judges sit idly by, waiting for contentious cases which fail to be filed. As a favour to the court, and to the system in which it operates, an artificial request for an advisory opinion may then be engineered, in order to keep the judges occupied. This is actually how the Inter-American Court of Human Rights started its business. The trouble is that, in such a setting, the topics raised are inescapably examined *in abstracto*. There are no concrete issues before the court because there is no genuine controversy, and there are no *bona fide* adversaries. An advisory opinion of this kind is liable to prove unsatisfactory in the long term. Once a real dispute relating to a similar *materia* flares up in the fullness of time, the advisory opinion may have to be revisited.

The second impulse to set in motion an advisory opinion – the one that I call *deus ex machina* – is entirely different. I am thinking about a scenario in which statesmen and scholars debate *ad nauseam* a particularly bothersome international legal bone of contention. Being unable to arrive at a compromise (let alone a consensus), they might feel frustrated enough to say: 'Why not bring the matter somehow before the International Court of Justice, which will shed light on the situation?'. The *Legality of Nuclear Weapons* Advisory Opinion is the paradigmatic example. There are two flies in this ointment. First, if statesmen and scholars are at loggerheads, who is to guarantee that the judges at The Hague will not be equally divided and driven to offer their advisory opinion by seven votes to seven, with the President casting the decisive vote? Moreover, even if the Court can reach a majority, the outcome is likely to be presented in Delphic language that does not seriously put dissensions to rest. There are numerous illustrations of this syndrome, from *Western Sahara* to *Kosovo*. For those who initiated the Advisory Opinions in these instances, the Court's answers to the questions posed may look beside the point and border on a fiasco. Thus, with respect to Kosovo, the Court completely (almost surrealistically) avoided coming to grips with the acute question whether there exists a right to secession from an existing State in exercise of the right of self-determination.

The third catalyst to leveraging an advisory opinion is the most dangerous of all, and that is the false shortcut. What I mean is that relations between certain States are strained by a tension-inducing dispute, but the International Court of Justice does not have contentious jurisdiction in the absence of consent of one or more of the parties. The temptation then is to persuade the General Assembly to ask the Court for an advisory opinion, outflanking the obstacle of lack of contentious jurisdiction. This is a bait that the Permanent Court decidedly declined to be hooked by in the famous *Eastern Carelia* case. In contrast, the present Court is continuously going in harm's way, offering the excuse that it is only assisting the General Assembly in discharging its duties under the UN Charter. No wonder that, when the Court comes up with an answer to the question put forward by the General Assembly, the Advisory Opinion is usually simply ignored by the State(s) concerned. That is what happened in the *Wall* Advisory Opinion, as well as in quite a few previous proceedings. The relevant pronouncements of the Court have remained transcribed in the ICJ Reports, but they have not impacted on real life. Israel's security barrier in the West Bank has actually been redemarcated several times in response to Judgments rendered by

the Israel Supreme Court, but the *Wall* Advisory Opinion by the International Court of Justice has practically been disregarded.

To conclude, the subject of this symposium is the settlement of disputes. What dispute between States has ever been resolved through an advisory opinion? I believe that this is a rhetorical question. Let me just add, as a PS, that when the International Court of Justice delivers an advisory opinion that purports to settle a dispute in the absence of State consent to do so, the aftereffects do not necessarily enhance the reputation of the Court.

A. Koroma: Thank you, Mr. Chairman. I'm not asking for the floor at this moment. I just wanted to indicate the following: It's my policy not to discuss the Judgments of the Court. They should speak for themselves. You ask for one example of an advisory opinion being successful. We have not heard the ICJ's Advisory Opinion on Namibia discussed here this afternoon. I think one could find that the Advisory Opinion of 1971 on Namibia contributed to the successful resolution of the Namibian problem. Moreover, I would like to add that there are other issues regarding advisory opinions which Rüdiger Wolfrum could have mentioned. Advisory opinions contribute to the development of international law. Whether a case falls under contentious or advisory jurisdiction, the Court still applies international law. The Court does not apply different international law in deciding issues which are involved in a request for an advisory opinion. One other matter: I think reference was made to the issue of international legal personality in the *Expenses* Case, as well as in the Advisory Opinions of the Court relating to the *Genocide Convention* and *Kosovo*. In the two former cases the issues decided by the Court have found their expression as part of international law. So if we are looking for innovation, for alternative methods of dispute settlement, the examples are many. We are not discussing specific cases here, I thought we just wanted to see how advisory opinions could be used to solve international disputes.

G. Abi-Saab: There are many things to be said. But I pick up the last word of Rüdiger Wolfrum. He said that he was a heretic by saying that there is not much difference between binding and non-binding. I accept that. But I will be more heretic than he is. 43 years ago, in my first published book, I defended the idea that an advisory opinion is binding. But on whom? I mean, you take Art. 59 of the ICJ Statute, it says a judgment is binding on the parties. Here we have one party who asks

for the advisory opinion. It is the organ that requests it. Now, the advisory opinion gives an interpretation which is a finding – a finding in law. This finding in law cannot be reversed by a political organ. If a political organ – like the General Assembly – is dealing with a dispute, it doesn't have to decide only on the basis of law. But when it comes to the question of law, I think the findings of the opinion are binding on the organ, not on States because States are not parties to the proceedings. I'm speaking technically. And I don't see how a finding by the International Court in an advisory opinion can be considered as not binding on the requesting organ.

As to the question of discretion. Again, I am even more heretical. I don't think the Court has discretion to effuse to give the opinion. In the *Eastern Carelia* case, the Council of the League of Nations asked for an advisory opinion in a dispute between Finland – a member State – and the Soviet Federative Republic as it was then called – which was not a member of the League. Art. 17 of the Covenant said that the Council can deal with disputes between a member State and a non-member State if the non-member accepts the competence of the Council, which the Soviet Republic did not. Thus, the Council was itself acting beyond its jurisdiction. The Court could not say that. So it formulated its refusal in terms of exercising a discretion rather than telling the Council 'you are acting *ultra-vires*'. But thereafter the Court has never declined a request. It's a kind of a mantra to say 'I have a discretion', but invariably it proceeds to give the opinion. However, if the request attempts to bring indirectly a dispute between two States without the consent of one of them, this would amount, in my opinion, to a ground of inadmissibility for the use of an inappropriate means of seizing the Court.

About the question how useful advisory opinions are, I concur with Abdul Koroma. If we look, for example, at the law of the UN Charter, most of the law of the UN Charter has been built on advisory opinions including the *Expenses* case. We cannot forget this aspect, which is very very important in the role of advisory opinions. Thank you.

H. Türk: First of all, I fully agree with Pierre-Marie Dupuy, that advisory opinions may be useful for interpreting points of law. And I would add, that indirectly, they contribute to the peaceful resolution of disputes. Rüdiger Wolfrum has stated that advisory opinions have a disadvantage in not being binding. Here again, like Pierre-Marie Dupuy, I believe that this may prove to be an advantage because we all know why States are so reluctant to submit disputes to judicial resolution. In my view, the answer to this question is very simple: because no one

wants to be the loser. In the case of an advisory opinion, there is, at least, no direct loser, if perhaps an indirect one.

Let me now turn to the Convention on the Law of the Sea. It is true that the drafters of the Convention were very reluctant to entrust advisory functions to ITLOS. In my view, this was a mistake; it is a *lacuna* which makes itself felt in practice. The Commission on the Limits of the Continental Shelf, for instance, is faced with interpreting provisions of the Convention in its daily work. This Commission consists of experts in hydrology, geology etc.; it does not have any lawyer on it. I am, however, sure that the Commission would be very happy if it could shift the burden of interpreting provisions of the Convention onto a tribunal. But unfortunately that is water under the bridge.

Let me address the advisory function of ITLOS on the basis of Art. 138 of its Rules, which states that the Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion. It is important to note that the Tribunal has discretion, to which Tullio Treves has already referred, because it might undermine the credibility of any judicial institution if a very far-fetched question were submitted and it did not have the discretion to say 'no'. It has been stated that this rule does not fully conform to the Convention. Here I again agree with Rüdiger Wolfrum, who said that the most convincing answer was that Art. 138 of the Rules established a consensual solution. It is obvious that international tribunals are not self-serving institutions. They assist States, the members of the international community, in resolving international disputes and clarifying points of international law. The consensual solution is thus a convincing argument.

However, with respect to the question as to whether the rule of Art. 138 constitutes a high threshold which makes it rather unlikely that States will use this option, as stated by Rüdiger Wolfrum, I would say that this should be viewed a bit more optimistically. If two or more States take a political decision to submit a question of international law to an international judicial institution for an advisory opinion, the technical problem of having to conclude an agreement within the meaning of the Vienna Convention on the Law of the Treaties will easily be overcome. It is only a matter of the political will of the States concerned. Thank you.

K. Oellers-Frahm: Thank you very much. I would like to make just three short remarks. The first one concerns the non-binding character of advisory opinions that has been underlined several times until now. I share the opinion of Rüdiger Wolfrum that the difference between non-binding and binding decisions in international law is not of the same relevance as it may be in national law due to the well-known lack of means for the coercive implementation of international decisions. On the other side it has to be stated that any action in conformity with what has been stated to be the law in a – non-binding – advisory opinion is justified, what may be considered as a sort of counter-balance to the non-binding character of advisory opinions.

My second remark concerns the discretion to deliver or not to deliver a requested opinion. This is a very delicate issue because it relates to the political implications of the cases brought to the Court. I share the view of those who argue that there were good reasons not to deliver the requested opinion not only in the *Wall* case, but perhaps even more so in the *Kosovo* case. However, there is another side of the coin: what would have been the public reaction if the Court would have declined to render an opinion on the question concerning the Construction of the Wall in the Occupied Palestinian Territory or on the Declaration of Independence of the Kosovo. These questions were highly debated by the international public and a decision of the 'World Court' declining to answer the question for good, though not compelling reasons would have met with incomprehension. Therefore, I think that there are some more aspects to be taken into consideration in particular with regard to requests for an advisory opinion concerning issues as those at stake in the *Wall* and in the *Kosovo* opinions.

This leads me to my third remark relating more concretely to the *Kosovo* opinion. It has rightly been referred to the critics expressed with regard to the Opinion not only by international lawyers, but also by members of the Court in their separate or dissenting opinions. Most of the critical remarks which center primarily on the fact that the Court strictly observed the extremely narrow frame set by the terms of the request are in fact justified. But the Court was in a dilemma: the question as it has been posed, namely its limited reach referring only to the *declaration* of independence was discussed in the General Assembly where the proposal to put the question into the wider context by requesting an opinion on 'the legal consequences of the declaration of independence' was explicitly rejected. The majority in the General Assembly insisted on the restricted terms of the request. Accordingly the Court would have acted *ultra vires* if it would have answered questions such

as whether the secession was legal or not. The fact that the narrowness of the request had been at issue in the discussion of the General Assembly and voluntarily been maintained prevented the Court from interpreting this part of the request in a more far-reaching manner, although some, however, small leeway for a more courageous decision may still have been available. As to the other part of the question, namely who were the authors of the declaration of independence, the situation is different. Pierre-Marie Dupuy expressed the opinion that this part of the request was clear, in that it considered the UNMIK government institutions as the authors of the declaration. But in my view the question who were the authors of the declaration could only be answered by examining the terms of the declaration of independence and not by simply referring to the wording of the request submitted by Serbia and accepted by the General Assembly. As the question of the authors was the central issue for assessing the legality of the declaration of independence it was for the Court, and not for the General Assembly, to decide this issue; the Court could not be bound in this context by any understanding of this aspect by the General Assembly, which, by the way, did not even discuss this question. Therefore I would like to stress that the Court's action in delivering an advisory opinion is always predetermined by the request which leaves only little room for interpretation, in particular where an issue was explicitly discussed by the requesting body. Nevertheless, in a case as the present one, where the Court decided to deliver the opinion despite of the problematic terms of the request, a more courageous action would be required in order to clearly answer the 'real' question at stake what in the *Kosovo* case was unfortunately done only in a rather biased, indirect manner.

T. Eitel: I have one remark and one question. My remark is going to voice my doubt regarding the 'heretical' part of Georges Abi-Saab's interesting statement. If I understood him correctly he believes that the UN General Assembly is bound by an earlier request, and result, of an advisory opinion. This would mean that the President of the General Assembly would be ill advised to put a matter, about which the Assembly had requested and received an advisory opinion, to a vote again, nor would the Delegates be allowed to vote on the matter other than reaffirming the opinion. I don't think that the representatives of sovereign Member States would accept this. Art. 10 of the Charter allows the General Assembly discussions and recommendations on 'any question or any matters within the scope of the present Charter' and the Court's opinion is an 'advisory' one.

The question came to my mind when thinking about 'binding' and 'non-binding' advisory opinions. When interpreting *national* courts' judgments, there is sometimes a discussion whether a certain statement in the judgment is an *obiter dictum*. If it were, this would take away much of the binding character that statement could have had. Since I don't recall having come across that discussion regarding parts of decisions of *international* courts, I wonder whether such decisions are at all capable of producing this kind of 'soft law' or whether their decisions are totally cast in bronze. On a lower level, the same question arises, at least for me, regarding advisory opinions. Thank you!

M. Bothe: I would like to address the issue of a difference between contentious proceedings and advisory opinions and I agree with all those, Rüdiger Wolfrum, Georges Abi-Saab, who said the difference is not as big as it might appear at a first glance. We have to distinguish, of course, two different functions of the judicial activity, namely deciding a case and contributing to law-making. If you look at the case decisions, the compliance record of the contentious cases of the Court is somewhat mixed. There are series of cases where there's a good compliance record, the delimitation cases for instance. There are others where this is not the case, take for instance *Nicaragua*. On the other hand, if you look at the law-making function, it is also a question of what the Court really says and a question of legal policy. There are contentious cases and advisory opinions which are decided on narrow grounds. The *Kosovo* Advisory Opinion is one of those which were decided on narrow grounds for reasons of political expediency, of judicial policy in this particular case. The formulation of the question is perhaps unfortunate. But if the Court had wanted to say something on those issues, it would have taken the liberty to reformulate the question a little bit and then to say what it had to say. But it did not want to do that for the reasons of the political context of the particular situation and the Court was in a way well advised to do so because the political realities had gone beyond the question. If you take other cases, for instance *Nicaragua*, which was decided on broad reasons, or the *Oil Platforms* case, there the Court said a number of things which were not strictly necessary for arriving at the final result, but which constitute up to this day a contribution to the development of international law in a question which seems to be particularly dear to the Court, namely the legal limitation on the use of force.

F. Pocar: I will shortly follow up on some issues that have been taken up by other speakers thus far. Concluding his thoughtful and stimulating presentation, Rüdiger Wolfrum has submitted a list of the advantages that advisory opinions may have over contentious cases in given situations. We can easily agree with his analysis, perhaps with some additional grounds. In particular, his comment with respect to the interpretation of multilateral agreements, that advisory opinions may become a substitute for contentious cases 'at least in early stages of a dispute and if no factual issues are controversial', may equally apply to cases in which factual issues are controversial, if the interpretation given in an advisory opinion renders the factual dispute moot. For example, an interpretation declaring that a given rule applies both to events that occurred in the high seas and in territorial waters, would render a factual dispute about the place where the event actually occurred irrelevant in a particular case.

After listing the advantages of advisory opinions, Rüdiger points out that 'the major disadvantage of advisory opinions is their non-binding character', but wonders whether this really matters, as the implementation of international judgments depends on their acceptability, thus making the difference between judgments and advisory opinions rather minimal. One may agree with this conclusion – although it has been described as metaphysical – but if so, why should one speak of disadvantages at all? Mentioning a disadvantage has a negative connotation and automatically implies a need for correction. But, irrespective of its connotation, is a correction of such a 'disadvantage' desirable? Would it be desirable to make advisory opinions binding? And binding on whom?

Georges Abi-Saab has already taken up the last question, binding on whom? On the institution that has requested the opinion? Of course, if one takes the UN General Assembly as the requesting authority, the problem is that the UN General Assembly is comprised of all States. It is true that it is formally possible to distinguish between the UN General Assembly as a UN organ and its Member States, but in fact, it would be rather odd to consider that what is binding for the UN General Assembly would not bind the States, its Member States, as well. On the other hand, if advisory opinions were assigned binding force on the UN General Assembly, effectively over the entire international community, they would become a sort of authentic interpretation of the law. Would we not thereby give an international jurisdiction, however authoritative as the International Court of Justice, a role which may be unjustified in the current context of international relations? This is without mentioning that the attribution of a binding nature to advisory

opinions would raise the issue of the duration of that binding force. Would it be subjected to the usual mechanisms for developing international law, or would a new pronouncement be necessary for changing the interpretation given by the court?

It clearly looks more appropriate to conclude that advisory opinions should remain, as they are, an authoritative, not an authentic, interpretation of the law. Such an interpretation is not binding, but allows any member of the international community to rely legitimately on the advisory opinion and to justifiably comply with its implications. As such, advisory opinions do not need to be binding in nature in order to correspond with the clarification and development of international law. I cannot see how their non-binding nature would result in a disadvantage in this respect.

A.F. Douhan: Thank you. I would like to add a couple of words concerning the non-binding character of advisory opinions. Currently, despite the growing number of international courts and tribunals, and probably due to it, quite a lot of disputes nevertheless stay unsettled. First of all, States are often unwilling to submit disputes for international adjudication, as far as they are afraid to be bound by the decision if they lose the case. And secondly, in a view of the conflicting jurisdiction of international courts in particular cases, the courts are often unable to decide on the case because of the fear to establish a collision with a decision of another court. In this situation, advisory opinions could be a very good alternative. The opinion itself is, naturally, not binding. At the same time, when taking an advisory opinion, a court states whether a breach of international law took place, and can ascertain the applicable rules of international law. I would like to draw your attention to the fact that the latter (applicable rules of international law) are by themselves binding. It means that the court, although not settling the dispute as it is, provides a legal guideline for States involved. I am also very doubtful that in a case if a State behaves in accordance with the findings of the Court, another State could feel itself right to apply any counter-measures. As a result, I believe that advisory opinions of international courts will make a significant impact to the settlement of international disputes.

P.-M. Dupuy: Thank you very much. I was very interested by the discussion which gave a clear picture of the mainstream position among the participants to this Symposium with regard to the legal potential

and impact of the ICJ's advisory opinions. I think that we all share the view expressed by Michael Bothe when he said with me that one should clearly distinguish between two functions: to decide a case and to develop the law. The way in which the question was put to us by the organizers of the symposium was whether an advisory opinion 'is a substitute to international dispute settlement'. The majority among us agree including Yoram Dinstein, Tullio Treves and myself as well as a number of other speakers that when it comes to dealing with a highly controversial case between two or more States, the advisory opinion is generally not the right format.

Now, we also agree that there are clear advantages, in particular in the multilateral dimension, i.e. participation of several UN Member States to the advisory proceedings, a point rightly raised by Tullio Treves.

No one discusses either that as far as the contribution to the development or clarification of the law is concerned, advisory opinions are equally able to provide the Court with an opportunity to do it as the contentious cases if not even more, inasmuch as it is not limited by the very terms according to which its jurisdiction is defined by the State or States within the contentious jurisdiction.

In that respect, I would like also to say a word about the *Namibia* case, which was mentioned by Abdul Koroma. It was indeed a very interesting case: in the background, there was a real dispute, not a bilateral one but a much larger one, between the international community of States, on the one side, and one single State, South Africa, on the other side. The legal issues at stake were a combination of rules of United Nations law and of general international law. In these respective perspectives, the *Namibia* case made it possible for the Court to issue decisive statements, may it concern the succession of the United Nations to the League of Nations system of mandates or the rules applicable in terms of interpretation of international legal acts.

It can be said at the same time that the *Namibia* Advisory Opinion most probably contributed in sustaining the overall pressure exercised by the international community on South Africa, a pressure which was finally successful. As far as the normative contribution of ICJ advisory opinions is concerned, the *Namibia* case belongs to the category of opinions where the Court has contributed to the clarification of positive international law, a category to which the *Kosovo* case does not belong.

In that respect, and to answer the concerns expressed by Michael Bothe, I would simply say that without even needing to reformulate the ques-

tion, the Court could have enlarged its vision of the legal problematic raised by it. Now, it is for the Court to decide, taking also into account the political context, whether it has to deal with a certain generosity with the issues raised before it. I easily recognize that it is not an easy task. But what is sure is that everybody is waiting for the opinions of the Court to help in clarifying the law, an expectation which, at least in that very case, was not satisfied.

R. Wolfrum: Let me start with the last point just mentioned by Pierre-Marie Dupuy: Whether and to what extent an advisory opinion can substitute for a contentious case. I approach that from the other side. Let's put it in the context of human rights issues. Human rights issues are normally not contentious cases between two States. When it comes to the interpretation of the Covenant on Civil and Political Rights or the Convention on the Elimination of All Forms of Racial Discrimination, that is actually a matter of interpretation concerning all States being parties to the respective instrument. In such a situation, and I am referring to all international instruments reflecting community interests, i.e. human rights treaties, international environmental agreements, the UN Convention on the Law of the Sea, there should be room for an advisory opinion. Let me give you two reasons for that. In many disputes, in particular environmental disputes, it is not easy to submit them to an international court or tribunal. For example, in a case of pollution of the high seas. How will you bring such a case before a court on the basis of a contentious case? Who could claim to have standing? These are the cases I mean, in particular. Let me advance my second argument. In all such cases the interests of all States parties are affected. As I said, in contradiction thereto a contentious case is artificially rendering such a dispute a bilateral one although it is of a truly international nature.

Now, as far as discretion is concerned, I agree with those who stated this meant flexibility, and I would also consider it a merit and an advantage for the ICJ that they have that flexibility. It is appropriate that rule 138 of the Rules of the Tribunal for the Law of the Sea provides for this discretion.

As to the non-binding character of advisory opinions, it may be an advantage, it may be a disadvantage. From a traditional point of view, it has been considered a disadvantage. But, as has been said in the discussion and I fully share that view, many States are in favour of advisory opinions exactly for the reason that they are technically not bound. And let us also consider the cultural differences. There are certain parts

of this world where you are not considered to go to court. In such regions legal disputes are settled differently – by negotiation. For such regions or for such States the advisory opinion could be a more acceptable mechanism, rather than the contentious case system.

Concerning transparency as mentioned by Tullio Treves, I share his view. Since the procedure for advisory opinions is a very open procedure, it can be followed from the outside. As such, transparency is a fact and provides for the legitimacy of the result.

As to the potential relevance of advisory opinions, my last point and the main point of Yoram Dinstein, let me say the following. It is always difficult to judge or to decide whether judgments or orders of courts are relevant in the reality of the world. Sure, it has been said and I agree, judgments on delimitation cases normally are fully implemented. But in respect of others, as Michael Bothe has pointed out, the record is somewhat mixed. As for advisory opinions, I am grateful to Abdul Koroma mentioning that several advisory opinions have left their trademarks, I may add, on the progressive development of international law. The *Genocide reservations* case is certainly an issue, for it triggered the interpretation of reservations commonly accepted at the moment. One should look upon the relevance of advisory opinions and judgments from a different point of view. Judgments should be implemented, as is happening in the delimitation cases. Advisory opinions may be more important for the progressive development of international law apart from what Georges Abi-Saab has pointed out, that they may be binding for the entity having requested them, and for the court having taken them. The latter has some inherent bearing upon all States parties to the particular instrument since they have a legal expectation that the interpretation given will be the one guiding the court in question in the future.

Panel III: Interaction between Counsel and International Courts and Arbitral Tribunals: Ethical Standards for Counsel

Interaction between Counsel and International Courts and Arbitral Tribunals: Ethical Standards for Counsel

*Presentation by Philippe Sands QC**

Ladies and Gentlemen, I begin by thanking you for inviting me to deliver this lecture today. My subject, the *Interaction between Counsel and International Courts and Arbitral Tribunals*, may be thought to be a rather arcane and uninteresting topic. I think it is not. It's one that has not been the subject of considerable academic attention and is of considerable significance in touching on the effectiveness and the legitimacy of the new system of international courts that has been put in place.

In delivering this lecture, I am speaking in an academic capacity. Yet I also happen to be a member of the English Bar, subject to rules of professional conduct that govern me wherever I carry out my professional activity. Whether sitting as an arbitrator, or appearing as counsel before the International Tribunal for the Law of the Sea or the International Court of Justice or some other international court or tribunal, I am subject to minimum standards of professional conduct that apply across the range of activities in which I engage. For any person who is a member of a bar or national legal bar association, the same principle applies, yet in international practise various issues arise, as different practitioners involved in the same proceeding are subject to different rules of professional conduct. This gives rise to instances that may cause real practical difficulty. In some situations, the international court or tribu-

* Professor of Law, University College London; barrister, Matrix Chambers. I would like to thak Ioana Hyde for her assistance in preparing the final text of the lecture.

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nal may have no requirement at all that a person who appears before it as counsel should be legally qualified or a member of a bar: this is the case with the International Court of Justice and the International Tribunal for the Law of the Sea. By contrast, the European Court of Human Rights and the European Court of Justice have rather strict entry requirements, akin to domestic legal systems. So there is a difference between the qualifications held by individuals appearing in international legal proceedings, as well as between the requirements imposed in this respect by various international courts.

This is the background against which 'The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals' (Hague Principles), recently adopted by a Study Group of the International Law Association (ILA), seek to establish minimum standards on these issues. I should say that in my experience of over 20 years as a practitioner, I do not see major or outrageous practical problems on a wide-spread or systematic scale. We should not create the impression that, by addressing this subject either as an academic or by engaging in promoting the Hague Principles, it is to address symptomatic and real problems. It is, in a sense, prophylactic. The reason for addressing this issue is preparing for what may be coming, as more international courts and tribunals deal with evermore cases. Yet there are difficulties already. Within rules of confidentiality, here are some examples.

Example no. 1: while appearing as counsel in an investment treaty arbitration, your distinguished and decent opponent prepares to describe to the arbitral tribunal what happened in a case in which she or he sat as arbitrator, to illustrate what arbitrators are really intended to do. Can a counsel do that? I think not. An objection was made and the lawyer acted impeccably, stating that he had not thought of the point and would not proceed any further with the issue. The individual concerned was not a member of a bar and was not subject to rules of professional conduct that bound her or him.

Example no. 2: a case in which the lawyer acting as counsel for a State but where the legal fees are being paid by a private actor with an interest in the case. The interests of the private actor and of the State are different. The lawyer gets different instructions, one set of instructions from the person paying the legal fees, and another set of instructions from the State that appears as the party before the proceeding. What is counsel to do? To my mind, it's clear: counsel represents the interests of the party before the proceeding. But others may take a different view. Is that appropriate?

Example no. 3: you wake up one morning, switch on your computer, open your emails and you see in your email inbox a message which contains, as an attachment, the internal deliberations of a court or tribunal before which you are appearing. What do you do in your capacity as counsel? Do you read those internal deliberations? Do you delete those internal deliberations? Do you complain to the court or tribunal? Do you complain to anyone else? These are not hypothetical or theoretical situations. The response may differ depending on which bar you are a member of. Or, as one colleague once put it to me, and I paraphrase: 'I am not a member of a bar, I have no rules of professional conduct, I do whatever I think is right and whatever promotes the interests of my client'. That can lead to practices that will, in the eyes of reasonable people, cause certain difficulties to arise.

It is against that background that a few years ago, working under the auspices of the International Law Association, Campbell McLachlan and I decided in the first instance to look at the issue of the independence of international judges. The outcome was the work of Study Group of the International Law Association, which in 2005 produced the 'Burgh House Principles on the Independence of the International Judiciary'[1] designed as much to protect the independence of judges and arbitrators as to ensure that practices that might, for example, allow certain judges or arbitrators to feel that private communications with a party in mid-case are stopped. Let us be clear, these types of practices happen. The issue is not discussed in law school textbooks or in law review articles and it is not talked about for the obvious reason, amongst others, that it gives rise to particular difficulties in relation to a practitioner's likelihood of being retained in future cases.

Additionally, it might be noted that there may be occasions where there could be a conflict between being, on the one hand, an academic, and on the other hand, being a practitioner, a judge, or an arbitrator. Can one write openly in free academic expression about issues that are currently before courts before which the same person is appearing? It is extremely difficult to do so. To be frank, it is not something that one can do as an academic and then expect to be appointed or reappointed as counsel very frequently. For good reasons, States do not expect those to whom they give the privilege of representing them before international courts and tribunals to then write academic articles expressing freely

[1] Burgh House Principles on the Independence of the International Judiciary (2005) <www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf> (11 February 2011).

what their true personal views are about certain matters that have come to their attention. This is a real issue in the closed world of international law, much more than in the domestic context, for the obvious reason that the regulation of the legal profession in the domestic context is much more tightly structured.

In the end, the ILA Study Group in 2005 adopted the Burgh House Principles. A number of individuals associated with that group did not act as full members but as observers. We benefited greatly from the input of Judge Rosalyn Higgins, who rightly emphasised that if the ILA Study Group was considering judges and arbitrators it should also look at the role of counsel, who have their own special responsibilities. She was absolutely right. This is not because of a particular problem with counsels any more than there is a particular problem with judges, but because there has to be a balanced approach.

Therefore, three years ago, the ILA Study Group turned to the issue of minimum principles governing ethical standards for counsel, against the background of the kinds of issues that I have addressed. I was privileged to serve as co-chair alongside Campbell McLachlan and Laurence Boisson de Chazournes. Laurence Boisson de Chazournes herself was very open about the fact that she was not a member of a national bar. And we thought that's exactly why she should be there because the group as a whole had to be broadly representative, as indeed it was. The final text of the Hague Principles is annexed to this lecture, and indicates the composition of the Study Group.

The membership of the Study Group primarily was intended to be representative. Some members were more active than others, but everyone contributed. Various drafts were put out for broader consultation, and we had feedback from a wide range of people. There were a number of other international efforts on which we were able to rely. We had an excellent secretariat to support us.

Some international courts and tribunals already have very detailed rules governing these issues. International criminal tribunals in particular have detailed rules for the very obvious reason that those courts are dealing with the deprivation of human liberty and must therefore ensure the highest standards of propriety in the conduct of proceedings. However, the use of clear and detailed rules by international courts and tribunals seem to be the exception rather than the norm. In the case of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), essentially it is a *renvoi* to counsel's national bar rules that come into play. The Study Group was acutely conscious of the fact that there is a wide array of perspectives on appropriate profes-

sional conduct, and we did not wish to impose a particular view. This was the right approach, although it meant that some of the more difficult questions – on which there are completely divergent views even within similar legal traditions – were not resolved. For example, there are considerable differences of view amongst common lawyers as to the preparation of a witness for cross-examination. In the English system, you just don't do it; in the New York system, it is part of the system, part of the lawyer's function. On issues like this it is difficult to identify a reasonable middle ground. Similar considerations apply in relation to *ex parte* communications. It was quite often the case, before the latest economic recession hit, that the UK Foreign Office legal adviser would host a cocktail party at Christmas to enable diplomats and lawyers and legal advisors and others to come together, informally. I remember on one occasion being told by an arbitrator in the *MOX Plant* dispute between Ireland and the United Kingdom telling me, with considerable regret, that he felt unable to accept the invitation to that party, lest it be wrongly perceived. Different practitioners have different perspectives on those types of issues.

It is with these issues born in mind as background that the Study Group worked over a period of three years to develop the Hague Principles. It was very collegial, despite rather strongly held differences of views on what various aspects of the appropriate ethical standards for counsel should be. I will not go through all the issues, given the time available, but I want so summarize and highlight some of the key points that indicate areas of difference. I speak personally and from my own perspective.

I invite you to keep at the forefronts of your mind a preliminary question that asks: why are such principles necessary? There is one stream of thought which says, and I have to say it has a certain legitimacy, that efforts like these are essentially intended to professionalize a particular group of participants with the intent of excluding others from appearing as practitioners before international courts and tribunals. I can say very clearly that for the individuals participating in the Study Group, that was not the intention at all and that is why the approach was to be flexible in outcomes.

The Hague Principles are divided into seven sections. I will briefly touch on each one and illustrate one or two examples of the kinds of issues that arose. Section I deals with the scope of application. We have limited our approach to any person discharging the functions of counsel by representing, appearing on behalf of, or providing legal advice to, a party in proceedings before an international court or tribunal. How-

ever, it is irrelevant whether or not the person has legal training or is admitted as a member of a bar association because we were concerned not to add – through the back door – a requirement of legal training or licensing for those international courts and tribunals: they have a long and distinguished tradition of having senior academics or other non-professionally qualified individuals appear before them. We used the phrase 'an international court or tribunal' and there was a lot of debate as to whether that ought to include international criminal tribunals, given that they have their very own distinguished and specific sets of principles and rules. In the end, we decided not to exclude such international courts and tribunals, and standing and *ad hoc* tribunals, as well as UNCITRAL and other arbitration tribunals in which one or more of the parties is a State. The desire was, however, to exclude the application of the Hague Principles from purely commercial arbitration, which has its own approach and in which sovereign States are usually not involved as such. We could not reach detailed agreement, however, on the relationship between (1) national bar rules, (2) the specific rules of the particular court or tribunal (e.g. ICTY, ICC) and (3) the minimum international standards we were developing. This issue raises many complexities. Paragraph 1.3 is a compromise of these views. Subject to principle 5.1, a counsel has a duty to ensure, so far as possible, compliance with the Hague Principles and proceedings before an international court or tribunal and with such national ethical rules as may be applicable to him or her. That was a contentious issue, because views were deeply divided about which duty takes priority in the event of a conflict between a national principle and an international principle. We did not think it was our job to try to reconcile that difference and impose any final view.

We then moved on to general principles. They may seem to be rather 'bread and butter' to anyone who is a member of a national bar, but for others who are not members of national bars it may be that articulating even these minimum principles is a step too far! One example is in paragraph 2.1, which sets out a number of principles on which in the end there was agreement, such as the fair administration of justice. The counsel has the duty of loyalty to his or her client consistent with a duty to the international court or tribunal to contribute to the fair administration of justice and the promotion of the rule of law. The words that caused difficulty were 'with a duty to the international court or tribunal'. Imposing such a duty on counsel in the discharge of his or her obligations was controversial, which came as a surprise to me given the English tradition that I am familiar with. In the English system, if you

are a lawyer, you are an officer of the court, and as a barrister or a solicitor you have a duty to the court or tribunal, not only to the client. In the event of a conflict between the two, it may well be your obligation to court – and to the system promoting the rule of law – that overrides. Some in the Study Group took a different view, namely that a counsel's obligation was exclusively to the client. In this context, you begin to see that very different outcomes are possible when an individual appears before a court and receives a communication that includes confidential material. In my system, I have an obligation to the court, I must comply with that obligation and that means I cannot permit myself to have any access to, or even sight of, confidential material that should not be made available to a counsel. I cannot read it, I have to destroy it immediately, I cannot take cognisance of what is in it, and I cannot act on it in any way because to do so would be to violate my obligation to the institution. I certainly cannot share it with the client. This situation illustrates the very difficult balance, which goes to the heart of the fundamental issue, between the interests of the parties, on the one hand, and those of the court or tribunal, on the other hand. That, of course, has significant implications for the conduct of proceedings.

Section 3 of the Principles addresses relations with the client. Reading this section on its face looks blindingly straightforward. Regarding loyalty, section 3.1 states that counsel shall loyally discharge his or her professional duties in the best interest of the client, placing those interests before his or her own or those of any third party to the proceedings. Yet this section goes to the heart of an example I mentioned at the outset: what is counsel to do faced with a divergence between the interest of the party appearing before the proceedings and the interest of the entity that is paying the lawyer's fees on behalf of that party? Section 3.1 seems to very clearly say that a lawyer's obligation is to the party before the proceedings; that is what is meant by the client.

Regarding professionalism, counsel must discharge his or her professional duties competently, with integrity, diligence and efficiency, and with a view to avoiding unnecessary expense or delay. Again, it seems like boilerplate language, yet in my experience issues frequently arise, not least as to the costs.

Section 4 addresses conflicts of interests. This is a problematic topic about which reasonable people may have very different views. The main principle is that a lawyer cannot represent two or more clients in the same proceeding if there is a reasonable risk of a conflict between the interests of those clients. I am not going to mention any particular cases, but we all know of situations where that happens. I would like to

draw your attention to paragraph 4.3.4 because it highlights an area of very real difference. 4.3.4 provides that the personal interests of counsel create an impermissible conflict where he or she has served as a judge or other officer of the international court or tribunal within the previous three years or such other period as the court or tribunal may establish by its rules. We thought it fair to proceed on the basis of the approach taken by the International Court of Justice a few years ago in a new practice direction in saying, absolutely rightly in my view, that an individual cannot serve as an *ad hoc* judge at the same time as he or she acts as counsel.[2] This practice was taking place until very recently, and it seems blindingly obvious now that it creates a perception of conflict. The perception of conflict exists not in the sense that the person is unable to do both jobs, or would be biased in doing both, but applying the 'man or woman on the Clapham omnibus' test: a reasonable outside observer of that situation would form a view that there could be a conflict.

What the words in paragraph 4.3.4 mask is a real and ongoing difference of opinion and we, wisely I think, did not want to express a view on that issues. When one moves outside the world of standing courts and tribunals, which have their own dynamic, into *ad hoc* proceedings and in particular into the world of arbitration, is it permissible for one person at the same time to serve as arbitrator in a case involving the interpretation of fair and equitable treatment, most favourite nation clause, umbrella clauses, or expropriation, and at the very same time, act as counsel making arguments in relation to precisely the same legal terms? Speaking for myself, and recognising that some of my closest colleagues and friends take a different view, I find it difficult to imagine that I could sit in the morning and draft an arbitral award on one of these complex and controversial issues, and then in the afternoon, prepare a pleading or an oral argument on the same issue without in some way muddling up my two roles. Yet the Principles do not impose a view: the chosen formulation is balanced and limited in scope.

Section 5 addresses relations with international courts or tribunals. This is also a delicate issue because the international legal community is very small. Many involved in the world of international law are involved in cases working on opposite teams, or on the same team, or appearing before each other. It is very possible, either inadvertently or by design, to

[2] ICJ Practice Directions VI and VII (as amended on 20 January 2009) <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (14 February 2011).

have communications regarding those matters which would be, in many of our views, inappropriate communications. But not everyone holds that view. I give out to students in my LLM course at UCL on International Courts and Tribunals an excellent article by Alain Pellet, published by the British Institute of International Comparative Law, in which he describes an occasion in which he conversed with a judge of the International Court of Justice, in mid-proceeding.[3] To an English barrister, this conversation is not the norm, as we are required to avoid any such situation. But in other systems it must be recognised that a different approach may be taken. The Study Group was acutely aware of the need to avoid imposing a particular result or value system, there are different approaches to these issues.

At the end, we cut out section 8, which dealt with enforcement or application of the Principles and minimum standards. It attempted to address situations where a lawyer comes across something inappropriate. What is she or he to do? Do you do nothing? Do you go and complain to the court or tribunal? To the national bar system of the individual concerned if that person is a member of the system? What if the person is not a member of a national bar? What do you do then? What mechanisms exist? These are key questions, and they raise complex possibilities. Yet in the end the Study Group decided, I think wisely, that it was not for a set of principles governing the ethical standards of counsel to impose on any court or tribunal a particular modality or mechanism for dealing with this issue. That said, there is a need to have an open mechanism to address such situations. The mechanism must be open in the sense of knowing what situations allow a party that comes across some things that are somehow inappropriate or questionable or on which it needs guidance, to go to the court or tribunal to obtain it or to raise a complaint. As matters currently stand, such a mechanism does not exist in most of the tribunals that I appear before, and therefore counsel do not know what they are supposed to do. It would be helpful to counsel if the judges on international courts and tribunals could begin the process of reflection on how to put in place appropriate procedures to ensure that the higher standards of ethical conduct are met at all times in the conduct of international proceedings.

In closing, I would like to emphasise that the Hague Principles are only intended to provide a starting point on minimum standards. The guide-

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[3] A. Pellet 'The Role of the International Lawyer in International Litigation' in C. Wickremasinghe (ed.) *The International Lawyer as Practitioner* (BIICL London 2000) 147–62.

lines are meant to spark a debate on what sorts of international courts and tribunals we wish to have, and how we want them to function. It is about ensuring the highest standards of propriety in proceedings before international courts and tribunals. When word gets out, to practitioners in particular, but also to the media and to the general public, about certain situations taking place in international proceedings, it may have the effect of undermining the authority of the courts and tribunals. The intention in raising these issues is to buttress and to strongly support the authority of all of these bodies, and not in any way weaken them, by ensuring that everyone who appears before such an institution is subject to some minimum standards of ethical practice.

I would like to thank you for inviting me to speak today, and would also like to extend my gratitude to all of the members and colleagues working on the Study Group for what was a delightful and collegial working experience.

ANNEX

The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals

The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals:

Convinced that the identification of clear and transparent principles of general application will contribute to the maintenance of the highest standards of professional conduct for counsel in proceedings before international courts and tribunals with a view to ensuring the integrity, justice and fairness of the international judicial process;

Conscious of the need to provide courts and counsel with practical guidance in order to resolve the ethical questions which can arise in reconciling counsel's duties to the court and to their client;

Recognising that general principles for counsel are a useful and necessary complement to the Burgh House Principles on the Independence of the International Judiciary 2005;

Noting the United Nations Basic Principles on the Role of Lawyers 1990; the relevant procedural rules of the principal international courts; ethical standards adopted by the International Bar Association and the Council of Bars and Law Societies of Europe and other international rules and standards on the ethical standards of the Bar;

Mindful of the special challenges faced by counsel in proceedings before international courts and tribunals in view of the non-national context in which they operate and differing national ethical rules;

Noting that these Principles are not intended to displace any special provision made in the ethical rules of a particular international court or tribunal;

Recognising that each international court and tribunal has its own characteristics and functions and that each international court may need to adapt principles to fit its particular circumstances and practices;

Conscious that international courts and tribunals have an inherent power and duty to conduct the proceedings before them in a manner that ensures that the parties are treated fairly and with equality and may decide to secure this objective by making procedural or other orders or decisions concerning the role and conduct of counsel;

PROPOSES the following Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals:

1. Scope

1.1 The Principles apply to any person discharging the functions of counsel by representing, appearing on behalf of, or providing legal advice to a party in proceedings before an international court or tribunal, however such person may be described, and whether or not the person has professional legal training or is admitted as a member of a bar association or other professional body.

1.2 'International court or tribunal' refers to a court or tribunal created under and governed by international law, including criminal and non-criminal courts, whether standing or *ad hoc*, and, as appropriate, to an international arbitral tribunal in a proceeding in which one or more of the parties is a state.

1.3 Subject to Principle 5.1, counsel has a duty to ensure, so far as possible, compliance with these Principles in proceedings before an international court or tribunal and with such national ethical rules as may be applicable to him or her.

2. General Principles

Counsel shall strive to carry out their duties in a manner which achieves compliance with a number of core principles, subject to the need to strike a balance between them in particular situations:

2.1 *Fair administration of justice*: Counsel has a duty of loyalty to his or her client consistent with a duty to the international court or tribunal to contribute to the fair administration of justice and the promotion of the rule of law.

2.2 *Independence*: Counsel shall maintain independence of conduct in the performance of his or her duties and shall act without regard to personal interests or external pressure.

2.3 *Professionalism*: Counsel shall discharge his or her professional duties with integrity, diligence, efficiency and with a view to avoiding unnecessary expense or delay.

2.4 *Confidentiality*: Counsel shall respect the confidential character of any information imparted to him or her in confidence in the litigation.

3. Relations with the Client

3.1 *Loyalty*: Counsel shall loyally discharge his or her professional duties in the best interests of the client, placing those interests before his or her own or those of any third party to the proceedings.

3.2 *Integrity*: Counsel shall not engage in any activity for a client, nor allow any other person to engage in any activity on counsel's behalf, that he or she reasonably believes to be criminal, fraudulent or otherwise in conflict with these Principles. Counsel shall not advise or assist a client to engage in conduct that he or she knows or ought to know is criminal or fraudulent or otherwise in conflict with these Principles.

3.3 *Professionalism*: Counsel shall discharge his or her professional duties competently and with integrity, diligence and efficiency and with a view to avoiding unnecessary expense or delay. Professionalism denotes both the requisite skill and the ability to dedicate the time and resources necessary to perform the required duties.

3.4 *Confidentiality*: Without prejudice to the rules of an international court or tribunal, counsel shall not disclose any information communicated by the client to counsel in a professional capacity unless authorised to do by the client. This duty applies in preparation for and during the proceedings and continues after their conclusion.

3.5 *Acceptance*: Counsel shall not accept a case if such acceptance will, or will be likely to, result in a violation of any of these Principles.

3.6 *Withdrawal*: Counsel may withdraw from a case where good cause for withdrawal exists, including a failure by the client to pay fees in a timely manner. Counsel exercising such right of withdrawal shall provide the client with reasonable notice.

4. Conflicts of Interest

This Principle identifies situations in which counsel may be precluded from representing a client before an international court or tribunal by

virtue of the conflicting interest which counsel may have arising from his representation of another current or former client, a third party, or his own interests:

4.1 Counsel may not represent two or more clients in the same proceedings if there is a reasonable risk of a conflict between the interests of those clients.

4.2 Counsel may not represent a new client in proceedings where a former client is party to the same or closely related proceedings and there exists a material risk of breach of confidentiality, except with the express authorisation of the former client.

4.3 The personal interests of counsel create an impermissible conflict where he or she:

4.3.1 has personal links to another party that might create a reasonable risk of a conflict of interest;

4.3.2 has a material personal, professional or financial interest in the outcome;

4.3.3 has a reasonable expectation that he or she may be required to give evidence in the proceedings as a witness of fact;

4.3.4 has served as a judge or other officer of the international court or tribunal within the previous three years or such other period as the court or tribunal may establish by its rules; or

4.3.5 has previously dealt with the case in a judicial capacity.

4.4 Notwithstanding Principle 4, counsel is not precluded from acting in a case in which he or she has made appropriate disclosure in writing of the facts relevant to the Principle on the basis of which the parties have given their express consent.

5. Relations with the International Court or Tribunal

5.1 Counsel shall abide by the rules of conduct, orders and directions of the international court or tribunal.

5.2 Counsel shall act in a manner that is conducive to the fair conduct of proceedings.

5.3 Counsel shall at all times address the international court or tribunal in a respectful manner.

5.4 Except as permitted by these Principles, when representing a client in a pending matter a counsel shall not communicate about the sub-

stance of the proceedings with any member of the international court or tribunal outside the presence of opposing counsel. Notwithstanding the foregoing, such communication may be permitted if:

(a) authorized by the rules or orders of the international court or tribunal;

(b) the communication is in writing and opposing counsel receives a copy of the communication at the same time as the international court or tribunal; or

(c) where permitted by the international court or tribunal, there is express agreement by all counsel and parties to such communication.

5.5 Counsel shall exercise appropriate caution in his or her personal contacts with the judges, officers and staff of the international court or tribunal, in particular in relation to any pending case. Any such contacts should be conducted in a manner that is compatible with the exercise of an independent judicial function and that may not affect or reasonably appear to affect independence or impartiality.

6. Presentation of Evidence

6.1 Counsel shall present evidence in a fair and reasonable manner and shall refrain from presenting or otherwise relying upon evidence that he or she knows or has reason to believe to be false or misleading.

6.2 Counsel may engage in pre-testimonial communication with a witness, subject to such rules as the international court or tribunal may have adopted.

6.3 Counsel shall comply with the procedural rules of the international court or tribunal when presenting evidence.

6.4 Counsel shall comply with the rules and orders of an international court or tribunal regarding the confidentiality of the proceeding or with any other applicable laws and regulations regarding the confidentiality of the proceeding.

7. Relations with Others

7.1 Counsel shall at all times treat each other, as well as witnesses, third parties, experts and officers of the international court or tribunal, with due respect, courtesy and dignity.

7.2 Counsel shall use best endeavours to cooperate effectively with each other.

7.3 Counsel shall respect any conditions attaching to correspondence received from counsel for the opposing party, including confidentiality.

7.4 Counsel shall not engage in any direct communication with the opposing party, where that party has retained counsel, except with the latter's consent or by order of the international court or tribunal.

International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals[1]

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[1] The Hague Principles on Ethical Standards before International Courts and Tribunals are issued on the authority of the Co-Chairs and members of the Study Group. They reflect the discussions that took place in the Study Group as a whole, and have been the subject of extensive review, consultation and comment. The members participated in the Study Group in their personal capacity. Additionally, the Study Group has benefited from input from advisers, also acting in their personal capacity. The content of the Principles should not be attributed to any individual member of the Study Group or be taken as representing the view of any institution to which anyone associated with the Study Group's work may be affiliated.

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27 September 2010 (Final)

*Comment by Antony Aust**

Thank you, Rüdiger Wolfrum. First of all, I have an 'advertisement' for Oxford University Press (OUP). My article on advisory opinions was published in the Journal of International Dispute Settlement, published by OUP in February 2010. I was going to mention this earlier.

I assume that all speakers and listeners here follow ethical principles or will do so if they should appear before an international court or tribunal. Frankly, I do not see an ILA study containing these principles as having a widespread readership, unless various international courts and tribunals adopt these principles, in particular the International Court of Justice (ICJ).

If you already appear before national courts, you should know what to do and what not to do, although there are of course disputes, particularly between American and British lawyers, as to what is right. If you are a counsel before international courts, ask someone who also is; that is obvious.

As far as ethics are concerned, you should act as you would before a domestic court, and never present evidence that you have doubts about: remember *Qatar* (1982). I need not refer in detail to that case, as most

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* Anthony Aust studied law at the London School of Economics (LSE). After 35 years as a legal adviser with the Foreign and Commonwealth Office, he retired in 2002 as Deputy Legal Adviser. From 1988-1991, he was the Legal Adviser of the UK Mission to the United Nations in New York. Afterwards, he advised, *inter alia*, the FCO's United Nations, Middle East and Counter-Terrorism Departments. For the last 10 years, he worked on all the legal aspects of Lockerbie.

In 2007, CUP published the 2nd edition of his *Modern Treaty Law and Practice*. (The first edition [2000] was also translated into Chinese.) He is now working on a 3rd edition. In 2010, a 2nd edition of his *Handbook of International Law* was also published by CUP. He also writes articles, and chapters of books, on international law.

He has taught international law at LSE, University College, London, the School of Oriental and African Studies, Westminster University and Notre Dame (London), and at other universities and institutions in the United Kingdom and abroad. He teaches and writes books and articles on the subject from a practical perspective, in particular how international law can be useful in dealing with actual problems. He is a consultant to law firms, governments and international organizations.

of you know of it. If you do not, ask someone who does know about it and the (failed) attempt to rely on bogus documents.

In other words, never present evidence that you have doubts about. If the evidence is bogus, your reputation may well be harmed. However innocent you are, unless you are very swift of foot you are likely to be tarnished by the matter. In other words, just be honest and accept that some clients may not be as honest as you. Don't put forward a document or argument which you know, or suspect, is false. It is better to resign. Don't worry about resigning, word will get around that you are to be trusted. And that's always a good thing.

Act as if you were trying to persuade a domestic judge. Forget there are one to three arbitrators or 15 judges at the ICJ. They will appreciate your candour. Some of them may well have appeared as counsel before their own domestic courts or international tribunals, and some may even have been judges of those domestic courts.

Some tips. First of all, say what points you are going to make. That goes without saying. Only put forward your better points, don't put forward points that you expect the Court to reject. Do not waste time on weak points, especially those favoured by your clients. It only looks bad if later you have to withdraw that point.

What you say in written advice to your clients may of course have covered some bad points, and makes it clear that the points are bad. So, only run a bad argument if your clients insist upon doing so, but *never* use an *unethical* argument. It's better to threaten to resign. If a bad argument fails, remind your clients (of course in the nicest possible way) of your earlier position and that they were wrong.

If it is clear that many of the judges will not agree with a point of yours, move on to another point, and pretty swiftly. Do not, as we say in English, flog a dead horse ('flog' means 'hit'). If the court includes a judge brought up in French or Spanish tradition and there is simultaneous translation, and you speak French or Spanish fluently (I emphasise fluently), make some of your points in that language, otherwise stick to the language that in international courts these days is often English.

If there is interpretation, whether it's simultaneous or consecutive, speak slowly and give time for the interpreter to finish. So, keep an eye on the interpreters. Do not forget to give a copy of your speaking notes, or your statement, to them as well before you start speaking.

I've only got one comment to make on the Hague Principles, which I was grateful for and have read. In paragraph 1.2 the last word 'state' is spelled with a small 's'. Does this mean a state, such as Bavaria, of a fed-

eration? Or, does it mean (as I assume) a State (capital 'S') like Germany? I'd like to know the answer. Surprisingly, it is important in practice given the number of federations that there are. I think Philippe Sands agrees.

I will end by telling you a true story of the late Arthur Watts, a superb counsel who was very fond of stories. At the last minute, he was asked to join the French team that was arguing against the reopening of the two nuclear cases[1] in the ICJ between Australia and France and New Zealand and France. The French team wanted a British advocate to address the English-speaking members of the ICJ. But, unbeknown then to Arthur, the French team had decided, instead of their traditional court robes, to indicate that they did not think the ICJ had any jurisdiction by wearing just ordinary suits. But, for Arthur this was first time he had appeared before the ICJ, so he already bought a British wig and a gown, as is normal when British counsel address the ICJ. When he then heard that the members of the French team were only going to wear suits, he went and asked them whether they minded if he wore his wig and gown? And they said: no, not at all; wear whatever you think is appropriate. So, he wore his wig and gown.

[1] *Nuclear Tests (Australia v. France)* [1974] ICJ Rep. 253; *Nuclear Tests (New Zealand v. France)* [1974] ICJ Rep. 457.

Discussion

C. Tomuschat: I want to abuse this opportunity to introduce another idea because you have turned this topic into an exercise in deontology for lawyers. I agree with all of that, but little has been said about the contribution of lawyers to establishing, to developing the law. In that regard, lawyers are extremely important, also before international courts and tribunals. We many times praise courts and tribunals for their magnificent contribution to progressive development of the law, but often those tribunals do not do very much, they just take up ideas which have been presented to them by the lawyers acting before them. Many times, it does not really appear from the judgment that the main ideas really come from the lawyers who have appeared before the tribunal. I can't give you now any precise example from international jurisprudence, but I could give examples from our constitutional jurisprudence, where it is a very frequent occurrence that the court takes up currents which have manifested themselves in the literature and which were presented to them by legal counsel. It's the same before international courts and tribunals. In that regard, sometimes the role of the lawyer is not really appreciated at its full value. This role is much bigger than that of a servant, a docile, humble servant of the court. He is someone who really actively participates in shaping the law.

M. Bothe: Christian Tomuschat is right. There are good examples for what he says, many from our Constitutional Court. I have a different and practical question, namely the relationship between the party and the counsel. What is the role of the counsel in relation to the behaviour of the party? For instance, there are proceedings which, according to the rules of procedure, are confidential. But of course your party, your client has the right to know. So the party has your brief, which is confidential. Now, the party, not the counsel, meets a journalist. The person may not even have told the journalist, the brief was just lying around, and the next day, the content of your confidential brief appears in 'Le Monde'. Is that a question of your professional or unprofessional behaviour as counsel? The second type of question, which is more related to what Anthony Aust has said, concerns the choice of arguments. There, too, you have a question of the relationship between the counsel and the party. The party has different reasons to like or to dislike cer-

tain types of argument, you have a professional conscience, you know which argument sells well to that particular court, which must not necessarily coincide with the subjective preference of your party, but probably with the true interest of your party because this increases the chance of the party to win. How do you deal with these questions?

F. Pocar: I wish to congratulate Philippe Sands on his very interesting presentation, and apologize to him, because my participation in the work of his ILA Group as an advisor has been very poor, in particular in its last phase. I share the concern which has been flagged, that it is essential for courts to take up the issue of monitoring compliance by counsel with certain ethical rules, because this question is within their competence. If we agree that compliance of counsel with ethical rules is critical for the fair administration of justice, and that the primary responsibility for a fair administration of justice lies with the court, it is an inevitable conclusion that it is for the court to monitor and to ensure that counsel behave accordingly, in compliance with ethic standards. While this syllogism may appear uncontested, the question remains, to what extent should the monitoring function of international courts be exercised. With respect to certain issues courts may indeed not be in the best position to monitor counsel's behaviour and in those instances, such monitoring should be left to bar associations, whether at the domestic or the international level. There are however a number of areas, such as some features of the presentation and treatment of evidence, where courts may be an appropriate and effective monitor. The experience of international criminal courts in that respect may already provide certain guidance. It goes without saying that criminal courts are assisted by the fact that counsel appearing before them must be members of domestic bars. Thus, they have in any event to comply both with the rules of the national bar and with the rules of the court. A certain degree of co-operation between international courts and national bar associations is critical.

Already, in this context, the ICTY and the ICTR have not only exercised control but even imposed sanctions when counsels do not comply with international rules of conduct. By way of example, with respect to the obligation not to cause unnecessary delays that may affect the proceedings – Principle 2.3 – the tribunals have in most cases a means of sanctioning violations by counsel, especially when the accused is entitled to legal aid and counsels are paid with public funds. One of the sanctions adopted results in the withholding of payment of fees in cases of frivolous activities that go against the principles of a fair and speedy

trial. Additionally, the decisions imposing these sanctions are transmitted to the national bars, in order that the appropriate sanctions are concurrently adopted in accordance with domestic legislation. Last but not least, the ICTY and ICTR have considered that they have an inherent power to commence contempt proceedings in appropriate cases, for instance, if counsel breaks rules of confidentiality, bearing in mind that a contempt procedure may lead to the imposition of a fine and even a sentence up to some number of years in detention, in serious cases. Thus, some practice in this field has already developed so far, but this practice is probably restricted to the international criminal courts. There is still a need to strive for a more general approach for the implementation of ethical standards for counsel appearing before any international jurisdiction.

F. Morrison: I am rising to ask the question of the relationship between 1.3 and 5.1.: 1.3 says you must comply with all the rules of your local bar and 5.1 says you must comply with the rules of the court. If adopted I agree fully with that the ideal solution is for the court to adopt rules that will govern all lawyers, as the criminal tribunals have done. But do you really mean that you have to comply with both? Now I understand that you as a British barrister feel that way. But to some extent, when you go into an international tribunal, have you not put yourself into a situation in which you are subject to the particular rules of that operation? And if it expressly finds certain things to be permissible, e.g., contact with court officials, is it not excessive to say: I couldn't do that with the High Court in London, so I can't do it with you? Especially to say that when everybody else is doing it. Does it not create an uneven footing, which means poor representation, which means a violation of the principle of adequate representation? Thank you.

C. Grabenwarter: I would like to come back to exactly this point and I would like to take up a topic that has already been raised this morning: the question of third party intervention. You, Philippe Sands, were mentioning the fact that more and more individuals are appearing before international courts now. Looking at third party interventions, we can see that at least in some parts of international jurisdiction individuals appear in their personal capacity, with personal interests in the outcome of proceedings. Proceedings before the European Court of Human Rights for instance are simply a continuation of domestic proceedings. However, the person who was successful in the proceedings before

the national courts as a matter of course is only a third party in the international proceedings. Hence, the problem arises for the counsel that the principle of equality of arms cannot be guaranteed by the rules of the Strasbourg Court. There is a time limit of twelve weeks to file an application to be accepted as a third party. However, this respite is counted from the communication of the application to the government. The third party is not notified about this. Therefore, in order to be aware of the beginning of the twelve week respite, it is necessary to constantly check the internet, where the fact that the application has been communicated to the government is published. Furthermore, there are a number of other disadvantages for the third party. Whereas the applicant is free to use any language of a Contracting State, a third party has to use one of the official languages. It can only intervene once, at the beginning and the President of the Court enjoys discretion to admit third parties in the interest of the proper administration of justice. Also, whereas the other parties do not have a page limit, the current practice is to set a limit of ten pages for the observations of the third party. Participation of third parties in hearings is limited to exceptional cases.

Therefore my question is directed to both of you, and perhaps you could comment on it from your perspective: Bearing in mind that we are talking of parties to domestic proceedings prior to an individual application, is what I just described in conformity with the principle of equality of arms? Thank you.

A. Koroma: Ladies and Gentlemen, I'd like to agree with Christian Tomuschat and Michael Bothe that the role of counsel in the development of the law has to be recognized. But in fact, it is recognized. The Court is supposed to know the law, however, when counsel appear before the Court it is to present facts as well as legal principles. While this may not expressly be stated in the judgment, when one argument prevails and is reflected in the judgment, that, in my view, is a contribution by counsel to the development of international law. I think that's why this topic jelled with Philippe Sands. So it's not just a question of whether the Court makes or creates law. Counsel, when arguing before the Court on behalf of States or otherwise, and professors, through their writings, contribute to the creation and development of the law. In my view, however, they acquire such status when the Court gives its imprimatur or authority. You take for example a topic in which Rüdiger Wolfrum is interested, maritime delimitation and whether to apply the equidistant, median or bi-sector principle; two learned counsel may express different views of these issues. When the Court accepts one or the

other, obviously the Court accepts or adopts one of the points or principles advanced by one of the parties. In that sense, counsel is contributing to the development of the law. And when this is reflected in the judgment, that's an acknowledgment of counsel's contribution to the development of the law by the judicial application of his or her argument.

S. Golubok: I have a rather technical question to Philippe Sands concerning para. 3.6 of the Hague Principles, which mentions failure of the client to pay fees as a legitimate reason for withdrawal of the counsel from the proceedings. And my question is, how is it compatible with the right to qualified legal assistance in so far as party to the proceedings happens to be an individual? Especially in so far as international criminal tribunals are concerned, where the client pays the fees and then happens to be indigent in the course of the proceedings or because of the proceedings. As I understand, it's exactly what has happened in the *Bemba* case before the International Criminal Court. Whether this principle is qualified by the consideration of the right to qualified legal assistance as a human right?

J.-P. Cot: Just a few comments. First, I congratulate Philippe Sands for having … *pour avoir réussi l'impossible*. The subject matter is so complicated, there's such a variety of tribunals and of actors, you couldn't do anything better than what you did. The result may seem modest to some in this room. But I think it really was quite a considerable achievement, given the assignment. On the variety of tribunals, I was one of those who were not very enthusiastic on including criminal courts. These tribunals operate with completely different rules, not only internal rules, but rules in relations with counsel and in relation with the whole proceedings. To try to unify the tribunals and formulate common rules to tribunals with completely different authority on counsel is quite an impossible task. As to the counsel themselves, you mentioned different types of counsel. There are other ones who do create other great difficulties. Experts for instance, expert counsels, as opposed to expert witnesses. They have a different relation, and problematic at that, with the clients. Another issue is that of civil servants. I am not alluding to French professors who aren't members of the bar. You have agents, naturally. You also have the civil servants who appear for their government as counsel. Do these rules apply to them? Can we ask of a civil servant to disregard the instructions of his government? We have had to sweep these complicated issues under the carpet to get to

some kind of a result. Given the difficulties, I think we did the best we could. I commend Philippe Sands and Laurence Boisson de Chazournes for their superb leadership and thank the excellent support staff. I hope the back-ground material we were provided with will be accessible online. There is a wealth of information to solve those problems that might not fit neatly into 'The Hague Principles'.

C. Schreuer: I want to revert quickly to the question of costs of legal representation. Both Georges Abi-Saab and Philippe Sands referred to the run-away costs, especially in arbitration. In fact, the sum of two million that you mentioned is rather on the modest side, I've seen much higher.

R. Wolfrum: I've seen 12 millions.

C. Schreuer: I had an interesting brief exchange with Lucy Reed a few weeks ago, at the BIICL Conference in London. Lucy Reed is one of the leading counsel and party representatives in international arbitration, especially investment arbitration. There was a general complaint at the conference about the uncontrolled rise of cost in arbitration. I pointed out that about 80 percent of the cost of an arbitration typically goes to legal representation. And wouldn't it be right to start with legal representation if one wanted to address costs? Lucy Reed seemed rather unhappy with the suggestion, not surprisingly perhaps. She suggested that it would be primarily the duty of the tribunal to control costs and not to allow the parties to make excessive submissions. For instance, she said, she had been in two recent cases in which one tribunal limited post-hearing submission to 30 pages and another didn't. Therefore, in the first proceeding, the post-hearing submission was 30 pages, in the second it was 350 pages. And that obviously makes a difference in terms of costs.

I have myself been in a case where an American law firm would appear at a hearing with an armada of lawyers. When I mentioned this, they said that the client had told them: don't spare any costs. The point of course is that the party that spends most on legal representation is not necessarily the party that actually wins or gets the upper hand. Throwing tons of paper at arbitrators is not going to win your case. But my question is, do you really think that it is the tribunal or court that should intervene and try to cut down cost and control run-away counsel in order to keep costs at a reasonable level?

G. Abi-Saab: I have a kind of far away question, but I want to ask it all the same. A few years ago, not a few years, some years ago, Oscar Schachter wrote an article with the title 'The Hidden Bar of the International Court'. I had a very small role in the ILA group, but all the time I was thinking, disciplining lawyers is self-discipline usually exercised through a professional group. When international adjudication was very limited, there was only one court, the International Court with one or two cases per year, the question did not arise, but the situation has now radically changed. Could we envisage – I mean this is a kind of science fiction if you want – but still, could we envisage an international bar? I understand that for the international criminal courts there is an attempt to that effect, but the question remains. And of course if there is a professional group, then we can envisage more easily a kind of a disciplinary system within it. Thank you.

A. Aust: I think there are only two questions for me. One was from Michael Bothe and another from Abdul Koroma. What if an argument that has not been put to the court but it is one favoured by the court? If it is based on clandestine information, then ethical questions arise. But if you received valid information lawfully, then the question is really one of timing. Do you need to go back to the court saying, 'I think I would like to argue the following'? Before doing so, you really need to speak the client first: does the client want you to argue this? So, that's really a question of timing. If you have already exhausted your time, then it's probably too late to do it, and probably would be unfortunate. If an argument is bad – and I've come across bad arguments – don't put it forward. But, if you are going to put it forward, it's really not for the court or tribunal to say if it is a bad argument. Just presenting an argument for the purpose of getting a fee is unethical. Thank you.

P. Sands: Thank you. I must say I'm gratified by the questions and the interest shown. Let me deal with each briefly. Christian Tomuschat's question, buttressed I think by Abdul Koroma, is obviously important. The relationship between counsel and bench is a complex one: it's an iterative relationship in which things are said and unsaid, particularly when counsel know the bench. A great deal of attention is paid to the individual writings and expressions of a judicial opinion by the court. As I tell my students, who may not really be aware of this from reading the literature, in preparing for oral arguments before a court like ITLOS or the ICJ, you put a huge amount of time into reading and reviewing separate opinions, dissenting opinions, and the judgments to

get a sense of what motivates each particular judge. You are not only making arguments to the bench as a whole; you are making arguments to each judge. And Abdul Koroma will be aware that there are moments in a hearing where the counsel will look at a particular judge, will engage with a particular judge. That is the reality. It is also right that counsel understand their responsibility to assist the court or tribunal, in particular by dealing with difficult issues, not avoiding them: our responsibility is to engage with them head on, try to find sensible solutions to the difficult issues. That is part of the positive duty of counsel. And you find many examples. I wasn't involved in the *Kosovo* case, so I can talk more freely about it. From what people told me about the hearings, and also I read then the transcripts, there was apparently a decisive moment, when James Crawford addressed the Court and said (I paraphrase): 'I declare independence for South Australia, nothing illegal about that, is there?' And that's basically what the Court has said in its opinion: anyone can stand up and declare independence. It seems to have been a masterful piece of advocacy, because it gave the Court in a sense a way to go.

Michael Bothe has asked a good question, which has been answered in part by Antony Aust. Yes, absolutely counsel has a responsibility with the parties. I mean if the parties are going off doing things that are inappropriate, as counsel you have a responsibility to remind them of their responsibilities to the court or tribunal, and if they cross a red line then you have no option but to bail out. As far as I can recall, I have resigned from two cases. That raises a difficulty, because you can't tell the court or tribunal why you're resigning without undermining the interests of the State you are representing, so you're stuck in a position where you have to maintain your silence. You just have to disappear, because it could be unethical to explain publicly why you resigned. That's part of your responsibility. So you've just got to take the hit. But yes, I think there's a particular responsibility not to associate yourself with really hopeless arguments. I recall that Pierre-Marie Dupuy, James Crawford and I did resign collectively from a case because the State concerned wanted us to make an argument that we were simply not willing to make. We said: 'We will not be associated with that argument, and if you insist that we make it we will have no option but to resign'. And we did. And I think you just have to take the responsibility to do that. Fausto Pocar reminds us that it's for the courts to take up the issue and that they do so and I've made the point already as to how that could be done and I'll come back. Someone else asked I think another question about that I'll come on to very briefly. Fred Morrison asked

about paragraphs 1.3 and 5.1 of the Hague Principles. They need to be read very, very carefully. 5.1 is about rules of conduct, orders and directions. At the ICJ, there are no rules of conduct. The Court doesn't adopt orders and doesn't adopt directions on counsel behaviour, at least up until now. And so you're left back just with 1.3. But if there are rules of conduct, as in criminal proceedings, that trumps. You're in front of a court or tribunal, you accept the rules of that court or tribunal. And if those rules are inconsistent with your national bar rules, my view is the national bar rules are most likely going to be trumped by the international rules.

On the ECtHR question, I think there is a distinction between an intervener and a party. If someone wants to intervene enough, they will find someone to represent them, who can deal with the particular language in which the case is structured. So I don't think that is per se a problem for equality of arms. On paragraph 3.6, a question was raised. It says 'may withdraw', it doesn't say 'must withdraw'. I think it does raise an issue, but here again, this is where paragraphs 1.3 and 5.1 come in. If the ICTY has a clear rule, or the ICC has a clear rule in the *Bemba* case that you've got to carry on representing a client who refuses to pay, that rule is going to trump. There's a limit obviously for how long that can go on for, but we thought through each of those issues. Jean-Pierre Cot, I want to express my gratitude, because he was actively involved, so he is really just thanking himself for his excellent work! And of course, he comes from the French tradition and I come from the English tradition, so we may have differences on some issues of deontology and related and other things. As to costs, Christoph Schreuer raises a question: the $2 million was for a jurisdiction phase with no hearing. So, yes, US$12 million, we've seen figures like that. The only way courts and tribunals can cut in on that is on costs issues. It's at the point of making a costs award at the end of the process. And that's of course what happens in a lot of domestic courts. It doesn't happen at ITLOS, or the ICJ. It almost happened in one ITLOS case, I believe, there was some thought that one State perhaps had not behaved so impeccably on some issues, but nevertheless, in the end there was no cost order. My view? Tribunals should increasingly use the possibility of making costs orders to bring discipline to the process; we've seen costs escalate, and at the end of the day if hopeless arguments are made and another party is put to great cost then – in the right cases – I don't see one would exclude a costs order. And finally, Georges Abi-Saab: can we envisage an international bar? Absolutely. I would say with certainty it will happen, but probably not in my lifetime. In international litigation

we are in the middle ages, rather as Professor Sir John Baker, the leading English legal historian, describes to me was the situation in England hundreds of years ago. If I were a betting man, I would wager that one day there will be an international bar and you will have to be a member of that bar to appear before the International Court of Justice.

Panel IV: International Courts as Lawmakers

International Courts as Lawmakers

*Presentation by Armin von Bogdandy and Ingo Venzke**

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This is a shortened version of the introductory and concluding chapters in A. von Bogdandy and I. Venzke (eds) 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 5 GLJ 979–1004, 1341–70.

R. Wolfrum and I. Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 239, DOI 10.1007/978-3-642-34967-6_5,

The increasing number of international judicial institutions, producing an ever-growing stream of decisions, has been one of the dominant features of the international legal order of the past two decades. The shift in quantity has gone hand in hand with a transformation in quality. Today, it is no longer convincing to only think of international courts in their role of settling disputes.[1] While this function is as relevant as ever, many international judicial institutions have developed a further role in what is often called global governance. Their decisions have effects beyond individual disputes. They exceed the confines of concrete cases and bear on the general legal structures. The practice of international adjudication creates and shifts actors' normative expectations and as such develops legal normativity.[2] Many actors relate to international judicial decisions when they devise or justify their actions, in ways similar to legal bases recognized as formal sources of international law.[3]

Although international courts have always been producing such normativity, not only the sheer volume, but also the systematic fashion in which some are developing a body of law of general relevance, points to a change in kind.[4] At the same time, we find that neither theory nor doctrine has yet adequately captured this aspect of international judicial activity. We suggest that the inevitable generation of legal normativity in the course of international adjudication should be understood as judicial lawmaking and hence as an exercise of public authority. Equipped with this understanding, we hope to draw attention to the legitimatory implications of international judicial lawmaking, placing the project in

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1 Note that we follow a broad understanding of the term 'court'. It covers arbitral tribunals as well as other institutions fulfilling a court-like function such as the WTO panels and Appellate Body even if they change in composition and do not formally *decide* a case. See also Project on International Courts and Tribunals <http://www.pict-pcti.org> (26 May 2011) (adopting an equally broad understanding of 'court'); cf. C. Romano 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 NYU JILP 709.

2 The creation and stabilization of normative expectations is considered by many, otherwise diverging, contemporary theories as the core function of law, see J. Habermas *Between Facts and Norms* (1st edn. Blackwell Publishers Oxford 1997) 427; N. Luhmann *Das Recht der Gesellschaft* (Suhrkamp Frankfurt 1995) 151.

3 Note that Art. 38 of the ICJ Statute refers to judicial decisions as 'subsidiary means for the determination of rules of law', we discuss this qualification in *infra* section I.3 (notes 59–61).

4 Cf. Y. Shany 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 EJIL 73.

the context of broader investigations of legitimate governance beyond the nation state.[5] Above all, we explore how this judicial lawmaking can be linked to the values, interests, and opinions of those whom it governs, i.e. its democratic credentials.

The phenomenon of international judicial lawmaking is omnipresent but most visible in legal regimes in which courts have compulsory jurisdiction and decide with sufficient frequency to allow for a *jurisprudence constante* to develop. Important examples include the judicial creation of the system of investment law, the development of Art. XX GATT into incisive standards for domestic regulatory policy, the creation of procedural obligations in policy-making, the lawmaking potential of proportionality analysis, the prohibition of amnesties in human rights law, the criminalization of belligerent reprisals in international humanitarian law, the doctrine of *erga omnes* in general international law, and the self-empowerment of courts, be it through proportionality analysis, through provisional measures, or through the pilot judgment procedure of the European Court of Human Rights.[6]

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[5] It follows the study by A. von Bogdandy et al. (eds) 'The Exercise of Public Authority by International Organizations' (2008) 9 GLJ Issue 11; *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer Heidelberg 2010). See further I. Venzke *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP Oxford 2012).

[6] See respectively the contributions in A. von Bogdandy and I. Venzke (eds) 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12 GLJ Issue 5 by: S. Schill 'System-Building in Investment Treaty Arbitration and Lawmaking' 1081–1110; I. Venzke 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' 1111–40; M. Ioannidis 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law' 1175–1202; T. Kleinlein 'Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law' 1141–74; C. Binder 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' 1203–30; M. Kuhli and K. Günther 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals' 1261–78; K. Oellers-Frahm 'Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function' 1279–94; M. Fyrnys 'Expanding Competences by Judicial Lawmaking – The Pilot Judgment Procedure of the European Court of Human Rights' 1231–60; M. Jacob 'Precedents: Lawmaking Through International Adjudication' 1005–32.

Perhaps the most noticeable legal and institutional development has occurred in international economic law. For example, international investment agreements usually contain standards that have only gained substance in the practice of adjudication. Fair and equitable treatment, one such standard, started as a vague concept that hardly stabilized normative expectations with regard to what would legally be required from host states. Today, there exists a rich body of investment law on the issue, shaping and hardening the standard.[7] International arbitral tribunals have decisively regulated the relationship between investors and host states and have developed and stabilized their reciprocal expectations.[8]

Such judicial lawmaking is not just a collateral side effect of adjudicatory practice. Corroborating evidence for this comes from former *General Counsel* of the World Bank Aron Broches, who pushed for creation of the International Centre for Settlement of Investment Disputes (ICSID) in the early 1960s against the backdrop of failed international negotiations regarding the applicable material law. He advanced the programmatic formula 'procedure before substance' and argued that the substance, i.e. the law of investment protection, would follow in the practice of adjudication.[9] And so it did, as judge-made law, deeply imbued with the functional logic that pervades the investment protection regime. In the wake of its economic crises, Argentina for example felt the painful squeeze and had to realize how narrow the judicially built body of law had left its room of manoeuvre for maintaining public order without running the risk of having to pay significant damages to foreign investors.[10]

Such judicial lawmaking is difficult to square with traditional understandings of international adjudication, which usually view the international judiciary as fixed on its dispute settlement function. Many textbooks of international law present international courts and tribunals, usually towards the end of the book, simply as mechanisms to settle

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[7] S. Schill 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in S. Schill (ed.) *International Investment Law and Comparative Public Law* (OUP Oxford 2010) 151.

[8] Schill (note 6).

[9] R. Dolzer and C. Schreuer *Principles of International Investment Law* (OUP Oxford 2008) 18.

[10] M. Hirsch 'Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective' in T. Broude and Y. Shany (eds) *The Shifting Allocation of Authority in International Law* (Hart Oxford 2008) 323 (344).

disputes, together in the same chapter with mediation and good offices.[11] They focus only on part of the picture and shut their eyes to the rest. Even if international courts are admitted or expected to contribute to the development of the law, it remains either obscure what is meant by development or development is equated with clarifying what the law is. Our interest in judicial lawmaking is specifically triggered by the observation that judicial practice is creative and that it may have considerable consequences for the regulatory autonomy of states, thus affecting the space for domestic democratic government. We wish to explore above all the democratic justification of international judicial lawmaking, stating clearly at the outset, however, that international law and adjudication may also serve as devices that can alleviate democratic deficits in the postnational condition.[12] We are not out to categorically mark international judicial lawmaking as illegitimate, let alone as illegal.[13]

It should be stressed that addressing judicial activity as lawmaking does not, as such, entail a negative judgment. Also, quite obviously, insisting, in doctrinal terms, that judges should only *apply* and not *make* the law does not make the phenomenon go away. Judicial lawmaking is an integral element of almost any adjudicatory practice. At the same time, there are different degrees of judicial innovation. Without too much theoretical baggage it is probably easy to see and safe to say that the International Court of Justice's lawmaking impetus differs widely between its *Kosovo* opinion and its *Wall* opinion.[14] We discuss degrees of

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[11] See e.g., M.N. Shaw *International Law* (6th edn. CUP Cambridge 2008) 1010; P. Daillier et al. (eds) *Droit international public* (8th edn. Librairie Générale de Droit et de Jurisprudence Paris 2009) 923.

[12] J. Habermas (ed.) *The Postnational Constellation: Political Essays* (Polity Press Cambridge 2001); S. Leibfried and M. Zürn 'Von der nationalen zur postnationalen Konstellation' in S. Leibfried and M. Zürn (eds) *Transformationen des Staates?* (Suhrkamp Frankfurt 2006) 19; A. von Bogdandy 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15 EJIL 885; Venzke (note 5).

[13] For a fierce and unconvincing argument on the illegitimacy, or, at best, plain futility of international adjudication, see E.A. Posner *The Perils of Global Legalism* (University of Chicago Press Chicago 2009).

[14] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) (22 July 2010)* ICJ Doc. 2010 General List No. 141; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. 136. For pointed commentary on the direction of impact of each opinion, see R. Howse

judicial lawmaking and questions of legitimacy in our concluding contribution. At this stage it may already be noted that the absence of judicial innovation, as it characterizes the *Kosovo* opinion, might actually be no less problematic than more audacious instances of judicial lawmaking.

Our focus does not question the view that international courts are integral parts of strategies to pursue shared aims, to mend failures of collective action and to overcome obstacles of cooperation. International courts frequently do play a crucial role in meeting hopes for betterment and in fulfilling promises vested in international law. But it is a common feature that the successful establishment of any new institution gives rise to new concerns. As many courts and tribunals have in fact become significant lawmakers, their actions require an elaborate justification that lives up to basic democratic premises and that feeds into the development of doctrinal *acquis*. Traditional approaches miss large chunks of reality and are no longer sufficient.

I. The Phenomenon of Lawmaking by Adjudication

1. (Far) Beyond the Cognitive Paradigm of Adjudication

Any argument that investigates judicial lawmaking and its justification would either be nonsensical or plainly pointless if the nature of judgments was that of cognition. The scales handled by *Justitia* would then look like a purely technical instrument that yields right answers. Correct adjudication would have to discover the law that is already given and judicial reasoning in support of a decision would simply serve the purpose of showing the rightness of cognition. Sure enough, few would still advocate a traditional cognitivistic understanding of judicial interpretation as Montesquieu famously expressed it in his metaphoric depiction of a judge or a court as 'bouche de la loi'.[15] And yet, there is still

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and R. Teitel 'Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?' (2010) 11 GLJ 841; L.F. Damrosch and B.H. Oxman 'Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory' (2005) 99 AJIL 1.

[15] See J. Lege 'Was Juristen wirklich tun. Jurisprudential Realism' in W. Brugger, U. Neumann and S. Kirste (eds) *Rechtsphilosophie im 21. Jahrhundert* (Suhrkamp Frankfurt 2008) 207 (216); R. Christensen and H. Kudlich *Theorie richterlichen Begründens* (Duncker & Humblodt Berlin 2001) 26.

a strong view suggesting that the right interpretation may be derived from the whole of the legal material in view of the intrinsic logic of the individual case through the correct application of the rules of legal discourse, considering all pertinent provisions, the context of the respective treaty, its object and purpose, and the whole of the international legal order.[16]

Moreover, there is a strong incentive for judges and courts to maintain such an image of their activity as it forms an intricate part of a prevailing and self-reinforcing judicial ethos: judges apply the law, this is the source of their authority, and whenever the impression gains currency that this is not what they are actually doing, they are usually in trouble.[17] But the obvious gap between the outward show and the actual activity should be overcome by more appropriate theory and doctrine that give a convincing account, both descriptive just as well as normative, of international judicial activity in the 21st century, an account that can also be conveyed in a rather straightforward fashion.

The traditional understanding of international adjudication as nothing but applying given abstract norms to concrete cases at hand has been proved unsound for a long time. It is beyond dispute that cognitivistic understandings of judicial decisions do not stand up to closer scrutiny. From the time of Kant's *Critique* it may hardly be claimed that decisions in concrete situations can be deduced from abstract concepts.[18] It is one of the main issues of legal scholarship how to best define this insight and how to translate it into doctrine. Hans Kelsen famously argued that it is impossible to maintain a categorical distinction between

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16 See International Law Commission 'Third Report on the Law of Treaties' (1964) 2 ILC Yb 5 (53) (assembling testimony for such a view on interpretation). A. Bianchi 'Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning' in P.H.F. Bekker, R. Dolzer and M. Waibel (eds) *Making Transnational Law Work in the Global Economy* (CUP Cambridge 2010) 34.

17 J.N. Shklar *Legalism* (Harvard University Press Cambridge Mass. 1964) 12–13. Consider the ICJ's emblematic pronouncements in *Fisheries Jurisdiction (Great Britain and Northern Ireland v. Iceland) (Judgement)* [1974] ICJ Rep. 3 para. 53; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226 para. 18.

18 I. Kant *Critique of Pure Reason* A 131–48 (Scientia 1982 [1781]); M. Koskenniemi 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 Theoretical Inquiries in Law 9.

law-creation and law-application.[19] More recently, the *linguistic turn* has thoroughly tested the relationship between surfaces and contents of expressions.[20] Building on the dominant variant of semantic pragmatism and its principle contention that the meaning of words has to be found in their use, Robert Brandom, one of the recent figureheads of this stream of thinking, has shown that every decision concerning the use or, which is the same, interpretation of a concept contributes to the making of its content. The discretionary as well as creative element in the application of the law makes the law.[21] He refines this position by suggesting that this moment of volition is tamed by the fact that judges are tied to past practices by the prospective reception of their claims. Pragmatism does not mean that anything goes. Applications of the law in the present have to connect to the past in a way that is convincing in the future.[22] This might allow for a discoursive embedding of adjudication which can be an important element in the democratic legitimation of judicial lawmaking.[23]

This strand of thinking does not detract from the deductive model of legal reasoning. The deductive mode of reasoning, dear to many lawyers, does *not* presuppose the belief in the full determinacy of legal concepts. It is rather based on the principle that judicial decisions must be

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[19] H. Kelsen *Law and Peace in International Relations* (Harvard University Press Cambridge Mass. 1942) 163; H. Kelsen *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Deuticke Leipzig 1934) 82–83.

[20] See R. Rorty (ed.) *The Linguistic Turn: Essays in Philosophical Method* (University of Chicago Press Chicago 1967) (giving the name to this shift in philosophy); R. Rorty 'Wittgenstein, Heidegger, and the Reification of Language' in R. Rorty (ed.) *Essays on Heidegger and Others* (CUP Cambridge 1991) 50 (offering an accessible overview on what it is about).

[21] Brandom argues that 'there is nothing more to the concept of the legal concepts being applied that the content they acquire through a tradition of such decisions, that the principles that emerge from this process are appropriately thought of as "judge-made law"'. R.B. Brandom 'Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms' (1999) 7 European Journal of Philosophy 164 (180).

[22] Brandom (note 21) 181 ('[t]he current judge is held accountable to the tradition she inherits by the judges yet to come'). Cf. J. Liptow *Regel und Interpretation. Eine Untersuchung zur sozialen Struktur sprachlicher Praxis* (Velbrück Baden-Baden 2004) 220–26.

[23] A. von Bogdandy and I. Venzke 'On the Democratic Legitimation of International Judicial Lawmaking' (2011) 5 GLJ 1341.

justified. The reasoning in support of a decision does not serve to show a necessary result but it is burdened with justifying the decision. In this view, Hans-Joachim Koch and Helmut Rüßmann defend the deductive mode of arguing as the central place of judicial rationality. They do not extend their defense to the schema of *analytical* deduction.[24] The deductive mode of reasoning demands that whenever a norm is disputed, the decision in favor of one or the other interpretation must be justified – it needs to be made explicit, to recall the work of Brandom on this issue.[25] In sum, deductive reasoning turns out to be an instrument for controlling and legitimizing judicial power. It regards the modus of *justifying* decisions and not the process of *finding* decisions.[26]

2. Judicial Lawmaking

The creation and development of legal normativity in judicial practice takes place in the context of concrete cases. Judicial decisions settle the particular case between the parties. They apply pertinent norms in view of the facts and legal interpretations presented to them. Owing to the doctrine of *res judicata*, judgments are taken to prescribe definitely what is required in a concrete situation from the parties of the dispute. At the same time, this practice reaches beyond the case at hand.[27] A judgment, its decisions as well as its justification can amount to signifi-

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[24] H.-J. Koch and H. Rüßmann *Juristische Begründungslehre* (Beck München 1982) 5 and 69. See specifically on the lawmaking dimension of judicial decisions, Ibid. 248.

[25] This is also the central theme in R.B. Brandom *Making it Explicit: Reasoning, Representing, and Discursive Commitment* (Harvard University Press Cambridge Mass. 1998). For a concise introduction into this theme, see R.B. Brandom 'Objectivity and the Normative Fine Structure of Rationality' in R.B. Brandom *Articulating Reasons: An Introduction to Inferentialism* (Harvard University Press Cambridge Mass. 2000) 186.

[26] U. Neumann 'Theorie der juristischen Argumentation' in Brugger, Neumann and Kirste (note 15) 233 (241). Many have argued that the concept of decision, i.e. a choice between at least two alternatives, defies the possibility that it can be *found*.

[27] W.S. Dodge 'Res Judicata' (2006) in R. Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* <http://www.mpepil.com> (26 May 2011).

cant legal arguments in later disputes about what the law means.[28] We concentrate precisely on this dimension of judicial lawmaking that we see in the creation and development of actors' general normative expectations – that is expectations sustained and stabilized by law about how actors should act and, more specifically, how they should interpret the law. Most international judgments reach beyond the dispute and the parties.

Courts, at least those that publish their decisions and reasoning, are participants in a general legal discourse with the very decision of the case, with the justification that carries the decision (*ratio decidendi*), and with everything said on the side (*obiter dictum*).[29] For good reasons, actors tend to develop their normative expectations in accordance with past judgments. They will at least expect a court to decide alike if a similar case arises; and, moreover, they will develop their expectations along generalizations based on elements of the decision. Actors in Latin America will expect the Inter-American Court of Human Rights to declare amnesties for generals who ordered torture null and void,[30] a party requesting a provisional measure by the ICJ will expect the court to declare it as binding,[31] and foreign investors as well as a host state will expect any investment tribunal to consider arbitrary, discriminatory, or a lack of due process as breach of fair and equitable treatment.[32] Some domestic constitutional courts even require domestic institutions, in particular domestic courts, to heed the authority of international decisions as precedent.[33] In addition, it seems that as a matter of fact many

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[28] C. Kirchner 'Zur konsequentialistischen Interpretationsmethode' in T. Eger et al. (eds) *Internationalisierung des Rechts und seine ökonomische Analyse* (Gabler Wiesbaden 2008) 37 (39).

[29] M. Shahabuddeen *Precedent in the World Court* (1st edn. Grotius Cambridge 1996) 76 (209); I. Scobbie 'Res Judicata, Precedent, and the International Court: A Preliminary Sketch' (1999) 20 AustralianYbIL 299; S. Schill *The Multilateralization of International Investment Law* (CUP Cambridge 2009) 321.

[30] Binder (note 6).

[31] Oellers-Frahm (note 6).

[32] Schill (note 6). Cf. Jacob (note 6) (showing how arguing with precedents is quite natural and appealing in judicial reasoning, not least because it has a legitimating effect).

[33] Bundesverfassungsgericht [Federal Constitutional Court] (14 October 2004) 2 BvR 1481/04, 111 (2004) Entscheidungen des Bundesverfassungsgerichts 307, for an English translation see <http://www.bverfg.de/entscheidun

decisions not only aim at settling the case at hand, but also at influencing the general legal discourse by establishing abstract and categorical statements as authoritative reference points for later legal practice. This aspect of the phenomenon that also clearly transcends the limits of the particular dispute and impacts the general development of the legal order is of particular interest to us.

Judicial lawmaking is not a concept of positive law, but a scholarly concept; as such it is to be judged on its usefulness for legal scholarship. One contending conceptual proposal is judicial activism (or pro-active courts).[34] One of the main drawbacks of this concept is that it does not specify in what the activism lies. It also obscures the most important element of such 'activism'; namely the generation of legal normativity for third parties not involved in the dispute. This holds true for the concept of dynamic interpretation as well that also tends to overdo what states would have had to know in the moment they entered into legal obligations.[35] In the German speaking world, the concept of *richterliche Rechtsfortbildung* is much used,[36] it can be translated as the judicial development or evolution of the law which are also terms of art in English. Its upside is that it clearly marks the difference with legislation. Its downside is, again, that it neglects the effect on third parties and tends to belittle the creative dimension of adjudication. Both these aspects are well expressed in the concept of judicial lawmaking, which is, in addition, well introduced in the Anglo-American legal terminology.[37] For these reasons we opt for lawmaking as our leading concept to mark

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gen/rs20041014_2bvr148104en.html> (26 May 2011) para. 68 (referring to a domestic court's duty to take a decision of the ECtHR into account).

[34] See Binder (note 6).

[35] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (Judgment) (2009)* ICJ Rep. 213 para. 64. Cf. J. Arato 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 LPICT 443.

[36] See Hochschullehrer der Juristischen Fakultät der Universität Heidelberg (eds) *Richterliche Rechtsfortbildung. Erscheinungsformen, Auftrag und Grenzen: Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Ruprecht-Karls-Universität Heidelberg* (Müller Heidelberg 1986).

[37] This distinction is held up in the use of different terms in German-speaking legal science whereas in the world of common law the innovative judge frequently simply figures as *lawmaker*. *South Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Justice Holmes, dissenting); L. Reid 'The Judge as Law Maker' (1972) 12 Journal of the Society of Public Teachers of Law 22.

our object of inquiry, i.e. the generation of general normativity by international courts that creates, develops or changes normative expectations.

The term *judicial* lawmaking indicates that it is not the only form of lawmaking. In fact, much lawmaking occurs by using the formal sources of law. One reason for unease with the concept of judicial lawmaking might be due to the concern that it is oblivious to important differences between judicial lawmaking and lawmaking through formal sources.[38] We agree with this concern. Whoever develops theory and doctrine on judicial lawmaking needs to be cautious of differences with lawmaking through formal sources, paying particular attention to distinct legitimatory profiles and the divergent institutional requirements. Sweepingly equating judicial law-*application* and *legislation* may hardly convince. Speaking of judicial lawmaking is far less precarious than also using the term legislation for the activity of courts.[39] In agreement with prevalent usage, we reserve the concept of legislation for the political process.

3. International Judicial Lawmaking as an Exercise of Public Authority

International adjudication would not require an elaborate justification of its own under the principle of democracy if it did not amount to an exercise of public authority: the very term *kratos* implies that link.[40] In the domestic setting, the public authority of courts is an essential element: *Justitia* herself not only handles scales but also wields a sword. It is rather evident in democratic constitutional contexts marked by the rule of law that mechanisms are in place to effectively implement domestic court decisions. This is evidently not the same when it comes to decisions of international courts. According to Art. 94 (2) of the UN Charter, the Security Council could take coercive measures if disregard

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[38] K. Oellers-Frahm 'Lawmaking through Advisory opinions?' (2011) 5 GLJ 1033 (1052–54).

[39] H. Lauterpacht *The Development of International Law by the International Court* (2nd edn. Stevens London 1958) 155–223 (speaking of 'judicial legislation').

[40] See W. Conze 'Demokratie' in O. Brunner, W. Conze and R. Koselleck (eds) *Geschichtliche Grundbegriffe vol. 1* (Klett Stuttgart 1972) 848.

for decisions of the ICJ threatened international peace and security.[41] In practice, however, noncompliance with judgments of the ICJ or most other courts rarely draws coercive measures of such kind in response.

The relative lack of strong enforcement mechanisms on part of international institutions, be it bureaucracies or courts, certainly needs to be taken into account in addressing their democratic legitimation. But does this mean that our investigation into their democratic justification is skewed? This might indeed be the case if one followed a traditional conception of public authority that is limited to coercive power.[42] The activity of most international institutions, including judicial lawmaking, would then not amount to public authority. Yet, such a traditional conception has become, if it has not always been, both inadequate and implausible. The concept of public authority should rather include other ways of exercising power that are no less decisive and incisive than coercive enforcement.[43] Today, it is an empirical fact that the impact of international institutions on social life can be similar in significance to that of domestic institutions.[44] In order to give effect to this observation and experience, we understand authority more broadly as the legal capacity to influence others in the exercise of their freedom, i.e. to shape their legal or factual situation.[45] Even if international judicial decisions are usually not backed by coercive mechanisms, they still condition

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41 See H. Mosler and K. Oellers-Frahm 'Article 94' in B. Simma (ed.) *The Charter of the United Nations: A Commentary* (2nd edn. OUP Oxford 2002) 1174 (1176).

42 R.A. Dahl 'The Concept of Power' (1957) 2 Behavioral Science 201 (202); R. Dahrendorf *Über den Ursprung der Ungleichheit unter den Menschen* (Mohr Tübingen 1961) 20.

43 Cf. M. Barnett and R. Duvall 'Power in Global Governance' in M. Barnett and R. Duvall (eds) *Power in Global Governance* (CUP Cambridge 2007) 1 (offering a nuanced conception of power that suits present purposes).

44 See I. Venzke 'International Bureaucracies in a Political Science Perspective – Agency, Authority and International Institutional Law' (2008) 9 GLJ 1401.

45 A. von Bogdandy, P. Dann and M. Goldmann 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 GLJ 1375 (1381).

parties to the dispute as well as other subjects of the legal order in the exercise of their freedom.[46]

That said, international courts *are* frequently embedded in contexts that may lever considerable enforcement mechanisms in support of their decisions, even if not to the same degree as in many domestic contexts of the rule of law. The Ministerial Committee of the Council of Europe oversees the implementation of decisions of the ECtHR,[47] member states of the ICC cooperate with the court in the execution of sentences and are obliged to implement its decisions,[48] in the framework of the WTO members may resort to countermeasures once their claims have succeeded in adjudication,[49] and arbitration awards of ICSID-Panels are enforceable in domestic courts as if they were rendered by the highest level of jurisdiction in the domestic system.[50] In sum, a more refined understanding of how authority is exercised and a cursory look at the enforcement mechanisms that do exist supports the contention that international courts do exercise public authority in deciding legal disputes.

But what about the lawmaking dimension of international decisions that reaches beyond the individual case? Judicial decisions impact the legal order differently than new legal provisions that pass by the way of the sources of law. Decisions figure as arguments and influence the law through their impact in the legal discourse. The lawmaking effect of judicial decisions, in particular in their general and abstract dimension that goes beyond the individual case, does not only depend on the *voluntas*, but also on its *ratio*. Legal scholarship, legal counsel, other courts and the same court at a later point in time must first be convinced of the quality of the decision. Whether a judicial interpretation turns out to make law depends on its reception by other actors involved. If this is so, does it then make sense to understand lawmaking in the practice of adjudication as an exercise of public authority?

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[46] Reputational costs are relevant even for such weighty and mighty actors as the United States. In a *rational choice* perspective, see A. Guzman *How International Law Works* (OUP Oxford 2008) 71.

[47] Art. 46 (2) of the European Convention on Human Rights.

[48] Arts 93 et seq. of the Rome Statute of the International Criminal Court.

[49] Art. 22 of the Dispute Settlement Understanding.

[50] Art. 54 of the ICSID Convention.

International decisions enjoy an exceptional standing in semantic struggles about what the law means.[51] Judicial precedents redistribute argumentative burdens in legal discourse in a way that is hard, if not impossible, to escape.[52] In many judgments, precedents figure as arguments in support of decisions that in terms of authority are hardly inferior to provisions spelled out in an international treaty. Courts regularly use precedents in their legal reasoning and at times engage in detailed reasoning on how earlier decisions are relevant or not. Disputing parties are of course well aware of this and thus fight about the meaning of earlier judicial decisions as if they formed part of the sources of international law and as if they could themselves carry judgments of (il)legality. In practice the response to one party relying on an earlier judicial decision is not that there is no formal rule of precedent but rather to counter that claim with other arguments, distinguishing the case referred to, or using it in a different way. Many contributions in this volume analyzed this dynamic in closer detail.[53]

The Appellate Body of the WTO has for example relied on Art. 3 (2) of the DSU (providing that '[t]he dispute settlement of the WTO is a central element in providing security and predictability to the multilateral trading system') to argue that previous reports on a subject matter 'create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute'.[54] Recently it raised its tone a notch and even suggested that a failure to do so on part of a panel might amount to a violation of the obligation to conduct an objective assessment of the matter before it.[55] Panel and Ap-

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[51] On the akin concept of 'semantic fights', see R. Christensen and M. Sokolowski 'Recht als Einsatz im semantischen Kampf' in E. Felder (ed.) *Semantische Kämpfe: Macht und Sprache in den Wissenschaften* (De Gruyter Berlin 2006) 353. For a yet more drastic understanding, see R.M. Cover 'Violence and the Word' (1986) 95 YaleLJ 1601.

[52] A.E. Boyle and C.M. Chinkin *The Making of International Law* (OUP Oxford 2007) 272–311. Cf. P. Bourdieu 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings Law Journal 814 (838).

[53] See, in particular, the contributions by Jacob (note 6); Schill (note 6); Venzke (note 6); Oellers-Frahm (note 40).

[54] WTO *Japan – Taxes on Alcoholic Beverages* (4 October 1996) WT/DS 8, 10 and 11/AB/R 14–15.

[55] This is a reference to Art. 11 of the DSU. See WTO *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Report of the Appellate Body* (30 April 2008) WT/DS344/AB/R para. 162.

pellate Body reports plainly do create legitimate expectations that must be considered in subsequent adjudication.[56] This is usually seen clearly in legal scholarship and it is evident to anyone involved in the operation of the system. The Brazilian representative in the WTO Dispute Settlement Body illustratively stated in the discussions pertaining to the *US – Shrimp* report that '[a]lthough no binding precedents had been created, the findings and conclusions of panels and the Appellate Body adopted by the DSB had created expectations concerning future interpretations of the DSU and the WTO Agreement'.[57]

In sum, the disputes about precedents illustrate how judicial decisions impact the legal order and influence individual as well as collective spheres of freedom beyond the individual case. The adjudicatory practice of any court that has some reputation should accordingly be qualified as an exercise of public authority that demands justification.[58] This is in particular so when courts have compulsory jurisdiction and decide a stream of cases conducive to a *jurisprudence constante*. It may be worth adding that our relatively broad conception of authority also stems from a principled consideration: if public law is seen in a liberal and democratic tradition as an order for safeguarding personal freedom and for allowing collective self-determination, then any act with an effect on these normative vantage points should come into consideration the moment its effects are significant enough to give rise to reasonable doubts about its legitimacy. International courts and tribunals enjoy an outstanding position in international legal discourse and their interpretations palpably redistribute argumentative burdens. They develop the law through their practice in a way that conditions others in the exercise of their freedom as they find themselves in a legal situation shaped by the courts.

This effect of judicial precedents is concealed by the doctrinal ordering of things in light of Art. 38 (1) (d) of the ICJ Statute, classifying international judicial decisions as 'subsidiary means for the determination of rules of law'. Under the impact of the cognitivistic understanding of judicial interpretation decisions are thought of as a source that helps rec-

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56 See Venzke (note 6).

57 WTO *Dispute Settlement Body – Minutes of Meeting Held in the Centre William Rappard on 6 November 1998* (12 December 1998) WT/DSB/M/50, 12 (the meeting concerned the adoption of the Appellate Body Report in *US–Shrimp*).

58 On the concept of reputation, see Guzman (note 46) 71.

ognizing the law but not a source of law.[59] It is still a lasting task to formulate a convincing response to the dissonance between the ordering of sources doctrine and the actual working of precedents. This is a task that strikes above all at positivist thinking prevalent in continental Europe.[60] Conversely, scholars at home in the common law tradition tend to neglect prerequisite institutional contexts when they downplay the distinction between sources of law and sources for the determination of law, above all they ignore the fact that in domestic contexts the common law idea of judicial lawmaking goes hand in hand with a notion of parliamentary legitimation that is unworkable at the international level.[61] The distinction retains importance in particular if one considers that the international institutional order is marked by an asymmetry between powers. This leads us to the central problem in the justification of international courts: in domestic contexts of functioning democracies judicial lawmaking is embedded in a responsive political system, something that is lacking at the international level in similar quality.

II. On the Legitimacy of International Judicial Lawmaking

1. The Decoupling of Law from Parliamentary Politics

The lawmaking effect of adjudication is a common feature of judicial activity in any legal order.[62] However, the lawmaking effect of international adjudication displays specific features that make it structurally more problematic when compared to the domestic context. One of the

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[59] A. Pellet 'Article 38' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *Statute of the International Court of Justice. A Commentary* (1st edn. OUP Oxford 2006) 677 paras 301–19; G.J.H. van Hoof *Rethinking the Sources of International Law* (Kluwer Utrecht 1983) 169.

[60] See e.g., G. Abi-Saab 'Les sources du droit international: Essai de déconstruction' in M. Rama-Montaldo (ed.) *El derecho internacional en un mundo en transformación vol. 1* (Fundación de Cultura Univ. Montevideo 1994) 29.

[61] Ibid. 266–72; more cautious and openly flagging his common law bias, R. Howse 'Moving the WTO Forward - One Case at a Time' (2009) 42 CornellILJ 223.

[62] See already M.O. Hudson *Progress in International Organization* (2nd edn. Rothman Littleton 1981) 80; Lauterpacht (note 39) 155 ('judicial lawmaking is a permanent feature of administration of justice in every society').

quintessential lessons of modern constitutionalism, which is worth recalling, is that legislation and judicial adjudication are two phenomena that should be kept apart and at the same time be understood in their intricate interaction.[63] It is a related and similarly great achievement of constitutional theory that it has conceptually grasped both distinction and connection, while stabilizing their simultaneity in legal institutions. The prevailing approach comes under the heading of separation of powers (or checks and balances) and it situates the legitimation of every power in its interaction with other powers.[64] Years of quarrel and learning have also established that law means *positive law*, at least in modern constitutional states.[65] The hallmark of positivity is that the legislature is responsible for this law.[66] In democratic societies, the majority (usually understood as the elected government) can intervene in the legal order by way of legislative procedures and can thus change the law.[67]

This main avenue of democratic legitimation is strained when it comes to international law and adjudication in a static perspective that focuses on the role of the parliament in the making of international agreements.[68] But the phenomenon of international judicial lawmaking pri-

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[63] See E.-W. Böckenförde 'Entstehung und Wandel des Rechtsstaatsbegriffs' in E.-W. Böckenförde (ed.) *Recht, Staat, Freiheit* (Suhrkamp Frankfurt 1991) 143; M. Loughlin *Public Law and Political Theory* (OUP Oxford 1992) 138.

[64] J. Locke *The Second Treatise of Government* (Liberal Arts Press New York 1952) ch. XII; G. de Vergottini *Diritto costituzionale comparato* (CEDAM Padova 1999) 346 *et seq.*

[65] For an early use of such a conception of positivity, see G.W.F. Hegel *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* in G.W.F. Hegel *Werke in 20 Bänden* (Suhrkamp 1970) Bd. 7 § 3.

[66] E.-W. Böckenförde 'Demokratie als Verfassungsprinzip' in E.-W. Böckenförde (ed.) *Recht, Staat, Freiheit* (Suhrkamp Frankfurt 1991) 289 (322); With regard to the situation in a common law context: P. Atiyah and R. Summers *Form and Substance in Anglo-American Law* (OUP Oxford 1991) 141.

[67] A. von Bogdandy *Gubernative Rechtsetzung* (Mohr Siebeck Tübingen 2000) 35. We do not think that international courts can draw sufficient legitimacy from the fact that they check the power exercized by other institutions. Such argument is made by S. Cassese *When Legal Orders Collide: The Role of Courts* (Global Law Press Sevilla 2010) 122–24.

[68] Our argumentation only relates to countries with a democratic constitution. For citizens living under authoritarian rule, this problem has to be examined separately. On the role of parliaments, see R. Wolfrum 'Die Kontrolle der auswärtigen Gewalt' (1997) 56 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler 38.

marily directs attention to a *dynamic perspective*.[69] International courts do not operate as parts of polities that include functioning political legislatures. Once an international agreement is in place, it is largely withdrawn from the grasp of its individual makers. This profoundly changes the relationship between law and politics. By agreeing to an international treaty, the parliamentary majority of the moment cements its position and puts it beyond the reach of any later majority.[70] This strategy is particularly incisive when it comes to regimes that are characterized by relatively strong mechanisms of adjudication because such regimes tend to portray a greater dynamic and non-compliance usually bears greater costs. A later majority may in principle be able to exit a regime. But this possibility speaks in favour of democratic legitimacy in the same unsatisfactory way as the right of individuals to emigrate supports the legitimacy of domestic public authority.[71] It can hardly be a sufficient escape hatch and, in any event, it frequently does not constitute a realistic option because it is legally impracticable (long sunset clauses on investment treaties, for example) or the costs of exit are prohibitively high.[72]

This dynamic perspective on the decoupling of law from politics is critical when it comes to areas of the law which are marked by international judicial institutions. As analyses of the American Convention on Human Rights, the European Charter on Human Rights, as well as international trade and investment law all show, international judicial institutions have had significant impact on the development of the law

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[69] J. Klabbers 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization' (2005) 74 NordicJIL 405; L. Bartels 'The Separation of Powers in the WTO: How to Avoid Judicial Activism?' (2004) 53 ICLQ 861.

[70] K. Abbott and D. Snidal 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421 (429); J. Goldstein et al. 'Introduction: Legalization and World Politics' 54 (2000) International Organization 385 (understanding this to be a general political strategy).

[71] Art. 13 (2) of the Universal Declaration of Human Rights (UNGA Res. 217 A (III) 'Universal Declaration of Human Rights' [10 December 1948] GAOR 3rd Session Part I Resolutions 71); Art. 12 (2) of the International Covenant on Civil and Political Rights ([adopted 19 December 1966, entered into force 23 March 1976] 999 UNTS 171); Art. 2 (2) of the Additional Protocol 4 to the European Convention on Human Rights (ETS No. 46).

[72] Note that, referring to the doubtful legitimation of arbitral jurisdiction, Bolivia declared on 1 May 2007, that it would exit the ICSID Convention, see Bolivia Foreign Ministry 'Letter Concerning Denunciation of ICSID Convention, 1 May 2007' (2007) 46 ILM 973.

and on the shape of the respective legal regimes.[73] Their grasp on the making of the law has not been confined to substantive provisions but is maybe all the more creative with regard to developments in procedural law and their genuine competences.[74] The history of provisional measures tells the intriguing story of a vivid dynamic between international courts and tribunals, starting out with a claim by the Inter-American Court of Human Rights that its provisional measures are binding, via a number of other international judicial institutions, including the International Court of Justice, and even leading arbitral tribunals and human rights bodies to make the same claim, although the wording and drafting history of the rules of procedure of the former suggested otherwise and the latter are not even empowered to deliver binding opinions.[75] The European Court of Human Rights has also contributed to a remarkable innovation in its procedures with the instigation of so-called *pilot judgments*.[76]

A number of qualifications would be in order and a more detailed picture may well offer instances in the institutions' histories that seem ambivalent. Some institutions, and some judges in those institutions, are also more dynamic than others. This does not diminish the argument that the remarkable increase in number of international judicial institutions and quantity of international decisions has contributed to a greater detachment of the law from parliamentary politics. It is interesting to note in this regard that dispute among state parties about the law and about the proper course that a court should take may not only be understood as a factor that pushes a court to be more cautious in its interpretations but also as a context that may offer it more leeway because it faces less risk of being countered in form of interpretative declarations or treaty amendments. Eyal Benvenisti and George Downs make

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[73] See respectively the contributions by Binder (note 6), Venzke (note 6), Schill (note 6), Oellers-Frahm (note 38). Compare this with the ambivalent track record explained by N. Petersen 'Lawmaking by the International Court of Justice – Factors of Success' (2011) 5 GLJ 1925.

[74] On developments in procedural law that form part of strategies responding to problems in the justification if international judicial lawmaking, see von Bogdandy and Venzke (note 23).

[75] Oellers-Frahm (note 6).

[76] Fyrnys (note 6).

precisely the argument that the absence of consent among subjects of the law may increase the chances of judicial lawmaking.[77]

2. Fragmentation as a Problem for Democracy

A further critical element in the justification of international courts' authority concerns the institutional differentiation of distinct issue areas. Such differentiation narrows down the perspectives that may be cast on a certain subject matter. Why is this relevant, let alone problematic, with regard to the quality of democratic legitimation? Because it negatively affects the requirement of generality. In its legitimatory aspect, the requirement of generality is related to the process of law-creation and demands that the democratic legislature is the central place of norm production and legitimation.[78] More specifically, it demands that procedures in this place are thematically unsettled and are open to all kinds of competing perspectives. It must further be open-ended, in the sense of being without a predetermined solution. They must not prejudge or in principle preclude any relevant aspect in the decision-making process from the point of view of a particular functional perspective.[79] Subject matters should precisely not be distorted from the outset by the order of things as defined by functional narratives. The starting point of this argument is the individual as a whole, multidimensional human being that cannot be split into functional logics but rather calls for a mechanism of representation in which competing perspectives can be negotiated.[80]

Due to the functional differentiation of distinct areas of politics on the international level, the chances of meeting this imperative of democratic

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[77] E. Benvenisti and G. Downs 'Prospects for the Increased Independence of International Tribunals' (2011) 5 GLJ 1057.

[78] T. Lieber *Diskursive Vernunft und formelle Gleichheit: Zu Demokratie, Gewaltenteilung und Rechtsanwendung in der Rechtstheorie von Jürgen Habermas* (Mohr Siebeck Tübingen 2007) 226–29.

[79] We take this point from J. Bast 'Das Demokratiedefizit fragmentierter Internationalisierung' in H. Brunkhorst (ed.) *Demokratie in der Weltgesellschaft* (Nomos Baden-Baden 2009) 177.

[80] A.L. Paulus 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?' in T. Broude and Y. Shany (eds) *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Publishing Oxford 2008) 193 (210).

generality are dim. In functionally tailored international regimes it is next to impossible to arrive at a certain degree of generality because in every regime there is an already prevalent particular set of preferences and concerns.[81] This undermines the requirement of generality as a critical element of democratic legitimation.[82] A functionally fragmented international judiciary threatens to weaken democratic generality in the further development of the legal order.

This is a problem that is part of but distinct from the decoupling of the law from parliamentary politics generally because it relates to deeper processes of sectoral differentiation. It suggests that increasing political oversight would be democratically meaningful to the extent that it heeds to the principle of generality. Oversight would have to transcend sectoral fragmentation, largely a question of personnel and of links to domestic levels of governance. The shift towards functional and institutional differentiation of international decision-making processes must not go hand in hand with a shift from democratic to technocratic rule.[83] Against this background we are also skeptical that seeing fragmented regimes in a system of checks and balances, where one rationale (and its institution) counters others, helps to ease concerns.

3. The Relevance of Democratic Legitimation

How can one square judicial lawmaking with the principle of democracy? A first response could be to negate the phenomenon. If there were no such thing as judicial lawmaking, there would evidently be no need for its justification. This response, though unconvincing, merits attention all the same because according to the traditional and still widespread view of international dispute settlement, international decisions flow from the consent of the state parties to the dispute – both from the consensual basis of the applicable law and from consent-based jurisdiction. If state parties are democratic, then the presence of their

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[81] M. Koskenniemi and P. Leino 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553; T. Treves 'Fragmentation of International Law, The Judicial Perspective' (2007) 23 Comunicazione e studi 821.

[82] To what extent the potential for legitimation, which arises from decision-making processes within the States, is affected by the fragmentation cannot be further examined at this place.

[83] Paulus (note 80) 210.

consent should solve any legitimatory question as long as the courts only fulfil their task of dispute settlement properly. This explains the emphasis that the traditional school of thought places on the cognitive paradigm and on the principle that judges are limited to applying the law to the dispute at hand.

These understandings are difficult to maintain, both as descriptions of international judicial practice and as normative constructions. It is therefore not surprising that alternative narratives of justification have surfaced in response. Most important among these are functional accounts suggesting that international decisions promote values, goals or community interests, above all international peace. By this token they may even attempt to justify lawmaking, precisely because international politico-legislative mechanisms are unable to achieve outcomes in the collective interest.[84] If this were so, a second response to questions regarding the democratic legitimation of international judicial lawmaking could be to argue that it strengthens democratic governance in a broader sense, rather than detracting from it.

It is true that the function of successfully settling disputes in the name of peace remains most relevant, not least for the promotion of democratic governance – after all democracy flourishes better in a peaceful world.[85] At the same time many international courts with a particular thematic outlook are justified on similar functional lines due to their contribution to effectively implementing specific goals that have come to complement the maintenance of international peace.[86] The international criminal tribunals and the International Criminal Court (ICC), for instance, are supposed to gain legitimacy by way of ending impunity for international crimes,[87] the WTO functions *inter alia* to increase

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[84] Kelsen (note 19) 165.

[85] Apart from this, international courts can, for instance, foster democratization through a democracy-oriented human rights jurisprudence. See *Matthews v. The United Kingdom (Judgment of 18 February 1999)* ECtHR App. No. 24833/94 <http://echr.coe.int/echr/en/hudoc> (11 June 2011).

[86] K. Oellers-Frahm 'Nowhere to Go? - The Obligation to Settle Disputes Peacefully in the Absence of Compulsory Jurisdiction' in T. Giegerich (ed.) *A Wiser Century?* (Duncker & Humblot Berlin 2009) 435 (440).

[87] In detail, see M. Benzing 'Community Interests in the Procedure of International Courts and Tribunals' (2006) 5 LPICT 369 (373).

economic welfare and arbitration in investment disputes should foster economic development by inducing foreign investments.[88]

Still, as important as a certain goal may be, it cannot fully settle the justification of public authority. The aim cannot offer a sufficient basis for concrete decisions that inevitably entail normative questions and redistributions of power. Moreover, functional arguments offer no solution for the unavoidable competition between different goals. At times it may be that international adjudication achieves what everyone wants and yet still fails to deliver.[89] But even those may be lucky hits. History cautions that not too much confidence should be placed even in the benevolent and enlightened ruler. This is particularly true in light of the growing autonomy of some courts as well as the breadth of controversial fields in which such courts have been involved: there are now many constellations in which this functional goal can no longer convincingly settle legitimatory concerns. In short, our conviction is that all aspects of judicial activity need a convincing justification in light of the principle of democracy. Democratic justification is ineluctable for the exercise of any public authority.

Some might suspect that our investigation into the democratic legitimation of judicial lawmaking aims at bringing the noise of popular assemblies to the quiet halls of learnt justice. However, we do not challenge the premise that the reasoning, the institution, the procedure of adjudication need to follow a specific logic, which is different from the reasoning, the institution, the procedure in the 'true' and 'primary' arena of politics.[90] But asking about democratic justification leads us to study how judicial lawmaking can be linked to the values, interests, and opinions of those whom it governs. Each of the following broad elements in

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[88] T. Broude 'The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO' (2006/07) 45 Columbia Journal of Transnational Law 221.

[89] R. Howse and S. Esserman 'The Appellate Body, the WTO Dispute Settlement System, and the Politics of Multilateralism' in G. Sacerdoti, A. Yanovich and J. Bohanes (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP Cambridge 2006) 61.

[90] For a brilliant description of what happens if the difference between courts and politics collapses, see M. Neves 'La concepción del Estado de derecho y su vigencia prática en Suramerica' in A. von Bogdandy, C. Landa Arroyo and M. Morales Antoniazzi (eds) *Integración suramericana a través del Derecho?* (Centro de estudios Políticos y Constitucionales Madrid 2009) 51.

response will lay out how its topic is connected with the principle of democracy.

III. The Reasoning

1. The Democratic Dimension of Judicial Reasoning

One of the first and foremost elements that contribute to the democratic legitimation of judicial lawmaking is nested in the established forms of legal argument, in the respective discursive treatment of the legal material. Any government and parliament ratifying an international agreement expects and requires that norms be interpreted and developed in accordance with the argumentative tools laid down in Arts 31 and 32 of the VCLT. The rules of interpretation prescribe how legal decisions can be justified; in the practice of international adjudication, such a justification is a straightforward legal requirement. Statutes of international courts and tribunals contain provisions that are akin to the example of Art. 56 (1) of the Statute of the International Court of Justice: 'The judgment shall state the reasons on which it is based.'[91] The alternatives, refraining from justifying decisions or from making them public, might weaken the lawmaking effect of judicial decisions. However, this would not only violate the statute and rules of the court, but it would also threaten the legitimacy of the decision: parties to the dispute would feel neither vindicated nor respected, the larger legal discourse could no longer function as a mechanism of control and critique and legal certainty would be sacrificed.[92] All of this points to the legitimatory significance of justifying legal decisions in a way that lives up to the standards of the profession and that meets expectations of participants in legal discourse.

Many scholars stress this point as a core element for justifying not only the final decision concerning the parties of the dispute, but also the

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[91] Failure to state reasons is also one of the few possible grounds for annulment in the ICSID system (Art. 52 (1) (e) of the ICSID Convention). See further Art. 41 of the Rules of Procedure of the European Nuclear Energy Tribunal (5 September 1965). See also A. Ross *Theorie der Rechtsquellen* (Deuticke Leipzig 1929) 283.

[92] The function of this discourse for the democratic legitimation of a decision is discussed below, section V. The Procedure.

lawmaking that affects third parties.[93] As lawmaking is an inevitable aspect of judicial interpretation, it is warranted that the reasoning should not only focus on the case at hand, but also look beyond it. Marking this lawmaking momentum vested in the justification of legal decisions as an undue expansion of competences or even as a usurpation of power on part of politicized courts would be plainly wrongheaded. Reasoning in the established forms that justifies a legal decision is part of judicial legitimation and required by the principle of democracy as it establishes the link with the formal sources that carry the democratic legitimacy of the norm-setting process. Sure enough, these forms of argument do not determine any outcome. Yet, one should not underestimate their constraining function. The creative lawmaking element is not only enhanced, but also tamed by the fact that judges are tied to past practices by the prospective reception of their interpretations; for that acceptance, a justification along the lines of Arts 31 and 32 of the VCLT is of great importance.[94] The semantic pragmatism we follow in view of the *linguistic turn* does not mean that anything goes. Applications of the law in the present have to connect to the past in a way that is convincing in the future.[95]

Lawmaking is an intrinsic element of adjudication and it is not as such *ultra vires*. At the same time, not all lawmaking falls within a court's competence. It is interesting to note that there have been long and difficult efforts to isolate judicial lawmaking that is beyond the competence of the court. Consider for example the recent decision of the German Federal Constitutional Court (FCC). On the one hand, the decision confirms that judicial lawmaking (or 'judicial development of the law', as the court puts it) is part of the competence of supranational and international courts.[96] It sees judicial lawmaking particularly warranted

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93 Binder (note 6); Oellers-Frahm (note 6).

94 Although it is, at least empirically seen, a necessary element. Some important lawmaking decisions are supported by very little reasoning, for example the introduction of the *erga-omnes* rule by the ICJ, see Petersen (note 73).

95 Brandom (note 21) 181 ('[t]he current judge is held accountable to the tradition she inherits by the judges yet to come').

96 Bundesverfassungsgericht [Federal Constitutional Court, FCC] (6 July 2010) 2 BvR 2661/06, for an English translation see <http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html> (28 May 2011). The judgment deals with the European Court of Justice (ECJ), but the FCC – engaging in general lawmaking – formulates a general point applicable not just to the ECJ as a supranational court, but also to international courts in general. In fact, the

when it 'concretizes programs', in the sense that it implements the normative project of a treaty, when it fills in legal gaps and when it solves contradictions.[97] On the other hand, the FCC considers judicial lawmaking likely to be *ultra vires* when it goes against what is clearly stated in the text, or when it creates new rights or obligations without sufficient justification in the relevant positive law. Judicial lawmaking is in particular illegal, according to the German court, if a supranational or international court lays new normative foundations or structurally alters the fundamental balance of power.[98]

Two clarifications are called for. First, legitimatory concerns do not only set in when a court acts *ultra vires* but also when it engages in lawmaking that might be deemed within its competence. Second, the standards that the FCC develops to distinguish one from the other are sketched only in the vaguest of terms and they are themselves in need of justification. The only certain element is that the court justifies them with the principle of democracy.

One attempt to give more substance to these standards can be found in discourse theory, understanding the separation of powers as a 'distribution of the possibilities for access to different sorts of reasons'.[99] Jürgen Habermas maintains that only the legislature enjoys unlimited access to normative, pragmatic, and empirical reasons while the judiciary has to stay within the narrower bounds of what is permitted in *legal* discourse.[100] According to this approach, law is a source of legitimation

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lawmaking by the European Court of Human Rights is at least as relevant for the FCC as that of the ECJ.

97 Ibid. para. 64: 'There is particular reason for further development of the law by judges where programmes are fleshed out, gaps are closed, contradistinctions of evaluation are resolved'.

98 Ibid.: 'Further development of the law transgresses these boundaries if it changes clearly recognisable statutory decisions which may even be explicitly documented in the wording (of the Treaties), or creates new provisions without sufficient connection to legislative statements. This is above all not permissible where case-law makes fundamental policy decisions over and above individual cases or as a result of the further development of the law causes structural shifts to occur in the system of the sharing of constitutional power and influence'.

99 J. Habermas *Faktizität und Geltung* (Suhrkamp Frankfurt 1992) 192. Cf. A. von Bogdandy and I. Venzke 'Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung' (2010) 70 ZaöRV 1 (14); Kuhli and Günther (note 6).

100 Habermas (note 99) 192–93, 229–37.

and not just a medium for the exercise of political authority. Law soaks up communicatively generated power and carries it into the rule of law – a kind of 'transmission belt', in Habermas terms.[101] This takes place in discourses that justify a norm, and their potential of legitimation hinges on the quality of democratic processes of political will formation.[102] At this stage and juncture, participants may draw on the whole spectrum of reasons. The administration and judiciary live on the communicatively generated power that was fed into the law at the moment of its legislative creation. Habermas argues that for this reason, 'the judiciary must be separated from the legislature and prevented from programming itself'.[103] This resonates well with the position taken by the Federal Constitutional Court.[104]

With respect to judicial lawmaking Habermas writes that 'to the extent that legal programs are in need of further specification by the courts … juristic discourses of application must be visibly supplemented by elements taken from discourses of justification. Naturally, these elements of a quasi-legislative opinion- and will-formation require another kind of legitimation than does adjudication proper. The additional burden of legitimation could be partly satisfied by additional obligations before an enlarged critical forum specific to the judiciary.'[105] He does not elaborate on the consequences of this proposition and how it can be operationalized. However, a close analysis of a judicial decision often indicates the degree of legal innovation and hence the magnitude of lawmaking. If one sets out to look for good reasons in support of important judgments of international courts, it appears quite evident when standard arguments in judicial discourses are not sufficient to convincingly justify a legal decision to the indubitable exclusion of all possible rival interpretations. The arguments given then tend to look like they mask the reasoning that really carries the judgment. Unsurprisingly, the scholarly and political discussions with regard to those judgments usually involve kinds of reasons that are grounded in discourses of norm justification. The question, for example, whether international trade law permits placing trade restrictions on products produced in a way that is

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[101] Ibid. 188–91; K. Günther 'Communicative Freedom, Communicative Power, and Jurisgenesis' (1996) 17 CardozoLRev 1035.

[102] Habermas (note 99) 150.

[103] Ibid. 172.

[104] Cf. Oellers-Frahm (note 38) 1036–37.

[105] Habermas (note 99) 439–40; Lieber (note 78) 222.

excessively detrimental to the climate can hardly be convincingly justified by interpreting Arts III, XI und XX of the GATT within the confines of the standard modes of the legal discourse.[106] They would rather need to be opened up to include arguments that are on discourse theory's terms only available in norm justification which is usually reserved to processes of political-legislative lawmaking.

It merits attention that Habermas develops his argument for the domestic setting where, at least in democratic states, parliaments and public opinion can generate communicative power that is channeled through legislative lawmaking into administrative and judicial adjudication. And which with the exception of constitutional adjudication the normal legislative process can override the judiciary. For international law, the situation is different. One conclusion might be that judicial lawmaking in the international realm should not be under the same constraints as in the domestic setting. In other words, the deficiencies of the international political system would provide a specific justification for judicial lawmaking. Kelsen's plea for a strong international judiciary is based on this view, considering the international legal order as a primitive legal order which – as any primitive legal order – receives its momentum of development from the courts.[107] Yet, it is hard to argue that international law today is primitive in the sense Kelsen saw it in 1944. It is also noteworthy in this regard that Hersch Lauterpacht, writing in 1933, explicitly linked his advocacy for the development of international law by judicial means to the fact that the law of his time was confined to a static and narrow set of international relations.[108]

We acknowledge that a court might be faced with a situation of crisis. For example, one might consider the ECtHR pilot judgment a response to its unbearable caseload.[109] A court might further be presented with a small window of historic opportunity, as in the prohibition of amnesties by the IACtHR after the fall of the dictators in Latin America.[110] That needs to be considered when evaluating judicial lawmaking in such extraordinary situations. But such necessities or opportunities cannot

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[106] See Jacob (note 6).

[107] H. Kelsen *Peace through Law* (University of North Carolina Press Chapel Hill N.C. 1944).

[108] H. Lauterpacht *The Function of Law in the International Community* (Clarendon Oxford 1933) 249 et seq.

[109] Fyrnys (note 6).

[110] See Binder (note 6).

substitute a principled argument. Hence, the forms of legal argument are as essential for the democratic legitimation of an international court as they are for a domestic one. Any decision needs to be embedded in the relevant sources and precedents. But that will oftentimes not fully carry a decision, in particular if such a decision has a strong lawmaking dimension.

The question is how a court should deal with its discretion: in particular, whether it should justify the exercise of this discretion. For Kelsen, the judge only has to mark the outer limits that define the field of possible interpretations, but then he or she is not burdened with justifying any specific choice within these bounds.[111] On the other end of the broad spectrum of theoretical views Ronald Dworkin but also Hans-Joachim Koch and Helmut Rüßmann demand more elaborate justifications.[112]

Our pragmatic and discourse oriented approach to the issues of democratic legitimation pushes towards the second direction, and is in many respects similar to the proposal of Milan Kuhli and Klaus Günther on this issue.[113] A more fully argued decision can be better placed within the general context of debating the exercise of public authority. The open discussion of interests and competing positions is part of the social basis of democracy that sustains a democratic public as well as processes of social integration. Judgments of courts are part of this and may generate democratic potential if they are embedded in normative discourses of a certain quality. Accordingly, judges should make explicit the principles they pursue with a certain decision. Such a decision is more intelligible for most citizens than purely 'legal-technical' reasoning phrased in hermetic language, which obscures the real choices that the court does indeed make. This also militates against decisions whose reasoning is so long and complex that even most experts are unable to criticize it with any depth, not least for time constraints. The WTO provides a number of examples for lengthy reports that are for that reason hard to understand and to critique.

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[111] This brings Kelsen close to realist conceptions of the law. See H. Dagan 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 607.

[112] R. Dworkin *Justice in Robes* (Harvard University Press Cambridge Mass. 2006); H.-J. Koch and H. Rüßmann *Juristische Begründungslehre* (Beck München 1982) 5, 69, 221. See also Lauterpracht (note 39) 39.

[113] Kuhli and Günther (note 6) section D.

Moreover, in many cases it would be a good start if judges were more open about the policies they pursue and what kind of social effects they intend to promote with a judgment. When those social effects do not set in, this would diminish the precedential effect of such decisions in later discourse. Please note: we do not suggest shedding the 'camouflage' of legal reasoning to talk politics instead.[114] There is ample space in legal analysis to make policy choices explicit without falling for blunt and perhaps hegemonic instrumentalism that reduces law to a handmaiden of power.[115] Considerations of policy and social effects can enter the legal reasoning in the form of teleological or purposive arguments.[116] They would contribute to a meaningful politizisation of the legal discourse which should be welcomed in light of the principle of democracy. Politicization in this sense may advance the public discourse on judicial decisions and can inform and guide future practice.[117] We are aware that these are demanding standards, not least because almost any international decision is the product of a college of judges.

2. Referring to Political Outcomes Beyond Formal Sources

In addition to tending to policy considerations in judicial reasoning with greater attention, politicization may relate to political processes in international institutional settings. In fact, the political discourse in such settings frequently yields outcomes that can and do play a role in the reasoning of international courts. Judges justify their decisions not only through formal sources of law. They also invoke other policy

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[114] Cf. G. Abi-Saab 'The Appellate Body and Treaty Interpretation' in G. Sacerdoti, A. Yanovich and J. Bohanes (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP Cambridge 2006) 453 (462) (asking whether it is not better 'to shed the camouflage' if the true reasons are hidden by technical legal reasoning).

[115] M. Koskenniemi 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Modern Law Review 1.

[116] Art. 31 (1) of the VCLT; G. Lübbe-Wolff *Rechtsfolgen und Realfolgen* (Alber Freiburg 1981) 139 et seq.

[117] D.A. Irwin and J.H.H. Weiler 'Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' (2008) 7 World Trade Review 71 (criticizing the 'textual fetish and policy phobia' of the Appellate Body).

documents whose precise legal standing is rather murky.[118] Within the context of this project, Markus Fyrnys for example meticulously shows the close relationship between decisions within the political institutions of the Council of Europe and decisions of the European Court of Human Rights.[119]

Given our starting point that the distance to parliamentary politics is one of the core problems of international judicial lawmaking, the justificatory relevance of such outcomes requires attention. With respect to the democratic legitimation of international judicial lawmaking, we find of particular interest the question whether the reference to non-binding acts of international organizations can be supportive of the democratic legitimation of judicial lawmaking, although the act in question is neither binding nor the result of a parliamentary decision.[120] Such considerations may also extend to documented reactions with regard to previous jurisprudence on a certain issue area, above all by relevant political bodies.[121]

Under a discourse oriented concept of democracy, such international acts might indeed justify a judicial decision *if* the process leading to that act fulfils certain requirements. At this point, it might be helpful to distinguish two different conceptions of politics. A first conception stands in the tradition of realism. Politics accordingly refers to the exercise of power.[122] If the act in question is seen to be the imposition of the will of

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[118] Consider for example WTO *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R paras 154 and 168. Cf. I. Van Damme 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 EJIL 605.

[119] Fyrnys (note 6).

[120] The study of such outcomes and an attempt of their doctrinal classification has been the focus of an earlier research, see A. von Bogdandy, P. Dann and M. Goldmann 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 GLJ 1375; M. Goldmann 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9 GLJ 1865.

[121] Note for example how State representatives frequently invest considerable time in discussing judicial reports in the WTO's Dispute Settlement Body. On further elements of politicization in this context, see I. Feichtner 'The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Public Interests' (2009) 20 EJIL 615.

[122] M. Weber 'Wissenschaft als Beruf' in W. J. Mommsen and W. Schluchter (eds) *Max Weber Gesamtausgabe* (Mohr Siebeck Tübingen 1992) 506.

one state or a few states on a larger group of states, the reference to such an act cannot support the democratic legitimacy of a judicial decision.[123] Politics according to this understanding is plainly ill-suited for responding to problems of justification.

However, the international settings might also institutionalize processes of arguing.[124] They might provide multilateral spaces for the development of outcomes that are representative,[125] or fair, as Thomas Franck puts it.[126] In the light of discourse theory, such outcomes can be of significance to support the democratic legitimation of judicial lawmaking which refers to such outcomes. It supports the democratic legitimacy of international judicial lawmaking.[127] However, the court needs to ascertain the inclusive quality of the process leading to the outcome that it plans to use.[128]

3. Systematic Interpretation as Democratic Strategy?

We have argued that processes of fragmentation in international law threaten its democratic legitimation in general and the justification of international courts' public authority in particular. Some judicial institutions tend to develop the law in a way that is imbued with the functional logic of their respective regime; judicial lawmaking potentially

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[123] On the issue of hegemony, see Benvenisti and Downs (note 77).

[124] R. Forst *Das Recht auf Rechtfertigung* (Suhrkamp Frankfurt 2007) 7; H. Kelsen *Allgemeine Staatslehre* (Springer Berlin 1925) 27 et seq. (differentiating between 'politics as ethics' and 'politics as technique').

[125] Venzke (note 44) 1425.

[126] T. Franck *Fairness in International Law and Institutions* (OUP Oxford 1995).

[127] In more detail Kuhli and Günther (note 6) 1267–74.

[128] It might similarly be problematic to give legal effect to international standards in relation to parties that have not consented to such standards, as may arguably on the basis of Appellate Body Report, WTO *ECs – Trade Description of Sardines: Report of the Appellate Body* (26 September 2002) WT/DS231/AB/R. Cf. R. Howse 'A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and International Standards' in C. Joerges and E.-U. Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Oxford 2006) 383.

aggravates the problem.[129] In response we now wonder whether systematic interpretation can be a strategy to curb those detrimental effects of fragmentation and hence to possibly foster the democratic legitimation of international adjudication. Art. 31 (3) (c) of the VCLT demands that in treaty interpretation 'there shall be taken into account, together with the context: […] any relevant rules of international law applicable in the relations between the parties.'[130] The ILC Report on fragmentation understands this rule of interpretation as an expression of the principle of systematic integration. In the words of the report, rule and principle of systemic integration 'call upon a dispute-settlement body – or a lawyer seeking to find out "what the law is" – to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have bearing upon a case. In this process the more concrete or immediately available sources are read against each other and against the general law "in the background".'[131] The decisive point is that the interpretation of a norm 'refers back to the wider legal environment, indeed the "system" of international law as a whole.'[132]

Sure enough, the idea of a legal system is fraught with difficulties and tends to be overburdened with philosophical aspirations. Not so long ago, a legal system was thought to be inherent in the law in a kind of crypto-idealistic fashion. In this mode of thinking, the idea of a system indeed faces severe problems. In the 19th century, legal science and its concern with the legal system was closely connected to the idea of a national legal order that in turn figured as an expression of the unitary will of the state and as an object of scientific investigation. In comparison with such a demanding project, international law could not possibly constitute a system and was understood as a primitive legal order.[133]

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[129] See Koskenniemi and Leino (note 81). While this is debatable as a general and timeless claim, examples are not hard to come by. The jurisprudence under the GATT, at least in its early years, testifies to this proposition just as well as instances of investment arbitration. See Venzke (note 6).

[130] At least since the 2001 ILC Fragmentation Report, a vivid discussion concerning the scope of this rule of interpretation has emerged, International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc. A/CN.4/L.682 [herafter *ILC Fragmentation Report*].

[131] ILC Fragmentation Report (note 130) para. 479.

[132] Ibid.

[133] Still in this line of reasoning, H. Hart *The Concept of Law* (2nd edn. OUP Oxford 1997) 92, 156, 214. Cf. D. Kennedy 'Primitive Legal Scholarship'(1986)

If the exaggerated hopes for what the idea of a system can really achieve are relaxed and freed from its etatistic shackles, then it appears as an external instrument for ordering and handling the law. Today the idea of a system features as an objective in the practice of interpretation.[134]

There are then good arguments that speak in favour of supposing that there is a system of international law.[135] In the communicative practice – on the level of interpretation, that is – the idea of a system can perform a significant role, especially under the impact of fragmentation. It is not a bygone topic in legal theory but rather reverberates in the thought that the meaning of a norm is inescapably contextual and relational. Also the extensive discussion about the fragmentation of international law and the protracted dominance of this topic is a strong testimony for the fixation of legal scholars and practitioners with the notion of a legal system. At issue is precisely the fragmentation of sectoral parts of the law that conceptually have to belong to a whole.[136] Finally, the demand to relate interpretations to the system of the law is part of positive law and of the prevailing legal ethos. In sum, it is every interpreter's task to aim at the system, not least because it serves legal equality.

As a matter of practice, the principle of systematic integration does pervade a number of judicial decisions even though courts only seldom invoke Art. 31 (3) (c) of the VCLT explicitly.[137] The ICJ already held in 1971 that 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time

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27 HarvardILJ 1; M. Craven 'Unity, Diversity and the Fragmentation of International Law' (2005) 14 FinnishYbIL 3 (9).

134 S. Oeter 'Vielfalt der Gerichte – Einheit des Prozessrechts?' in R. Hofmann et al. (eds) *Die Rechtskontrolle von Organen der Staatengemeinschaft* (Müller Heidelberg 2007) 149 (158); B. Simma and T. Kill 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C. Binder et al. (eds) *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (OUP Oxford 2009) 678 (686).

135 B. Simma and D. Pulkowski 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 EJIL 483; P.-M. Dupuy 'L'unité de l'ordre juridique international' (2002) 297 RdC 12 (89).

136 G.W.F. Hegel *Wissenschaft der Logik vol. 1* (2nd edn. Meiner Leipzig 1934 [1812]) 59.

137 ILC Fragmentation Report (note 130) para. 410.

of the interpretation.'[138] Also the WTO Appellate Body prominently found in its very first case that the GATT should not be read in 'clinical isolation from public international law.'[139] International trade law in the context of the WTO, among the most thoroughly judicialized parts of universal international law, thus clearly presents itself as a part of the whole of international law. In stark contrast to European Union law, it has not formed an independent legal order.[140] Struggles for independence or isolation that have come under the heading of *self-contained regimes* do not take away from the effectiveness of systemic integration.[141]

Concerns about practical feasibility in the sense that no interpreter and no international judge could be expected to take into account all of international law are not compelling. Systematic interpretation does not demand an ideal judge like Dworkin's superhuman *Hercules* who is able to find the one and only right interpretation of a norm at issue in light of all the legal practice of the system.[142] Systematic integration is only the objective marked by rules of interpretation. What is more, individual decisions are embedded in larger discursive contexts.[143] In the course of fragmentation it is also possible that different understandings compete in a dialogue *between* courts.[144] In the open process of interpretation between functionally specialized courts perspectives might compete and may possibly be approximated by way of the common language of international law. Some voices from the benches indicate that

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[138] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep. 16 para. 53.

[139] *WTO United States – Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R 17.

[140] W. Benedek *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* (Springer Berlin 1990) (critically on the early tendencies to understand the GATT as an independent legal order).

[141] Cf. B. Simma 'Self-Contained Regimes' 16 (1985) NetherlandsYbIL 111; J. Pauwelyn *Conflict of Norms in Public International Law* (CUP Cambridge 2003) 37; ILC Fragmentation Report (note 130) para. 174.

[142] R. Dworkin *Taking Rights Seriously* (1st edn. Harvard University Press Cambridge Mass. 1977).

[143] Habermas (note 99) 224.

[144] R.G. Teitel and R. Howse 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order' (2009) 41 NYU JILP 959; Y. Shany *The Competing Jurisdictions of International Courts and Tribunals* (OUP Oxford 2003) 272.

they would be inclined to follow this path.[145] This way of dealing with the consequences of fragmentation is also preferable when compared with proposals that would introduce a hierarchy between judicial institutions, for example by installing the ICJ as a higher authority that can receive preliminary or advisory proceedings.[146] It does not spoil the benefits gained by functional fragmentation.

It may be the case, however, that the strategy of systematic integration in and between judicial decisions builds on excessive trust in international judges. If judges are understood to form an 'epistemic community'[147] or if they are viewed as an 'invisible college'[148] together with legal scholars, then it could even be that the strategy ends up advocating an autocratic rule of courts. The 'community' must not be closed and the 'college' must not be invisible.[149] These are minimal safeguards and any genuine effect of legitimation could only set in when minimal preconditions for a legitimatory juridical discourse are met – above all, publicness, transparency and adequate participation. Judicial proceedings on the whole hinge on a critical general public that transcends functional differentiations. Precondition for all of this is a sensibility for the problems of legitimating international judicial authority. Not least, our contribution intends to contribute to such sensibility.

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145 T. Treves 'Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?' in R. Wolfrum and V. Röben (eds) *Developments of International Law in Treaty Making* (Springer Berlin 2005) 587; R. Higgins 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 ICLQ 791.

146 K. Oellers-Frahm 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions' (2001) 5 Max Planck UNYB 67.

147 D. Terris, C.P.R. Romano and L. Swigart *The International Judge: An Inquiry into the Men and Women Who Decide the World's Cases* (Brandeis University Press Waltham 2007) 64.

148 O. Schachter 'The Invisible College of International Lawyers' (1977) 72 Northwestern University Law Review 217; D. Kennedy 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (2001) 5 European Human Rights Law Review 463 (unfolding a pointed critique of the apologetic sides to the idea of an invisible college).

149 Kuhli and Günther (note 6) 1267–74.

IV. The Judges

1. The Democratic Importance of Independence and Impartiality

Judicial lawmaking is part of the regular mandate of international courts and tribunals. But the mandate comes with strings attached. After discussing those flowing from the allowed argumentative tools, we now look at those concerning the acting individuals. Here, the requirement of independence and impartiality stand out, hence these standards can be reconsidered in light of the principle of democracy. Eyal Benvenisti and George Downs show the importance of these two standards for the democratic legitimation of international judicial lawmaking and how these standards are wanting in the current set-up.[150]

Independence and impartiality are essential legal requirements. Indeed, the second article of the ICJ Statute specifies that '[t]he Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices'.[151] The statutes of all other courts and tribunals contain similar provisions. However, as Eyal Benvenisti and George Downs explain, there are various elements that might structurally jeopardize the independence and impartiality.

For improving independence and impartiality, some propose to introduce longer singular terms of office and to rule out the possibility of re-election. This might decrease judges' dependence on their governments, whose support they would otherwise need in a campaign for re-election.[152] Striving for greater scrutiny in the assessment of candidates is another possibility for reform. The ICC Statute for example requires that member states must justify candidacies, thus providing minimal conditions for a meaningful debate.[153] And the Caribbean Court of Jus-

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[150] Benvenisti and Downs (note 77).

[151] Art. 2 Statute of the ICJ corresponds to Art. 36 (3) Statute of the ICC.

[152] R. Mackenzie and P. Sands 'Judicial Selection for International Courts: Towards Common Principles and Practices' in K. Malleson and P. Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press Toronto 2006) 213 (223); R.D. Keohane, A. Moravcsik and A.-M. Slaughter 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 International Organization 457 (476).

[153] Art. 36 (4) of the Statute of the ICC. See Mackenzie and Sands (note 152) 228.

tice, operative since 2005, is the first international court that entirely entrusts the appointment of judges to the international Regional Judicial and Legal Services Commission.[154]

Statutes of international courts usually give instructions on the exercise of office – for instance, on a judge's secondary employment or the conditions under which she would have to recuse herself. These provisions have gained prominence in the course of recent cases on the matter.[155] Among other courts, the ICTY had to deal with an objection that called into doubt the impartiality of one of the judges in the *Furundžija* case. On that occasion, it carved out a number of criteria according to which an actual, or, under further conditions, a probable partiality of a judge leads to the exclusion from the proceedings.[156] Some courts, whose statutes provide insufficient clarity on this issue or do not speak of it at all, have adopted directives on their own initiative that spell out certain codes of conduct in considerable detail.[157]

2. Reconsidering the Process of Appointment

The imperatives of independence and impartiality of international judges, good judicial qualifications, and ethical integrity on the bench are all very important. Accordingly, they are two commanding tenets in the process of appointment to which we turn now. In fact, the appointment procedure is largely studied in this light. Nonetheless, looking at the lawmaking function of international courts, one needs to go beyond this in order to understand the full importance of the appointment procedure in light of the principle of democracy. For example, it makes a great difference whether an international judge considers state sovereignty as the most basic principle of international law or rather conceives the state as an agent of the international community in gen-

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154 D. Byron and C. Malcolm 'Caribbean Court of Justice (CCJ)' (2009) in Wolfrum (note 27).

155 Art. 40 (2) of the Statute of the ICC; Art. 7 (1) of the Statute of the ITLOS; Y. Shany and S. Horovitz 'Judicial Independence in The Hague and Freetown: A Tale of Two Cities' 21 (2008) LJIL 113.

156 *Prosecutor v. Furundžija (Judgment)* Case No. IT-95-17/1 A (21 July 2000) para. 189.

157 S. Shetreet 'Standards of Conduct of International Judges: Outside Activites' (2003) 2 LPICT 127.

eral and international human rights in particular.[158] It is above all when courts engage in judicial lawmaking on subject matters that are thoroughly contested, the political leanings of judges are of primary significance. Under democratic premises it is impossible to justify the path of lawmaking only with reference to the 'high moral character' (Art. 2 of the ICJ Statute) of the office holder.

Within the domestic system, the democratic element of the appointment procedure is well-studied, in particular with respect to judges of constitutional courts. Their appointment is not left to the executive alone, parliaments usually play some role in that procedure.[159] The role of executive institutions is far stronger with respect to international judges. Overall, the various procedures display a lot of similarities. Usually the UN Secretary-General or the secretariats of sectoral organizations invite member states to submit nominations. Candidates are then selected by the plenary body of the organization or by the assembly of all states. The example of the ICJ is paradigmatic. The General Assembly and Security Council elect judges with an absolute majority and in secret ballot for a term of nine years with the possibility of re-election. Not more than one of the 15 judges may have the nationality of the same state and, furthermore, the bench shall represent 'the principal legal systems of the world'.[160] The latter condition may be understood as recognition of the fact that (judicial) socialization bears on legal interpretation.[161] It stands in some tension to the idea of judicial independence that disputing parties who do not have a judge of their na-

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[158] For an elaboration of these visions, see A. von Bogdandy and S. Dellavalle 'Universalism and Particularism as Paradigms of International Law' IILJ Working Paper (2008/3) <http://www.iilj.org/publications/2008-3Bogdandy-Dellavalle.asp> (29 May 2011).

[159] Cf. Art. II 2 (2) of the U.S. Constitution; Art. 94 of the German Basic Law; Art. 150 of the Constitution of Estonia; Art. 135 of the Constitution of Italy; Art. 58 of the Constitution of Latvia; Art. 103 of the Constitution of Lithuania; Art. 147 of the Constitution of Austria; Art. 149 of the Constitution of Poland; Art. 159 of the Constitution of Spain. See also Malleson and Russell (note 152).

[160] Arts 3, 4, 9, 10 and 13 of the Statute of the ICJ.

[161] L.V. Prott *The Latent Power of Culture and the International Judge* (Professional Books Abingdon 1979).

tionality on the bench may choose a judge *ad hoc*, but this may also be traced back to the same idea of representing diversity.[162]

Analyses of the practice of judicial elections have highlighted the dominance of executives in the process. A state's political position and its leverage in bargaining in an international regime is often decisive for its opportunities to fill a vacancy on an international bench. Only if a decent chance exists does the executive look for a suitable candidate. In most cases candidates need heavy support of their respective governments, which have to invest considerable political capital in the election campaign.[163] Is this dominant role of the domestic governments a problem in light of the principle of democracy? This leads us to consider the vanishing point of democratic justification.

In whose name do international courts speak the law and which forum is called upon to elect international judges? With regard to domestic constitutional adjudication there are good reasons to involve the representation of the democratic sovereign in the election of judges. This usually translates into requirements of parliamentary participation, supplemented in light of discourse theoretical considerations with demands for publicness. But which institutions and *fora* should elect international judges as long as the states that are subject to a court's jurisdiction do not constitute a single nation? Three answers may be distinguished.[164]

The traditional *intergovernmental approach* traces the authority of international courts to the will of the legal entities which created them – states. State governments then figure prominently as representatives in international law (consider only Art. 7 (2) of the VCLT). Viewed from this angle, the selection of judges forms a genuine part of foreign poli-

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[162] Art. 31 (2–3) of the ICJ Statute. Cf. I. Scobbie 'Une hérésie en matière judiciaire? The Role of the Judge *ad hoc* in the International Court' (2005) 4 LPICT 421. The far younger ITLOS also provides for judges *ad hoc*, Art. 17 of the ITLOS Statute.

[163] P. Sands 'The Independence of the International Judiciary: Some Introductory Thoughts' in S. Charnovitz, D. Steger and P. van den Bossche (eds) *Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano* (CUP Cambridge 2005) 313 (319).

[164] N. Krisch 'The Pluralism of Global Administrative Law' (2006) 17 EJIL 247 (253) (sketching these competing constituencies with regard to the accountability of international bureaucracies); E. de Wet 'Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review' (2008) 11 GLJ 1987 (1989).

tics and remains a prerogative of the executive. This approach indeed informs most of the procedures for electing judges. Some even suggest that judges should be responsive to the input of their governments.[165]

The *liberal or domestic approach* does not accept the division of domestic and foreign politics that characterizes the traditional intergovernmental approach. A categorical distinction is indeed increasingly less plausible in the wake of the globalization of many spheres of life. The liberal approach then pleads in favour of aligning the procedures for choosing senior domestic and international judges. This points towards a prominent role for domestic parliaments to play.[166]

The *cosmopolitan approach*, in contrast, looks at new supranational *fora*. It takes the individual citizen to be the ultimate reference point in the justification of public authority and invests it with a national as well as a cosmopolitan identity. The latter relates the citizen to supranational or international institutions and on this basis supranational or international parliamentary *fora* can generate democratic legitimacy in the election of judges.[167] This approach finds cautious expression in the election of judges to the ECtHR by the Parliamentary Assembly of the Council of Europe.[168] Ever since 1998, interviews with candidates by a sub-committee also bear the potential of nourishing the development of a public that further increases the legitimatory momentum. This procedural element has for example triggered a positive politicization of the election process when the assembly rejected a member state's list of candidates because it did not include any female candidate.[169]

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165 E. Posner and J. Yoo 'Judicial Independence in International Tribunals' (2005) 93 California Law Review 1.

166 In line with this, the German parliament will have a say on the selection of Future German ECJ judges, see Richterwahlgesetz in der Fassung des Gesetzes über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, 22 September 2009, paras 1 and 3.

167 See F. Arndt 'Parliamentary Assemblies, International' in Wolfrum (note 27).

168 Art. 22 of the ECHR. See J.A. Frowein 'Art. 22' in J.A. Frowein and W. Peukert (eds) *EMRK-Kommentar* (3rd edn. Engel Kehl am Rhein 2009) para. 2.

169 See, however, ECtHR *Advisory Opinion on Certain Legal Questions concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights* (Grand Chamber, 12 February 2008). Also note that some statutes explicitly try to address the disproportionately weak representation of women, see, e.g., Art. 36 (8) (a) (iii) of the ICC Statute.

How much justification can the cosmopolitan approach actually shoulder? Can the election of international judges by international bodies generate democratic legitimacy, or does the cosmopolitan approach lead to the wrong track? Discourse theory once more is of help. Habermas has worked towards loosening the close ties of the concepts of democracy, constitution and law with the idea of the state and explores questions of democratic legitimation in a politically organized world society while neither assuming that this political organization has the attributes of a state, nor suggesting that this is a goal to be desired.[170] Habermas builds here on his theory of intersubjectivity, paving the way for imagining democracy without implying that there is a unitary people. At the same time, he underlines that domestic constitutional orders have created democratic processes for forming public opinion and political will that are hard to reproduce at the supranational level.[171] Legitimating new forms of public authority in the postnational constellation therefore has to connect to the threads of legitimation that passes through democratic states and should further be complemented by an additional cosmopolitan basis of legitimation.[172]

Accordingly, the participation of international bodies in the election of judges may already offer a certain degree of cosmopolitan justification. For this purpose it is crucial that the election of judges is embedded in a global public. This is not sheer aspiration. It may be recalled that the election of Christopher Greenwood to the ICJ stirred some global criticism and discussion because of his legal opinions with regard to the war in Iraq.[173] Be it noted, however, that the degree of cosmopolitan justification hinges on the discursive quality of participation. In any event, the mechanism of judicial election as it is practiced in the context of the ECtHR turns out to be truly forward-looking from the point of view of democratic theory.

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[170] J. Habermas *Die postnationale Konstellation* (Suhrkamp Frankfurt 1998) 165.

[171] J. Habermas 'Does the Constitutionalization of International Law Still Have a Chance?' in J. Habermas (ed.) *The Divided West* (Polity Press Cambridge 2006) 113 (141).

[172] J. Habermas 'Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft' in Brugger, Neumann and Kirste (note 15) 360 (362).

[173] See J. Ku 'Will the ICJ Have a U.S.-Style Nomination Fight? (We Can Only Hope)' (3 November 2008) <http://opiniojuris.org/2008/11/03/will-the-icj-have-a-us-style-nomination-fight-we-can-only-hope/> (29 May 2011).

V. The Procedure

After having looked at courts' reasoning and judicial appointments in light of the principle of democracy, we now turn to procedural law. The first question is how judicial procedures can be understood as spaces in which democratic legitimacy may be generated while neither calling into doubt the judge's monopoly over the judicial decision nor watering down a nuanced concept of democracy that demands effective participation in decision-making processes. In the tradition of pragmatics and discourse theory, two features appear by way of which judicial procedures could strengthen the democratic legitimation of judicial decisions. The first concerns the justification of decisions with regard to the participants in the process. The parties to a dispute are involved in how the case is handled and the court is required to deal with the arguments that they introduce. This co-operative treatment of the matter in dispute is not confined to questions of fact or evidence but – against the widespread understanding of the principle of *iura novit curia* – also extends to questions of law. The other element, more central to the focus of our study, is the way in which the procedure allows the wider public to take part in the process of judicial will formation, embedding the judges in the general discourses on a given topic.

This way of looking at the procedures of international adjudication is certainly not very common and the relevant law is underdeveloped in this respect. International judicial institutions, specifically their procedural law, respond to conceptions of what international dispute settlement is about, what it is for and what it actually does. So far that has almost exclusively been the settlement of the dispute at hand. The more the generation of legal normativity in the practice of international adjudication becomes visible, the more traditionally prevailing requirements for judicial procedures need to be supplemented by further considerations.[174] The more judicial lawmaking becomes palpable, the more procedural law will start to respond to legitimatory concerns that spring from the jurisgenerative dimension of international adjudication.

This section highlights how the increasing recognition of the jurisgenerative dimension of international judicial practice is reflected in

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[174] C. Chinkin 'Art. 62' in Zimmermann, Tomuschat and Oellers-Frahm (note 59) 1331 (1366); R. Wolfrum 'Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea' in V. Götz, P. Selmer and R. Wolfrum (eds) *Liber amicorum Günther Jaenicke – zum 85. Geburtstag* (Springer Berlin 1999) 427.

mounting demands for transparency, publicness and participation in international proceedings. It investigates comparatively how the procedural law of international courts and tribunals copes with similar problems, in particular regarding legitimatory concerns that are triggered by the phenomenon of judicial lawmaking. At the same time, trends in procedural law give evidence to shifting ideas about international dispute settlement that inform even larger debates about the nature of the international legal order and its deep social structure.

It is worth noting that the procedural law of international judicial institutions is largely a product of their own making.[175] As Jean-Marc Sorel put it, 'self-regulation is the prevailing system, which implies mutability of the rules of procedure within the framework of the statute. This is an important source of independence and one of the ways in which such a creature may escape its makers'.[176] We understand developments in rules of procedure with regard to more transparency and opportunities of participation as an expression of the changing conception of international decisions and as part of attempts that aim at strengthening the capacity of democratic legitimation that is nested in the judicial process itself. Three dimensions are of particular relevance.[177]

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[175] The notion of *procedural law* describes the body of requirements that govern how a judicial process has to be conducted. No uniform *procedural law* for all courts is thereby postulated. R. Kolb 'General Principles of Procedural Law' in Zimmermann, Tomuschat and Oellers-Frahm (note 59); C. Brown *A Common Law of International Adjudication* (OUP Oxford 2007) 6.

[176] J.-M. Sorel 'International Courts and Tribunals, Procedure' (2009) in Wolfrum (note 27) para. 1.

[177] Other dimensions include the establishment of facts and rules of evidence, both may be relevant for the legitimation of international adjudication, possibly less so, however, with regard to international judicial lawmaking. See *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Joint Dissenting Opinion of Judges Al-Khasawneh and Simma*) [2010] ICJ General List No. 135 para. 8 (lamenting that the court excessively relied on expertise offered by the parties and arguing that the court should have either appointed its own experts or had party-appointed experts subjected to cross-examination); M. Benzing *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer Berlin 2010).

1. Publicness and Transparency

A crucial element for publicness and transparency and hence democracy are the oral proceedings that some court statutes explicitly provide for.[178] In other contexts like the WTO and much of investment arbitration confidentiality is the rule. But even here procedures have opened up in practice to some prerequisites of publicness and transparency.[179] The Sutherland Report of 2004 reinforced this trend by stating that 'the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution' and by suggesting that oral proceedings should be public.[180] Of course it remains critically important to pay due respect to the interests of the parties. Also sensitive trade secrets must be kept. Often proceedings do remain behind closed doors, in particular in cases before the panels that are, in comparison to the Appellate Body, as an institution as well as in their nature, composition and ethos closer to the arbitration model.[181]

And yet there is room for improvement. The position taken by the panel in *Canada – Continued Suspension* is remarkable. The panel held hearings in public and justified this step *inter alia* with the innovative argument that the provisions about confidentiality of proceedings only relate to the internal deliberations of the panel but not the exchange of arguments between the parties.[182] And the Appellate Body maintained

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[178] Art. 46 of the ICJ Statute; Art. 59 of the ICJ Rules of Court; Art. 26 (2) of the ITLOS Statute; Art. 74 of the Rules of ITLOS; Art. 40 of the ECHR; Art. 63 (2) of the Rules of ECtHR; Arts 67, 68 (2) of the ICC Statute. See Sorel (note 176) para. 18; S. von Schorlemer 'Art. 46' in Zimmermann, Tomuschat and Oellers-Frahm (note 59) 1063 (1070).

[179] Arts 14 (1), 18 (2) and 17 (10) of the DSU provide that procedures and written submissions are confidential. L. Ehring 'Public Access to Dispute Settlement Hearings in the World Trade Organization' (2008) 11 JIEL 1021.

[180] P. Sutherland et al. 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium ('Sutherland Report', 2004)' <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf> (18 June 2011) paras 261 et seq.

[181] J.H.H. Weiler 'The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 JWT 191; C.-D. Ehlermann 'Six Years on the Bench of the "World Trade Court" - Some Personal Experiences as Member of the Appellate Body of the World Trade Organization' (2002) 36 JWT 605.

[182] *WTO Canada – Continued Suspension of Obligations in the EC – Hormones Dispute – Report of the Panel* (31 March 2008) WT/DS321/R para. 7.47.

that '[i]n practice, the confidentiality requirement in Article 17.10 has its limits. […] Public disclosure of Appellate Body reports is an inherent and necessary feature of our rules based system of adjudication. Consequently, under the DSU, confidentiality is relative and time-bound.'[183]

Procedures in the ICSID framework fall short of those of the WTO on this point. But also here first cracks are starting to show that may soon widen so as to accommodate growing demands for more transparency.[184] In June 2005, the OECD Investment Committee threw its authority behind the argument when it maintained that '[t]here is a general understanding among the Members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence.'[185] Apart from the fact that the Committee clearly connects questions of transparency with questions of legitimacy and effectiveness, it should be highlighted that it explicitly describes building up a visible body of jurisprudence as a valuable goal to be pursued.[186]

2. Third Party Intervention

Further avenues for responding to problems in the justification of international courts' exercise of public authority may be found in an expansion of possibilities for intervention and participation. In a straight-

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[183] *WTO United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body* (4 February 2009) WT/DS350/AB/R Annex III para. 4.

[184] C.N. Brower, C.H. Brower II and J.K. Sharpe 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arbitration International 415.

[185] OECD 'Transparency and Third Party Participation' in: Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee (2005) 1.

[186] Rule 32 (2) of the ICSID Rules of Procedure (10 April 2006). From legal practice, see, for instance, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal v. Argentine Republic (Order of 19 May 2005)* ICSID Case No. ARB/03/19 para. 6.

forward fashion, Art. 63 of the ICJ Statute gives every party to a convention a right to intervene if the interpretation of that convention is at issue. Beyond this clear provision, it is noteworthy that in the seminal *Pulau Ligitan* case the ICJ in principle allowed that a party may intervene even if it cannot itself show a jurisdictional link to any of the parties.[187] The trend towards wider participation in judicial proceedings is a testament to an increasing recognition of the effects that judgments create beyond those who are immediately involved in the particular dispute. This is yet another indication showing that understanding judicial decisions as acts of simply finding the law and as acts that are binding only *inter partes* is inadequate.[188]

In the procedures of the WTO, members that are not parties to the dispute have always been able to participate in all steps of the dispute (consultations, panel proceedings, appellate proceedings, and surveillance of implementation).[189] In contrast to the ICJ and also to ITLOS, however, the black letter procedural law does not grant intervening parties the right to attend hearings. Whether and how often hearings are opened up to third parties largely lies within the discretion of the panels.[190] In *EC – Bananas III*, a large number of developing countries requested to attend the hearings and the panel observed that decisions to open up the hearings have so far always been taken with the consent of the disputing parties – a crucial element that it saw lacking in the case at hand. In the same breath, the panel nevertheless allowed that the respective states attend the hearings and justified this decision with the special economic implications that the EC legal regime on bananas had.[191] Judicial practice has since supported the claim that special circumstances may justify extended possibilities for participation in judicial proceedings.

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[187] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) (Judgment)* [2001] ICJ Rep. 575 para. 35.

[188] A. Zimmermann 'International Courts and Tribunals, Intervention in Proceedings' (2006) in Wolfrum (note 27).

[189] Arts 4 (11), 10, 17 (4) and 21 of the DSU. Cf. M. Hilf 'Das Streitbeilegungssystem der WTO' in M. Hilf and S. Oeter (eds) *WTO-Recht: Rechtsordnung des Welthandels* (Nomos Baden-Baden 2005) 505 (521).

[190] Art. 10 and Appendix 3 (6) of the DSU. Cf. K. Arend 'Article 10 DSU' in R. Wolfrum, P.-T. Stoll and K. Kaiser *Max Planck Commentaries on World Trade Law* vol. 2 (Nijhoff Leiden 2006) 373.

[191] See P. van den Bossche *The Law and Policy of the World Trade Organization* (CUP Cambridge 2008) 279.

Practice in investment arbitration still shows that the traditional logic of arbitration leaves little room for third parties to participate. There are a number of salient reasons for this approach that are akin to those that already militated against transparency and publicness of the proceedings: the effective dispute resolution in the concrete individual case, sensitive concessions and compromises that may only be reached in confidential settings, and protection of business secrets.[192] And yet, even in this field of adjudication there are trends to expand the proceedings. They may be better discussed with regard to the role of *amici curiae*.

3. *Amici Curiae*

Usually *amici curiae* are those actors who do not themselves have a legally protected interest in the particular case and yet want to intervene.[193] Above all NGO participation may open up legitimatory potential. This may bridge the gap between the legal procedures and the global or national public. They can also introduce additional perspectives and might be able to trigger processes of scandalisation that contribute to discussions and mobilize the general public. Civil society at the periphery of international processes tends to show a greater sensibility for social and ecological questions when compared with actors at the centre of international political decision-making.[194]

The procedural law of the ICJ and ITLOS does not provide for submissions by *amici curiae*.[195] In one of the ICJ's first cases ever, its registrar rejected the motion on the part of an NGO that sought to submit its

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[192] J. Delaney and D.B. Magraw 'Procedural Transparency' in P. Muchlinski, F. Ortino and C. Schreuer (eds) *The Oxford Handbook of International Investment Law* (OUP Oxford 200) 721 (775).

[193] P. Sands and R. Mackenzie 'International Courts and Tribunals, Amicus Curiae' (2009) in Wolfrum (note 27) margin number 2; H. Ascensio 'L'amicus curiae devant les juridictions internationales' (2001) 105 RGDIP 897.

[194] Habermas (note 99) 303, 382; J. von Bernstorff 'Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Expertenherrschaft?' in H. Brunkhorst (ed.) *Demokratie in der Weltgesellschaft: Soziale Welt Sonderband vol. 18* (Nomos Baden-Baden 2009) 277.

[195] In detail, see Wolfrum (note 174).

opinion in writing and to present its view orally.[196] This decision holds for contentious cases but not when the ICJ acts in an advisory capacity.[197] Only a little later the same NGO received a positive response from the registrar and was allowed to appear as *amicus curiae* in the advisory proceedings concerning the *Status of South-West Africa*.[198] Ever since the *Gabcíkovo-Nagymaros* case it is also clear that *amicus curiae* briefs may be introduced as part of the submissions of the disputing parties.[199] Beyond this minimal common denominator there remains considerable disagreement within the ICJ on how to deal with *amicus curiae* briefs. Opposing opinions have so far impeded developments like they have taken place in other judicial institutions.[200] Former President Gilbert Guillaume stated bluntly that nowadays states and intergovernmental institutions should be protected against 'powerful pressure groups which besiege them today with the support of the mass media'. For that reason, he argued, that the ICJ should better ward off unwanted *amicus curiae* submissions.[201]

Neither treaty law within the WTO context makes any provisions on how to deal with *amicus curiae* briefs. But here legal practice has warmed up to the idea that maybe *amici curiae* should have a role to play. Legal practice has been paralleled by a significant discussion among practitioners and scholars on the issue.[202] As early as the *US – Gasoline* case NGOs pushed to present their views but were simply ignored by the panel. In the path-breaking *US – Shrimp* case, the panel explicitly rejected *amicus curiae* submissions but was corrected by the

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196 The answer was an easy one because the NGO had tried to base its claim on Art. 34 of the ICJ Statute, whose relevant paragraph 3 is shaped to fit public international organizations. Therefore, the simple conclusion that the NGO is not a public international organization sufficed. See P.-M. Dupuy 'Article 34' in Zimmermann, Tomuschat and Oellers-Frahm (note 59) 545 (548).

197 Art. 66 ICJ of the Statute.

198 A.-K. Lindblom *Non-Governmental Organisations in International Law* (CUP Cambridge 2005) 303.

199 *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia) (Judgment)* [1997] ICJ Rep. 7.

200 See ICJ Practice Direction XII (2004).

201 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (Separate Opinion of Judge Guillaume)* [1996] ICJ Rep. 287.

202 R. Howse 'Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy' (2003) 9 ELJ 496.

higher level of jurisdiction. The Appellate Body argued that '[t]he thrust of Arts 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.'[203]

ICSID proceedings have for long been sealed off from any possibility of participation beyond the parties to the case. And yet, even in this context legal practice has changed and opened up avenues for *amici curiae*.[204] The NAFTA Free Trade Commission passed a recommendation in which it maintained that the rules of procedure do not in principle prevent third parties from stating their views. It went on to argue that in their decisions on this issue panels should be guided by the consideration of whether the case concerned a public interest.[205] Similarly, the OECD Investment Committee elaborated in the report mentioned above that 'Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific regulations.'[206] The new ICSID Arbitration Rules of 2006 responded to shifts in practice as well as political commentary and introduced a new Art. 37 that speaks of the possibility of submissions by third parties and *amici curiae*.[207]

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[203] WTO *United States - Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R para. 106. The *EC-Asbestos* Case was also of great importance, see especially WTO *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products – Communication from the Appallate Body* (8 November 2000) WT/DS135/9 and *General Council - Minutes of Meeting - Held in the Centre William Rappard on 22 November 2000* (23 January 2001) WT/GC/M/60.

[204] See Delaney and Magraw (note 192).

[205] NAFTA 'Statement of the Free Trade Commission on Non-disputing Party Participation' <http://www.naftaclaims.com/Papers/Nondisputing-en.pdf> (11 June 2011).

[206] OECD *Transparency and Third Party Participation* (note 185).

[207] Art. 37 (2) of the Arbitration Rules. ICSID Discussion Paper 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14> (12 February 2011).

VI. The Role of Domestic Organs

Our piece has identified problems in the democratic legitimation of international judicial lawmaking and has shown that there are promising strategies to respond, but that no solutions are readily available to ease all concerns. Moreover, such strategies must be spelled out in further detail and it remains to be seen how they stand the test of practice and which legitimatory effect they will actually be able to achieve. On its own, it is hard to see how it is possible to fully square international judicial lawmaking with the principle of democracy.

So we see a dilemma: our conviction is that the increasing authority of international courts constitutes a grand achievement. Even if the international judiciary does not fulfil all aspirations of global justice,[208] its lawmaking has significantly contributed to legalization and hence a transformation of international discourses. Although one should not see international legalization as a value per se irrespective of content, the overall process should be welcomed.[209] Yet, these achievements are accompanied by a sense of discomfort springing from the insight that, as of now, international courts may not always satisfy well-founded expectations of legitimation.

The resulting tension may be relaxed by holding up the political and legal responsibility that municipal constitutional organs retain in deciding about the effect of international decisions and by bearing in mind how they, in turn, can feed back into developments at the international level.[210] From a legal point of view, this means that the effect of international law and international decisions, including the precedential effect for domestic courts, is determined by constitutional law. Their normativity in the domestic realm is mediated by the municipal legal sys-

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[208] See Benvenisti and Downs (note 77) (sharpening the understanding of how powerful states and sectoral interests strategically use international judicial institutions).

[209] E. Brimmer 'International Politics Needs International Law' in E. Jouannet, H.R. Fabri and J.-M. Sorel (eds) *Regards d'une Génération sur le Droit International* (Pedone Paris 2008) 113; M. Koskenniemi *The Gentle Civilizer of Nations* (CUP Cambridge 2001) 494.

[210] R. Howse and K. Nicolaïdis 'Democracy Without Sovereignty: The Global Vocation of Political Ethics' in T. Broude and Y. Shany (eds) *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Oxford 2008) 163.

tem.[211] This mediation frees international judicial lawmaking from legitimatory burdens that it may not always be in a position to shoulder. Such interplay between levels of governance opens up yet another strategy of maintaining the possibilities of democratic self-determination in the post-national constellation.

This constellation does not provide an obstacle to further develop international adjudication. Quite to the contrary, relieving such adjudication from some of the burdens of legitimation may actually serve its development. For that purpose it is important that the consequences of non-compliance are made clear. Unmistakably then, the mere disregard of an international decision cannot justify military sanctions, unless it amounted to a threat to international peace and security and was sanctioned by the UN Security Council.[212]

The disencumbering role that municipal organs can perform may also positively feed into processes of international law's development because municipal organs not only control the effects of international decisions within their legal order. We suggest that they exercise their control function with explicit reasons. They can thus formulate standards and may inspire further developments in the international legal order.[213] It should be stressed that domestic non-compliance triggers heavy argumentative burdens.[214] In the present state of the world, the smooth operation of international law is of critical importance and domestic organs must consider the consequences of any non-compliance for the international legal order in general and for the authority of the international court in question in particular.

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[211] In detail see A. von Bogdandy 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 International Journal of Constitutional Law 397.

[212] Art. 50 of the Articles on Responsibility of States for Internationally Wrongful Acts.

[213] Case C-93/02 P, *Établissements Biret et Cie SA v. Council of the EU*, 2003 E.C.R. I-10497; Joined Cases C-402/05 P and 415/05 P, *Kadi and Al Barakaat v. Council of the EU and EC Commission*, 2008 E.C.R. I-6351 (also following this logic).

[214] Bundesverfassungsgericht (Federal Constitutional Court), 14 October 2004, 2 BvR1481/04, 111 Entscheidungen des Bundesverfassungsgerichts 307, for an English translation see <http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html> (31 May 2011). Cf. on the role of domestic courts, E. Benvenisti 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241.

*Comment by Abdul G. Koroma**

An Investigation of International Courts, Public Authority and its Democratic Justification

As is to be expected of any paper by Armin von Bogdandy and his associate, the paper 'International Courts as Lawmakers' is well researched and draws on many points of view, with some of which even the authors themselves do not agree. Some sections of the paper could stand on their own if the authors had chosen to advance their own theories on the exercise of public authority by courts.

In my view, the paper deals appropriately with the exercise of public authority through international adjudication when it states: 'International adjudication would not require an elaborate justification of its own under the principle of democracy if it did not amount to an exercise of public authority'.[1] The paper recalls that *Justitia* wields a sword, which shows that a democratic society governed by the rule of law puts in place coercive mechanisms to ensure effective implementation of domestic court decisions. This is evidently not the case when it comes to decisions of international courts. Under Art. 94 (2) of the UN Charter, the UN Security Council should take coercive measures if disregard for an ICJ decision threatens international peace and security. In practice, however, according to the paper, non-compliance with judgments of the ICJ or most other courts rarely draws coercive measures in response.

They also observe that it is an empirical fact today that the power of many international institutions is similar in significance and in its potential to shape and constrain freedom as that of domestic institutions. In this regard the authors understand authority as the legal capacity to direct others and to influence their freedom, i.e., to shape their legal or factual situation; even if international judicial decisions are usually not backed by coercive mechanisms, they still constrain parties to the dispute as well as other subjects of the legal order in their actions.

The authors contend that adjudicatory practice on the part of any court that has some reputation should be qualified as an exercise of public authority that demands justification. They point out that the relatively

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* Judge at the International Court of Justice.

1 At p. 172 above.

broad conception of authority stems from a principal consideration that, if public law is seen in a liberal and democratic tradition as an order for safeguarding personal freedom and for allowing collective self-determination, then any act with an effect on these normative vantage points should come into consideration the moment its effects are significant enough to give rise to reasonable doubts about its legitimacy.

According to the authors, this position leads to the central problem in the justification of international courts: According to them, in the domestic context of functioning democracies, judicial lawmaking is embedded in a responsive political system, whereas the international level is marked by the absence of a functionally equivalent system. In my view, while it is normal to take such a theoretical stance, the problem remains, however, as to why such a theoretical stance should be applied to all international law.

In a discussion of the role of the International Centre for Settlement of Investment Disputes (ICSID) reference is made to the occasion when General Counsel of the World Bank, faced with failed international negotiations about the applicable material law, advanced the programmatic formula 'procedure before substance'. The substance, he argued, would follow the practice of adjudication. And so it did, as judge-made law and deeply imbued with the functional logic pervading the investment protection regime. This observation is both striking and insightful.

As I stated earlier on, some sections of this paper could stand on their own if the authors had chosen to advance their own theories on the exercise of public authority functions by the court. This is well illustrated by the first sentence of the first paragraph of concluding Section VI: 'Our piece has identified problems in the democratic legitimation of international judicial lawmaking and has shown that there are promising strategies to respond, but that no solutions are readily available to ease all concerns'. This may well be true, but it does not get us very far. It might have been better to focus on specific aspects of the matter rather than on the subject as a whole.

In the opinion of the authors, 'public law [should be] seen in a liberal and democratic tradition as an order for safeguarding personal freedom and for allowing collective self-determination'. This statement is problematic in itself, as it is not made clear why this point of view should be preferred over others or why it should apply to international law at all. (For instance: Is the 'preservation of liberty' point fully applicable to states? Does it apply to individuals and the way general international law still treats them?) But, in any case, after this statement the paper

goes on to explain that domestic parliaments are not in full command of international legislative processes – but should be more involved –, that constitutionalist readings of the function of international courts are unconvincing, and that fragmentation is a problem for democracy.

The discussion on the absence of international legislatures could have benefited from more attention to actual experience than the authors give. Thus, for instance, it is well known that the *Lotus*[2] holdings on jurisdiction over collisions at sea were later reversed by some states through a special convention. Likewise, the Court's 1966 decision in the *South West Africa*[3] cases came under heavy criticism by states, including through the United Nations fora. It later led the Court itself to reverse its holdings – or so say some – in *Barcelona Traction*[4] and, to some extent, in the *Namibia* Advisory Opinion[5], which was more in line with the pre-1966 case law of the Court. By the same token, the decision in *Nicaragua*[6] was criticized by the United States, but it led to a change in the law of the use of force and to acceptance of the jurisdiction of the Court. Thus, although no parliamentary process exists in international law, that law does have some equivalents to what parliaments do in municipal systems to redress – or not to redress – excessive exercises of judicial authority, in this context engaged in by states.

'Constitutionalism' is rejected too summarily in the paper. First, the analogy drawn between domestic constitutional law and international law is problematic. International law may be without a written constitution, say, and thus without notions of 'constitutional law' or 'constitutional organs' or 'constitution', but this is not the end of the matter. Many constitutional systems apply different techniques in protecting even written rules. In the United Kingdom constitutional law, the situation is similar. Although no written constitution exists, there are statutes and conventions that 'speak to "constitutional values"'. Thus, for

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2 *The 'Lotus' (France v. Turkey)* PCIJ Series A No. 10.

3 *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase)* [1966] ICJ Rep. 6.

4 *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain) (Second Phase)* [1970] ICJ Rep. 3.

5 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep. 16.

6 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep. 14.

example, monarchical succession is regulated by the Bill of Rights (1689). British law protects such acts with interpretative restrictions: *lex posteriori* or *lex specialis* may only derogate from these constitutional statutes expressly. Interpretations implicitly introducing derogations hold no traction before courts. Therefore, these statutes apply in all cases to situations arising under them unless purposely excluded by parliament. One should wonder whether international law does not have similar rules that 'speak to' what in municipal law would be called 'constitutional issues' (for example: that all wrongful acts entail responsibility; all responsibility entails reparation; the definition of 'state' covers all its organs – principle of the unity of the state; states are free to enter into treaties; states are not free to derogate from certain norms; and so on).

Second, while they state that constitutionalists like Habermas have the burden of proving the correctness of their approach, I think the authors also should have explained their own approach. The paper used legal theory to inform the article and, as we all know, different theories can be used to justify different points of view. But if this is done, it might be good to explain how the theory is relevant to positive law, or, at least, to explain why present-day positive law or some aspects of it would benefit from this theory. Although it is not strictly necessary to do this, forgoing such an analysis raises the risk of positing a theory that does not address the real problems to be grappled with by the law.

Finally, it is unlikely that the courts would have 'constitutional' functions in international law. As we know, courts and some international organizations are created through treaties or similar instruments (for example, UN Security Council resolutions, practice under certain regimes, etc.) rather than through general customary international law or general principles of law. And thus it cannot be said that there are constitutional provisions in 'international law' (as opposed to conventional international law) defining the roles of courts in the same way as there are provisions on the roles of courts in, say, Art. 3 of the United States Constitution, applicable throughout the nation. The few customary rules that exist about tribunals (for example, exhaustion of local remedies, nationality of claims) do not rise to the same level. Thus, there are many regimes with their own degrees of cohesion, logic (cf. 'the functional logic that pervades the investment protection regime', p. 164) and so on. This is why, even though the ICJ, ITLOS, ICSID tribunals, and the World Trade Organization (WTO) panels are all 'courts', a comparison between the roles of these tribunals is a suitable topic for discussion. The WTO panels, for example, do not have to concern them-

selves with the problem of consensual jurisdiction dealt with by the ICJ; their broad treatment of third-party intervention as a party and the ICJ's traditional reluctance to do the same are formally the same exercise, but they answer to very different expectations, roles, considerations, etc.

Thus, the influence of the 'liberal' approach, which, I take it, is subscribed to by the authors in respect of the process for selecting judges, is discussed too briefly. Although it raises truly interesting points, such as the lack of intrinsic difference between selecting senior judges for international and municipal tribunals or how international and national politics are not different, those claims are very sweeping and they can be points for discussion as well. Again, the selection of judges and its legitimacy – or not – the relevant process of the court in question, could be the subject of an article on its own. It is possible to speculate why the liberal approach points towards a prominent role for domestic parliament, but that is all that can be done with the material in the paper.

Regarding 'the trend towards wider participation in judicial proceedings', this testifies to an increasing recognition of the effects that judgments create beyond those which are immediately involved in the particular case. When discussing intervention before the WTO, the authors recall the *EC-Bananas* case.[7] *EC-Bananas* has been widely criticized for allowing the United States to intervene as a party in a dispute concerning European Union tariffs on bananas despite the fact that the United States produced – but did not export – bananas. Therefore, arguably, no United States' benefit was nullified by the tariffs in question. More discussion of the reactions to this very interesting point, including those in opposition to it, and any negative connotation that intervention in these circumstances would have been welcome here.

The insights into control by domestic parliaments of treaties once concluded are excellent, but need further development. It is true that a treaty, once approved, escapes control of parliament. Treaty practice, within the meaning of Art. 31 (3) (b) of the Vienna Convention on the Law of Treaties (VCLT), for instance, would more often than not be undertaken by the executive rather than the legislature. So would authoritative interpretations like the one issued in respect of *Pope & Talbot*[8] by the NAFTA parties. These observations apply even more force-

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[7] WTO *EC – Regime for the Importation, Sale and Distribution of Bananas* (9 September 1997) WT/DS27/AB/R.

[8] *Pope & Talbot Inc v. Canada (Award on the Merits of Phase 2 of 10 April 2001)* (2005) 7 ICSID Rep. 102.

fully to customary law, which is beyond the remit of any one parliament individually considered, and arguably beyond that of governments unaware of customary rights and obligations. Something more could have been said on Art. 31 (3) (b) VCLT practice, which is one of the more obvious angles of this problem.

Finally, let me give you my views on the topic 'Does the Court Make Law?'. After all my years in the Court, I do not think so. The function of the Court is to apply international law in deciding cases. In doing so, the Court has always applied the existing sources of law specified in Art. 38 of the ICJ Statute. In so doing, the Court has interpreted and applied treaties, and determined whether customary law exists or is imagined. The Court has applied general principles such as *res judicata* or what appears to be much like it. Despite the prohibition in Art. 59 of the ICJ Statute, the Court has not been able to resist citing its decided cases. Presently, there is a matter before the Court regarding requests for permission to intervene under Art. 62 of the ICJ Statute. Art. 62 of the ICJ Statute allows the Court to interpret a multilateral treaty and a decision in such a case is binding on third parties who have chosen to intervene. Lawmaking by the Court therefore, in my view, does not take place. The Court would rather declare a *non-liquet* than make the law.

Notwithstanding the foregoing comments, I have to agree with the authors that the real problem of lawmaking by international courts is one of legitimation, as courts may not always satisfy well-founded expectations and the effect this may have on the domestic legal order.

There is no doubt that the paper has brought to the fore very interesting ideas and issues which I am confident will continue to be discussed here in this forum and beyond.

Discussion

P.-M. Dupuy: I would like to refer to Theodor Eisenberg, a famous German physician. He said there is nothing more practical than a good theory. And I think that Armin von Bogdandy provided us with an excellent theory in the sense that he gives us a framework which helps very much in going a bit further. In the exercise of public authority, I think he insisted very well on the necessity of maintaining at least an element of communication between individual lawmaking and general lawmaking, which could be also called *jurisdictio*. And I think that this is a very important point that we already touched this morning. That being said, the two contributors insisted on the legitimate expectations and one should perhaps add to that – it has been already alluded to – the number of expectations is growing more and more important and it emanates from different groups of people. There are the States, of course, but there are also other international courts – I'm referring for instance to the Appellate Body, request or quests for the legal nature of the precautionary principle for instance – and there are also supreme national courts, not only constitutional courts, which would like very much in a number of cases to be enlightened about complex issues. And in that respect, the role of the court and the ICJ in particular is becoming more and more important. The problem with it is that States will remain the main clients and are not always keen at the same level on receiving developments of the law by the Court itself. But that's another issue. Thank you very much.

M. Villiger: I am a judge at the European Court of Human Rights. May I make some personal remarks on the Strasburg Court (ECtHR) as a legislator. There can be no question of the judgment of the ECtHR having some fixed position in domestic law. The judgment is one step towards, possibly, new legislation or any other means whereby the authorities take over the judgment into their legal order. One cannot speak here of legislation for different reasons. First, judgments always arise in individual applications, an individual is filing a complaint against the State. There is not much room for legislation there. The fact that inter-State applications are envisaged by the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention, European Convention on Human Rights) does not change this

conclusion fundamentally. Second, Art. 41 of the Convention, which provides that the ECtHR may, if it has found a violation, award the applicant just satisfaction. However, in the very first place the State should provide for *restitutio in integrum* and resort to the situation as it was before the violation occurred, i.e., if property was expropriated it should be returned. If *restitutio* is not possible, then material and immaterial damages may be called for. Nowhere is legislation mentioned. Third, Art. 1 of the Convention obliges States to comply in their legislation with the European Convention on Human Rights. Art. 1 is a 'sleeping beauty' as regards the potential role of the ECtHR as a legislator which does indeed exist. I believe that this sleeping beauty can still be woken. Fourth, the *travaux préparatoires* to the Convention are clear when they explain that the ECtHR will never be able to quash domestic decisions. Its judgments always have a declaratory function; they will state whether or not there has been a breach of the Convention and will give the reasons herefor. Still, there have been certain developments in this respect. In the first ten or so years, the ECtHR was very reticent about stating anything on the effects of the judgments. Then it started making some remarks *obiter*. In *Marckx v. Belgium* for example, it said very timidly that it was inevitable that the judgments would have some other effect in the domestic sphere than just between the applicant and the government. Then came the case of *Papamichalopoulos v. Greece*, where the ECtHR said that States, if necessary, may have to change the situation and resort to the situation before the breach occurred in their system. And in an Italian case, *Scozzari*, the ECtHR stated that it is up to the State to choose the means, general or individual, in order to comply with the judgment. If the State chooses general means, the ECtHR continued, then this must occur under the supervision of the Committee of Ministers. I think that is more or less the standard as it applies today. The State is free to choose general or individual means. The most important general means would be legislation. However, there have been other developments of which I shall mention two. First, the so-called pilot judgments, whereby, because of a legislative defect in domestic law, thousands of applications are being filed with the ECtHR. The ECtHR then issues a pilot judgment which leads to changes in the domestic legislation. Subsequently, the many other applications are dealt with in the same way. In this way the ECtHR can more or less directly influence the law in order to remedy the situation. The other development is the increasing authority of the judgments of the ECtHR. The Protocol No. 11 to the Convention of 1998 set up a Grand Chamber within the ECtHR with 17 judges ad-

judging its most difficult cases, and it is clear that, if the Grand Chamber issues a judgment, all States in Europe will read it carefully in order to see whether and to what extent it should be transposed into domestic law. To give you one example, *Salduz vs. Turkey* concerning the so-called 'lawyer of the first hour'. The judgment explains from when on after a person's arrest he or she shall have contact with a lawyer (*avocat*). There can be no doubt that the principles enunciated in *Salduz* will have a strong impact in the domestic law. Interestingly enough, *Salduz* concerned criminal proceedings against a 17 year old boy. It would have been very easy for the ECtHR to state that a 17 year old boy always need legal representation. But the ECtHR went beyond that, thereby enhancing the authority of the judgment, by generally stating the principles which the fairness of a criminal procedure require when a person has been arrested. Thus, the *Salduz* judgment is not a substitute for legislation, but will have a strong impact on it. To close the circle, whenever there are such legislative influences, of course, they will only concern a very limited issue, because the starting point is always the individual complaint by an applicant against a government. Thank you very much.

E. Brown Weiss: I want to start by congratulating Armin von Bogdandy on an exciting presentation and on his theoretical work. I also want to thank Abdul Koroma for his comments from the perspective of a judge of the International Court of Justice who links practice and theory. First, an observation and then two questions. As many of you know, in the international legal literature there is lots of discussion about a democratic deficit in international law. The argument is that customary international law suffers from a democratic deficit and thus cannot be a source of international law. The argument is used to strike at the legitimacy of international law. The argument about a democratic deficit also appears in other aspects of international law. What I am struck by in the presentation today is that the concept of deliberative democracy is being applied and developed in a way that is intended to increase the legitimacy of international law. The paper offers constructive suggestions for how one can implement and carry out more deliberative democracy in the international field. Two questions arise. In the framework presented, could you elaborate in more detail about the classical relationship between law as process and law as substance? In some of the discussion about the *Shrimp-Turtle* dispute before the WTO, the focus seemed to be on law as process. Does the framework mainly assume law as process? A more significant question relates to

the concept of a cosmopolitan citizen in today's context. We have a world in which increasingly many people everywhere communicate by Twitter, Facebook, internet and cell phones. Instant coalitions form and disband; people find information from many different sources or sometimes only the same source; blogs are common; and people share their views and mobilize others in support of them. It is a very different world than in the last century, in terms of the participation of the individual in the international system. What are the implications of this for the framework you present? Does it enhance participation in procedures? What are the limitations and problems that it may pose in implementing your theory? What are the implications for what happens after a judicial decision is made? Does a cosmopolitan citizen make it easier to implement decisions or to hold the Court accountable?

C. Tomuschat: First of all, I would like to thank the two speakers for their fascinating presentations. They do not seem to agree completely on all points, I understand. Now, let me just raise one issue. It's the *gouvernement des juges*. To what extent are we prepared to accept a *gouvernement des juges*? In that regard, international tribunals are different. In the case of the European Convention of Human Rights, we accept the traditional function of international and national tribunals to explain and apply human rights. This is something which is really genuine for judges. But when it comes to more technical matters, like in the case of European Union law, where you deal with economic and financial matters, you are faced with the dilemma that the jurisprudence of the Court in Luxemburg has always the last word. You cannot change it. You can't change anything. There exists as a matter of principle a structural deficit in the institutional framework. Every institution needs a countervailing power, some checks and balances. But regarding the European Court of Human Rights, and this morning we heard about WTO jurisprudence, there is no one who can change a single word. These bodies are the masters of their legal frameworks. Let me use a very bad word: How do we protect those international treaties from being hijacked by their supervisory bodies? What kind of countervailing power is there? There are indeed many powers, but there are obviously no parliamentary bodies. Normally, in a domestic setting, you have a parliamentary body which, if something goes wrong, can change the law. This is always possible. But in an international setting, because of the *pacta sunt servanda* principle, everyone has to agree, you can't do anything alone and not even by a majority vote. It's all left to the judges, the wisdom of the judges. Are they always wise? Do we want to

commit our future to judges in all fields? And in particular in economic fields where sometimes quick and fast decisions will have to be made? If something goes wrong in the international sphere, let me just refer to the famous *Mangold* judgment of the Luxemburg Court, which certainly was not a very good judgment. What can you do about it? Nothing, or very little. Accordingly, we have to explore much more attentively the system of countervailing powers. Let me just mention the conversation between judges where also domestic supreme courts intervene, and also the legal doctrine, which has a crucial role to play. We have seen that the Lisbon judgment of the German Constitutional Court was implicitly amended by its *Honeywell* judgment, certainly under the influence of the legal doctrine. In conclusion, it seems to me that we have to develop the mechanisms of countervailing powers.

A. Koroma: Thank you very much. May I apologize to all of you and beg your indulgence. I would simply like to pick up on what Christian Tomuschat just said; I think that will summarize my position. Should we – or do we want to – commit our future to judges? No! Absolutely not. I don't think we should allow that to happen. But then we do have some choices to make: on certain issues, we obviously can put our future in the hands of judges. But, in general, I don't think we should. And with the experience of many years as a member of the Court, I say that I don't think it would be wise to do so. I regret to have to say that I just don't think it would be a judicious thing to do. And, of course, the determination as to which decisions, which issues, will be entrusted to judges, to the courts, must not be arbitrary and unconsidered, but should, I think, be informed by theory. That, in my view, is where the theoretical underpinnings which Armin von Bogdandy has been endeavouring to elaborate should come in handy. So if we are skilful enough to match the two, then of course certain issues could be left in the hands of judges, but I don't think all issues should be. One other point which I should have made – but of which I am sure you are all aware – is that the Court, I'm talking about the International Court of Justice now, does not pronounce *ex cathedra*; the Court is not the Vatican. The Court has to justify its judgment; that is required by the Statute. We have to do that regardless of universal or not agreement with the judgment. While the Pope is infallible, the Court has to justify its judgment in detail on the basis of law. Of course, as I said, whether the Court gets it right or wrong is another matter. But I must now thank you for this most stimulating exchange. Please accept my apologies.

J. d'Aspremont: My question will be a very brief question because it's turning quite late. Actually, I'm raising a very elementary question, and it rather is a question of clarification pertaining to what we mean by international lawmaking by international courts and tribunals. Indeed, I have the impression that what we mean by 'lawmaking by international courts' directly impinges on how we devise our frameworks of legitimacy. And that brings me to the fascinating paper which has just been presented by Armin von Bogdandy. I think that lawmaking by international courts and tribunals is a very heterogeneous and multifold phenomenon. It is my impression that most of the time we focus on the making or the progressive development by international courts and tribunals of primary rules, i.e. rules of behaviour: those rules that have an effect on the behaviour of addressees. And I think these are precisely the rules which fall within Armin von Bogdandy's definition of exercise of public authority. This sort of lawmaking by international courts and tribunals boils down to a progressive development of primary norms. However, as we all know, international courts and tribunals also play a huge role and are very instrumental in the development of the rules of the system, i.e. 'secondary rules' according to British analytical jurisprudence. This is what I have tried to describe in my paper. Against the backdrop of this 'other' lawmaking role of international courts and tribunals, my question is the following: I am not sure that the development of secondary rules by international courts really fits with Armin von Bogdandy's definition of exercise of public authority. Or at least this constitutes a different kind of exercise of public authority. And so the question is the following: Do we need to legitimize the development of secondary rules by international courts to the same extent as primary norms? And if so, does Armin von Bogdandy's model or blueprint of legitimacy apply to the contribution of international courts and tribunals to the development of the rules of the legal system, i.e. secondary rules of international law?

D. Halberstam: Thank you for an excellent and informative panel on an important topic. I wanted to raise three quick points that amount to both cheering you on, on the one hand, and raising a very basic scepticism, on the other. I should make clear at the outset that, in many ways, what I say to you would apply to things that I've written myself on this topic. So this is a good deal of self-criticism and self-directed scepticism as well.

The first point is that when you talk about decoupling law from parliamentary politics, we must recognize that, in some ways, national sys-

tems have a similar decoupling problem. We are often far too generous with national systems regarding how we present the relationship between the courts and the parliament. Yes, we understand there to be a certain exception for constitutional decisions on the part of the courts by virtue of the dynamic that interpretive decisions of the court are difficult to overturn via constitutional amendment. But even in non-constitutional decision-making (i.e. in the case of judicial interpretation of statutes), it isn't all that easy to overturn judicial decisions either. And, indeed, some of this (independence and lack of accountability) holds true for the actions and interpretations of domestic administrative agencies as well.

Courts, administrative agencies, and other actors who have what you would call 'public power' in the domestic sphere also frequently operate at a certain level of removal from the threat of immediate quashing by what you might call the *volonté générale*. So we have some of the problems you identify at the domestic level as well.

Now what in part makes up for the lack of close parliamentary checks at the domestic level (and this is perhaps the bigger issue) is a connection to a broad-based public sphere. And so the concern in the international arena may be less a decoupling from any parliament than a decoupling from a broad-based public discourse and publicly shared culture and from commonly shared political understandings.

This brings me to my second point, which concerns your strategies of procedure, that is, the politicization of decision-making and the election of judges. You seem to be suggesting that we should be bringing in NGOs and non-State actors. But this, of course, is a huge question and one that involves controversies of which you yourself are quite aware. The big question is: Can we bring those actors into the conversation productively and should we be bringing those particular actors into the conversation at the present time?

That leads me to my third and final point, which concerns your suggestion that we are talking about the world citizen after all. All I offer here is a very basic point of scepticism or caution. In some ways we are certainly talking about the world citizen. But how thick is this concept today and how rich can it become? One elementary scepticism is that we don't have the rich public discourse, we don't have the rich institutionalization of the public discourse at the world level that would be necessary for the kind of politicization you advocate to be productive. And the sceptics' response is that in the absence of such a rich public sphere, paying attention to NGOs and the world citizen might make matters worse. This means that paying heed to the world citizen, to NGO's and

the like under conditions of a highly impoverished global public sphere may not just be a little bit of a good thing, it might be a little bit (or even a lot) of a very bad thing. And that is the core of the sceptics' reply: ought we to seek a gradual incorporation of the world citizen or ought we to proceed in a mode where, until we have a rich broad public discourse, we stick to the more State-centred system. That's not my own position (as you well know). But that, I think, is the basic scepticism that the paper, in its current form, does not address.

Y. Chen: I have a few comments on the interesting presentation 'International Courts as Lawmakers' by Armin von Bogdandy.

First, I think that to characterize the delivery of judgments by international courts as an exercise of public international authority in general legal discourse beyond the particular case between the disputing parties is probably to make an overstatement. It might be arguable that a particular judgment can legislate for the particular parties to a dispute in the sense that the judgment demarcates specific rights and duties or obligations for those parties. Such specific lawmaking may be justified by the consents of parties to submit their dispute to the court for a judicial decision. However, it is harder to assert an outside effect of judgments beyond the particular case. Unlike the practice within common law countries, there is no such doctrine of precedent in the international society that would affirm that a judgment delivered by a qualified court would later also bind other courts in similar cases. Nothing is clearer than Art. 59 of the Statute of the International Court of Justice stating: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. Considering that 'international courts are frequently embedded in contexts that may lever considerable coercive mechanisms in support of judicial decisions' may strengthen the argument that international courts exercise authority over particular parties, but it does not aid the argument that the international courts are exercising general international public authority. Of course, it can be observed that some judgments of international courts are cross-referenced to judgments or to judicial opinions expressed in judgments of other courts. Due consideration is sometimes given to the legal reasoning employed in prior judgments. However, default deference is in no sense equal to a legal obligation upon international courts to follow prior judgments. Default deference is simply a consideration of policy, convenience or comity. The choice between a decision of deference or defiance to the judgments of other international courts is more or less conditioned by the institutional politics of current interna-

tional courts. A reference to a precedent may be made simply to clothe another international court with greater legitimacy; while a deviation from a prior judgment of another court may involve a self-empowerment strategy within the market of institutional judicial competition. In short, the authority of the precedent may not be inherent in the content of the precedent itself. The precedent has acquired an authoritative face simply because the current court makes it so look via reference to it in the current judgment. Precedent is created by the followers who have the power to sanctify the precedent.

In critical understanding, the identification of and the reference to a precedent is a real exercise of power by international courts, since there is much room available to the judiciary in selecting and defining the precedent. Rules that are general and vague proclaimed in prior cases allow room for different or even conflicting application in subsequent cases. It is not rare to discover contradictory pronouncements about rules by different international courts especially in view of the proliferation of adjudicative bodies in international society nowadays. By referring to prior cases, international courts pick and choose, using those which help to justify themselves, while ignoring whichever cases do not favour their own lines of reasoning. So probably there is not necessarily much of value here on the generation of legal normativity. The contrary is equally possibly true: with the growing number of cases, the normative pull of a precedent fades.

Having said that, I would like to concede that when an international court exercises the interpretative function over a particular treaty as a supervising body, as does the European Court of Human Rights, in relation to its own judgments we may presume a doctrine of precedent may exist or develop. We can admit that such a court exercises a certain form of public authority beyond the particular case. However, in this instance, the public authority exercised does not seem to need such justifications as are proposed by the presentation.

Second, even if we suppose that international courts do exercise public authority in a few limited cases, the suggested strategies in response may still beg questions. The history of international law reveals that international judicial entities are established with the primary aim to resolve disputes among parties in a peaceful way. As is suggested by the presentation, the idea of international adjudication closely links to the pursuit of world peace. However, redefining international courts as public authorities and asking for broader public participation, including public transparency and third party intervention, may impair the very function and aim of the international judiciaries to achieve dispute set-

tlement. Generally practice shows that the State parties to disputes tend to privatize their dispute. They often hope to resolve the dispute confidentially, and maybe promptly. In particular, they are usually reluctant to lower the thresholds to accept third parties' intervention. And it is conceivable, should the international courts overly publicize the dispute resolution procedure, it would simply push the States to adopt an alternative more private mechanism of dispute resolution. The new interpretation of the roles of international courts as suggested by the presentation may impair their functions as fora for dispute resolution. I see some unresolvable tension here between the two different functions we assign to international courts, deriving from different understanding of international courts and conflicting policy goals that are to be pursued. What lies deeper may be the potential tension of the rationale of peace and democracy behind international adjudication.

And finally, the presentation proposed to legitimize the exercise of public authority by international courts in arguing that international adjudication should be guided by the idea of 'world citizenship'. But if we characterize international courts as institutions exercising public authority, then there arises not only the question of justification, but also the matter of ensuring proper restraints on the exercise of authority, since it is equally possible for international courts to pursue their own programme and consolidate their privileged roles as global actors under the slogan of developing something like a 'world citizenship'. Viewed from the perspective of ensuring the proper exercise of public authority by international courts, the specific exercise of authority by international courts in their relationships with the parties to the dispute may be even more significant in practice and relevant to legal scholarship than what has been conceived by the presentation. Thus the presentation has merit in drawing our attention to the fact of a growing powerful sector of judiciaries existing and active in international society, while the normative element of the project is however unfortunately weak. Thank you.

N. Sagüés: The title of this part of the session is 'International Courts as Lawmakers'. So, the discussion is not about the legitimation of international courts in general terms. We are in a second and special step: the legitimation of international courts as lawmakers. In this question I think we must distinguish two levels, one is formal, the other is about substance. The question about the formal level: I remember one phrase of Armin von Bogdandy. I agree completely with him, when he said, this evening, that in some questions, in some moments, it is impossible

to divide, it's impossible to split, for a tribunal, the process of performing the law and the process of creating the law. So, if in one case it is necessary to develop the law or to create the law, in order to practice, in order to perform the law, I think the question is over. It is not necessary to go to democratic arguments. It's only a question of necessity. This is not a new idea, it is very old. In 1803, Marshall said in *Marbury v. Madison* that when there is a conflict between a superior norm (the Constitution), and other inferior norm that violate the superior one, it is necessary to create a judicial review in order to protect the Constitution. So, I think that the argument of the necessity is enough to solve the problem of the ability or the capacity of international courts in order to develop or create the law. The second question is about substance: the problem of essential legitimation about the rule or the law created by the international court. It's a question that depends on philosophical ideas, and the ideological position of each one. I think that, in general terms, we may consider that the law created or developed by one international court, has legitimation if it is according to the current points of view about justice of international community.

P. Sands: I didn't want to take the floor but I am prompted by Christian Tomuschat's intervention. I believe that there is an important distinction between procedure and substance that has to be addressed. We find examples, for example in the ICSID case law and in investment treaty arbitration case law, on the issue for example of most favoured nation and its interpretation. I doubt many States imagined that when they were putting that provision into treaties that they might be expanding the basis of jurisdiction. If States are unhappy with an award, they can renegotiate their treaties to put in clearer terms the language that they thought they intended to do. But that doesn't always apply. And I'd like to inject into this discussion some reflections on the legitimacy issue, and refer to one case that hasn't been mentioned, that's the case of *CMS v. Argentina*. I must declare an interest, as I was counsel in the annulment process. You ended up with a situation in which a distinguished *ad hoc* committee, including James Crawford and Gilbert Guillaume, ruled that the award in the underlying arbitration was manifestly erroneous as a matter of law on numerous issues, but they did not have the power to do anything about it. That left a situation in which a State was required as a matter of ICSID law to make a payment of a couple of hundred million dollars off the back of an award that has been found by a distinguished panel to be wrong as a matter of law. And the question then arises: What does the State do? That issue fell

into my inbox in the sense of linking your panel with a previous panel. The lawyer then gets asked: What do we do? And this raises an issue as to the relationship between legality and legitimacy. As a matter of law, a State has to pay. But which State's treasury is going to write a cheque for US$ 200 million off the back of an award that has been found to be manifestly wrong as a matter of law. I doubt many national treasuries will authorize such a payment, notwithstanding the fact that it is required as a matter of law. And that raises the fundamental question: in the context of a legal system that is disaggregated, that is fragmented, in which there is no legislature that can step in and correct a perceived wrong in the circumstances, what is to be done?

A. von Bogdandy: Thank you for your interest and critique. I'm particularly grateful to Abdul Koroma. He has invested so much time into reading and developing forward-looking comments. I agree with those who found my statements a bit sweeping. But my presentation is based on a detailed analysis of courts: the ICJ, the Inter-American Court and the European Court of Human Rights, ITLOS, investiment tribunals, the WTO Appellate Body and so on and so forth. For some, each institution needs a specific discourse attuned to its specific regime. But at the same time there is a need for general arguments. It must be possible to speak of the international judiciary in general. Sure enough, at that level of abstraction one cannot determine the legitimacy or legality of individual decisions. In fact, you won't find any such determination in my paper.

Abdul Koroma criticized the use of the 'domestic analogy'. What use do I make of it? Its role is not to find solutions. The role is rather to better see the problems. The domestic analogy tells us that there might be a problem if judges operate without a corresponding parliament. That does not suggest the same answer as in the domestic realm. Global governance works differently, so it is likely that convincing solutions will also be different.

Then there was the question if it is possible to speak of a global or international constitution. I do not deny that constitutionalism is a powerful paradigm. But the constitutional argument at some point needs to address the body of thought on the *pouvoir constituant*, the 'We the people' as we find it in the American Constitution. For most international courts, I'm not convinced that they exercise a constitutional function.

On the cosmopolitan citizenship. Cosmopolitan citizenship is less a concept of eggheads than many think. President Obama mentions it regularly. There are certainly limits and problems in the concept, but I think it's a meaningful as has been the concept of European citizenship in the seventies and eighties, before it became a concept of positive law.

The last point, on Christian Tomuschat: who has the last word? In my understanding, the very point and charm of our current situation is that there is no last word. Any domestic constitutional court (like the Federal Constitutional Court) has to face that its decision can be reviewed by the European Court of Human Rights and that this court might find its decision wanting. At the same time, every international court will face the situation that its decision will not be followed by domestic courts. This is the core of our pluralist constellation. I suggest to see it as a new mode of checks and balances for the 21st century.

Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law

*Paper submitted by Ingo Venzke**

I. Introduction

Institutions for the settlement of international disputes are products of competing interests and aspirations. They testify to rivalling and changing ideas about international order and bear witness to incremental shifts in the antinomies that underlie their concrete shape. International judicial institutions, specifically their procedural law, respond to conceptions of what international dispute settlement is about, what it is for

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and what it actually does. While international adjudication could for long plausibly be understood as a sporadic affair concerned exclusively with the successful resolution of disputes between immediate parties, the quantitative increase in international adjudicators and in international decisions over the past two decades has gone hand in hand with a shift in quality. Even if the demand for the pacific settlement of disputes has not lost its force or salience, it has become more and more evident that international courts and tribunals do much more than this. Notably, they have developed international norms in their practice, shaped legal regimes and conditioned the legal situation of all those who are subject to the law. The more such systemic effects of international judicial decisions are recognized, the more traditionally prevailing requirements for judicial procedures are supplemented by new demands. The successful settlement of disputes as the overarching goal and respect for the will of the immediate parties then no longer dictates what the procedures look like. Instead, procedural law starts to respond to legitimatory concerns that spring from the jurisgenerative dimension of international adjudication.[1]

At their early modern stages, mechanisms for the settlement of international disputes by judicial means were very flexible and bent so as to accommodate the interests and concerns of the parties. Arbitration was for a long time the only modus of settling disputes, very much prone to the vernacular and ethos of diplomacy rather than to ideas connected with the somehow distinctly judicial resolution of conflicts. The First Hague Peace Conference of 1899 for example produced very rudimentary procedural rules for the Permanent Court of Arbitration, subjecting crucial decisions about the form of the proceedings and selection of arbitrators to the agreement of the parties.[2] Léon Bourgeois, a French

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[1] In this article I build on A. von Bogdandy and I. Venzke 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (2012) 23 EJIL 7 (forthcoming). On the tensions between understanding adjudication as a matter between the parties alone and its actual effects on third parties, see M. Jacob 'Precedents: Lawmaking Through International Adjudication' (2011) 13 GLJ 1005; R. Wolfrum 'Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea' in V. Götz, P. Selmer and R. Wolfrum (eds) *Liber amicorum Günther Jaenicke* (Springer Heidelberg 1998) 427. Also see A. von Bogdany and I. Venzke 'International Courts as Lawmakers' p. 161 et seq. above.

[2] D.D. Caron 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94 AJIL 4; R.P. Anand *International Courts and Con-*

lawyer and member of the court since 1903, argued at the Second Peace Conference in 1907 that it was absolutely indispensable to pay utmost respect to the will of the parties in order to ensure that they submit their disputes to adjudication in the first place. Next to political expedience there have also been elements of justice and prudence embedded in this idea: the will of State parties constitutes the almost exclusive building block for legitimate international order and all international action needs to be based on their will, so the argument goes.

Such a conception remains vital but institutional developments over time give evidence to alternative views just as well. Already at the time of the Second Peace Conference in The Hague, US Secretary of State Elihu Root argued that only independent permanent judges could gain the confidence of the parties. The only promising avenue for the resolution of international disputes, he maintained, was to resort to standing impartial judicial mechanisms. Root argued at the 1907 national peace congress in New York: 'What we need for the future development of arbitration is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility'.[3] The establishment of the Permanent International Court of Justice (PCIJ) in 1920 was a large step into that direction, hailed by many at the time as a grand achievement and the beginning of a new era.[4] Some viewed it as the central organ of the international

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temporary Conflicts (Asia Pub. House New York 1974) 28. According to James Brown Scott, the Court was not worthy of its name. In his view, it was not a court because it was made up of diplomats, not judges, and neither was it permanent but constituted anew with every case. See the statement by J. Brown Scott reproduced in Anand (Ibid.) 33. The Permanent Court of Arbitration, to be clear, has not lost its appeal and continues to offer important avenues for dispute resolution.

[3] Quoted in H. Wehberg *Das Problem eines internationalen Staatengerichtshofes* (Duncker & Humblot München 1912) 55.

[4] J.B. Scott 'A Permanent Court of International Justice (Editorial Comment)' (1921) 15 AJIL 53 (stating that 'we should […] fall upon our knees and thank God that the hope of ages is in process of realization'); N. Politis *La justice internationale* (Hachette Paris 1924) 182 (understanding the court as 'l'avènement d'une ère nouvelle dans la civilisation mondiale'). Cf. M. Koskenniemi 'The Ideology of International Adjudication and the 1907 Hague Conference' in Y. Daudet (ed.) *Topicality of the 1907 Hague Conference, the Second Peace Conference* (Nijhoff Leiden 2008) 127.

community and projected their hopes for international peace and human betterment onto this new institution.[5]

The debates at these informative times centred on the balance between the will of the parties, on the one hand, and the autonomy of the judicial proceedings as well as the powers of the adjudicators, on the other. Many commentators advanced the argument that beyond the settlement of the concrete disputes, international courts should rise to the occasion of developing international law in their practice. Even if the PCIJ could certainly not live up to all expectations, it did contribute to international legal developments and helped form the legal order. It not only did so as a matter of fact, but shifts in its argumentative practice indicate that it increasingly embraced the ethos of an actor who partakes in dynamic development of international law.[6] Be it with or without such a self-understanding or intention, international judicial institutions have by now become significant actors in the making of international law. They shape legal regimes and develop international law in a way that escapes the doctrine of sources in international law and that largely exceeds the reach of States.[7]

This contribution aims at elucidating the antinomies and changes in international dispute settlement by examining trends in the procedural law of a number of prominent international judicial institutions. It highlights how the increasing recognition of the jurisgenerative dimension of international judicial practice is reflected in demands for transparency, publicness and participation in international proceedings. It investigates by way of comparison, how the procedural law of international courts and tribunals copes with similar problems, in particular with legitimatory concerns that are triggered by the phenomenon of judicial lawmaking. At the same time, trends in procedural law give evidence to shifting ideas about international dispute settlement that inform yet broader debates about the nature of the international legal order and its deep social structure.

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[5] See with further references O. Spiermann *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (CUP Cambridge 2005) 14.

[6] Spiermann (note 5). Also see the early contribution by H. Lauterpacht *The Development of International Law by the Permanent Court of International Justice* (Longmans Green London 1934).

[7] See in detail A. von Bogdandy and I. Venzke 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 13 GLJ 979.

With this focus, the article does not touch on the jurisdictional relations between courts and tribunals.[8] It further limits itself to a more detailed discussion of a number of procedural aspects that may best respond to legitimatory problems of judicial lawmaking.[9] Lastly, the article focuses on those institutions in which at least one party is a State and it marginalizes the fields of international human rights protection and international criminal law. While those fields might be connected to a thicker notion of dispute settlement and to rich accounts of international peace, they ultimately show elements of a different paradigm and therefore recede into the background for the present purposes.[10] Within these confines, the article first exposes multiple antinomies underlying procedural law, drawing attention to how they are embedded in larger frameworks. It also briefly discusses the making of procedural law and highlights the considerable discretion of many international courts and tribunals over their own procedures (II). The main task will then be the comparative study of recent trends in the procedural law of international judicial institutions in light of legitimatory problems stemming from the systemic effects of international adjudication. Issues of transparency and publicness, third party intervention and *amicus curiae* submissions, as well as avenues of judicial review are most significant in this regard (III). These trends harbour valuable potentials for improvement but also considerable perils. The article concludes with a sketch of possible future dynamics (IV).

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[8] For a discussion of issues of *lis pendens* and judicial comity under the rubric of international procedural law, see B. Simma 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265. In further detail see Y. Shany *The Competing Jurisdictions of International Courts and Tribunals* (OUP Oxford 2003).

[9] It largely excludes, for example, the very rich and no less intriguing law pertaining to issues of evidence and standards of proof, recognizing however that developments in these fields also respond to shifting ideas about the nature and function of international adjudication. See in detail M. Benzing *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer Heidelberg 2010).

[10] This is less of a loss in view of the study undertaken by F. Mégret '"Beyond Fairness": Understanding the Determinants of International Criminal Procedure' (2009) 14 UCLA Journal of International Law and Foreign Affairs 37. Also see M. Kuhli and K. Günther 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals' (2011) 13 GLJ 1261.

II. Multiple Antinomies and the Making of Procedural Law

The procedural law of international judicial institutions is largely a product of their own making.[11] As Jean-Marc Sorel put it, 'self-regulation is the prevailing system, which implies mutability of the rules of procedure within the framework of the statute. This is an important source of independence and one of the ways in which such a creature may escape its makers'.[12] International procedural law mirrors the historiography of international adjudication more generally – it is a sound expression of competing conceptions of the functions of international courts and of the expectations raised with regard to their work.

The interplay of three antinomies has left its mark. First, and of little concern from the present perspective, the procedural law of international judicial institutions oftentimes strikes a compromise between different national legal traditions – in particular between adversarial legal systems of the common law and the inquisitorial process of civil law systems.[13] Second, the traditional conception of international arbitration battles with ideas closer connected with permanent courts. While the former ties the judicial process to the will of the disputing parties, the latter tend to uphold a stronger autonomy on part of the court.[14] The juxtaposition of ideas endorsed by Léon Bourgeois and Elihu Root are illustrative of a deep conflict about the potentials and functions of international dispute settlement and, yet more fundamentally, of diverg-

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[11] The notion of procedural law describes the body of requirements that govern how a judicial process has to be conducted. No uniform procedural law for all courts is thereby postulated. R. Kolb 'General Principles of Procedural Law' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (OUP Oxford 2006) 793 (795); C. Brown *A Common Law of International Adjudication* (OUP Oxford 2007) 6.

[12] J.–M. Sorel 'International Courts and Tribunals, Procedure' (2007) in R. Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* <www.mpepil.com> (12 February 2011) para. 1.

[13] See in particular the prominent debates in international criminal law, above all in the ICC. A. Cassese *International Criminal Law* (2nd edn. OUP Oxford 2008) 353; C. Kress 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 Journal of International Criminal Justice 603.

[14] S. Rosenne *The Law and Practice of the International Court 1920–2005* (4th edn. Nijhoff Leiden 2006) vol. I 9.

ing views on the relationship between law and politics.[15] Closely intertwined is a third main antinomy, which is of elevated interest. Understandings of the international legal order that stand in close analogy to private law thinking compete with views in which international courts act as parts and organs of an international public order.[16] In the former understanding, the judicial process builds on maxims of negotiation between the disputing parties; in the latter, adjudicating bodies are predisposed to act in pursuit of public interests. They may then act on their own motion and with different, broader powers. Not the negotiations of the parties characterize the proceedings, but maxims of investigation by the court or tribunal.[17]

The procedural law of the PCIJ, setting the precedent for the International Court of Justice (ICJ) and influencing younger courts and tribunals, offers an illustrative example of the interplay between these antinomies. It also serves as a fitting case in point with regard to the large discretion that the PCIJ had in forming its own procedures. Art. 30 of the PCIJ Statue enabled the court to adopt its own rules of procedures, within the bounds of its Statute, to be sure, but those bounds were so loose that they hardly amounted to significant constraints. It was thus also a crucial and enormously influential decision by the judges themselves not to categorically subject the judicial process to the will of the disputing parties but to retain a firm grip and ultimate authority over the proceedings. Should the parties come to unanimous agreement and push for changes in the procedures, and should such changes be justified by the particularities of the case, it would still be up to the Court to

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[15] Consider the strong and eloquent positions taken by the Russian delegate Friedrich von Martens and the German delegate Philipp Zorn, both arguing for a preservation of political elements in arbitration. H. Wehberg 'Friedrich von Martens und die Haager Friedenskonferenzen' (1910) 20 Zeitschrift für internationales Recht 343; P. Zorn *Die beiden Haager Friedenskonferenzen von 1899 und 1907* (Kohlhammer Stuttgart 1914). A bit later Manley O. Hudson and Hans Kelsen offered excellent arguments to the contrary, building on the qualities of a distinct judicial process. M.O. Hudson 'The Permanent Court of International Justice – An Indispensable First Step' (1923) 108 American Academy of Political and Social Science, Annals 188; H. Kelsen *Law and Peace in International Relations* (Hein Buffalo New York 1942).

[16] Compare C.H. Brower II 'The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law' (2008) 18 DukeJComp&IL 259.

[17] Kolb (note 11) 809–10 paras 27–30.

accept and implement these changes.[18] The parties are left with rather minimal possibilities of influencing the procedural law. It is precisely not subject to their will, but in the hands of the Court as an autonomous actor.[19] Also Art. 30 of the ICJ Statute vests the Court with the power to 'frame rules for carrying out its functions. In particular, it shall lay down rules of procedure'.

The procedural law of international courts and tribunals is first and most straightforwardly the product of formal legislation on part of the judges. Beyond this formal act of lawmaking, procedural law is shaped in the practice of adjudication. Its making can also show how international courts and tribunals influence each other in their practice.[20] The international judicial institutions created ever since the first feeble steps of the PCIJ usually enjoy the competence to decide about the concrete form of the judicial process.[21] They certainly need to comply with the provisions of their foundational treaties, but these provisions are, with some due qualifications and nuances, rather vague. The framework set up by the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) offers more detail and amendments are only loosely tied to the agreement of Members.[22] Changes in the procedural

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[18] Rule 32 of the Rules of the Court. Cf. J. Kolasa 'Origins and Sources of Procedural Law of International Courts: ubi jus, ibi remedium' in V. Epping, H. Fischer and W. Heintschel von Heinegg (eds) *Brücken bauen und begehen: Festschrift für Knut Ipsen zum 65. Geburtstag* (Beck München 2000) 185 (190).

[19] This stands in contrast to the law of the Permanent Court of Arbitration whose default procedures yield to any agreement between the parties. See Art. 41 of the Convention for the Pacific Settlement of International Disputes ([adopted 18 October 1907, entered into force 26 January 1910] [1907] 205 CTS 233).

[20] Consider, for instance, the history of provisional measures that tells the intriguing story of a vivid dynamic between international courts and tribunals, K. Oellers-Frahm 'Expanding Competence to Issue Provisional Measures – Strengthening the International Judicial Function' (2011) 13 GLJ 1279.

[21] Art. 16 of the ITLOS Statute; Art. 17 (9) of the DSU; Art. 26 (d) of the ECHR; Art. 15 of the ICTY Statute; Art. 14 of the ICTR Statute.

[22] Annex 3 to the DSU contains the panels' working procedures. Noteworthy is also Art. 12 (2) of the DSU stipulating that the 'Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'. The Appellate Body formulates its working procedures in consultation with the Chairman of the DSB and with the Director-General. According to Art. 17 (9) of the DSU it suffices, however, that it only informs the Members about the procedures it adopts.

law of the International Centre for Settlement of Investment Disputes (ICSID), in contrast, may only be introduced by a two-thirds majority in the Administrative Council, composed of one member from each contracting party. In addition, parties bringing their case before the ICSID can agree to adapt the procedural law for their concrete case.[23] This is not particularly surprising in view of the tradition of arbitration. Also changes in the rules of procedure and evidence of the International Criminal Court (ICC) require the affirmative vote of two-thirds of the Assembly of State Parties.[24]

In spite of notable differences, it generally holds true that the procedural law significantly develops in the practice of adjudication and under the tutelage of the respective courts and tribunals. Not only can most international judicial institutions decide autonomously about the rules of procedures, but beyond this avenue they can adopt directions to guide their work whenever the statutory basis does not regulate an issue in sufficient detail or when it is simple mute on certain aspects of the judicial process.[25] Such practice directions, sometimes also termed guidelines,[26] are not binding but they do have a remarkable influence on the proceedings.[27] Even with regard to the rather specific and meticulously detailed provisions of the DSU has the practice of adjudication set procedures in place, which arguably deviate from the treaty provisions.[28] It remains questionable and rather doubtful, however, whether international judicial practice has generated general principles, which

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[23] Rule 20 (2) of the ICSID Arbitration Rules.

[24] Art. 51 of the Rome Statute of the International Criminal Court.

[25] Neither the ICJ Statute nor the Rules of the Court make any mention of directives. This has not kept the Court from using directives in the shaping of its work and procedures. Cf. S. Rosenne 'The International Court of Justice – New Practice Directions' (2009) 8 LPICT 171.

[26] Art. 50 of the ITLOS Rules.

[27] For example, international courts and tribunals have adopted directives on the issue of judicial independence or pronounced on this issue in their decisions. See R. Mackenzie and P. Sands 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 HarvardILJ 271; Y. Shany and S. Horovitz 'Judicial Independence in The Hague and Freetown: A Tale of Two Cities' (2008) 21 LJIL 113.

[28] Consider for instance the take on confidentiality by the Appellate Body, p. 247 et seq. below.

may amount to a source of procedural law.[29] But even if one does not wish to elevate practice to such prominence, this doubt does not take away from the discretion and authority that international courts and tribunals enjoy in making their procedural law.

Their relative autonomy opens up avenues for mutual influence, possibly for processes of learning between institutions, and it allows for adaptations that tend to assimilate procedural laws of specific international judicial institutions, while marked differences do remain. It would be inadequate to speak of one singular international procedural law that applied across the board but, nevertheless, it is possible to note converging trends in the explicit provisions and even more so in the practice of adjudication.[30] Also propositions for reforms are oftentimes formulated in a comparative perspective. The discussion about possibilities for appellate review on the international investment arbitration, for example, is characterized by jealous leers towards the WTO context.[31]

Change and flexibility of the procedural law of international courts and tribunals long for orientation. It is decisive that legal and political propositions are backed by convincing normative arguments that are embedded in ideas about international order. International courts and tribunals exercise authority over the proceedings. At the same time, procedural law is part of the justification of judicial authority. This article understands trends in the changing procedural law as expressions of the insight that it is increasingly insufficient to only view international dispute settlement as the successful resolution of concrete cases. Instead, the systemic repercussions of international adjudication and le-

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[29] Robert Kolb therefore speaks of 'general principles' not as a source of law in the sense of Art. 38 (1) (c) of the ICJ Staute but aptly as 'general normative proposition considered to be expressive of the ration of a series of more detailed rules' or as 'hallmark of a legal idea that permeates different questions of law', Kolb (note 11) 793 (794) para. 2. He further leaves open the question whether his observations in the context of the ICJ may be generalized. Ibid. 797 para. 6. Less reluctant and in the end not convincing in this regard is Chester Brown who carves out general principles as sources of law from the practice of adjudication, Brown (note 11) 53. Cf. A. von Bogdandy 'General Principles of International Public Authority: Sketching a Research Field' (2008) 11 GLJ 1909 (on the different uses and functions of general principles in international law).

[30] See the rich material gathered in Brown (note 11). With nuances also compare Benzing (note 9).

[31] See *infra* notes 131–133.

gitimatory concerns with regard to international judicial authority have come to inform the procedures of international judicial institutions.

III. Manifestations of Change

There are a number of fields of procedural law that express antinomies and change in international dispute settlement. For example, international courts and tribunals may resort to their own mechanisms of fact-finding or they may call on their own experts rather than relying on the submissions of the parties alone.[32] It is also intriguing that provisional measures have commonly been understood as serving to avert an irredeemable loss of one of the parties, and that lately also community interests, such as the protection of the environment, appear as targets of such measures.[33] The present article focuses on the repercussions triggered by judicial lawmaking and international judicial authority.[34] Avenues for participation and increased publicness, introducing different interests and opening up possibilities for public scrutiny and deliberation, are taken to be of primary importance in this regard. When international judicial practice has systemic effects beyond the disputing parties and when it conditions others in the exercise of their freedom, it seems only plausible to give those others a meaningful say in the making of judicial decisions. Trends in the procedural law of international courts and tribunals give evidence to an increasing recognition of such systemic effects and partake in offering responses to problems of legitimation.

There remains a fundamental question. How may judicial procedures be understood as spaces in which the legitimacy of international judicial practice may be strengthened in a way that would also live up to fundamental democratic premises, while neither calling into doubt the

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[32] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Joint Dissenting Opinion of Judges Al-Khasawneh and Simma) (20 April 2010)* <http://www.icj-cij.org> (12 February 2011) para. 8 (lamenting that the court excessively relied on expertise offered by the parties and arguing that the Court should have either appointed its own experts or had party-appointed experts subjected to cross-examination).

[33] M. Benzing 'Community Interests in the Procedure of International Courts and Tribunals' (2006) 5 LPICT 369.

[34] See in further detail von A. von Bogdandy and I. Venzke 'International Courts as Lawmakers' p. 161 et seq. above.

judge's monopoly over the judicial decision nor watering down a nuanced concept of democracy that demands effective participation in decision-making processes? Two features come to mind by way of which judicial procedures could strengthen the legitimacy of judicial decisions. The first concerns the justification of decisions with regard to the participants in the process. The parties to a dispute are involved in a debate about the case and the court is required to address their arguments in a reasonable manner. This co-operative treatment of the matter in dispute is not confined to questions of fact or evidence but – against the widespread understanding of the principle *jura novit curia* – also extends to questions of law. The second feature places the judicial decision within the general context of justifying public authority. The open discussion of interests and competing positions is part of the social basis that is necessary for democratic legitimation. Judgments of courts form part of this basis and may contribute to legitimacy if only they are embedded in normative discourses of a certain quality. Both features raise very similar demand for judicial institutions' procedural law.

1. Publicness and Transparency

a. Oral Proceedings and Public Hearings

A crucial link for publicness and transparency are the oral proceedings. Some court statutes such as Art. of the 46 ICJ Statute explicitly provide that '[t]he hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted'.[35] The detail of the Rules of Court (Arts 54–72) on this issue shows the reluctance on the part of State parties to submit to the force of arguments in public oral proceedings.[36] In the practice of the Court, it is almost always the case that the oral proceedings are public and the Rules of Court allow to exclude the public only from parts of the proceedings. Such is the exception that is in need of justification.[37] In addi-

[35] See Art. 46 of the ICJ Statute; Rule 59 of the ICJ Rules of Court; Art. 26 (2) of the ITLOS Statute; Rule 74 of the ITLOS Rules of the Tribunal; Art. 40 of the ECHR; Rule 63 (2) of the ECtHR Rules of Court; Arts 67 and 68 (2) of the ICC Statute.

[36] Sorel (note 12) para. 18.

[37] von Schorlemer 'Article 46' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1063 (1065) para. 5.

tion to the fact that the proceedings are in principle public, the ICJ introduced in 2004 live transmissions on the internet, of oral hearings and of the announcement of its judgments. With this move, the Court says, it responds to the considerable interest of the general public.[38] As anybody interested in its Advisory Opinion on Kosovo's Declaration of Independence knows, demand for this service was so high that the Court's website collapsed – indication of the demand for publicness and room for improvement.

Art. 26 of the ITLOS Statute is modelled in close analogy to the example of the ICJ. The procedural law of both institutions is in significant parts plainly identical. Also Art. 40 of the ECHR provides that '[h]earings shall be in public unless the Court in exceptional circumstances decides otherwise'.[39] Until now, the court has never decided that hearings should not be public.[40] In addition, the documents in the possession of the Registrar of the Court are accessible by the public, as long as the President of the Court does not decide otherwise.[41] The same qualifications apply here as in the case of the hearings.[42]

In other contexts like the WTO, confidentiality is the rule. But even here procedures have opened up in practice to meet some demands for publicness and transparency.[43] The Sutherland Report of 2004 reinforced this trend by stating that 'the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution' and by suggesting that oral proceedings better be public.[44] Of course it remains critically important to pay due respect

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38 UNGA 'Report of the International Court of Justice' (2 September 2004) UN Doc. A/59/4 para. 266.

39 The specific circumstances are further specified in Art. 63 (2) of the ECtHR Rules of Court.

40 J. Frowein and W. Peukert *Europäische Menschenrechtskonvention: EMRK-Kommentar* (3rd edn. Engel Kehl am Rhein 2009) 534.

41 Art. 40 (2) of the ECHR.

42 Art. 33 of the ECtHR Rules. See Frowein and Peukert (note 40) 535.

43 Arts 14 (1), 18 (2) and 17 (10) of the DSU provide that procedures and written submissions are confidential. Cf. L. Ehring 'Public Access to Dispute Settlement Hearings in the World Trade Organization' (2008) 11 JIEL 1021.

44 P. Sutherland et al. 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium ('Sutherland Report', 2004)' <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf> (18 June 2011) paras 261 et seq.

to the interests of the parties. Also sensitive trade secrets must be kept. Proceedings do often remain behind closed doors, in particular proceedings at the stage of panels, which are, in comparison to the Appellate Body, both as an institution as well as in their personal membership closer to the ethos of arbitration.[45]

And yet there is room for manoeuvre. For instance, the parties and the panel in *EC – Bananas III (Article 21.5 – US)* agreed to open the doors to the public.[46] In *Brazil – Retreaded Tyres*, the Centre for International Environmental Law advanced with the initiative to transmit the first session of the panel live on the Internet but was met with rejection on the part of the panel, deciding in consultation with the parties that the session should be confidential in accordance with the Working Procedures.[47] But this is not generally the case. The position taken by the panel in *Canada – Continued Suspension* is most remarkable. It held public hearings and backed this decision with the witty argument that the rules providing for confidentiality only pertained to the internal deliberations of the panels, but not to the exchange of arguments between the parties – a truly innovative interpretation of the rules of procedure.[48] Lately, the parties and the panel in *Measures Affecting the Im-*

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[45] J.H.H. Weiler 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 JWT 191; P. van den Bossche 'From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System' in G. Sacerdoti, A. Yanovich and J. Bohanes (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP Cambridge 2006) 289; C. Ehlermann 'Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as Member of the Appellate Body of the World Trade Organization' (2002) 36 JWT 605.

[46] WTO 2007 News Items 'WTO Hearings on Banana Dispute Opened to the Public' (29 October 2007) <http://www.wto.org/english/news_e/news07_e/dispu_banana_7nov07_e.htm> (12 February 2011); P. van den Bossche *The Law and Policy of the World Trade Organization* (2nd edn. CUP Cambridge 2008) 212.

[47] WTO *Brazil – Measures Affecting Imports of Retreaded Tyres* (12 June 2007) WT/DS332/R para. 1.9. See further L. Johnson and E. Tuerk 'CIEL's Experience in WTO Dispute Settlement: Challenges and Complexities from a Practical Point of View' in T. Treves et al. (eds) *Civil Society, International Courts and Compliance Bodies* (Asser Press The Hague 2005) 243.

[48] WTO *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (31 March 2008) WT/DS321/R para. 7.47.

portation of Apples from New Zealand[49] agreed to open the meeting of experts and the further proceedings up to the public.[50]

When it comes to the Appellate Body, whose members tend to understand themselves more as judges of an ordinary court, maybe even of the 'World Trade Court', public proceedings are rather common.[51] In 2009 the Appellate Body asserted self-confidently that '[i]n practice, the confidentiality requirement in Article 17.10 has its limits. Notices of Appeal and Appellate Body reports are disclosed to the public. Appellate Body reports contain summaries of the participants' and third participants' written and oral submissions and frequently quote directly from them. Public disclosure of Appellate Body reports is an inherent and necessary feature of our rulesbased system of adjudication. Consequently, under the DSU, confidentiality is relative and timebound'.[52] It is also noteworthy that it is due to the initiative of the Appellate Body that there are oral proceedings at all, something not provided for in the DSU.[53]

Procedures in the ICSID framework fall short of those in the WTO on the point of publicness and transparency. But first cracks start to show that may soon widen so as to accommodate growing demands for better possibilities of participation and public scrutiny.[54] The understanding

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[49] WTO *Australia – Measures Affecting the Importation of Apples from New Zealand* (9 August 2010) WT/DS367/R paras 1.18–1.19.

[50] WTO 2007 News Items 'WTO Hearings on Apple Dispute Opened to the Public' (16 June 2009) <http://www.wto.org/english/news_e/news09_e/hear_ds367_16jun09_e.htm> (12 February 2011).

[51] Ehlermann (note 45); G. Abi-Saab 'The Appellate Body and Treaty Interpretation' in Sacerdoti, Yanovich and Bohanes (note 45) 453.

[52] WTO *United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body* (4 February 2009) WT/DS350/AB/R, Annex III, Procedural Ruling para. 4; WTO *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute – Report of the Appellate Body* (16 October 2008) WT/DS321/AB/R, Annex IV *Procedural Ruling of 10 July to Allow Public Observation of the Oral Hearing* paras 3–6.

[53] WTO *United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body* (4 February 2009) WT/DS350/AB/R, Annex III Procedural Ruling para. 6.

[54] A.J. Menaker 'Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Invester-State Arbitration' in K. Yannaca-Small (ed.) *Arbitration under International Investment Agreements* (OUP Oxford 2010) 129; C.N. Brower, C.H. Brower II and J.K.

that tribunals have come to increasingly touch on issues of public interest has pushed such demands to increasing relevance when compared to imperatives stemming from the confidentiality of the proceedings.[55] In June 2005, the OECD Investment Committee threw its authority into the discussion when it maintained that '[t]here is a general understanding among the Members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence'.[56] Apart from the fact that the Committee clearly connects questions of transparency with questions of legitimacy and effectiveness, it should be highlighted that it explicitly describes building up a visible body of jurisprudence as a valuable goal to be pursued.[57]

Many decisions with regard to the procedural law in ICSID remain subject to the agreement of disputing parties. Rule 32 (2) of the new Rules of Procedure for Arbitration now provides that a tribunal may, in consultation with the Secretary-General, allow interested individuals to

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Sharpe 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arbitration International 415; C. Zoellner 'Third-Party Participation (NGOs and Private Persons) and Transparency in ICSID Proceedings' in R. Hofmann and C.J. Tams (eds) *The International Convention for the Settlement of Investment Disputes (ICSID) – Taking Stock After 40 Years* (Nomos Baden-Baden 2007) 179; C. McLachlan, L. Shore and M. Weiniger *International Investment Arbitration: Substantive Principles* (OUP Oxford 2007) 57 para. 3.40.

[55] See S. Schill 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 13 GLJ 1083.

[56] OECD 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee (2005) <http://www.oecd.org/dataoecd/25/3/34786913.pdf> (12 February 2011).

[57] Rule 32 (2) of the ICSID Arbitration Rules (10 April 2006). For an example from legal practice see for instance *Aguas Argentinas SA Suez v. The Argentine Republic (Order in Response to a Petition for Transparency and Participation as Amicus Curiae)* ICSID Case No. ARB/03/19 para. 6 ('While the *Methanex and UPS* cases […] cited by Petitioners did indeed involve public hearings, both claimants and respondents in those cases specifically consented to allowing the public to attend the hearings. The crucial element of consent by both parties to the dispute is absent in this case').

attend and observe the oral proceedings, if neither party objects. This has turned out to be a sensible compromise in practice.[58] It also merits emphasis that Rule 48 (4) provides that '[t]he Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal'. This appears to indicate that the publication of excerpts is not subject to the agreement of the parties.[59]

The procedural law of international criminal courts and tribunals deviates from the general rule of publicness of proceedings for quite distinct reasons. Criminal proceedings need to respond to different demands and imperatives. Art. 79 of the ICTY Rules on Procedure and Evidence stipulate for example that sessions may be closed in order to effectively protect witnesses. Should a chamber decide to hold confidential sessions, it needs to make the reasons for this decision public, which again underscores the exceptional character of such a decision.[60]

b. Judicial Deliberations and Individual Opinions

Next to oral proceedings, the deliberations of the judges may themselves be tested against demands for publicness and transparency. On first sight this thought evidently runs counter to the explicit provisions of almost all international courts and tribunals and also counter to the common view upheld in legal doctrine. Art. 54 (3) of the ICJ Statue states clearly in an exemplary fashion: 'The deliberations of the Court shall take place in private and remain secret'. At no time has this been subject to discussion in practice.[61] Shortly before the decision on preliminary measures in the *Nucelar Test Case* between Australia and France in June 1973 some pieces of information were leaked to the Australian press. The Court strongly condemned this fact and in a biting

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[58] J. Delaney and D. Barstow Magraw 'Procedural Transparency' in P. Muchlinski, F. Ortino and C. Schreuer (eds) *The Oxford Handbook of International Investment Law* (OUP Oxford 2009) 721 (774).

[59] Rule 48 (4) of the ICSID Arbitration Rules.

[60] Von Schorlemer (note 37) 1070–71 para. 28. Also compare for example the clear provisions of Arts 67 and 68 (2) of the ICC Statute.

[61] Art. 54 was reproduced from the PCIJ Statute and is equal to Arts 77 and 78 of the Convention for the Pacific Settlement of International Disputes (1907). See B. Fassbender 'Article 54' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1171 para. 1.

resolution it reiterated its view that 'the making, circulation or publication of such statements is incompatible with the fundamental principles governing the good administration of justice'.[62] For the case of the ICJ, the conclusive summary by Bardo Fassbender is largely unchallenged: 'the secrecy of proceedings', he maintains, 'is essential for the continued trust that the Court enjoys among States and international organizations'.[63]

This view has a lot in its favour. But it is not categorically without alternative. When it comes to very important issues, the Swiss *Bundesgericht* for example deliberates in public.[64] It might merit second thoughts to explore which consequences such a working mode would have for certain international courts and tribunals. At this point, it appears adequate to discuss a general concern pertaining to the implementation of demands for transparency: it might very well be suggested that, once certain areas and parts of judicial proceedings become more transparent, it is likely that new processes of (informal) decision-making emerge that again lead behind closed doors. While this may indeed be correct, it is too short sighted. New procedural requirements could still influence behaviour and could still create new requirements of justification. In addition, public and confidential proceedings are not two different kinds, but publicness and transparency are qualifications that may be pursued in degrees and in parts.

The example of international dispute settlement in the context of the WTO provides for the notable practice of interim review in which panels present to the disputing parties excerpts of their draft, containing both findings of fact and descriptive conclusions. In a second step, the panel then gives to the disputing parties an interim report, which extends beyond questions of fact to findings of law and to the overall conclusions of the panel. The disputing parties may suggest that certain parts be revisited before the report is distributed to all members of the WTO. If need be, the panel holds a further meeting with the disputing parties to present its revisions.[65] This remarkable procedure contributes

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62 (1973–1974) 28 ICJ Yearbook 126.

63 Fassbender (note 61) 1175 para. 16.

64 Art. 59 of the Bundesgesetz über das Bundesgericht.

65 Art. 17 (2) of the DSU. On this issue see M. Hilf '§ 27. Das Streitbeilegungssystem der WTO' in M. Hilf and S. Oeter (eds) *WTO-Recht: Rechtsordnung des Welthandels* (Nomos Baden-Baden 2005) 505–35 (518) para. 31; P. Stoll and K. Arend 'Article 15 DSU' in R. Wolfrum, P. Stoll and K. Kaiser (eds)

to a higher quality of the decisions and it partakes in ensuring its legitimacy. At the appellate stage, such a process is not provided for, but the Appellate Body can of course build on the findings that the panel has already made. At least formally it is in any event confined to reviewing questions of law, not of fact.[66] At this stage of the proceedings, another practice is quite remarkable; namely, a high degree of collegiality. The rules of procedure provide that according to mechanism of rotation, three of the total seven members of the Appellate Body deal with any case.[67] In drafting their reports, the members in charge of a certain dispute still exchange their views with all other members who receive all the relevant documents as a basis for deliberations.[68] This is hardly compatible with strong notions of confidentiality, but it helps avoid contradictory judgments, which would otherwise give rise to serious concerns of legitimacy.[69]

Apart from the deliberations of the courts and tribunals, the possibility of dissenting or separate opinions remains to be discussed. The positive procedural law of international judicial institutions diverges on this issue. Art. 57 of the ICJ Statute provides that 'if the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion'.[70] This is regularly practiced and well known. Most other international courts and tribunals have a similar provision on this issue.[71] In the context of the WTO, in contrast, every effort shall be made to achieve consensus; should this not be possible, the majority decides.[72] Art. 17 (11) of the DSU stipulates that 'opinions expressed in the Appellate Body report by individu-

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Max Planck Commentaries on World Trade Law (Nijhoff Leiden 2006) *Vol. 2* 435.

66 Art. 17 (6) of the DSU.

67 Art. 17 (1) of the DSU.

68 WTO *Working Procedure for Appellate Review – Report of the Appellate Body* (4 January 2005) WT/AB/WP/5, Rule 4.3 of the Working Procedures.

69 This alternative has occurred in investment treaty arbitration.

70 Further specified in Rule 95 (2) of the Rules of Court.

71 Art. 30 (3) of the ITLOS Statute; Rule 125 (3) of the ITLOS Rules; Art. 48 (4) of the ICSID Convention; Art. 45 (2) of the ECHR; Rule 74 (2) of the ECtHR Rules.

72 WTO (note 68) Rule 3.2 of the Working Procedures.

als serving on the Appellate Body shall be anonymous'.[73] The Appellate Body has interpreted this to mean that it is possible to formulate separate opinions.[74] In practice this remains the rare exception. Among the more important courts and tribunals discussed in this contribution, none requires unanimity absolutely. It is interesting to see that the ILC Draft for the Statute of the ICC first explicitly prohibited the formulation of separate or dissenting opinions, but was modified on this point in the treaty negotiations.[75] One of the factors conducive to this change was the opinion of judges who had experience serving on the ICTY and ICTR.[76]

Judges frequently make use of the possibility to formulate separate or dissenting opinions. As a matter of fact, it is truly rare that the ICJ takes a decision without dissent.[77] Some have argued that this practice undermines the authority of the Court.[78] But such voices are few and praise of this practice prevails for good reasons.[79] It may be helpful to support this praise by way of juxtaposing the practice of the ECJ, whose procedural rules explicitly prohibit individual opinions.[80] In this

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[73] Art. 17 (11) of the DSU ('Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous').

[74] WTO *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products– Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R paras 149–54.

[75] Art. 45 of the Draft Statute for an International Criminal Court, in UNGA 'Report of the ILC on the Work of its Forty-Sixth Session' (1 September 1994) UN Doc. A/49/355, 22.

[76] Compare the statements by Judge Gabrielle Kirk McDonald, President of the ICTY, in front of the preparation committee for the establishment of the ICC, ICTY Press Release No. CC/PTO/234-E (14 August 1997) (maintaining *inter alia* that individual opinions may be very helpful in developing the case law). Cf. L. Fisler Damrosch 'Article 56' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1183 (1196–97) paras 42–44.

[77] The 90 judgments, 25 advisory opinions and 128 decisions that the court has rendered until 15 November 2005 have been accompanied by a total of 1017 personal opinions (262 declarations, 206 separate opinions and 349 dissenting opinions). See R. Hofmann and T. Laubner 'Article 57' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1199 (1208–09) para. 35.

[78] Ibid.

[79] Ibid. 1215 para. 57.

[80] Art. 36 of the ECJ Statute. Cf. V. Perju 'Reason and Authority in the European Court of Justice' (2009) 49 VJIL 307. The debate about effects and normative assessments of separate opinions is far developed with a view on do-

comparison it becomes evident that authority does not primarily depend on unanimity.

First of all, it speaks in favour of individual opinions that the decisions of the court gain in lucidity. There would be no necessity to compromise on rather vague formulations. The majority must meet the expectation of clear judgments and the contrast of diverging views offers additional clarity.[81] Furthermore, the psychological effect is important. The losing party to the dispute may see a certain satisfaction in the fact that it could at least convince part of the bench with its reasoning. It might gain the support of others in its view that some individual opinion did indeed provide the better resolution of the case. This is of particular importance in the context of the international legal order where the enforcement of judgments oftentimes leans on discoursive processes.[82] The practice of individual opinions highlights the plurality of opinions and feeds into the general legal discourse in which the judgment, including its dissenting or separate opinions, is negotiated, praised and critiqued. This is a very important element of the legitimation of international judicial authority. Lastly, in the development of international law there are a number of examples in which a position that was once in the minority advanced in the discoursive reception and informed later judicial practice or legislative projects.[83]

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mestic courts, with regard to the international legal order the contributions are few and invite to further comparative research on this issue. See D. Terris, C.P.R. Romano and L. Swigart *The International Judge: An Introduction into the Men and Women Who Decide the World's Cases* (OUP Oxford 2007) 123; A. Oraison 'Quelques réflexions générales sur les opinions séparées individuelles et dissidentes des Juges de la Cour Internationale de Justice' (2000) 78 Revue de Droit International, de Sciences Diplomatiques et Politiques 167; R.P. Anand 'The Role of Individual and Dissenting Opinions in International Adjudication' (1965) 14 ICLQ 788; I. Hussain *Dissenting and Separate Opinions at the World Court* (Nijhoff Dordrecht 1984); E. Hambro 'Dissenting and Individual Opinions in the International Court of Justice' (1956) 17 ZaöRV 229 (offering intriguing insights into the debates at the time of the making of the PCIJ Statute).

[81] See the position by Max Humber reproduced in Hambro (note 80) 238. See further Hofmann and Laubner (note 77) 1212 para. 48 (arguing that this is one of separate opinions' most important functions).

[82] Compare von Bogdandy and Venzke (note 7) (on the authority of judicial interpretations and how it is embedded in legal discourse).

[83] Hofmann and Laubner (note 77) 1213–15 paras 55–56.

2. Standing and Participation

a. Third Party Intervention

Further manifestations of changes in the conception of international dispute settlement and responses to problems of legitimation may be found in an expansion of possibilities for intervention and participation. In spite of its vagueness in this matter, the ICJ Statue is again archetypical and influential with regard to the procedural law of other institutions.[84] According to Art. 62 of the ICJ Statute, States may seek permission from the Court to intervene in pending cases. The Court alone decides about such requests.[85] Principally, State parties can intervene when they can show an interest of a legal nature that would be affected by a decision in the case at issue.[86] Only such actors may intervene who also have standing as parties. The possibility of third party intervention is generally understood as a mechanism for combining similar cases.[87] When it comes to the interpretation of multilateral agreements, a legal interest is not expressly necessary when a third treaty party wants to intervene, but it is simply presumed. In such cases every party to the treaty at issue is notified by the Court according to Art. 63 of its Statute and may intervene. Since 2005, also international organizations are notified and submissions by its secretariats are allowed to the extent that their respective statute is at issue in the proceedings before the Court.[88]

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[84] C.M. Chinkin 'Article 62' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1331 (1365–66) para. 94.

[85] Cf. S. Torres Bernárdez 'L'intervention dans la procédure de la Cour internationale de Justice' (1995) 256 RdC 197; C.M. Chinkin *Third Parties in International Law* (Clarendon Press Oxford 1993); K. Oellers-Frahm 'Die Intervention nach Art. 62 des Statuts des Internationalen Gerichtshofs' (1985) 41 ZaöRV 579.

[86] Chinkin (note 84) 1346–51 paras 41–49 (offering an overview of the use of this qualification in the practice of international adjudication). According to Art. 81 (2) (b) of the ICJ Rules, the party applying to intervene 'precise object of the intervention', even if the procedural law does not limit intervention to particular objects, neither has the object of intervention ever been tested in practice.

[87] Chinkin (note 84) 1334–39 paras 7–19.

[88] Rule 43 of the ICJ Rules. Cf. A. Koroma 'International Court of Justice, Rules and Practice Directions' (2006) in R. Wolfrum (ed.) Max Planck Encyclopedia of Public International Law <www.mpepil.com> (12 February 2011) para. 2.

The ICJ Statute makes no determination on the issue whether an intervening party needs to show a jurisdictional link to the disputing parties. The Court clarified the issue in the seminal *Pulau Ligitan* case in which it allowed an intervention even if such a link to any of the disputing parties was not established.[89] This take on the issue has also been adopted in the ITLOS Statute, whose Art. 31, in combination with Rule 99 (3) of the Rules of the Tribunal, explicitly allows for the intervention of parties who have not submitted themselves to its jurisdiction – yet another manifestation of a trend towards wider participation in judicial proceedings, testifying to an increasing recognition of the effects that judgments create beyond those who are immediately involved in the particular dispute. A trend towards lowering the threshold for third party intervention further indicates that it is largely inadequate to understand judicial decisions as acts of simply finding the law and as acts that are binding only *inter partes*. The tension between systemic repercussions of international adjudicatory practice, on the one hand, and ideas of *res judicata* that is binding only between the parties, on the other, has not yet been treated in a wholly satisfactory manner and discussions on this issue still seem to be in their rather embryonic stages. In the *Pulau Ligitan Case*, Judge Christopher Weeramantry wrote a separate opinion with the intention to rekindle debates on this issue of procedural law. Until now, such debates have in his view only been 'cramped and ineffectual'.[90]

In the procedures of the WTO, members who are not parties to the dispute have always been able to participate in all steps of the dispute (consultations, panel proceedings, appellate proceedings, and surveillance of implementation).[91] According to Art. 10 (2) of the DSU, every party having a substantial interest in the matter dealt with in front of the panel should enjoy the opportunity to be heard by the panel. It may also file written submissions that are made available to the disputing parties and that should be addressed in the panel report. The Working Procedures detail further that the first meeting of the panel should be

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[89] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Application to Intervene)* [2001] ICJ Rep. 575 para. 35.

[90] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Application to Intervene) (Separate Opinion by Judge Weeramantry)* [2001] ICJ Rep. 630 para. 13. Cf. P. Palchetti 'Opening the International Court of Justice to Third States Intervention and Beyond' (2002) 6 Max Planck UNYB 139.

[91] Arts 4 (11), 10, 17 (4) and 21 of the DSU. See further Hilf (note 65) 521; D. McRae 'What is the Future of WTO Dispute Settlement?' (2004) 7 JIEL 2.

used in order to hear the views of third parties.[92] In contrast to the ICJ and also to ITLOS, the black letter procedural law of the WTO does not grant intervening parties the right to attend the hearings. Whether and how often hearings are opened up to third parties, largely lies within the discretion of the panels.[93] In *EC – Bananas III*, a large number of developing countries requested to attend the hearings and the panel observed that decisions to open up the hearings have so far always been taken with the consent of the disputing parties – a crucial element that it saw lacking in the case at hand. In the same breath, the panel nevertheless allowed that the respective States attend the hearings and justified this decision with the special economic implications that the EC legal regime on bananas had.[94] Judicial practice has since supported the claim that special circumstances may justify extended possibilities for participation in judicial proceedings.

Practice in investment arbitration still shows that the traditional logic of arbitration leaves little room for third parties to participate. There are good reasons for this which are akin to those that already militated against transparency and publicness of the proceedings: the effective dispute resolution in the concrete case, sensitive concessions and compromises that may only be reached in confidential settings, and keeping business secrets.[95] Accordingly, until 2006 no provision of the ICSID Rules of Procedure in Arbitration spoke on the possibility of third party intervention. And yet, even in this field of adjudication there are trends to expand the proceedings. They may be better discussed with regard to the role of *amici curiae*.

b. Amici Curiae

Usually, *amici curiae* are those actors who do not themselves have a legally protected interest in the particular case and yet want to intervene.[96] Above all, NGO participation may open up legitimatory poten-

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92 Appendix 3 (Working Procedures) DSU para. 6.

93 Art. 10 and Appendix 3 para. 6 of the DSU. Cf. K. Arend 'Article 10 DSU' in Wolfrum, Stoll and Kaiser (note 65) 373.

94 See van den Bossche (note 46) 279.

95 Delaney and Barstow Magraw (note 58) 721 (775).

96 P. Sands and R. Mackenzie 'International Courts and Tribunals, Amicus Curiae' in Wolfrum (note 12) para. 2; A. Zimmermann 'International Courts and Tribunals, Intervention in Proceedings' in Wolfrum (note 12) para. 1. Ter-

tials. They may bridge the gap between the legal procedures and the global or national public. They can also introduce additional perspectives and might be able to trigger processes of scandalization that contribute to discussions and mobilize the general public. Civil society at the periphery of international processes tends to show a greater sensibility for social and ecological questions when compared with actors at the centre of international political decision-making.[97] In contrast to intervening third parties who themselves would usually have standing in front of the respective international court or tribunal, it is not necessary that *amici curiae* have standing or a protected legal interest. They commonly offer their views as experts.[98]

The procedural law of the ICJ and ITLOS does not provide for submissions by an *amicus curiae*.[99] In one of the ICJ's first cases ever, its registrar rejected the motion on part of an NGO to submit its opinion in writing and to present its view orally.[100] This decision holds for conten-

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minology is by no means consistent. See L. Vierucci 'NGOs Before International Courts and Tribunals' in P.-M. Dupuy and L. Vierucci (eds) *NGOs In International Law: Efficiency in Flexibility?* (Elgar Cheltenham 2008) 155 (156); H. Ascensio 'L' amicus curiae devant les juridictions internationales' (2001) 105 RGDIP 897.

97 J. Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press Cambridge 2008) 303, 382; P. Nanz and J. Steffek 'Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens' in P. Niesen and B. Herborth (eds) *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (Suhrkamp Frankfurt am Main 2007) 87; J. von Bernstorff 'Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Expertenherrschaft?' in H. Brunkhorst (ed.) *Demokratie in der Weltgesellschaft* (Nomos Baden-Baden 2009) 277.

98 It is worth noting that in some courts, like the ECtHR, NGOs and private individuals themselves have a right to initiate proceedings; conversely, also States, who usually act as parties may also function as *amici curiae* in such contexts as international investment arbitration. The meaning of each notions is thus evidently not all that clear-cut.

99 In detail see Wolfrum (note 1) 427.

100 The answer was an easy one because the NGO had tried to base its claim on Art. 34 of the ICJ Statute, whose relevant paragraph 3 is shaped to fit public international organizations. Therefore, the simple conclusion that the NGO is not a public international organization sufficed.

tious cases but not when the ICJ acts in an advisory capacity.[101] Only a little later the same NGO received a positive response from the registrar and was allowed to appear as *amicus curiae* in the advisory proceedings concerning the *Status of South-West Africa*.[102] Ever since the *Gabčíkovo-Nagymaros* case it is also clear that *amicus curiae* briefs may be introduced as part of the submissions of the disputing parties.[103] Beyond this minimal common denominator there prevails considerable disagreement within the ICJ on how to deal with *amicus curiae* briefs. Opposite opinions have so far impeded developments as they have taken place in other judicial institutions. The lowest common denominator is expressed in Practice Direction XII of 2004, stating that '[w]here an international non-governmental organization submits a written statement […], such statement and/or document is not to be considered as part of the case file. [It] may […] be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain [and it] will be placed in a designated location in the Peace Palace'.[104] Former President Gilbert Guillaume expressed candidly that nowadays States and intergovernmental institutions should be protected against 'powerful pressure groups which besiege them today with the support of the mass media'. For that reason, he argued that the ICJ should better ward off unwanted *amicus curiae* submissions.[105]

Also treaty law within the WTO context does not contain any provision on how to deal with *amicus curiae* briefs. In contrast to the ICJ, here legal practice has warmed up to the idea that maybe *amici curiae* should have a word to say. Practice has been paralleled by a significant discussion among practitioners and scholars on the issue.[106] Already in

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[101] Art. 66 of the ICJ Statute.

[102] Cf. A.K. Lindblom *Non-Governmental Organisations in International Law* (CUP Cambridge 2005) 303.

[103] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep. 7.

[104] See ICJ Practice Direction XII (2004).

[105] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (Dissenting Opinion of Judge Guillaume)* [1996] ICJ Rep. 287.

[106] R. Howse 'Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy' (2003) 9 ELJ 496; P.C. Mavroidis 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing' in A. von Bogdandy, Y. Mény and P.C. Mavroidis (eds) *European Integration and International Co-Ordination: Studies In Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer The Hague 2002) 317.

the *US – Gasoline* case NGOs pushed to present their views but were simply ignored by the panel. In the path-breaking *US – Shrimp* case the panel then explicitly rejected *amicus curiae* submissions but was corrected by the Appellate Body. The Appellate Body argued that '[t]he thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts'.[107] It is also worthy to point out that the Appellate Body successfully claimed the authority to decide whether to accept *amicus curiae* briefs or not.[108]

The practice on this issue varies and in particular in *EC – Asbestos* the unusually high number of briefs raised critiques on part of the members. In this case the Appellate Body even set up additional procedures for the submission of *amicus curiae* briefs according to Rule 16 (1) of its Working Procedures, a move that triggered notable protest in the Dispute Settlement Body.[109] Many State delegates argued that the Appellate Body had surpassed its competences by adopting such guiding principles, going beyond its adjudicatory function and unduly acting as a quasi-legislator.[110] The delegate of the United States was one of the very

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[107] WTO *United States – Import Prohibition of Certain Shrimp and Shrimp Products –Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R para. 106. The *EC – Asbestos* case was also of great importance; see especially WTO *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Communication from the Appellate Body* (8 November 2000) WT/DS135/9 and WTO *Minutes of the Meeting of the General Council held on 22 November 2000* (23 January 2001) WT/GC/M/60.

[108] WTO *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom – Report of the Appellate Body* (10 May 2000) WT/DS138/AB/R paras 38–39, with reference to Art. 17 (9) of the DSU.

[109] WTO *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Communication from the Appellate Body* (8 November 2000) WT/DS135/9 (the Appellate Body informs the Chairman of the DSB about additional rules of procedure according to Rule 16 (1) of the Working Procedures). See WTO *European Communities – Measures Affecting Asbestos and Products Containing Asbestos – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R para. 51.

[110] See WTO *Minutes of the Meeting of the General Council held on 22 November 2000* (23 January 2001) WT/GC/M/60.

few who backed the actions of the Appellate Body on this issue and supported the new principles.[111] The Appellate Body eventually rejected all submissions with the reason that they did not meet the rules for their submission – in the eyes of many this was a response to the overwhelming criticism in the DSB with negative implications for the independence of the adjudicating bodies.[112] Ever since the Appellate Body has accepted *amicus curiae* briefs in some sporadic cases, hope rests on a formal revision of the procedural law to clarify this issue. While it still remains unlikely that such a reform is soon to come, the practice of adjudication will continue to shape the rules on the submission of *amicus curiae* briefs.

ICSID proceedings have for long been sealed off from any possibility of participation. But also here legal practice has changed and opened up avenues for *amici curiae*.[113] The NAFTA Free Trade Commission passed a recommendation in which it maintained that the rules of procedure do not in principle contradict allowing third parties to state their views. It went on to argue that in their decisions on this issue panels should be guided by the consideration of whether the case concerned a public interest.[114] Similarly, the OECD Investment Committee elaborated in the report mentioned above states that 'Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific regulations'.[115] The new ICSID Rules of Procedure for Arbitra-

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111 Ibid.; Cf. R. Mackenzie and P. Sands 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 HarvardILJ 271 (284).

112 S. Charnovitz 'Judicial Independence in the World Trade Organization' in L. Boisson de Chazournes, C.P.R. Romano and R. Mackenzie (eds) *International Organization and International Dispute Settlement: Trends and Prospects* (Transnational Publishers New York 2002) 219. On the critical issue of judicial independence generally see E. Benvenisti and G. Downs 'Prospects for the Increased Independence of International Tribunals' (2011) 13 GLJ 1057.

113 See Delaney and Barstow Magraw (note 58) 721.

114 NAFTA 'Statement of the Free Trade Commission on Non-disputing Party Participation' (7 October 2004) <http://www.sice.oas.org/tpd/nafta/Commission/Nondispute_e.pdf> (14 February 2011).

115 OECD 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee' (2005) <http://www.oecd.org/dataoecd/25/3/34786913.pdf> (12 February 2011).

tion of 2006 responded to such observations and introduced a new Art. 37, which speaks on the possibility of submissions by third parties and *amici curiae*.[116] This development in the positive procedural rules was again foreshadowed in the practice of adjudication. In *Vivendi Universal v. Argentine Republic* the tribunal acknowledged that *amici curiae* had a public interest in the case – namely the maintenance of a functioning water and sewage system in Buenos Aires and its surroundings – and thus allowed for *amicus curiae* briefs.[117] On the basis of the new rules of procedure for arbitration, for example, the ICSID tribunal in *Biwater Gauff* accepted *amicus curiae* submissions from a number of interested actors.[118] Such a shift in the conception of what such kind of dispute settlement is about further expresses itself in the practice of treaty making. Increasingly, bilateral investment treaties improve the possibilities for non-parties to participate in the proceedings.

In the case of the ECtHR, Art. 44 of the Rules of the Court provides a solid basis for NGOs and other interested persons to intervene in the proceedings. The court habitually takes up the arguments of *amici curiae* or intervening third parties and discusses them directly. The role of NGOs in human rights litigation also exceeds their functions as third participants in the proceedings and extends to the active support of individual applicants.[119] With regard to the ICC Rules of Procedure and Evidence, the chambers of the court enjoy the explicit competence to deal with third party submissions autonomously.[120] In this context, *amici curiae* are understood as offering impartial support in dealing with rather technical questions. Likewise, the Statutes of the ICTY and the ICTR leave it to the chambers to decide about submissions.[121] It is

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[116] Rule 37 (2) of the ICSID Arbitration Rules. See also ICSID Discussion Paper 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14> (12 February 2011).

[117] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal v. Argentine Republic (Order of 19 May 2005)* ICSID Case No. ARB/03/19.

[118] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (Order of 2 February 2007)* ICSID Case No. ARB/05/22.

[119] Compare E. Valencia-Ospina 'Non-Governmental Organizations and the International Court of Justice' in Treves et al. (note 47) 227.

[120] Rules 103 and 149 ICC Rules of Procedure and Evidence.

[121] Rule 74 of the respective Rules of Procedure and Evidence.

interesting to note that the ICTY stretched its competence to adopt rules of procedure and evidence under Art. 15 of its Statute and further adopted a number of internal rules that would *inter alia* specify how to deal with *amicus curiae* briefs. On this basis, the court has occasionally allowed statements by NGOs and by private persons such as experts in international (criminal) law.

3. Avenues of Review

Expectations with regard to the legitimation of international judicial authority are particularly strong when it comes to mechanisms of review by another, higher judicial body. The provisions across international courts and tribunals and views *lege ferenda* differ widely on this issue. Avenues of review harbour numerous potentials, some of which are not immediately related to antinomies and change in international dispute settlement. They seem to stand separate from these issues as categorical demands. First of all, review may simply correct mistakes, aiming at justice in the individual case and building on the greater professional competence of the members of appellate bodies. Second, avenues of review contribute to consistency in judicial practice, significant for the development of the legal order generally. If one understands justice in contrast to arbitrariness, then this second aspect is also important for pursuing justice in individual cases.[122] Both aspects are important, but are not of prime interest for present purposes. There is a third aspect to appellate review, which merits further attention: it improves the conditions and possibilities for linkages with a general public. Avenues of review are valuable because they combine important cases and stoke attention. In this way, they increase the possibilities of a meaningful discourse about the quality of reasons offered for and against a decision.

On a preliminary note, it may help to bear in mind that the relationships between international courts and tribunals are hardly ordered.[123] The discussion of avenues of review thus pertains to particular legal regimes and to proceedings within separate institutional settings, nothing

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[122] See R. Forst *Das Recht auf Rechtfertigung: Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Suhrkamp Frankfurt am Main 2007) 9.

[123] Shany (note 8). On a theoretical note prone to systems theory see A. Fischer-Lescano and G. Teubner 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 MichiganJIL 999.

more.[124] In the case of the ICJ, the issue is abundantly clear. Art. 60 of the ICJ Statue stipulates that its judgments are 'final and without appeal'. A State could at a later stage request an interpretation of a judgment, but this does certainly not open up avenues of review.[125] ITLOS again follows the example of the ICJ on this issue.[126] Some newer judicial institutions have, in contrast, opted for different kinds of appeal and review. Above all international criminal courts and tribunals offer fully-fledged appellate proceedings very much akin to those in domestic legal orders. They respond to Art. 14 (5) of the ICCPR, providing that '[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'. Also the procedures of the ECtHR allow that a case is referred to the Grand Chamber 'if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance'.

The WTO Appellate Body contributes significantly to meeting expectations of 'security and predictability' (Art. 3 (2) of the DSU) within the multilateral trading system. In the negotiations leading to the 1995 Marrakesh Agreement, many State parties linked their agreement to a quasi-automatic adoption of panel reports (reports are adopted unless there is a consensus against their adoption, something which, unsurprisingly, has never happened) to the possibilities of appellate review.[127] The ex-

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[124] It might be debated whether the ICJ should eventually play a coordinating role. As a matter of fact this is not likely to happen. For an affirmative argument in this regard see K. Oellers-Frahm 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions' (2001) 5 Max Planck UNYB 67; S. Oeter 'Vielfalt der Gerichte – Einheit des Prozessrechts?' in R. Hofmann et al. (eds) *Die Rechtskontrolle von Organen der Staatengemeinschaft: Vielfalt der Gerichte – Einheit des Prozessrechts? Berichte der Deutschen Gesellschaft für Völkerrecht* vol. 42 (Müller Heidelberg 2007), 149 (offering a well-balanced discussion of the advantages and disadvantages of such a move).

[125] See A. Zimmermann and T. Thienel 'Article 60' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1275 (1282–84) paras 25–28.

[126] Art. 33 of the ITLOS Statute.

[127] P. van den Bossche 'From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System' in Sacerdoti, Yanovich and Bohanes (note 45) 289 (294–300). The Appellate Body is confined to revisit questions of law according to Art. 17 (6) of the DSU. Cf. Hilf (note 65) 519 para. 34. Compare I. Venzke 'Making General Exceptions:

pectations of the future members of the WTO was that the Appellate Body would come to act on rare occasion in order to correct straightforward mistakes of law on the part of the panels.[128] As a matter of fact, the large majority of all cases (about 70%) has been appealed since 1995. And at issue were not only the findings in the concrete case but also the systemic effects of international judicial practice.[129] It is illustrative in this regard that in *Japan – Alcoholic Beverages* the US agreed with the results reached by the panel, it had practically won the case, but still appealed because it thought the panel's reasoning to be flawed. In clear recognition of the effects that the report creates as a matter of fact beyond the immediate parties, the US did not want to leave a bad precedent unchallenged.[130]

ICSID knows no avenues of review, but debates about institutional reform have given prime attention to such a mechanism.[131] In part, they have been triggered by investment tribunals reaching contradicting conclusions on the same or very similar matters.[132] More recent contradictions between cases stemming from the Argentinean economic crisis have further fuelled such demands. One of the central issues in these cases has been whether Argentina could rely on the justification of necessity as part of the customary law on State responsibility. Argentina

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The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' (2011) 13 GLJ 1111.

[128] Van den Bossche (note 127) 294–300.

[129] See Venzke (note 127).

[130] WTO *Japan – Taxes on Alcoholic Beverages – Report of the Panel* (11 July 1996) WT/DS8/R, WT/DS10/R and WT/DS11/R; WTO *Japan – Taxes on Alcoholic Beverages – Report of the Appellate Body* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R.

[131] Cf. G. Sacerdoti 'Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review' in E. Petersmann (ed.) *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer London 1997) 245; J.E. Alvarez 'Implications for the Future of International Investment Law' in K.P. Sauvant (ed.) *Appeals Mechanism in International Investment Disputes* (OUP New York 2008) 29 (stating that 'the WTO still inspires the envy of investment lawyers').

[132] Cf. *Lauder v. Czech Republic (UNCITRAL, Award of 3 September 2001)* (2006) 9 ICSID Rep. 66 para. 313; *CME v. Czech Republic (UNCITRAL, Partial Award of 13 September 2001)* (2006) 9 ICSID Rep. 121 para. 575; *CME v. Czech Republic (UNCITRAL, Final Award of 14 March 2003)* (2006) 9 ICSID Rep. 264 paras 446–47.

filed a request for annulment against the first award on the issue, which had found in the negative (*CMS Gas Transmission Co. v Argentine Republic*). According to Art. 52 ICSID, an annulment committee is strongly confined in what it can actually do. It may annul an award only for a number of very limited reasons, for example, when the panel 'manifestly exceeded its powers' or if it 'failed to state the reasons' on which the award is based. The annulment committee in *CMS Gas Transmission Co. v Argentine Republic* thus strongly critiqued the legal reasoning of the tribunal, but, with an unmistakable sense of discomfort and dismay, it found itself incapable of annulling the award. This stark decision has gained immense prominence, not least for the authority of its authors Gilbert Guillaume, Nabil Elaraby and James R. Crawford. It pushed the topic of new avenues of review in international investment arbitration to the top of the reform agenda.[133]

IV. Promises, Perils and Future Dynamics

Recent trends in the procedural law of a number of significant international courts and tribunals illustrate antinomies in what international dispute settlement is for and what it is about. The comparative study of procedural law helps to see and to understand changes in the conception of international adjudication. In growing recognition of the systemic effects of international judicial practice – its jurisgenerative dimension that comes to influence the law in general and that conditions other actors – procedural law responds to demands for increasing possibilities of participation and public scrutiny.

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[133] *CMS v. Argentina (Decision on Annulment of 25 September 2007)* ICSID Case No. ARB/01/8. Also consider the recent decisions in *Sempra Energy International v. Argentine Republic (Decision on the Application for Annulment of 29 June 2010)* ICSID Case No. ARB/02/16 and *Enron Corp. v. Argentine Republic (Decision on the Application for Annulment of 30 July 2010)* ICSID Case No. ARB/01/3. In some cases, annulment committees have significantly stretched the confines of their limited mandate, see for instances the cases pertaining to what amounts to an investment in the sense of Art. 25 (1) of the ICSID Convention, e.g. *Mitchell v. Democratic Republic of the Congo (Decision on Annulment of 1 November 2006)* ICSID Case No. ARB/99/7; in detail see J.D. Mortenson 'The Meaning of "Investment": ICSID's Traveaux and the Domain of International Investment Law' (2010) 51 HarvardILJ 257.

These developments are indicative of a deeper change in the thinking about international adjudication. The traditional function of successfully resolving disputes in concrete cases is supplemented, certainly not replaced, by the simple fact that international courts and tribunals develop international law through the practice of interpretation. International courts and tribunals are weighty actors in disputes about what certain provisions mean and their judgments frequently amount to authoritative reference points in legal argument. In this way, they exercise public authority and contribute to the creation of legal normativity.[134] Improved mechanisms for transparency and participation, minimal preconditions for meaningful deliberations and public scrutiny, may help curb concerns about the legitimacy of such exercises of power. These trends in the procedural law of international judicial institutions harbour a legitimating potential that is slowly set free. In their concrete effects, however, they need to be tested on an empirical basis and in view of a number of possible downsides and alternatives.

One of the principal disadvantages of the recent trends discussed in the preceding sections might be the overrepresentation of particular interests at the expense of others, which are not backed by the clout of equally powerful actors or which cannot raise similar economic resources in their support. This is a well-recognized and very real danger. It is noteworthy in this regard that in the context of the WTO above all representatives of developing countries have opposed the possibility of *amicus curiae* submissions.[135] Another concern relates to the distinctive characteristics and comparative advantages of the judicial process of adjudication over the political-legislative process. It seems that judicial processes can only accommodate specific forms and degrees of participation without losing advantages that rest on judicial modes of dealing with dispute. An alternative might open up with improved mechanisms of politicization of the regimes in which international courts and tribunals are embedded. International institutional law then comes into focus next to the procedural law of international courts and tribunals.

In conclusion, the future dynamics of institutional developments might be shaped in the interplay between mechanisms of international dispute settlement, on the one hand, and domestic courts, on the other. It is interesting in this regard to observe how domestic courts treat international decisions. In particular there are relatively frequent points of

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[134] Von Bogdandy and Venzke (note 7); Jacob (note 1).

[135] See WTO *Minutes of the Meeting of the General Council held on 22 November 2000* (23 January 2001) WT/GC/M/60.

contact in the field of investment arbitration. In view of concerns about legitimacy, domestic courts may come to act as instances of review; not only enforcing awards as they are supposed to, but questioning their quality and sometimes even formulating procedural demands for the international judicial process.[136] The authority of mechanisms for the settlement of disputes will be negotiated at this juncture and actors will continue to shape their self-understanding in this practice. In reflexive awareness of their authority over the respective other, they will need to come to terms with the repercussions of their actions in the grand normative pluriverse.

[136] E. Baldwin, M. Kantor and M. Nolan 'Limits to Enforcement of ICSID Awards' (2006) 23 JIntlArb 1. It is true, however, that so far domestic courts have shown a high degree of deference to international awards. See K. Hobér and N. Eliasson 'Review of Investment Treaty Awards by Municipal Courts' in Yannaca-Small (note 54) 635.

The Non-Monopolistic Role of International Courts and Tribunals in Designing the Rules of Recognition of the International Legal System

*Paper submitted by Jean d'Aspremont**

Abstract

This paper argues that international courts and tribunals, although they have not always been successful in that endeavor, are very instrumental in developing meaningful law-ascertainment criteria necessary to distinguish law from non-law. Indeed, if one espouses a Hartian conception of international law, international courts and tribunals, in their capacity as law-applying bodies, generate the social practice necessary to give a meaning to the rule of recognition of the international legal system. Yet, this paper simultaneously shows that this role of the international courts and tribunals is not exclusive in that international courts and tribunal cannot be deemed to have a monopoly on the elaboration of law-ascertainment vocabulary. Nowadays, a new string of actors also participate in the emergence of the necessary semantics to distinguish law from non-law. International court and tribunals' contribution to the clarification of the rules of recognition of the international legal system is supplemented by the social practice of other international actors. It is submitted, however, that this role of international courts and tribunals, although being not exclusive, should be preserved and remain central. This nonetheless requires a greater

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awareness by international courts and tribunals of the necessity of a consistent use of those formal indicators allowing the distinction between law and non-law.

I. Introduction

When settling international disputes submitted to them or assessing the international criminal responsibility of individuals, international courts and tribunals apply and interpret international legal rules. In doing so, they accordingly not only determine the content the rules they are entitled to apply but also delineate which rules are proper legal rules. When identifying which norms can be considered rules of international law, international courts and tribunals generate what is construed, from a Hartian perspective, as a social practice, thereby generating meaning – in the form of communitarian semantics – to the otherwise indeterminate rules of recognition of the international legal order. This central role of international courts and tribunals ought not to be underestimated. It is not far from being equally important as the settlement of the disputes or the punishment of individual internationally criminal behaviors. While being of an overarching importance for the international legal system as a whole, the contribution of international courts and tribunals to the elaboration of meaningful rules of recognition does not rest on any kind of monopoly. Indeed, it is submitted here that a wide array of different actors nowadays contribute to the communitarian semantics necessary for meaningful law-identification criteria. It could even be argued that the extent of social practice nowadays generated by these actors is not far from putting into question the traditional primary importance of international courts and tribunals in designing the rules of recognition of the international legal system. This paper argues that, although not endowed with any monopoly in the elaboration of the vocabulary of

law-ascertainment, international courts and tribunals should keep the upper hand in providing meaningful criteria for the distinction between law and non-law. This however requires a greater awareness by these judicial bodies of the degree in which they impact on the determination of law-ascertainment yardsticks as well as more rigor and consistency in their elaboration.

After spelling out the Hartian conception of international law by virtue of which international courts and tribunals should be seen as the main source of the social practice in which law-identification is rooted (1), this brief contribution explains how this law-ascertaining role of international courts and tribunals is growingly overshadowed by the social practice generated by other (mostly non-State) actors (2). Eventually, this paper will formulate some thoughts on how international courts and tribunals can preserve their central role in defining the law-identification criteria of the international legal system (3).

1. A (Post-Modern) Hartian Conception of International Law: the Determination of Law-Ascertainment Criteria through Communitarian Semantics

The following paragraphs expound on the conception of international law which bestows a central role on international courts and tribunals when it comes to define and clarify the criteria by virtue of which law is distinguished from non-law. The dominant positivist overtones of the following conception of the international legal system and especially the Hartian perspective which it espouses are obvious. However, it will be shown that the positivist (and Hartian) conception of law in which the argument made here clearly originates has undergone some inevitable adjustments which allow for positivism to accommodate some of the most sweeping contemporary changes in the practice of international relations.

It should be preliminarily indicated that legal positivism in legal theory or in the international legal scholarship is associated with so many different, if not conflicting, meanings – even among legal positivists themselves[1] – that the debate about the value of legal positivism

[1] Compare e.g. the five meanings of positivism by H.L.A. Hart in 'Positivism and the Separation of Law and Morals' (1958) 71 HarvardLRev 593 with the three meanings of positivism of N. Bobbio in *Essais de théorie du droit* (LGDJ Paris 1998) 24. See the understanding of positivism of L. Oppenheim

sometimes is unintelligible.[2] Yet, for this short contribution, positivism is associated with a conception of law that rests on two fundamental concepts: the *source thesis* and the *social thesis*. The conception of legal positivism which I espouse here is thus primarily grounded in formalism,[3] i.e. the use of formal-law identification criteria whose meaning is derived from social practice.[4] Legal positivism, in a broader sense, probably encapsulates other theories than the source and social thesis in that the source and social thesis are only two of the main tenets of classical legal positivism.[5] Yet, I here stick to this restrictive conception of positivism,[6] which I have called elsewhere 'postmodern legal positivism' to emphasize its continued relevance.[7]

This restrictive conception of positivism primarily refers to the use of *formal standards* to identify rules of international law. According to that blueprint, any norm that meets such pre-defined standards is a rule of international law. These standards constitute the *pedigree* of international legal rules. The idea that law is identified by virtue of a

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'The Science of International Law: Its Task and Method' (1908) 2 AJIL 313 (326 and 333). See also the definition of positivism provided by N. Onuf 'Global Law-Making and Legal Thought' in N. Onuf (ed.) *Law-Making in the Global Community* (Durham Carolina Academic Press 1982) 1.

2 W. Twining *General Jurisprudence: Understanding Law from a Global Perspective* (CUP Cambridge 2009) 25; G. Pino 'The Place of Legal Positivism in Contemporary Constitutional States' (1999) 18 Law and Philosophy 513–36; See also F. Chevrette and H. Cyr 'De Quel Positivisme Parlez-vous?' in L. Rolland and P. Noreau (eds) *Mélanges Andrée Lajoie* (Themis Montreal 2008) 33; See also M. Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (CUP Cambridge 2005) 131, note 258.

3 On the need to distinguish formalism and positivism see also B. Simma and A. Paulus 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 AJIL 302 (307).

4 This is the conception I have espoused in J. d'Aspremont *Formalism in International Law – A Theory of the Ascertainment of Legal Rules* (OUP Oxford 2011).

5 On the difference between formalism and legal positivism see A.J. Sebok 'Misunderstanding Positivism' (1994–1995) 93 MichiganLRev 2054.

6 For similar conflations between positivism and formalism see G.J.H. Van Hoof *Rethinking the Sources of International Law* (Kluwer The Hague 1983) 283. He construes positivism as an 'analytical approach' to the sources of international law.

7 J. d'Aspremont 'Hart et le Positivisme Postmoderne' (2009) 113 RGDIP 635.

standardized pedigree of rules constitutes, what is referred to in the literature as, the *source thesis*. The so-called source thesis provides that law is determined by its pedigree and that identifying the law boils down to a pedigree test.[8] Because this pedigree is the object of a prior standardization, the source thesis is thus synonymous with formal law-ascertainment. The source thesis is often contrasted with models of law-ascertainment based on substantive criteria, like that defended by the classical natural law school. It also is sometimes conceptualized as a *rule-approach* to law,[9] in contrast to effect-based[10] or process-based[11] definitions of law.

The source thesis found in positivism inevitably brings about some indeterminacy.[12] Indeed, because of the indeterminacy of the language with which the standard pedigree of the rules is defined, formalism as a set of standardized criteria of law-identification inevitably fails to produce an autonomous and self-contained linguistic convention for the sake of law-identification. Herbert Hart himself recognized that law-ascertainment criteria – in his words the 'rule of recognition' – are vague and open-textured.[13]

Although this is often overlooked in the literature, positivists have devised several conceptual strategies to overcome the non self-sufficiency of the source thesis and rein in, to the extent possible, the inevitable indeterminacy of the formal standards of law-ascertainment. One of them is the use of social practice to stem the indeterminacy stirred by the source thesis. Such a particular conception of the foun-

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8 On the source thesis see generally J. Raz 'Legal Positivism and the Sources of Law' in J. Raz (ed.) *The Authority of Law: Essays on Law and Morality* (Clarendon Oxford 1983) 37.

9 N. Purvis 'Critical Legal Studies in Public International Law' (1991) 32 Harvard Journal of International Law 81 (84).

10 J.E. Alvarez *International Organizations as Law-makers* (OUP New York 2005), esp. x-xi; D.J. Bederman 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1996) 36 VJIL 275 (372); N. White 'Separate but Connected: Inter-Governmental Organizations and International Law' (2008) 5 International Organizations Law Review 175 (181–86).

11 This is classically construed as the New Haven approach.

12 See Raz (note 8) esp. 41–52. See more generally L. Murphy 'The Political Question of the Concept of Law' in J. Coleman (ed.) *Hart's Postcript: Essays on the Postscript to 'The Concept of Law'* (OUP Oxford 2001) 393.

13 H.L.A. Hart *The Concept of Law* (2nd edn. OUP Oxford 1997) 144–50.

dations of the source thesis has been designated in the literature as the *social thesis*. The archetype social thesis purports to supplement the classical positivist source-based criteria of identification of international law ('the source thesis'), with a view to endowing it with some limited autonomy, by inferring the meaning of the standard pedigree of rules derived from the practice of law-applying authorities.[14] While the social thesis does not completely eliminate indeterminacy or provide autonomy from the source thesis, it still constitutes, a useful framework within which the indeterminacy of formal standards of law-ascertainment can be domesticated without falling into naive objectivism. In that sense, and thanks to its definitional advantages, the social thesis remains a good starting point for the modernization of formalism envisaged here. This is true even if the peculiarities of international law – and the unique configuration of its law-making processes – have always impeded a mechanical and full transposition of the social thesis into the theory of international law. This understanding of legal positivism is certainly not new. It corresponds with the well-known conception defended by Herbert Hart in the *Concept of Law*.[15]

While Hart's theory can prove significantly helpful in sharpening formalism in the context of international law, it can be argued that Hart's insights do not suffice to appraise the place of non-State actors from the perspective of international legal positivism, especially when it comes to the conceptualization of the law-applying authority capable of generating a meaningful social practice for the sake of law-ascertainment. Indeed, as will be explained below, Hart adopts a very restrictive conception of law-applying authority, which is exclusive of non-State actors. A convincing adjustment of that aspect of Hart's thesis is found in the endeavours of Brian Tamanaha,[16] as well as William Twining,[17] to modernize Hart's theory in order to accommodate a wider range of contemporary phenomena. In particular, these authors advocate a

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[14] It has also been referred to as the 'exclusive internal point of view'. See G.P. Fletcher 'Law as a Discourse' (1991–1992) 13 CardozoLRev 1631 (1634).

[15] Hart (note 13) 108–09. For a recent re-appraisal of Hart's relevance in international legal scholarship see d'Aspremont (note 7).

[16] See B. Tamahana *A General Jurisprudence of Law and Society* (OUP Oxford 2001); see also B. Tamanaha 'The Contemporary Relevance of Legal Positivism' St John's University School of Law Legal Studies Research Paper Series Paper No. 07-0065 (January 2007).

[17] Twining acknowledges that he has himself been very widely influenced by Tamanaha. See Twining (note 2) 94–95.

broader conception of law-applying authorities at the origin of the social practice, in which formal law-ascertainment is grounded, in order to embrace a wide range of social actors.[18] As is explained in this chapter, this expanded social thesis is precisely the reason why, in the positivistic perspective defended here, non-State actors still play a very important role that ought to be taken into account by international lawyers.

2. International Courts and Tribunals Confronted with the Production of Communitarian Semantics by Non-State Actors

While international courts and tribunals, according to the above-mentioned Hartian conception of law, are to play the exclusive role when it comes to providing a meaning to law-ascertainment criteria, contemporary practice weathers an increasing corresponding role played by a wide array of actors, and mostly non-State actors. The following paragraphs elaborate on the contemporary law-ascertaining role of non-State actors, thereby showing that international courts and tribunals can no longer be seen as being endowed with any kind of monopoly on the definition of the law-ascertainment criteria of the international legal system.

Although non-State actors, subject to a few exceptions, do not usually qualify for any of the formal status prescribed by international law, it is argued here that this does not mean that international legal scholars ought to turn a blind eye to these actors. On the contrary, this chapter, drawing on the conceptualization of positivism described above, contends that non-State actors are very instrumental in the communitarian semantics necessary to give meaning to law-ascertainment criteria, that is the meaning of the secondary rules of recognition.

According to the conception of positivism that is put forward here, the source thesis – that is the idea that law is identified by virtue of its source – is not self-sufficient, for it does not provide any indications as to the foundations of such formal criteria for the identification of international rules. Indeed, any set of formal yardsticks of law-ascertainment shaped through ordinary language would remain inextricably beset by the indeterminacy of language if these criteria were not grounded in the social practice of those who apply them. This

[18] See e.g. Tamanaha (note 16) 142.

is why the criteria of law-identification (i.e. the rule of recognition) cannot be severed from the social practice of law-applying authorities and the practice of law-applying authorities is thus a necessary constitutive element of any formal blueprint of law-identification.

The social practice that is conducive to gauging the communitarian semantics necessary to provide meaning to law-ascertainment criteria is that of the law-applying authorities. As was alluded to above, in line with Hart's view, the concept of 'law-applying authorities' has been narrowly construed, for Hart devised his social thesis exclusively in the context of domestic law. The restricted concept of law-applying authorities makes its transposition in international law problematic. For the sake of determining those who provide the social foundations to the formal ascertainment of international legal rules, the concept of law-applying authorities must be refreshed with a view to accommodating the specificities of the application of international law.

As was indicated earlier, a refinement of the concept of law-applying authorities has been advocated by Brian Tamanaha. According to the modernization proposed by Tamanaha, a law-applying authority is 'whomever, as a matter of social practice, members of the group (including legal officials themselves) identify and treat as "legal officials"'.[19] The social practice on which the rule of recognition is based must accordingly not be restricted to strictly-defined law-applying officials but must include all social actors.[20] This expansion of the concept of law-applying authority is undoubtedly of great relevance in a legal order – like the international legal order – which lacks any vertical nomenclature or institutional hierarchy. Tamanaha's definition, although proving somewhat all-embracing to a certain extent, can help capture the practice necessary for the establishment of the criteria for the ascertainment of international rules. It surely points to the insufficiency of a too narrow construction of the concept of law-applying authority as well as to the necessity not to limit the induction of the communitarian semantics from the practice of formal judicial authorities only. In the reality of international law, it can hardly be contested that other 'social actors' participate in the practice of law-ascertainment and should be taken into account in the determination of the communitarian semantics constitutive of the meaning of law-ascertainment criteria. The following paragraphs, accordingly, mention

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[19] Ibid. 142.

[20] Ibid. 159–66.

those social actors whose practice must be deemed relevant by virtue of the social thesis. It will be shown that among these various social actors, non-State actors play a significant role when it comes to providing meaning to the rules of recognition of the international legal system.

It must, as a preliminary point, be made very clear that being a 'social actor' whose practice of law-ascertainment is instrumental to the meaning of the formal criteria of the identification of law does not necessarily elevate that actor into a formal international lawmaker. It is true that some of the actors mentioned here may well wield some undeniable law-creating powers – as is illustrated by judges whose role in the development of international law is almost uncontested[21] – or some influence on the making of international law – as exemplified by the influence of non-State actors.[22] However, the potential law-creating/law-making role of these actors as regards the (progressive) development of substantive international legal rules is of no relevance here. Indeed, although law-determination by international courts may sometimes come close to law-creation and even if law-identification and law-creation

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[21] H. Kelsen 'La Théorie Pure dans la Pensée Juridique' in C. Leben et R. Kolb (eds) *Controverses sur la Théorie Pure du Droit* (LGDJ Paris 2005) 173; Hart (note 13) 136; See also H.L.A. Hart and A.M. Honore *Causation in the Law* (OUP Oxford 1985) 5 or Bobbio (note 1) 10 and 38; Raz (note 8) 41–52. As regards international law more specifically see R. Jennings 'What is International Law and How Do We Tell it When We See it' (1981) 37 Annuaire Suisse de Droit international 77; H. Thirlway 'The Sources of International Law' in M. Evans (ed.) *International Law* (2nd edn. OUP Oxford 2006) 129–30; H. Lauterpacht *The Development of International Law by the International Court* (2nd edn. Praeger 1958); M. Lachs 'Some Reflections on the Contribution of the International Court of Justice to the Development of International Law' (1983) 10 Syracuse Journal of International Law and Commerce 239; R. Higgins *Problems and Process: International Law and How We Use It* (OUP Oxford 1995) 202; A. Boyle and C. Chinkin *The Making of International Law* (OUP Oxford 2007) 266–69 and 310–11. See however the statement of the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 237 para. 18 (according to which the Court 'states the existing law and does not legislate' and this is so 'even if in stating and applying the law the Court necessarily has to specify its scope and sometimes not is general trend'). Art. 38 of the ICJ Statute also seems to lend support to a strictly cognitivistic task of international courts.

[22] See gen. J. d'Aspremont (ed.) *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (Routledge London 2011).

may be carried out simultaneously,[23] the practice relevant for the sake of law-ascertainment is alien to any question of a law-making power properly so-called. The communitarian semantics that they generate by identifying international legal rules do not constitute a substantive law-making exercise. The actors mentioned below simply partake in the semantics of the formal criteria of law-ascertainment, which – although they are often captured through the Hartian concept of the rule of recognition – do not constitute legal rules in the same sense as the substantive rules of international law.

There is no doubt that the central law-applying authority whose behaviour is the most instrumental in defining the standard of law-ascertainment is the International Court of Justice. Yet, the International Court of Justice is not the only law-applying authority in the international legal order. Arbitral tribunals have also applied international legal rules and thus participated in the elaboration of the linguistic indicators of law-ascertainment.[24] Moreover, and despite the International Court of Justice occasionally still believing in its natural monopoly to set the tone in the international judicial arena,[25] a growing number of international tribunals have been applying international law, thereby participating in the elaboration of the criteria for the ascertainment of international legal rules. Furthermore, all these various tribunals are engaged in

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[23] See R. Jennings 'General Course on Principles of International Law' (1967-II) 121 RdC 341.

[24] For a recent example see the final award in *The Government of Sudan v. The Sudan People's Liberation Movement/Army (Abyei Arbitration) (Final Award)* PCA (22 July 2009) <http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf> (20 April 2011) paras 425–35.

[25] See the famous rebuke of the ICTY by the ICJ in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits) (26 February 2007)* ICJ Doc. 2007 General List No. 91 paras 402–07; See also UNGA 'Agenda Item 13: Report of the International Court of Justice' (26 October 1999) UN Doc. A/54/PV.39 at 3–4; 'Report of Gilbert Guillaume President of the International Court of Justice' (26 October 2000) UN GAOR 55th Sess. Agenda Item 13 UN Doc. A/55/PV.42 at 7; See also G. Guillaume 'The Future of International Judicial Institutions' (1995) 44 ILCQ 848 (860–02); G. Guillaume 'La Cour Internationale de Justice. Quelques propositions concrètes à l'occasion du cinquantenaire' (1996) 100 RGDIP 323 (331); S. Oda 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 ILCQ 863 (864).

a uncontested 'cross-fertilization' which further shores up the importance of the social practice which they generate.[26]

Even though the contribution of the International Court of Justice in this respect has not always been consistent and fully satisfying – as is illustrated by the fluctuations in its case-law regarding the formal evidence of custom, the law-ascertainment criteria of unilateral promises or the evidence of intent to make law for the sake of the identification of international agreements[27] – the practice of the International Court of Justice has nonetheless proved more indicative than that of other tribunals. Indeed, the International Court of Justice has long carried a lot of clout over international judicial proceedings, making its contribution to the practice of law-ascertainment naturally dominant. Whatever the varying weight of each of these tribunals, it is uncontested that the practice of law-ascertainment in the international arena, now emerging from a greater variety of tribunals, is thus far the most generative of communitarian semantics for the sake of law-ascertainment criteria in international law.

International courts and tribunals are not the only judicial authorities which generate communitarian semantics of law-ascertainment. Indeed, international law has long ceased to exclusively govern inter-State relations and has become more regulatory of internal matters and issues affecting individuals. Compliance with international law has accordingly incrementally required the adoption of domestic rules, thereby

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[26] See e.g. F. Jacobs 'Judicial Dialogue and the Cross-Fertilization of Legal System: The European Court of Human Rights' (2008) 38 TexasILJ 547; C. Koh 'Judicial Dialogue for Legal Multiculturalism' (2004) 25 MichiganJIL 979; P. Tavernier 'L'interaction des jurisprudences des tribunaux pénaux internationaux et des cours européennes et interaméricaines des droits de l'homme' in P. Tavernier (ed.) *Actualité de la jurisprudence internationale: à l'heure de la mise en place de la Cour pénale internationale* (Bruylant Brussels 2004) 251–61.

[27] See e.g. as regards the identification of international treaties *Aegean Sea Continental Shelf (Greece v. Turkey)* [1978] ICJ Rep. 3 paras 95–107: emphasis is put on the actual terms and circumstances. Compare *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Merits)* [2001] ICJ Rep. 40. Regarding the identification of unilateral promise see *Nuclear Tests (Australia v. France)* [1974] ICJ Rep. 253 para. 43. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep. 14. See *Frontier Dispute (Burkina Faso/Republic of Mali)* [1986] ICJ Rep. 554. This case-law is analyzed in d'Aspremont (note 4) chapter 7.1.

increasing the application of international law by domestic courts.[28] Even rules regulating inter-State relations have required domestic implementation. This infiltration by international law into domestic systems is thus a natural consequence of the extension *ratione materiae* of its object.[29] That international law now regulates objects previously deemed of domestic relevance is insufficient, however, to explain the growing application of international law by domestic courts. Because international law only enters domestic legal orders if so allowed, the greater presence of international law in the domestic legal orders of States is also the direct consequence of the growing amenability of States towards international law.[30] In this respect, it is not disputed that States are proving less reluctant to let international law pervade and enter their own legal order. Incorporation is not the only means by which international law has been applied by domestic courts. Indeed, most States in the world instruct their courts to construe domestic law in a manner that is consistent with the international obligations of that State. If international law is not the 'law of the land' because it has not been incorporated, it may still yield effects in the domestic legal order if domestic judges interpret national law in accordance with international law.[31] The growing effect of international law in the domestic legal

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[28] For an analysis of some significant decisions of domestic courts applying international law see A. Nollkaemper *National Courts and the International Rule of Law* (OUP Oxford 2011).

[29] According to Provost and Conforti 'The truly legal function of international law essentially is found in the internal legal system of States'. See R. Provost and B. Conforti *International Law and the Role of Domestic Legal Systems* (Nijhoff Dordrecht 1993) 8; J.H.H. Weiler 'The Geology of International Law: Governance Democracy and Legitimacy' (2004) 64 ZaöRV 547 (559–661); See also A. von Bogdandy 'Globalization and Europe: How to Square Democracy Globalization and International Law' (2004) 15 EJIL 885 (889); M. Kumm 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 917; See contra G. Arangio-Ruiz 'Le domaine reservé. L'organisation internationale et le rapport entre le droit international et le droit interne'. Cours général de droit international public' (1990-VI) 225 RdC 29 (435–79).

[30] See gen. J. Niman and A.Nollkaemper 'Beyond the Divide' in J. Nijman and A. Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (OUP Oxford 2007) 341–60.

[31] This principle of *consistent interpretation* of domestic law is also known as the 'Charming Betsy' principle. See US Supreme Court *Murray v. The Schooner Charming Betsy* 6 U.S. (2 Cranch) 64 (1804); see also *Restatement (Third) of Foreign Relations Law* § 114 (1987). On the charming Betsy principle

order through incorporation and consistent interpretation has been accompanied by a general amenability of domestic judges towards international law as a whole, irrespective of whether it is incorporated into national law and binding upon the State.[32] Whether the entry of international law into domestic legal orders takes the path of incorporation, consistent interpretation or simple persuasiveness and to whomever this entry can be traced back, it is uncontested that international law is becoming more and more present in domestic legal orders and is relentlessly applied by domestic courts. In applying international law, these domestic courts are thus called upon to ascertain its rules, thereby participating in the general practice of international law-ascertainment. It has thus become undeniable that domestic courts count as actors participating in the generation of the communitarian semantics of law-ascertainment as well.[33]

It goes without saying that, despite the multiplicity of international and domestic judicial authorities engaged in the ascertainment of international legal rules, their practice has remained too scarce to generate sufficient communitarian semantics. After all, these law-applying authori-

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see gen. R.G. Steinhardt 'The Role of International Law as a Canon of Domestic Statutory Construction' (1990) 43 Vanderbilt Law Review 1103 or J. Turley 'Dualistic Values in an Age of International Legisprudence' (1993) 44 Hastings Law Journal 185. A similar principle is found in regional legal orders as is illustrated by the European legal order where European Law ought to be interpreted in conformity with international law. See Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337; see also *Poulsen and Diva Corp* [1992] ECR-I 6019.

[32] See generally Y. Shany 'National Courts as International Actors: Jurisdictional Implications' (October 2008) *Hebrew University International Law Research Paper* No. 22-08. See also the remarks by E. Benvenisti and G.W. Downs 'National Courts Domestic Democracy and the Evolution of International Law' (2009) 20 EJIL 59–72; G. Betlem and A. Nollkaemper 'Giving effect to Public International Law' (2003) 14 EJIL 569; see also J. d'Aspremont 'Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in A. Nollkaemper and O.K. Fauchald (eds) *Unity or Fragmentation of International Law: The Role of International and National Tribunals* (OUP forthcoming 2011).

[33] On the application of international law by domestic courts see generally See K. Knop 'Here and There: International Law in Domestic Courts' (2000) 32 NYU JILP 501; A. von Bogdandy 'Pluralism, Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) International Journal of Constitutional Law 1.

ties are of a limited number and their case-law is proportionally modest, especially if compared to the practice of law-ascertainment of domestic legal rules generated by domestic courts. This is precisely why, in line with Tamanaha's proposition, the practice of other actors engaged in the application of international law should be included in the social practice necessary to establish the social practice at the heart of formal law-ascertainment in international law.

It must be acknowledged that the practice of law-ascertainment generated by States is not so central anymore, for international law has nowadays grown beyond its original strictly inter-State configuration. It cannot be denied that some non-State actors also provide some interesting insights as to the meaning of law-ascertainment criteria. Particular mention should be made here of the International Committee of the Red Cross (ICRC). It is true that the recent study produced by the ICRC on customary international law[34] stirs some severe reservations in terms of the consistency of its methodology in the establishment of customary international law[35]– a large part of which can be traced back to the non-formal character of custom-ascertainment for which the ICRC cannot be blamed. Yet, it cannot be denied that the determination of what is law and what is non-law by the ICRC – as is illustrated by the extent to which States took pains to react to it – constitutes a practice of law-ascertainment that is to be reckoned with. A few other non-State actors are probably also instrumental in the consolidation of a practice of law-ascertainment.[36] It is not my intention to list them all

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[34] J.M. Henckaerts 'Study on Customary International Humanitarian Law: a Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 International Review of the Red Cross 175.

[35] See the critique of Boyle and Chinkin (note 21) 36. See also the critique expressed by J.B. Bellinger and W.J. Haynes 'A U.S. Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study' (2007) 46 ILM 514. See the reaction of J.M. Henckaerts 'Customary International Humanitarian Law – A Response to US Comments' (2007) International Review of the Red Cross 473.

[36] See e.g. The 2004 Report of the UN Secretary General's High Level Panel 'A More Secure World: Our Shared Responsibility' (2004) <http://www.un.org/secureworld/> (20 April 2011). See also the Report of the International Commission on Intervention and State Sovereignty 'Responsibility to Protect' (2001) <http://www.iciss.ca/report-en.asp> (20 April 2011): The Commission was established by the Government of Canada in September 2000.

here.[37] It must simply be recalled once again that recognizing that law-ascertainment by non-States actors like the ICRC constitutes relevant practice from the standpoint of the social thesis does not amount to saying that these bodies or entities are endowed with law-making authority.[38]

It is tempting to include the International Law Commission among those non-State bodies which engage in a practice of ascertainment of international legal rules. Certainly, the International Law Commission ascertains international legal rules when it codifies international law. In this respect, the codification undertakings of the International Law Commission could potentially yield some relevant social practice for the sake of law-ascertainment. Yet, the International Law Commission is also endowed with the responsibility to propose progressive developments of international law. Whilst these two tasks ought to be clearly distinguished according to its Statute,[39] the practice shows that the Commission carries them out simultaneously and does not deem it necessary to make any distinction in this regard. [40] The final outcome of

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[37] On the role of non-State actors in the international legal order see gen. d'Aspremont (note 22).

[38] Such a perception often permeates the legal scholarship. See generally C. Thomas 'International Financial Institutions and Social and Economic Rights: An Exploration' in T. Evans (ed.) *Human Rights Fifty Years On: A Reappraisal* (MUP Manchester 1998) 161 (163); for a mild approach see I.R. Gunning 'Modernizing Customary International Law: The Challenge of Human Rights' (1990–1991) 31 VirginiaJIL 211; A.M. Slaughter is not far from recognizing such a law-making role to individuals 'The Real New World Order' (1997) 76 Foreign Affairs 183. See also E. Beigzadeh 'L'évolution du droit international public' in E. Jouannet, H. Ruiz-Fabri and J.M. Sorel (eds) *Regards d'une génération sur le droit international public* (Pedone Paris 2008) 78. For a criticism of that perception see J. d'Aspremont 'The Doctrinal Illusion of Heterogenity of International Lawmaking Processes' in H. Ruiz Fabri, R. Wolfrum and J. Gogolin (eds) *Select Proceedings of the European Society of International Law* (Hart Oxford 2010) vol 2, 297.

[39] See e.g. Arts 16–18 of the ILC Statute ('Statute of the International Law Commission' [21 November 1947] UNGA Res. 174 [II]). The Statute as was subsequently amended is available at <http://www.un.org/law/ilc/> (20 April 2011).

[40] This is why the Commission suggested that such a distinction be abolished. See the UN ILC 'Report of the International Law Commission on the Work of its Forty-eighth Session) (6 May–26 July 1996) UN Doc. A/51/10 para. 147 (a) and paras 156–59. On that aspect of the ILC Statute see J.

the work of the International Law Commission, whatever form it may take, will generally fall short of making any distinction between those rules that have been codified and those that originate in a progressive development. It is usually the commentary that will indicate whether a rule must be considered the mere codification of an existing rule or whether it constitutes a progressive development of international law. But such indications do not always suffice and rules meant by the Commission to be progressive development of international law are sometimes subsequently elevated to rules have been the object of a codification by the judicial bodies applying them.[41] The almost impossibility to distinguish between progressive development and codification explains why the contribution of the International Law Commission to the practice of law-ascertainment ought to be seen as very modest. The same is probably true with respect to the Institut de Droit international.[42]

Finally mention must be made of the secondary role played by international legal scholars in the ascertainment of international legal rules. It is argued here that international legal scholars, although they are not at the origin of a practice of law-ascertainment generative of communitarian semantics, undoubtedly participate in the fine-tuning and streamlining of the formal criteria of law-ascertainment which, in turn, are picked up by the social actors involved in the application of international legal rules. In other words, it is submitted here that legal scholars come to play the role of grammarians of formal law-ascertainment who systematize the standards of distinction between law and non-law.

It is undeniable that scholars may occasionally be instrumental in the progressive development of primary norms. Indeed, while they cer-

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d'Aspremont 'Les travaux de la Commission du droit international relatifs aux actes unilatéraux des Etats' (2005) 109 RGDIP 163.

[41] See the famous contention of the ICJ that Art. 16 of the Articles on Responsibility of States for Internationally Wrongful Acts corresponds with a rule of customary international law a position contrasting with that of the Special Rapporteur of the ILC. Compare ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (note 25) para. 420 and J. Crawford *The International Law Commission's Articles on State Responsibility Introduction Text and Commentaries* (Cambridge CUP 2005) 148.

[42] On the Institut de Droit international see e.g. F. Rigaux 'Non-State Actors from the Perspective of the Institut de Droit international' in d'Aspremont (note 22).

tainly are not lawmakers,[43] international legal scholars often play a public role or participate in public affairs.[44] Although international legal scholars themselves may be tempted to see their offerings as more influential than they really are[45] and even though their contribution is more modest today than it used to be a century ago – for States have grown weary of the influence that scholars can have[46]– their writings, their opinions and their decisions also influence law-making and international legal adjudication.[47] Article 38 of the Statute of the Inter-

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[43] J. d'Aspremont 'Softness in International Law: A Self-serving Quest for New Legal Materials' (2008) 19 EJIL 1075; A. Bianchi 'Une generation de "communautaristes"' in Jouannet, Ruiz-Fabri and Sorel (note 38) 105; J. Kammerhofer 'Law-Making by Scholarship? The Dark Side of 21st Century International Legal "Methodology"' in J. Crawford et al (eds) *Selected Proceedings of the European Society of International Law* (Hart Oxford forthcoming) vol 3.

[44] For an illustration of the public role that scholars may play according to the conception submitted here see M. Craven et al. 'We Are Teachers of International Law' (2004) 17 LJIL 363; See also the letter published in the Guardian 'War Would be Illegal' (7 March 2003) <http://www.guardian.co.uk/politics/2003/mar/07/highereducation.iraq/print> (20 April 2011). See also the 'appel de juristes de droit international concernant le recours à la force contre l'Irak' initiated by the Centre de droit international of the Free University of Brussels (ULB) in January 2003 <http://www.ridi.org/adi/special/index.htm> (20 April 2011). On the idea that international legal scholars are not immune from the political debates in which they have been claiming a say see L. Mälksoo 'The Science of International Law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Iurev/Tartu 1855-1985' (2005) 76 BYIL 383 (499).

[45] For a classical example of this belief see O. Schachter 'The Invisible College of International Lawyers' (1977-1978) 72 Northwestern University Law Review 217 (217): 'We should be mindful however that international lawyers both individually and as a group play a role in the process of creative new law and in extending existing law to meet emerging needs. This legislative role is carried out principally through multilateral treaties but it may also be accomplished through the evolution of customary international the use of general principles […]. In all of these processes the professional community may perform a significant function'.

[46] M. Virally 'A Propos de la "Lex Ferenda"' in D. Bardonnet (ed.) *Mélanges Reuter* (Pedone Paris 1981) 520.

[47] See the famous statement of Justice Gray in the case of *The Paquete Habana* and the *Lola* in 1920: '[…] where there is not treaty and no controlling executive or legislative act or judicial decision resort must be made to the customs and usages of civilized nations; and as evidence of these to the works of

national Court of Justice has long shrouded the influence of scholars and judges upon law-making in a formal veil by elevating them to a 'subsidiary means for the determination of rules of law'. Nothing could be more illusory than the formalization of their influence on law-making which – albeit recognized as secondary – in the making of international law is not tangible and can hardly be captured in formal terms. The role of legal scholars in the making of substantive rules of international law falls outside the ambit of our inquiry. All that matters is to shed light on their contribution to the practice of law-ascertainment and their corresponding contribution to communitarian semantics.

Clearly legal scholars do not constitute law-applying authorities *sensu stricto*. Nor are they social actors as was understood by Tamanaha. Indeed, strictly speaking they do not apply the law but interpret and comment upon it. However, it cannot be denied that international legal scholars have always constituted grammarians of the language of international law.[48] By contrast to domestic law,[49] the systematization of

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jurists and commentators who by years of labor research and experience have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is' (cited by R. Jennings 'International Law Reform and Progressive Development' in G. Hafner et al. [eds] *Liber Amicorum Professor Seidl-Hohenveldern* [Kluwer The Hague 1998] 325 [333]). See also Mälksoo (note 44).

48 See P.-M. Dupuy 'L'unité de l'ordre juridique international. Cours général de droit international public' (2002) 297 RdC 4 (205): 'un internationaliste ne devrait jamais prétendre à autre chose que d'être un bon grammarien du language normatif du droit international'. P. Reuter 'Principes de droit international public' (1961-II) 103 RdC 425 (459): 'Le droit n'est pas seulement un produit de la vie sociale il est également le fruit d'un effort de pensée s'efforçant d'agencer les données ainsi recueillies dans un ensemble cohérent et aussi logique que possible. C'est l'aspect systématique du droit international il est à la fois plus important et plus délicat que celui des droits nationaux. Il est plus important parce que les sociétés nationales du fait qu'elles sont profondément centralisées par l'autorité étatique engendrent un droit déjà systématisé par ses conditions d'élaboration. Au contraire la "décentralisation du pouvoir politique" qui règne dans la société internationale rejette sur le juriste un fardeau plus lourd. Il est plus délicat parce que le désordre de la société internationale n'est pas tant désordre de la pensée que désordre du pouvoir; certes le juriste peut se laisser aller à la systématisation mais s'agit-il de systématiser seulement ses pensées ou de systématiser aussi la réalité? Certes de

international law has primarily been an achievement of legal scholarship rather than of legal practice.[50] International law would not have reached its current level of systemacity without the input of international legal scholarship. One of the paramount tasks undertaken as grammarians has been the systematization and the streamlining of the criteria for the distinction between law and non-law.[51] While their work in this respect does not constitute, strictly speaking practice of law-applying authorities, the law-ascertainment criteria carved out and polished by legal scholars have been very conducive to shaping the practice of law-applying authorities. *That means that international legal scholars do not themselves yield social practice*. Yet, they clearly *impact* on that practice by contributing to the elaboration of the communitarian semantics of law-ascertainment in international law.

The foregoing has thus attempted to show that the practice of law-ascertainment generating the communitarian semantics necessary to ensure the meaning of the formal criteria of law-ascertainment is made by a multifold practice generated by a diverse set of social actors, among which a few non-State actors may potentially play a paramount role. All these actors, although they are not necessarily endowed with a formal status can be very instrumental in providing meaning to the secondary rules of the international legal system. International legal scholars, while they do not themselves directly yield a practice of law-ascertainment, undoubtedly partake in the shaping of the communitarian semantics necessary to ensure the meaningfulness of formal law-ascertainment criteria. The role played in this regard by domestic courts and non-State actors in generating social practice for the sake of the meaning of the law-ascertainment criteria of the international legal

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par sa nature même le droit est avide d'ordre mais à quoi servirait-il par excès de rigueur dans la pensée de poursuivre une systématisation en dehors du cadre des solutions admises'. See also Van Hoof (note 8) 291 or J. von Bernstorff and T. Dunlap *The Public International Law Theory of Hans Kelsen – Believing in Universal Law* (CUP Cambridge 2010) 266.

[49] In this regard, the Code Napoléon has been particular instrumental in the systematization of continental European domestic orders.

[50] For some general thoughts on the contribution of legal scholars to the systematization of law see N. MacCormick *Institutions of Law: An Essay in Legal Theory* (OUP Oxford 2008) 6.

[51] A. D'Amato 'What "Counts" as Law?' in N.G. Onuf (ed.) *Law-Making in the Global Community* (Carolina Academic Press Durham 1982) 106–07; See also Virally (note 46) 532.

system participates in the reinforcement of the ability of the international legal system to produce a vocabulary enabling the delineation of the rules of which it is composed. This is another reason why, according to the modernized positivist account presented here, non-State actors can hardly be ignored by international lawyers, who should take them very seriously.

3. Concluding Remarks: The Necessity to Preserve the Central Role of International Courts and Tribunals in Defining the Law-Ascertainment Criteria of the International Legal System

The abovementioned role played by non-State actors in generating social practice for the sake of the meaning of the law-ascertainment criteria of the international legal system should certainly not be bemoaned. Indeed, it undoubtedly participates to the reinforcement of the ability of the international legal system to produce a vocabulary enabling the delineation of the rules of which it is composed. It is true that the plurality of the sources of the communitarian semantics necessary for the meaningfulness of law-ascertainment criteria accentuates the risk of conflicting social practice. This is why the law-ascertaining role of international courts and tribunals should be kept central. Yet, ensuring the centrality of their law-ascertaining role requires them to be more aware of their law-ascertainment responsibilities and exercice their law-identification powers with greater care. However, the practice of international courts and tribunals of the two last decades weathers a great deal of oscillations and inconsistencies. It is not only that some courts and tribunals, as is illustrated by the International Tribunal for the former Yugoslavia, have ventured into some atavist use of naturalist law-ascertainment criteria.[52] More seriously, the International Court of Justice – on which much of the spotlight is turned when it comes to determining law-ascertainment criteria of the international legal system – has itself been incapable of designing some consistent criteria as to – to give just one example – how international legal treaties could be distinguished from mere political instruments.

In particular, in its strive to devise something of a methodology for ascertaining the intent of the parties,[53] the International Court of Justice

[52] See e.g. ICTY Case No. IT-95-16-T (14 January 2000) para. 527.

[53] As regards the identification of international treaties see *Aegean Sea Continental Shelf* (note 27) paras 95–107: emphasis is put on the actual terms

has fallen short of defusing controversies and providing sufficient guidance to enable a consistent practice of law-ascertainment to emerge.[54] The methodology used by the Court, on top of lacking clear consistency, has failed to alleviate the problems inherent to the establishment of intent. This is why we have been left in bind when it comes to establish the intent with a view to distinguish law from non-law.[55] The difficulty to systematize intent probably explains why, more recently, the Court seems to have backed away from attempting to offer a clear methodology in this respect as is illustrated by its decisions in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*[56] and the case of *Pulp Mills on the River Uruguay*.[57] Such silence fuelled little controversy, as if judges, like scholars, had come to terms with the impossibility to formally evidence intent.

The reason of the abovementioned lack of clear indications as to how distinguish legal instrument from non-legal instruments are complex. I have explained elsewhere that they are, to a large extent, to be traced back to the ultimate use of non-formal criteria to identify law and non-law – although these law-ascertainment yardsticks are often portrayed

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and circumstances. Compare *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (note 27). Regarding the identification of unilateral promise see *Nuclear Tests* (note 27) para. 43. *Military and Paramilitary Activities in and against Nicaragua* (note 27); *Frontier Dispute* (note 27).

54 Compare *Aegean Sea Continental Shelf* (note 27) paras 95 et seq. and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (note 27) paras 26 et seq.

55 See gen. J. Klabbers *The Concept of Treaty in International Law* (Kluwer The Hague 1996) 245–50.

56 See the laconic consideration of the Court regarding the nature of the Maroua Declaration adopted by Cameroon and Nigeria in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)* [2002] ICJ Rep. 303 para. 263 ('The Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (see Art. 2 para. 1) to which Nigeria has been a party since 1969 and Cameroon since 1991 and which in any case reflects customary international law in this respect').

57 *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment) (20 April 2010)* ICJ Doc. 2010 General List No. 135 para. 138.

as formal.[58] It certainly is not the place to discuss this issue. It suffices here to stress that the lack of consistency in the guidelines provided by international courts and tribunals originates in an overly limited awareness of these law-applying bodies of their overarching importance when it comes to generate the social practice necessary for the emergence of meaningful law-ascertainment criteria. It is argued here that international courts and tribunals should be more mindful of their responsibilities in designing the indicators to distinguish law and non-law and should carry out that role with greater diligence.

Surely, at a time where the existence of multiple foras of dispute settlement based on the use of international legal rules has grown more common, the production of consistent indicators by international courts and tribunals simultaneously requires them to be mutually attentive to their respective work. It could even be defended that the consistency of the social practice yielding by international courts and tribunals calls for a greater – even informal – collaboration among them. Yet, the question of dialogue between law-applying authorities is not new and does not need to be taken on here.[59] The foregoing only provides another motive for ensuring a better coordination of international courts and tribunals when it comes to clarifying the law-ascertainment criteria of the international legal system. Failing to do so, international courts and tribunals could quickly be demoted to a secondary source of social practice necessary, in a Hartian perspective, to the emergence of meaningful indicators to distinguish law from non-law. If international courts and tribunals are stripped of their central law-ascertaining role, the risk is significant that the plurality of actors nowadays participating in the definition of the law-identification yardsticks brings about a great cacophony synonymous of an impossibility to correctly distinguish law from non-law, thereby depriving international courts and tribunals from one of their most important *raisons d'être*.

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[58] This is the object of my book *Formalism and the Sources of International Law – A Theory of the Ascertainment of Legal Rules* (OUP Oxford 2011).

[59] See gen. A.M. Slaughter 'A Global Community of Courts' (2003) 44 HarvardILJ 191.

Preconditions for *Stare Decisis* – What International Law Can Learn from Comparative Constitutional Law

*Paper submitted by Marjan Ajevski**

I. Introduction[1]

The question of whether there is or there is not a *stare decisis* system in international law has ebbed and flowed for the past decade and half. For instance, Judge Shahabuddeen in his seminal work *Precedent at the World Court*[2] concluded, that there is no system of *stare decisis*,[3] at least

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1 Some parts of this paper have drawn inspiration from a paper presented at the 4th Biannual ESIL Review Conference 2-4 September 2010, Ajevski Marjan 'Judicial Law-making in International Criminal Law: the Legitimacy Conundrum'.

2 M. Shahabuddeen *Precedent in the World Court: Hersch Lauterpacht Memorial Lectures* (CUP Cambridge 1996).

when it comes to the ICJ, that even if there is no system of *stare decisis* this does not mean that international courts, or at least the ICJ, do not make law[4] and that even though there is no system of *stare decisis* it does not mean that the judgments of the court do not represent precedents,[5] albeit in as much as they espouse the 'principles and rules of international law [that] were found to be applicable as between the parties'.[6]

Another author has criticized judge Shahabuddeen's claims of the non-existence of a *stare decisis* system in international law, more specifically, international trade law.[7] For him, the notion of the word precedent includes the notion of its bindingness; there is no such thing as a non-binding i.e. authoritative precedent.[8] He also, later in his article, talks about *de facto stare decisis* and *de jure stare decisis* and says that:

> 'My definition of de facto *stare decisis* sets a higher threshold for the meaning of past decisions and the institutional role of the adjudicator. It says the adjudicator has an institutional memory and puts it to work at every, or almost every, opportunity. A "de facto" precedent is, in other words, far more potent than a "non-binding" precedent. It provides greater certainty and predictability than does a "non-binding" precedent, though not quite as much as a "de jure" precedent'.[9]

Other authors have tried to discern whether a *stare decisis* system operates within different branches/regimes in international law. For instance, the *Oxford Companion to International Criminal Justice*[10] when talking about the sources of international criminal law says that it seems that a *stare decisis* system is in operation within the UN *ad hoc* tribu-

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3 Shahabuddeen (note 2) 97–105.

4 Ibid. 105–07.

5 Ibid. 107–09.

6 Ibid. 109.

7 R. Bhala 'The Myth About *Stare Decisis* and International Trade Law (Part One of a Trilogy)' (1999) 14 AmUIntlLRev 845 (924–36).

8 Ibid. 924–26.

9 Ibid. 940–41.

10 A. Cassese et al. (eds) *The Oxford Companion to International Criminal Justice* (OUP Oxford 2009).

nals.[11] It finds the evidence for such a claim in the *Aleksovski* Appeals Chamber judgment and the rules that it sets regarding the bindingness of Appeals Chamber judgments on the tribunals' Trail Chambers.[12] The Appeals Chamber itself is also bound by previous Appeals Chamber judgments save 'for cogent reasons in the interest of justice'.[13] Other authors have seen the possibility of whether other branches/regimes of international law follow the doctrine of *stare decisis*, namely the WTO, the ECtHR or the ICC.[14]

This renewed discussion begs the answer of several basic questions: what actually is *stare decisis*; how do we recognize it; are there certain preconditions that must be met for a *stare decisis* doctrine to evolve and how can that be applied to international law? I will answer these questions by looking at what *stare decisis* means in different constitutional systems, how it is distinguished from the practice of following previous judgments and whether it can have any relevance to international law.

Before I go into the discussion, one short note on the terminology I use in the paper. I make a distinction between *binding* and *non-binding* or *persuasive precedent*. I borrow this terminology from a study of different constitutional systems and their use of previous judgments in courts' reasoning titled *Interpreting Precedent*.[15] The aim of the terminology was to present a uniformed notion of whether there are certain provisions within the specific constitutional system that regulate the way that courts can use previously decided cases. However, I must stress that, when it comes to common law countries that are featured in this study, the provisions themselves can only be found in the highest court judgments and not in statutory law.

I will present my arguments in three parts. In part II, I will deal with the definition of *stare decisis* as it is understood by the US and UK con-

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[11] D. Akade 'Sources of International Criminal Law' in Cassese (note 10) 53.

[12] *Prosecutor v. Zlatko Aleksovski (Judgment)* IT-95-14/1 (24 March 2000) para. 113.

[13] Ibid. para. 107; but also see *Prosecutor v. Zoran Zugic (Declaration of Judge Shahabuddeen)* IT-98-30/1-A (26 June 2006) para. 2.

[14] G. Acquaviva and F. Pocar 'Stare Decisis' (2007) in R. Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* <www.mpepil.com> (12 Feburary 2011).

[15] D.N. MacCormick and R.S. Summers (eds) *Interpreting Precedents: A Comparative Study* (Ashgate Dartmouth 1997).

stitutional systems. I will present the basic rules and the basic rational behind these rules. In part III, I will go into the preconditions that are needed for a doctrine of *stare decisis* to even be contemplated. In part IV, I will see whether these preconditions are or can be met in international law and explain why we can talk about a doctrine of *stare decisis* within specific branches of international law but not as within general international law.

II. What is *Stare Decisis*?

It seems only natural that before I can examine the question of *stare decisis* in international law, I should lay out the basic ground rules as to what exactly do I mean when I say *stare decisis*. Let me then start with the dictionary meaning of the phrase *stare decisis* as understood in the *Oxford English Dictionary*. Under the phrase *stare decisis* we can find that it is understood as '[t]he legal principle of determining points in litigation according to precedent; properly as *v.* (*phr.*), to be bound by precedents'.[16] However, this is only a definition found in a dictionary, something that we can and should use as a heuristic tool and not at face value. Therefore, we would need to look at what different legal systems understand under the terms *stare decisis* and the word precedent in order to see how this can be applicable to international law.

In the United States the meaning of the phrase *stare decisis* has a specific connotation. *Stare decisis* is seen as 'the principle that courts are to follow similar previous judicial decisions when deciding legal questions'.[17] The doctrine of *stare decisis* applies to both the traditional Common law, i.e. torts, contracts, property, wills and trust and also to statutory and constitutional interpretation.[18] *Stare decisis* is a judicial doctrine, a doctrine 'which involves a court's choice to stand by a precedent notwithstanding suspicions (or worse) about its wrongness'.[19] In short, 'the doctrine of *stare decisis* is the judicial policy of (sometimes) adhering to

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16 J. Simpson and E. Weiner (eds) *The Oxford English Dictionary* (2nd edn. OUP Oxford 1989).

17 R.S. Summers 'Precedent in the United States (New York State)' in MacCormick and Summers (note 15) 355.

18 Ibid.

19 R.J. Kozel '*Stare Decisis* as Judicial Doctrine' (2010) 67 Washington & Lee Law Review 411 (412).

prior decision irrespective of the prior decision's legal correctness according to other interpretative criteria'.[20]

In the US, the United States Supreme Court has even developed a set of rules as to the precise meaning of what does it mean to follow *stare decisis*, when does it compel courts to adhere to a previously decided precedent, and what conditions need to be fulfilled in order for the Supreme Court to overrule a previously set precedent. The rules of the doctrine of *stare decisis* have been finally clearly put in the US Supreme Court's judgment in the case of *Planned Parenthood v. Casey*[21] which is better summarized in Justice Scalia's dissent in *Lawrence*,[22] which said that:

> 'Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) if: (1) its foundations have been "eroded" by subsequent decisions, ante, at 15; (2) it has been subject to "substantial and continuing" criticism, ibid.; and (3) it has not induced "individual or societal reliance"'.[23]

In the UK, the doctrine of *stare decisis* is seen as the rigid or narrow meaning of the word precedent, more specifically, the relevant case that is binding and even only then the relevant part of the case that is binding.[24] It seems that in the UK, much like in the US, scholars have a nuanced view of the doctrine of *stare decisis* as related to the notion of precedents. Specifically,

> 'the doctrine of precedent is, broadly speaking, variable in its "strictness" across different jurisdictions, and historically, within the same jurisdiction. It is fair to say that the English doctrine of *stare decisis* (keep to what has been decided previously) is at the "stricter"

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[20] M.S. Paulsen 'Does the Supreme Court's Current Doctrine of *Stare Decisis* Require Adherence to the Supreme Court's Current Doctrine of *Stare Decisis*?' 86 (2008) North Carolina LRev 1165 (1171).

[21] *Planned Parenthood of South Eastern Pennsylvania v. Robert P. Casey* 505 U.S. 833 (1992).

[22] *Lawrence v. Texas* 539 U.S. 558 (2003).

[23] Ibid. 587.

[24] Z. Bankowski, D.N. MacCormick and G. Marshall 'Precedent in the United Kingdom' in MacCormick and Summers (note 15) 315 (323–24).

> end of this continuum. A significant feature of the English doctrine has been its coercive nature. (footnote omitted)'.[25]

The UK doctrine of *stare decisis* has been developed by the House of Lords through a series of cases. It started with the judgment in the case of *London Street Tramways v. LCC*[26] where it decided in 1898 that it would be strictly bound to follow its own precedents.[27] This does not mean that the House of Lords slavishly followed its own previous judgments, but rather found innovative ways to distinguish them. Finally in 1966 it issued a practice statement that allowed for overruling of previous precedents by saying that:

> '[...] the use of precedent [...] [is] an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law'.[28]

Consequently, it seems that the doctrine of *stare decisis* is intrinsically linked with the notion of precedent, and a specific narrow notion of precedent at that – a vertically formally binding precedent. For instance, in New York State the strictest notion, but also the most widely used notion, of precedent involves the concept that the lower courts[29] are

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[25] T. Buck 'Precedent in Tribunals and the Development of Principles' (2005) 25 Civil Justice Quarterly 458.

[26] *London Street Tramways v. LCC* A.C 37 (1898).

[27] Bankowski, MacCormick and Marshall (note 24) 326.

[28] Practice Statement issued by the House of Lords [1966] 1 WLR 1234.

[29] The names of the New York court hierarchy is somewhat strange in US terms with the highest court in the state called New York Court of Appeals, followed by the courts of the Appellate Division, which are allocated geographically throughout New York State, and New York Supreme Courts which

bound by the decisions of the higher courts of the same jurisdiction (usually meant territorial jurisdiction) as well as the higher courts being bound by their own decisions.[30] The level of bindingness is formal, in the terms that if a lower court does not respect a precedent's bindingness then its decision is not lawful and so is subject to reversal on appeal.[31]

Furthermore, the lower courts are only bound by the judgments of their directly vertical superiors covering the same territory, i.e. a Supreme Court is bound by the precedents set by Appellate Division that covers the territory of the Supreme Court and there is a strong presumption that it is bound by the precedents set by the other Appellate Divisions.[32] An Appellate Division is only formally bound by the Court of Appeals, while not bound by the precedents set by other Appellate Divisions covering different geographical areas.[33] The Court of Appeals, however, is not formally bound by its previous judgments since there is no higher court that can overrule it and is free to depart from them. This does not mean, however, that it does not follow its previous decisions as a rule, and departs from them as an exception. [34]

It is also important to note that the doctrine of *stare decisis*, i.e. the bindingness of precedent, is only applicable within a court system. For instance, a Court of Appeals decision is not a precedent for courts of other states, in terms of its formal bindingness. Such a judgment can only have persuasive value.[35] It can be said that the US has 51 separate legal systems, each for every state plus the US federal system. Each system comes with its own court system hierarchy and its own vertical binding precedent system.[36] Furthermore, in certain cases state courts of general jurisdiction can have concurrent jurisdiction with federal courts

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are the trial courts of general jurisdiction, and can be several within the territorial jurisdiction of a Appellate Division court, see MacCormick and Summers (note 15) 356–59.

30 MacCormick and Summers (note 15) 364.

31 Ibid. 368.

32 Ibid. 369.

33 Ibid.

34 Ibid.

35 Ibid. 355.

36 Ibid.

of general jurisdiction[37] at which point they are bound by the precedents set by the federal Court of Appeal for that specific district and ultimately by the Supreme Court.[38]

Before I go into how the *stare decisis* system was built in the US, there is one more point that I would like to emphasize. As you may have noticed, I have used several words to describe the notion of *stare decisis* – system, doctrine and policy. All of these words are in a way pertinent to the notion of *stare decisis*. The word system emphasizes the fact that *stare decisis* is only present in hierarchical judicial systems.

On the other hand, the words doctrine and policy emphasises the fact that even though I have been talking about formal bindingness of precedents, the doctrine of *stare decisis* is not set down in statutory law, but can only be found as a judicial doctrine or the policy of courts.[39] It is doctrine or policy of the highest court to decide to follow its previous decisions throughout change in its composition, even when the current composition disagrees with those same decisions.[40] Moreover, this policy is policed, to the best of their ability, by the highest courts themselves in regards to the lower courts through the possibility of reversal of the lover courts' decision.[41] So far in my limited research, I have only found one statutory mandated *stare decisis* system, that of the state of Georgia in the US.[42] The act was passed, according to one author, because the 'doctrine of stare decisis had obtained such firm allegiance in public opinion, as personified by the legislature, that it was imposed as a rule on the court'.[43]

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37 The US Federal Court system is divided into districts with each district having several Federal District Courts of general jurisdiction with a federal Court of Appeals as an appellate court for that specific district (e.g. the federal appellate court for New York State which also covers the territory of other states is called Court of Appeals for the Second Circuit) and a Supreme Court sitting at the top, MacCormick and Summers (note 15) 359.

38 Ibid. 355–59.

39 Paulsen (note 20); Kozel (note 19) 411; R.A. Sedler 'The Michigan Supreme Court, *Stare Decisis*, and Overruling the Overrulings' (2009) 55 Wayne Law Review 1911.

40 F.G. Kempin Jr. 'Precedent and *Stare Decisis*: The Critical Years, 1800 to 1850' (1959) 3 American Journal of Legal History 28 (28–29).

41 Ibid. 28–29.

42 Ibid. 42.

43 Ibid. 43.

Furthermore, since this is, in almost all cases, a judicially constructed and perpetuated doctrine, the 'rules of the roads', in terms of when to overrule and when to stick to a previously decided but not well liked judgment, are also judicially constructed. This can, as evidenced by the discussions in the US Supreme Court itself, lead to some heated debates between the justices themselves regarding the proper test for overruling and whether the case at hand satisfies the same test.[44] This, however, should not be construed that courts would negate the binding nature of precedents set by higher courts, or that of one's own previous precedents, regardless how messy the doctrine can be in practice. Quite the contrary, the discussions between the Supreme Court justices are an affirmation of the doctrine of *stare decisis*, even though they might disagree regarding the details of its application.

III. Pre-conditions for *Stare Decisis*

Saying that the doctrine of *stare decisis* is a judicial doctrine and that it is, in almost all cases constructed by the courts, does not mean that *stare decisis* can exist in any system at any time. The fact that a court uses and quotes its own or a superior court's previous decisions does not mean that a system of *stare decisis* is in operation. *Stare decisis* can best be understood as:

> 'a peculiar and legal adaptation of the common practice of relying on past experience. It is based on the idea that a series of precedents should not be departed from. This natural and perhaps unavoidable tendency approaches legal usage when precedents are deemed to be authority. It reaches its apogee when a single precedent is considered to be a "binding" authority. But the concepts of the value of prior experience, respect for precedents, and *stare decisis*, must be kept distinct'.[45]

To understand the fact that *stare decisis* is but one way that precedents, i.e. previous judgments are used, one would have to keep in mind that

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[44] For instance see the discussion that is present in *Planned Parenthood of South Eastern Pennsylvania v. Robert P. Casey* 505 U.S. 833 (1992) and *Lawrence v. Texas* 539 U.S. 558 (2003); also Paulsen (note 20), talking about the messy application of the doctrine of *stare decisis* by the US Supreme Court itself.

[45] Kempin Jr. (note 40) 29.

the use of previous judgments in the reasoning of courts is not an aberration of Common Law systems. Courts in different Continental Law systems use previous judgments in a myriad of different ways. In the Italian legal system, for instance, a discussion of the previous judgment of the *Corte di Cassazione* and the Constitutional Court at length in either court judgments or scholarly writings is not an unusual occurrence.[46] This practice is not only followed by judges and scholars, but by practicing lawyers while arguing before the Italian courts as well.[47]

This does not mean, however, that a doctrine of *stare decisis* is present in the Italian legal system. For instance, prior judicial decisions, even though they are called precedents, are not formally binding,[48] the use of precedents is 'not an alternative to reference to codes, statutes or constitution. On the contrary, precedent is very often a sort of *medium* for the references to codes, statutory provisions and constitution'.[49] Consequently, precedents in Italian law have an authoritative value, they are not part of the sources of law, and consequently, '[e]vry Italian precedent is [...] a *de facto* or *persuasive* precedent, lacking in any formal biding effect'.[50]

Similar uses of previous judgments can be found in other countries as well, Germany being the other prime example. The only formally binding precedent in Germany is the judgments handed down by the Federal Constitutional Court (FCC), although there is a discussion as to whether the legislature is also bound to follow a judgment of the FCC.[51] The judgments of other courts have only persuasive value, even though they are regularly used in part of the judges reasoning albeit without having a detailed discussion on the cases themselves.[52]

France can be said to be on one of the far ends of the scale when it comes to the use of previous judicial decisions. In France, for instance, a number of formal legislative provisions exist that specifically forbids

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46 M. Taruffo and M.L. Torre 'Precedent in Italy' in MacCormick and Summers (note 15) 141 (151–53).

47 Ibid. 152.

48 Ibid. 151, 154–57.

49 Ibid. 152.

50 Ibid. 154.

51 R. Alexy and R. Dreier 'Precedent in the Federal Republic of Germany' in MacCormick and Summers (note 15) 17 (26–31).

52 Ibid. 23–24.

the use of cases to decide a controversy before the courts.[53] Judgments in France are only meant to display the 'true meaning of the statute or the previous existence of a principle. The ideological assumption is that the legal system is complete'.[54] This does not mean that courts do not adhere to previously settled cases, or that they do not look at the courts' previous practice. For one thing, there is a notion of *jurisprudence constante* (persisting jurisprudence) in France that indicates a rule that has been solidified by the constant reliance of courts.[55] However, French courts avoid the open citation of previously decided cases, especially if the appearance of deciding a case based on judicially constructed general rules.[56]

As we can see the use of precedents, i.e. previously decided cases, is not only the privilege of Common Law legal systems. Continental Law systems have no qualms about using prior judicial experience in their deliberations. As the quote from Kempin points out, it is 'a natural and perhaps unavoidable tendency'[57] to use the wisdom accrued through the ages in the form of jurisprudence. However, it is a completely different thing to do so as part of mandatory system, judicially constructed or not. Moreover, a court cannot construct a doctrine of *stare decisis* without the necessary preconditions.

In his paper, Kempin explores whether the preconditions that were germane for the adoption of the doctrine of *stare decisis* in the UK were present in the US at the time when most state courts decided to follow that doctrine.[58] He says:

> 'The reason for the late development of *stare decisis* in England lies in the fact that there were certain conditions precedent to its full development. To put the matter another way, *stare decisis* did not de-

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53 M. Lasser 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' (1995) 104 YaleLJ 1325 (1134–40).

54 M. Troper and C. Grzegorczyk 'Precedent in France' in MacCormick and Summers (note 15) 103 (115).

55 Ibid. 122.

56 Lasser (note 53) 1336–38; Lasser has devoted a monograph to the different ways that previous judgments, from the point of legitimacy and transparency, are used in judicial deliberations in the US, France and the ECJ and has described the reasons for this, see M. Lasser *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP Oxford 2004).

57 Kempin Jr. (note 40) 29.

58 Ibid. 30–32.

> velop in England because of conditions which prevented its full development. These conditions, as far as English law is concerned, were suggested in a 1934 article in the Law Quarterly Review by W. S. Holdsworth. The reasons given were somewhat as follows:
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> 1. English law has classically operated on the theory that cases are not law, but rather only the best evidence of what law is.
>
> 2. The authority of the reporters of cases, not being officially appointed by the courts, was such that the reported cases could be discounted by judges on the basis of inaccuracy, inadequacy, or unintelligibility.
>
> 3. The English court system to the middle of the nineteenth century was such that conflicting decisions could and did exist side by side.
>
> 4. That law is not precedents, but general principles.
>
> The fourth reason may be disregarded for, as Goodhart pointed out in his article, it is virtually indistinguishable from the first. The other three reasons, however, require examination. (footnotes omitted)'.[59]

As we can see, if we were to look at any constitutional system and see whether that system follows a *stare decisis* doctrine, we would first have to look whether that system fulfils the two structural and the one theoretical/ideological preconditions for a *stare decisis* system. As Kempin points out, regardless of the fact that most US states had a hierarchical court system since their independence, it was impossible to talk of a *stare decisis* system without having reliable case reporting practices.[60] Those case reporting practices were only set firmly in place by the mid nineteen century, when most of the states adopted a *stare decisis* doctrine.[61]

The theoretical/ideological barrier is somewhat more persistent and nuanced than the other two structural preconditions. The theoretical line of thinking in US law for example, arguing that judges did nothing more than just merely apply the law was already under severe attack by the middle of the nineteenth century.[62] Moreover, by the middle of the second half to the end of the nineteen century, the theoretical doctrine that judges did something more than just discover and apply the law that was objectively out there became the mainstream among both

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[59] Ibid. 31.

[60] Ibid. 32–36.

[61] Ibid. 36.

[62] Ibid.

scholars and practitioners.[63] This does not mean, however, that the 'judges as umpires'[64] line of theoretical thought is not still firm in the US judicial and scholarly community. These two lines of thought have ebbed and flowed throughout different periods in US legal scholarly thought.[65]

What I have attempted to convey with the discussion presented in the two preceding parts is the notion that the phrase *stare decisis* has a specific meaning, one of vertically binding precedent where only the highest court in the land, in theory, can overrule its own previously set precedent. Furthermore, I have tried to convey the idea that just because constitutional systems follow previously decided cases, i.e. precedents (whether openly or behind closed doors) does not mean that a doctrine of *stare decisis* is in place. There are a large number of ways in which courts from different national judicial systems can use the previous experience accrued through cases, only one of which is the doctrine of *stare decisis*. Moreover, there are certain structural and theoretical preconditions/barriers that need to be in place/absent in order for a doctrine of *stare decisis* to be plausible. I will now use these insights to see whether a *stare decisis* system is and can be in operation in international law.

IV. *Stare Decisis* in International Law?

My first line of inquiry on whether there is a possibility for a *stare decisis* system in international law will start with the question of whether international courts use the past accrued wisdom of courts through case-law? This question is in fact pretty easy to answer, if we decide to gloss over the details a bit. International courts do not shy away from discussing and quoting their own or even other courts' previous judg-

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[63] B.Z. Tamanha *Beyond the Realist-Formalist Divide; the Role of Politics in Judging* (Princeton University Press Princeton 2010) 27–43 accounting for the misreading of the early realists of the scholarly and practitioners insights into the proper role of judges.

[64] C. Babington and J. Becker '"Judges Are Not Politicians", Roberts Says' (13 September 2005) The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091200642_pf.html> (12 February 2011).

[65] Tamanha (note 63).

ments. International criminal tribunals are probably the most notorious example of this, but there is hardly an international court that does not rely on its or other courts' previous case-law.

However, as I have said previously, this in itself does not mean that these courts follow a doctrine of *stare decisis*. I have given examples of constitutional systems where the use of previous judgments is prolific without following a doctrine of *stare decisis*. Consequently, we cannot say that a *stare decisis* system exists within general international law or within a specific courts system merely on the evidence that courts use previously decided cases, their own or other courts' regardless.

Consequently, it is time to see whether the preconditions/barriers for *stare decisis* are present in general international law and within certain branches/regimes. I will start with the easiest one, a case reporting system. In the age of the internet and electronic sources, it is hard to say that there is a major deficiency in case reporting of international courts. Almost all international court judgments and decisions are available either in an online database[66] or through their published reports (for earlier judgments). Not only that, but certain publishers and international journals have stared or have had dedicated reports and case notes as part of their publication practices.[67] Consequently, reliable information regarding the proper state of case law of any give tribunal are more than available, and consequently, easily exploitable by international judges.

The other two preconditions/barriers are a little bit more complicated than they appear. For instance, the precondition of a hierarchical court system will depend on one's specific view point. We can for a certainty say that there is a hierarchical system within the UN *ad hoc* criminal tribunals,[68] as well as the SCSL[69] and the ICC[70] which are structured

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[66] For instance see the websites of the ICJ which also holds the reports of the PCIJ, the ICTY and ICTR, the ICC, the SCSL, the ECJ, the ECtHR, the IACtHR, the WTO panels and Appellate body and the published reports of their judgments.

[67] For instance see the International Law Reports <http://www.justis.com/data-coverage/international-law-reports.aspx> (12 February 2011); Oxford Reports on International Law <http://www.oup.com/online/us/law/oril/> (12 February); AJIL which regularly publishes case notes of different jurisdictions connected to international law, see AJIL 'International Legal Materials' <http://www.asil.org/ilm/ilmindx.htm> (12 February).

[68] Art. 11 of the Statute of the ICTY in UNSC 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc. S/25704.

around separate Trial Chambers and an Appeals Chamber at the top. The ECtHR also has a somewhat hierarchical structure, with Sections and a Grand Chamber where the Grand Chamber acts as an appellate instance.[71] Similarly with the WTO, where there are DSU panels and an Appellate body.[72]

However, if we look at the international system as a whole, we can, with a high degree of certainty, say that there is no hierarchical court structure, neither one established by treaty or custom, nor one established by the courts themselves.[73] One just has to recall the disagreement that the sparked between the ICJ and the ICTY over the issue of State responsibility for actions of paramilitary groups.[74]

The theoretical precondition/barrier is somewhat more complicated. As we are all painfully aware so far, Art. 38 of the ICJ Statute puts international judgments in the realm of subsidiary sources of law as evidence of what the law is. As in most Continental Law systems, courts (should) share the same normative ladder with the opinions of scholars.[75] For instance, almost no text book puts international judgments as

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[69] Art. 11 of the Statute of the SCSL <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176> (12 February).

[70] Art. 34 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[71] The ECtHR is comprised of five sections and a Grand Chamber, more information available at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/The+Sections/> (12 February).

[72] Panel and Appellate Body reports available at <http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm> (12 February).

[73] Generally see C.P.R. Romano 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41 NYU JILP 755; R. Teitel and R. Howse 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order' (2009) 41 NYU JILP 959; S. Linton and F.K. Tiba 'The International Judge in an Age of Multiple International Courts and Tribunals' (2009) 9 ChicagoJIL 407.

[74] *Prosecutor v. Tadić (Judgment)* IT-94-1-A (15 July 1999) paras 102–45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)* [2007] ICJ Rep. 43 paras 398–407; A. Cassese 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649.

[75] M.A. Glendon, M.W. Gordon and C. Osakwe *Comparative Legal Traditions: Texts Materials and Cases on the Civil and Common Law Traditions, with Special Reference to French, German, English and European Law* (2nd edn.

sources of law, which one would have to if they were more than just law discoverers.[76]

However, the notion that courts are mere law discoverers and not law shapers has been put into doubt in the past decade and a half. As I said earlier, Judge Shahabuddeen in his book has already acknowledged the law shaping character of the ICJ judgments.[77] Other authors have mentioned in passing that it is almost unsupportable in the current state of international law to say that international tribunals are mere law discoverers, but that they have a considerable normative power.[78] Furthermore, if I may go back to the article of Kempin, in order for a *stare decisis* doctrine to emerge, it is not necessary to refute the concept that courts are mere law discoverers, but for it to be under serious attack.[79]

Consequently, I can say with some conviction that the barriers that would suggest against the adoption of a *stare decisis* doctrine or policy are somewhat blurred and somewhat under strain. It is because of the case reporting system, the hierarchy in certain international court systems and the questioning of the age old wisdom of international judgments as subsidiary sources of law that a doctrine of *stare decisis* can and does exist in certain branches of international law, like within the UN *ad hoc* criminal tribunals. However, this also means that, because of the lack of hierarchy in between the court systems in international law, we cannot talk of a doctrine of *stare decisis* in general international law.

Furthermore, we should not forget probably the most important factor in creating a doctrine of *stare decisis*, and that is the courts themselves. As I have said, *stare decisis* is a judicial doctrine or policy. In almost all of its occurrences, it has been created by the courts themselves. Even within the UN *ad hoc* system, it was the Appeals Chamber that con-

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West Publishing Co. St. Paul Minnesota 1994) 192–10; also see Lasser [2004] (note 56) 190–200.

[76] R.M.M. Wallace *International Law* (4th edn. Sweet & Maxwell London 2002) 3–7; V. Lawe *International Law* (OUP Oxford 2007) having no discussion about courts in his text-book when discussing the issue of the sources of law; M.N. Shaw *International Law* (6th edn. CUP Cambridge 2008) 109–12.

[77] Shahabuddeen (note 2) 105–07.

[78] D. Terris, C.P.R. Romano and L. Swigart *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (OUP Oxford 2007) 102–30.

[79] Kempin Jr. (note 40) 32–36.

structed the doctrine of *stare decisis* that is applicable within the ICTY and the ICTR in the *Aleksovski* Appeals Chamber judgment,[80] and not the UN Security Council through the adoption of their Statutes. Consequently, even if the preconditions/barriers are present/lifted in a specific system of international law, a doctrine of *stare decisis* most certainly will have to be established by the courts themselves. Absent expressly stated rules of formal bindingness by the highest courts within a certain international law branch/regime we could not talk of a *stare decisis* doctrine operating within that branch. Another scenario would be for the States themselves to modify the current structure of the international system, establish a hierarchical order and allow or require of courts to follow a doctrine of *stare decisis*. I, however, will not be holding my breath for this scenario to happen.

[80] *Prosecutor v. Zlatko Aleksovski (Judgment)* (note 12) paras 92–115.

Unacknowledged Legislators: Some Preliminary Reflections on the Limits of Judicial Lawmaking

*Paper submitted by Hugh Thirlway**

It was Shelley, himself a poet, who memorably declared in 1821 that 'Poets are the unacknowledged legislators of the world'.[1] It is to be feared that in almost two centuries they have not yet received the acknowledgment of that role that he felt was their due. In our day, this is an appellation which could perhaps be applied with more accuracy to international courts and tribunals.

It is a cardinal and well-known principle that tribunals do not make law: they only apply it. It is also an open secret that in practice this is simply not true: when a court settles a dispute by the application of international law, there is inevitably an element of added value: something is clarified or declared that had not been clarified or declared before. The International Court of Justice, for its part, has asserted that 'it states the existing law and does not legislate', and that '[t]his is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend'.[2] Inevitably however, the specification of the scope of existing law involves law-making, even if not always in any great or evident degree; and to note the general trend of the law implies ascertaining what that trend is, not always an impartial operation of recording, and may, deliberately or otherwise, involve

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1 Percy Bysshe Shelley *The Defence of Poetry* (1821).

2 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226 para. 18.

directing that trend. The conclusion of the most thorough and authoritative survey of the question in recent years is categorical:

> 'International courts and tribunals do more than apply the law […] they are also part of the process for making it. In some cases this involves affirming the law-making effect of multilateral agreements, UN resolutions, ILC codifications or other products of […] law-making processes […]. In other cases judges have drawn upon a rather broader legal basis for their decisions, and articulated rules and principles of law that can only be described as novel and are not necessarily supported by evidence of general practice or *opinio juris*'.[3]

The question posed in the present paper is this: given that international courts and tribunals make law for States, and that this, being unacknowledged, involves no specific regulation, what control do States have over the process, and what (if anything) can they do to prevent a tribunal diverging, consciously or otherwise, from law as expressing the individual or collective will of States, or to remedy such a divergence once committed? The views offered are no more than tentative; a complete survey of the instances in which international tribunals, particularly the International Court of Justice, have broken new ground in declaring the law, and of any detectable international reaction to these cases, would be needed for any more confident assertions or predictions.

As background, to demonstrate the rigorously classical approach here adopted, some elementary answers to the elementary question: how is international law made? The answer is of course found in the theory of sources: as students we learn that Art. 38 of the Statute of the International Court of Justice declares that its 'function is to decide in accordance with international law', and that it is to apply in the first place 'international conventions, whether general or particular' and 'international custom, as evidence of a general practice accepted as law'. The evident common factor here is input by States. States that draw up a treaty include in it the rights and obligations that they choose to take upon themselves; when it is a multilateral convention that is being drafted, there may be a multiplicity of mutual accommodations, not to say horse-trading, but the end-product is, theoretically at least, acceptable to all; and there remains the possibility of non-ratification, or

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[3] A. Boyle and C.M. Chinkin *The Making of International Law* (OUP Oxford 2007) 310–11.

(where permitted) ratification with reservations. Custom by definition is made by States, and a general custom[4] is recognized as binding on all States, not merely those who took part in its creation (subject to the doctrine, not much heard of nowadays, of the 'persistent objector'[5]). The 'general principles of law' are less easily definable or discoverable, and have in fact not proved useful in the work of the ICJ at least; but these have to be 'recognized by civilized nations',[6] which means all recognized States, so that some evidence of such recognition in State practice or domestic jurisprudence would seem to be required.

Once we move, in Art. 38, from the State-related sources to 'judicial decisions and the teachings of the most highly qualified publicists of the various nations', the product is down-graded: these are not sources, but 'subsidiary means for the determination of rules of law'. Thus a decision of the ICJ itself has 'binding force […] between the parties and in respect of that particular case', and no other binding force, but may still rank as a 'subsidiary means' leading, in effect, to its application between other litigating States. Since it is generally agreed that the sources defined in Art. 38 are valid also for other international tribunals, a finding in one case could theoretically be bandied about among different tribunals with no more support in the practice of States than was discerned, perhaps optimistically, by the original tribunal.[7] Certainly the original

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[4] Local or special custom may be left aside for present purposes: but note the ICJ decision in *Frontier Dispute (Burkina Faso/Republic of Mali)* [1986] ICJ Rep. 554 paras 20–26 (itself perhaps a questionable one) that the principle of *uti possidetis*, developed in Latin America, was or had become a general principle of world-wide application.

[5] An exception is the lucid treatment by M. Byers *Custom, Power and the Power of Rules* (CUP Cambridge 1999) 102–05.

[6] A term which at one time provoked some resentment among lawyers from the developing world, who felt that their countries were aimed at: *cf.* the separate opinion of Judge Ammoun in the *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany /Netherlands) (Separate Opinion of Judge Fouad Ammoun)* [1969] ICJ Rep. 101 (132–35).

[7] That this will not necessarily be the case is however exemplified by the criticism by the ICTY, in the case *Prosecutor v. Tadić (Judgment)* IT-94-1-A (15 July 1999), of the ICJ decision in the case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep. 14 (and the response of the ICJ in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos-*

tribunal, if it is a standing body, will regard it as the normal process to follow its established jurisprudence, as is demonstrated by the number of examples in the *ICJ Reports* of a finding being buttressed by a whole string of references to previous consistent findings on the same point. As to the 'most highly qualified publicists of the various nations', whether they can be relied on to state the *lex lata*, or at least in their teachings to distinguish clearly between *lex lata* and *lex* which the author, probably with good reason, considers eminently *ferenda*, is another matter.[8]

The ICJ may serve as a paradigm, in the sense that the mission entrusted to other standing tribunals, in terms of finding and applying the law, is analogous if not identical;[9] and arbitration bodies, and counsel pleading before them, tend to assume the existence of a standard approach to law-finding best expressed in the terms of Art. 38.

If the situation of international tribunals in the international legal system is compared with that of courts in a national legal system, it is clear that there is an element missing. If the national courts lay down as a rule of law something which does not correspond to the wishes and intentions of the community that they serve (normally to be identified with the State, as represented by the national government), then apart from the possibility of appeal,[10] which may merely displace the prob-

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nia and Herzegovina v. Serbia and Montenegro) (Judgment) [2007] ICJ Rep. 209 paras 402–03.

[8] As a cautionary tale, we may recall the persistent attempt attributed to the late Roberto Ago to re-establish, in his successive ILC Reports on State Responsibility, a thesis of which he had endeavoured unsuccessfully to convince the Permanent Court many years before: see J. Crawford *The International Law Commission's Articles on State Responsibility* (CUP Cambridge 2002) Introduction 23.

[9] For example, Art. 293 of the UNCLOS, to which Art. 23 of the ITLOS Statute refers, requires the application of the Convention 'and other rules of international law not incompatible with' the Convention.; no further definition is offered, leaving Art. 38 of the ICJ Statute as the recognized yardstick. For a perhaps excessive assumption by an arbitral tribunal that what applies to the ICJ applies to such a tribunal, see *Victor Pey Casado v. Chile (Decision of 25 September 2001)* ICSID Case No. ARB/98/2.

[10] The ICC and other international criminal courts of course include appeal structures, but these are not here to our purpose. For an almost unique example of appeal being provided for from one international body, sitting judicially, to another, see Art. 84 of the Chicago Convention on International Civil Aviation ([signed 7 December 1944, entered into force 4 April 1947] 15 UNTS 295), ap-

lem, legislation can be introduced to cancel out the ruling for the future, or to re-establish what had previously been regarded as the *status quo*. Whether this may involve cancelling the effect of the specific judgment in its direct effect on the litigants, depriving one of them of the benefit obtained, is a more complex question; but we are here more interested in the possibility of general adjustment of law in its future reach.

Against that background, what is the situation if an international tribunal, in particular the International Court, gives a ruling which is regarded (let us reserve for the moment the question, by whom?) not merely as a development, in that it does not correspond to an existing rule or principle, but furthermore as an unwelcome development? That such development does occur we may take, on the basis of the study cited above, as established; that it may be sometimes an unwelcome development is perhaps not so unlikely as it seems if the area of law concerned is in an early stage of development. And if this is a real danger, how is it to be guarded against?

As regards the parties to a specific case, they will not plead before the Court for a solution that they would not welcome; but we should not overlook the rule *jura novit curia*: it is possible for the two States parties to a case to have different views of the applicable law, and to seek to learn from the Court which of them is right, only to be told that they are both wrong: the law is otherwise. It is possible in principle for the parties to restrain the scope of the matter submitted to the Court,[11] and

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plied in the case of *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* [1972] ICJ Rep. 46.

[11] When the law of maritime delimitation was still in an uncertain and inchoate state, the first submissions of such matters to the ICJ were guarded in their terms: in the *North Sea Continental Shelf* cases the parties in their special agreement asked the Court merely to declare the 'rules and principles of international law' applicable to the delimitation of their continental shelves, reserving for themselves the actual delimitation: *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep. 3 (6); in the case *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] the parties went further, asking the Court to 'specify precisely the practical way' in which the principles and rules that it would have defined should be applied (*Continental Shelf [Tunisia/Libyan Arab Jamahiriya]* [1982] ICJ Rep. 18 [23]), and in fact the Court very nearly drew the parties' line for them (see the map at ibid. 90). Later applications to the Court have asked for a line as well as an examination of the law.

the principle *ne ultra petita* then keeps the decision within bounds;[12] but it is doubtful whether the Court's law-finding activity can be restrained in this way.[13]

If the decision concerns the interpretation of a bilateral treaty, and neither party likes the Court's ruling, the remedy is, up to a point, clearly in their own hands: to agree to a different interpretation. Since however the original dispute concerned, or involved, precisely that point of interpretation, this may not be such a simple matter. If the matter concerns a multilateral treaty, the question of the identification of the hypothetical unsatisfied customer becomes crucial: if it is the two parties that are unhappy, they can again (subject to the same practical problem) agree a mutual interpretation, which may or may not match the general view of the other States parties to the treaty. It could on the other hand be a matter of concern to the generality of States parties if the Court adopts, in a case between two only of them, an interpretation that does not correspond to the wishes and beliefs of those third States. The ICJ Statute of course contains a provision, Art. 63, to enable third States to be heard by the Court on the interpretation of a multilateral or plurilateral treaty, but the downside of this is that in such case the intervening State becomes bound by the Court's interpretation; so far in most cases States have preferred to remain on the sidelines, so as to keep their own reserved legal position intact.

In the case of a decision by the Court concerning a rule of customary law, no such power of intervention exists; and it is doubtful whether Art. 62 of the Statute, permitting intervention when the third State 'has an interest of a legal nature which may be affected by the decision' would extend to the protection, as an academic point, of the integrity of

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[12] For a recent criticism suggesting that the Court had in effect disregarded this principle, see the separate opinion of Judge *ad hoc* Sur appended to the Order of 28 May 2009 in the case *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Provisional Measures) (Separate Opinion of Judge* ad hoc *Sur)* ICJ Doc. 2009 General List No. 144 paras 14–15.

[13] Note however the examination by the Court of the Special Agreement in the case of the *Continental Shelf* between Tunisia and Libya, authorizing the Court to take into account the 'new accepted trends' in UNCLOS; the Court observed that 'It would no doubt have been possible for the Parties to have identified in the Special Agreement certain specific developments in the law of the sea of this kind, and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*'; but the Court found that this had not been the intention; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (note 11) para. 24.

a customary rule. It may seem that the hypothesis of the Court producing an eccentric view of a customary rule is an artificial one; but the study already quoted above gives a number of examples.[14]

Furthermore, there is a reforming spirit abroad in some Members of the Court, a view that might be crudely expressed as being that the judge sometimes sees more clearly than the *justiciable* how law should develop, and he should thus not be tied to custom as established in practice. While denying that it amounts to 'judicial legislation', a recent President of the Court, of great authority, has stated that 'It is the role of the judge to resolve, in context, and on grounds that should be articulated, why the application of one norm rather than another should be preferred'.[15] The nature of customary law, in principle unwritten and fragmented (despite the achievements of the International Law Commission), lends itself to comparative freedom of interpretation; and abstract concepts of justice, and the growing importance attached to human rights, may act as a spur. The Court might not go so far as Wotan addressing Freya: 'Stets Gewohntes/nur magst du verstehn:/doch was noch nie sich traf/danach trachtet mein Sinn';[16] but if it is once conceded that it is part of the role of the Court to develop – judiciously – the law, it cannot necessarily be expected that the development will please everybody, or be universally regarded as a logical extension of what was already established.[17] In the case of *Armed Activities on the Territory of the Congo*, the Court hinted at a re-visiting of the ruling in the advisory opinion on *Reservations to the Genocide Convention* that a reservation to Art. IX of that Convention (the disputes-settlement clause, providing for ICJ jurisdiction) is not incompatible with the ob-

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[14] Boyle and Chinkin (note 3) 279–80.

[15] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (Dissenting Opinion of Judge Higgins)* [1996] ICJ Rep. 591 para. 32.

[16] Richard Wagner *Die Walküre* Act II Sc. 1: 'All that *you* can understand is ever what is customary: it is toward what has not yet occurred that *my* spirit strives'.

[17] If an anecdote may be excused: the writer was told many years ago that the decision in the *Nottebohm* case took the form it did, not on the basis of the parties' arguments on customary law, but because one of the judges had recently read a thesis by a young scholar suggesting that the law was, or should be, on those lines, and the judge was sufficiently impressed to convince his colleagues. How much truth there is in the tale it is impossible to determine.

ject and purpose of the Convention;[18] and a joint opinion of five Members of the Court was still more specific.[19] It may be doubted whether the general desire to repress genocide leads States, as opposed to judges, to consider appropriate the abandonment of this instance of their right to decide for themselves the extent of their commitment to judicial settlement.

A clear – and well-known – example can be cited of what might be called 'judge-made law' which in fact *did* please, and ended up by becoming the accepted standard. When the Court was asked for an advisory opinion in the case of *Reservations to the Genocide Convention*, it was faced both with divergent views and with divergent practice on the question whether a State that became a party to a multilateral convention with a reservation was or was not to be regarded as a party to it without the express acceptance of all the other States parties. The Court's solution, that the test was whether the reservation was 'compatible with the object and purpose of the Convention', and that a State could be a party *vis-à-vis* States that did not object to its reservation, and not a party *vis-à-vis* those that did, was accepted and incorporated in the Vienna Convention on the Law of Treaties.[20]

On the other hand, an equally classic example can be cited of an ICJ ruling which was received with something like horror and incredulity by the generality of States: the 1966 decision in the *South West Africa*

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[18] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* [2006] ICJ Rep. 32 para. 67, where the Court carefully limits finding of compatibility to 'the circumstances of the present case'.

[19] Ibid. 68 para. 13, referring to the 1951 advisory opinion as not foreclosing 'legal developments in respect of hitherto uncharted waters in the future'; it is difficult to see in what respect there are here 'uncharted' areas; note also ibid. 72 para. 28.

[20] Art. 20 of the VCLT. The resulting situation is open to criticism as causing confusion and as injurious to the unity of the treaty, but it had, and has, its merits. The study of Reservations to Treaties by the ILC in 1993–1997 did not propose any amendments to the Convention in this respect; in the discussions in the Sixth Committee in 1997 it was generally agreed that the Convention rules remained applicable, but might be supplemented by a Code of Practice. See the draft Guidelines adopted in 1998/1999: UNGA 'Report of the International Law Commission on the Work of its fiftieth Sesstion' (20 April–12 June 1998, 27 July–14 August 1998) UN Doc. A/53/10 para. 540 and UNGA 'Report of the International Law Commission on the work of its fifty-first Session' (3 May–23 July 1999) UN Doc. A/54/10 para. 470.

cases,[21] which was generally, but inaccurately, perceived as a refusal on the merits to condemn the racist policies of the then Government of South Africa. The legal point on which the decision turned, the extent to which the League of Nations Mandate for South West Africa rendered the actions of the mandatory power justiciable at the suit of other former Members of the League, tended to be lost sight of. If the General Assembly had had, for example, a power of repeal or legislative correction similar to that possessed by a domestic legislature in relation to a domestic court decision, its exercise as a matter of *general* legislation would have been pointless, since South West Africa was the only territory 'left over' from a Mandate regime in respect of which the question was of any relevance.[22]

In the absence of any such repealing or reforming power in the General Assembly or elsewhere, if the Court were to state a customary rule that did not correspond to the expectations of States, it is not clear what action might be taken. The parties to the case, once again, may, if they are both dissatisfied, be able to agree to regulate their affairs in a manner inconsistent with the Court's ruling (barring, of course, any question of *jus cogens*). If they accept the ruling, an interesting theoretical question offers itself: do their actions rank as State practice for purposes of later assessment of the customary character of the new rule? It would seem that they would not, since they were, on the hypothesis we are considering, based on an identifiable *opinio juris* consistent with the action taken. On the wider international level, one could imagine the matter being referred to the ILC for study, but only in an egregious case, of vital import to the majority of States – not a very probable scenario. Otherwise, States not bound by the decision are free to go on as though it had never been given; but if the new ruling suits the interest of one State, or group of States, but not the others, one can envisage it being seized on as a negotiating point.

There is however a special class of case in which a decision of the Court that could be regarded as incorrect would nevertheless have, *de facto*, virtually complete authority: if the decision concerned the Court's own legal powers.[23] Here the decision in the *LaGrand* case as to the binding

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[21] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase)* [1966] ICJ Rep. 6.

[22] And on the question of the illegality of *apartheid* as such the UN General Assembly had repeatedly made its collective view known.

[23] Interestingly, it is on this kind of question that the Court often backs its statements with a lengthy enumeration of its own previous decisions in the

character of provisional measures may serve as a paradigm. Let it be accepted as a hypothesis, for argument's sake, that the intention of the draftsmen of the Statutes of the Permanent Court and the post-war Court was *not* to confer a power to indicate measures binding on the State to which they were addressed, but merely a power to make 'indications' – meaning non-binding recommendations.[24] On that basis, the decision in *LaGrand* was a development (to put the matter favourably) or a distortion (to put it less favourably).[25] It is hardly likely that a State to which the Court has addressed an order indicating provisional measures will be able to remedy this by coming to an agreement with its opponent that the measures will not be regarded as binding, since it is presumably binding measures that were being asked for. The question is thus whether it is open to a State now to argue before the Court that it may not indicate binding measures; or that measures which it has indicated, and which we will suppose the State does not intend to comply with, are not binding? The Court would no doubt listen to such arguments with its usual courtesy, but the objecting State might still feel it was a dialogue of the deaf. There is nothing to exempt the *LaGrand* decision from the general rule of Art. 59 of the Statute; and yet there would be something contradictory about successive decisions of the Court about its own powers which came to opposite conclusions –

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same sense: see for example the recent Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* (22 July 2010) ICJ Doc. 2010 General List No. 141 paras 29–30 (on the Court's discretion to give or refuse an opinion).

[24] There was of course a significant body of scholarly opinion (shared by the present writer) to the effect that this was indeed the legal situation (see the useful survey in K. Oellers-Frahm 'Article 41' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm [eds] *The Statute of the International Court of Justice* [OUP Oxford 2006] 955–56 paras 86–87); but it is not our purpose to argue that issue here. For a critical examination of this aspect of the *LaGrand* decision, see H. Thirlway 'The Law and Procedure of the International Court of Justice' (2001) 37 BYIL (111–25).

[25] It is striking, perhaps even disturbing, to find an ICSID arbitral tribunal taking the *LaGrand* decision as a general principle applicable to all judicial or arbitral bodies, so as to justify such a tribunal in declaring its power to indicate binding measures, in the face of a constitutional text referring to the action of the tribunal as a 'recommendation': see Rule 39 of the ICSID Arbitration Rules, and the decision in the case of *Victor Pey Casado v. Chile* (note 9) paras 19 et seq.

rather more so than if the two decisions were on a rule of general law which happened to be relevant in two successive cases.

Another example of a decision of the Court in the field of its own powers and procedures which could be, and indeed was, challenged, related to intervention under Art. 62 of the Statute. In the *Land, Island and Maritime Frontier Dispute* a chamber had been formed at the request of the parties, El Salvador and Honduras, and on the basis of their unofficial indications as to its preferred composition, to hear the case. The Government of Nicaragua then applied to intervene in the case under Art. 62 of the Statute, and the procedural problem that arose was whether this application should be heard and determined by the Chamber or by the full Court. The Court examined the matter, and decided that the application was for the Chamber to rule upon;[26] Judge Shahabuddeen, in a powerful dissenting opinion,[27] argued that this was wrong. It may be presumed that Nicaragua was of the same view, since, as Judge Shahabuddeen pointed out, Nicaragua could reasonably suppose that the Court had created for the original parties a Chamber composed according to their wishes:

> 'In substance, therefore, the Applicant is being told by the Court that it has no option but to submit to a Chamber all of whose five members it is reasonably entitled to feel have been practically handpicked by the existing Parties'.[28]

Judge Shahabuddeen considered that the case was one:

> 'in which the application by the Court of a text taken at its received face value yields a result so deeply offensive to basal norms of justice as to make it impossible for the Court responsibly to avert its gaze from the necessity to examine the foundations of the system which leads to that result'.[29]

He was thus led to examine the interpretation of Art. 62 of the Statute by the Court, as reflected in Art. 17 (2) of the Rules of Court, by which the parties were consulted as to 'their views regarding the composition

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[26] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) (Order of 28 February 1990)* [1990] ICJ Rep. 3.

[27] Ibid. 18.

[28] Ibid. 19. The Chamber did authorize the intervention (*sub modo*) of Nicaragua, and Nicaragua participated in the proceedings before the 'packed' Chamber, with apparent satisfaction: see the eventual Judgment at [1992] ICJ Rep. 351.

[29] Ibid. 20.

of the chamber' to be formed, and in the unofficial but generally recognized practice of the Court giving effect to those views. His view was that Art. 62 was being mis-interpreted; his argument is extremely compelling; and if it was not shared by his colleagues (and possibly by States forming the clientele of the Court), the reason is that the notion of letting the parties choose their judges in a chamber was an idea whose time had come, and the fact that it was inconsistent with the Statute (and, as Judge Shahabuddeen showed, with the *travaux préparatoires*) was not allowed to stand in its way.[30]

The interesting hypothesis is therefore the opposite: if States parties to the Statute had shared Judge Shahabuddeen's view that the Court was in breach of that text, and that this should not continue; what then? In a domestic context, the legislature could, as noted above, step in to restore the intention of the Statute.[31] The International Court could however not be compelled to change its practice by anything short of an unambiguous amendment of the Statute; and amendment of the Statute, though authorized by its Art. 69, is to be by the same procedure as for the Charter, and is generally considered almost as hazardous an enterprise as amendment of the Charter itself. From this the surprising conclusion must be that in practice the Court is free to 'bend' the Statute with impunity.[32]

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[30] Chambers do not however seem necessarily to have retained this popularity in more recent years; leaving aside the Chamber formed for the *Application for Revision of the Judgment of 11 September 1992 in the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) (El Salvador v. Honduras)* [2003] ICJ Rep. 392, which was in effect a continuation of the original Chamber, the last request for the formation of an *ad hoc* chamber was in *Frontier Dispute (Benin/Niger)* [2005] ICJ Rep. 90; and no such request has been made for the similar *Frontier Dispute (Burkina Faso/Niger)* of 2010.

[31] Interestingly, Judge Shahabuddeen demonstrates, in the course of his argument, that 'The history of the creation of the Permanent Court makes it clear that the concept of a court of justice to which the Court was intended to conform was that of a court of justice as generally understood in municipal law': ibid. 33.

[32] A practice which on a more trivial level may be regarded as inconsistent with the Court's function is that of including, in a decision finding a lack of jurisdiction, recommendations to the parties as to their behaviour. One such recommendation was objected to by a Member of the Court: 'The Court's function is to pronounce itself on matters within its jurisdiction and not to voice personal sentiments or to make comments, general or specific, which, despite their admittedly "feel-good" qualities, have no legitimate place in this Order':

Shelley saw poets as unacknowledged legislators; another nineteenth-century British poet, Tennyson, saw the acknowledged legislative activity of the English courts, the development of law through judicial decision, as a force wholly for good; England was for him:

> 'A land of settled government,/ A land of just and old renown,/ Where Freedom slowly broadens down/ From precedent to precedent'.[33]

He was right to discern the essential genius of the common law as embodied in the system of judicial precedent; but perhaps did not give enough credit to the possible role of the legislature in ensuring that the precedents were always such as to broaden freedom, or at all events such as to advance the interests of the society served by the courts. At the international level, in the absence of such constitutional checks and balances, it must be incumbent on the international judge in principle to take international law as he finds it – that finding of it is already his peculiar role and privilege – and to be particularly wary of temptations to improve it on his own responsibility.

Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda) (Order of 10 July 2002) (Declaration by Judge Buergenthal) [2002] ICJ Rep. 257 para. 4.

[33] Alfred Lord Tennyson *You Ask Me Why, Tho' Ill at Ease* (1842).

Lawmaking of Courts and Tribunals Results in the Destruction of the Rule of Law

*Paper submitted by Karl Doehring †**

Definition: What is the essential core of law-making? The essence of law-making is the creation of binding legal rules *erga omnes* within a legal system conferring this competence on the creator with the effect that new rules may supersede former rules, eventually *contra legem*. Under western democratic constitutions the law-making competence is vested in the parliament in its capacity as legislator. Limits of such a competence are to be sought and found in the legal system conferring the law-making competence.

This definition is not meant to ignore or to neglect the task of the courts to interpret legal norms. The courts contribute in this way to the development of the law where existing rules need concretization. Regarding international law no deviation from this fundamental concept can be identified.[1]

Concretization of a legal rule through interpretation by a court does not signify the creation of a new rule but has to respect the spirit of the rule to be interpreted and the spirit of the legal system forming the basis

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[1] J.A. Frowein 'Randbemerkungen zu den Grenzen des Richterrechts in rechtsvergleichender Betrachtung' in G. Reinhart (ed.) *Richterliche Rechtsfortbildung: Erscheinungsformen, Auftrag und Grenzen, Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Ruprecht-Karls-Universität Heidelberg* (Müller Heidelberg 1986) 555–65; K. Doehring 'Die Rechtsprechung als Quelle des Völkerrechts: Zur Auslegung des Art. 38 Abs. 1 Ziff. d des Statuts des Internationalen Gerichtshofs' in G. Reinhardt ibid. 541–54.

of the rule. There is no room for law-making as such because the deciding court should remain with in the frame of law-application.

Definition: What is the true core of the rule of law? It is the calculability of norms producing certainty of law this way. The parties to a litigation before a court must be sure that the dispute will be resolved on the basis of existing norms that are generally known by the members of the legal community. Any rule applied by a court which is created by the court itself in deciding a legal dispute would logically have been unknown to the parties appearing before the court. No calculability of law would prevail, and the judgment of a court based on a newly-created rule would have a surprising effect.

This basic principle also forms part of the generally accepted rule which denies a retroactive effect of norms. Any non-observance of such a basic principle of the rule of law would signify the government of men and not of law.

The calculability of norms as a basic principle of the rule of law is confirmed by the procedural rules of international courts. The decisions of an international court produce binding effect only upon the parties to the litigation, i.e. *inter partes*, and limit in this way the *res iudicata*. Third States are not bound so that any law-making effect regarding their rights is excluded. Where the competence of the court embraces the power to interpret a multilateral treaty only the parties to that treaty are bound, due to their obligations laid down in the treaty. So far that decision produces again an effect only *inter partes*.

Also in regard to the binding effect only *inter partes* a court has to apply the law which is defined by the statute of the court or by the treaty to be applied. Regarding the Statute of the International Court of Justice which declares that the Court has to decide on the basis of international law, it is expressly laid down that international treaties, international customary law and the general principles of law recognized by civilized nations form the body of the norms to be applied. Moreover, Art. 94 of the United Nations Charter declares that the observance of the decisions of the Court is only obligatory for the parties before the Court. Judicial decisions and teachings of reputable scholars may be invoked by the Court only as devices to find out the existing law and thus do not belong to the sources of law.

Art. 59 of the Statute of the International Court of Justice declares that a decision of the Court produces binding force only upon the parties to

the litigation and only in regard to the subject matter dealt with by the Court.

The worldwide accepted principle which guarantees the independence of the judiciary and of judges forms part of the 'general principles of law recognized by civilized nations'. The justification of that independence reposes – as a kind of compensation – on the binding force of law imposed on the judges. If they were to create new rules the principle of judicial independence would be misused. Law-making judges would be comparable to dictators because they misuse the power also to decide *contra legem*. The protection of the individuals through the rule of law then ceases. The German history during the national socialist regime and the Marxist system of the Soviet Union are clear examples of that situation.

International courts do not have the power to produce international customary law. The creator of these rules is the law-making practice of the International Society of States. Any law-making function of international courts denies the exclusive competence of States to create or abolish customary law and would signify an uncontrolled power of the courts to invent rules by themselves, i.e. rules which nobody had known of before, which would be a clear contradiction to the rule of law.

Even if one would emphasize the view that in reality the transition from interpretation of law to the creation of law remains often a vague determination so that the court would always be in position to create new rules, this argument would be of a misleading character. The misuse of a principle does not justify its negation. The fact that judges might transgress the threshold between interpretation and creation of law in a given case reminds us to observe the classic rule that we never should confuse facts and norms. Georg Jellinek who invented the famous expression of the *Normative Kraft des Faktischen* was fully aware of the need to clearly recognize facts as legally relevant only where the legal community attributes this relevance to the facts and Hans Kelsen saw this principle as the basis of judicial thinking, namely the strict distinction between 'sein and sollen'.

Regarding national law a competence of national courts to create law would signify a violation of the principle of the separation of powers guaranteeing at least indirectly the rule of law.

Panel V: Privatization of the Settlement of International Disputes

Privatization of the Settlement of International Disputes

*Presentation by Francisco Orrego Vicuña**

I am most grateful for the invitation that Rüdiger Wolfrum and the Max Planck Institute have extended to me to participate in this most interesting event. As many of you know, we have had a long standing association with the Max Planck Institute and the University of Heidelberg, particularly in the context of the Master's Program on 'International Law: Trade, Investments and Arbitration' that we have organized in Santiago de Chile and in which a number of you have participated in teaching or research activities. We look indeed forward to a continuing and fruitful cooperation.

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R. Wolfrum and I. Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 239, DOI 10.1007/978-3-642-34967-6_6,

I. The Individual as the Beneficiary of the International Legal System

Armin von Bogdandy has ended his presentation with a question that serves well as my own point of departure, which is that after the many constitutional and other developments in international law one has to ask oneself for whom and in whose name the international legal system works. His conclusion is that ultimately it is the individuals who are the beneficiaries of this legal system. My inquiry is whether it is also the individual who can be regarded as the beneficiary of the dispute settlement system under international law.

While the problem is not new, it has become necessary to solve it in a clear cut manner as we often find initiatives and perceptions moving in different directions, sometimes in a contradictory manner. Some directions are moving in favour of the approach that individuals are the ultimate beneficiaries of the dispute settlement system and enjoy or should enjoy a right of action and access to international courts and tribunals, but other directions move in the contrary sense aiming at the re-establishment of situations and views that we would have thought had been long surpassed.

We all know the many changes that have intervened in this matter along the history of international law. This evolution helps to identify where we are at present and which is the direction we would be reasonably expecting in the years ahead. At an early moment the basic premise was that only States had rights and obligations, but this view was not to last long as all the efforts that characterized the early part of the 20th century were aimed at strengthening a system of international arbitration in spite of States claiming vital interests and other privileges.

A second conceptual step was to follow. While the view held in the *Mavrommatis Palestine Concessions* and other cases was that in exercising diplomatic protection of its citizens the State was acting in its own interest and rights, it came to be later accepted that the State was acting on behalf of the rights of the individual. That conceptual change had many implications, reducing the discretionary role of the State and concluding that it was not the State but the individual the beneficiary of any compensation obtained for the wrong inflicted. All such developments were indicating where the system was moving to.

A third major step, with which we are all very familiar, was related to the claims by nationals in the context of the evolving law of human rights. It was thus the case that individuals could not only claim against

foreign States as it had been the case under the principles of diplomatic protection but could do so against their State of nationality in the context of the specific area of human rights law. While at first it was also thought that individuals could have substantive rights under international law but lack the procedural rights to make them effective by resorting in their own right to international courts and tribunals, what only the State could do on their behalf, this was soon to change, too. It was Lord Denning who clearly warned that if individuals have rights but cannot exercise them it is like having no rights at all. It followed that substantive rights would necessarily be accompanied by procedural rights. Although that distinction appears to have faded in history there are still some remnants of it occasionally pointing to a revitalized role of the State in this context. Both the evolution that has taken place and the discussion surrounding it can be well understood in connection with investment claims and trade disputes, which are the two main areas on which I will concentrate this presentation.

II. Innovation in International Investment Dispute Settlement

In looking first at the area of investment treaty claims it is apparent that the essence of the system is the action of individuals on their own right. Bilateral investment treaties, multilateral arrangements and free trade agreements have all converged on this particular feature. This is the consequence of the major historical evolution that had been taking place and it is today well established in international practice.

Much has been discussed recently about whether this system is right or wrong. Some argue that the system is devised to help out investors against the State, that it is a system that degrades the environment, breaches human rights and ignore social issues. Like with every system of dispute settlement, problems there are. But in my view a number of criticisms are based on prejudice and do not respond at all to realities. Tribunals go to a very great length in the effort to find out who is right or wrong in the disputes brought before them and save very exceptional cases it is hard to find an outcome which deliberately tries to help one party or the other. In my own experience as arbitrator in many cases I must conclude that I have seen such distortion in only one decision, from which I duly dissented.

If you look at the statistics relating to the many decisions and awards rendered you will find that they have gone in one way as much as in the other. States have won as many cases as investors, if not more. But this is not something that will attract the attention of writers who are inclined to revert historical trends so as to curtail the rights of individuals to defend themselves from State acts that might be held in breach of international obligations. What would be utterly wrong in my view would be that States be recognized more privileges, like those they had at the time when the individual had no role to play in the international legal system. It would be to return to the time of allegations of the States' vital interests and their intent not to be submitted to international arbitration or dispute settlement at all. Even in respect of immunities of States and their officials one can see that the trend is to restrict them so as to prevent abuse, and I would regard that to shield the State against claims from individuals would be inconsistent with this evolution.

III. Deficiencies, Corrections and Paradoxes of Investment Dispute Settlement

As mentioned above, it is evidently not possible to ignore that the system has many deficiencies. There have been tribunals saying the wrong things or have said things in unpleasant and discourteous manners, but these exceptional events do not mean that the system is deficient in itself. True enough some international arbitration centres have been more effective than others in handling international dispute proceedings, what has even prompted an increased interest in *ad hoc* arbitration under UNCITRAL, but even those less effective handlings do not mean that the system is wrong. In any event, institutional deficiencies can always be corrected and no doubt they will be in the short term.

One such correction is taking place at present following some recent ICSID annulment decisions as clearly explained in the papers presented to this symposium by Katharina Diel-Gligor and Shotaro Hamamoto. Some such decisions have clearly overstepped the function of annulment in the ICSID system and have openly addressed the merits of the case as an appeals court would do. And even in doing so under some obscure pretext they have wrongly understood the applicable law. Interestingly enough, in all such cases international law matters have been addressed by commissioners who are not experienced in this particular international legal system, what increases the possibility of coming to

the wrong conclusions, as indeed they did. The workings of customary international law and treaties in connection with some matters, particularly state of necessity, are complex enough and not easily understood by persons whose expertise is entirely alien to such system of law. Worse still is that those decisions have come to conclusions inconsistent with the findings of the national courts of the States concerned in the light of their own domestic legal systems.

When things can go this wrong it is inevitable that a crisis will be prompted. Legal uncertainty will be the underlying reason for such crisis as no one can be now certain about the finality of international arbitral awards to the extent that they can be lightly set aside on grounds that have not been envisaged by the annulment mechanisms. Such developments also have institutional implications as counsel will see whenever possible to move their claims to be handled under UNCITRAL rules which provide for any challenge to be submitted to the national courts of the seat of arbitration. Interestingly enough, cases involving the same issues and the same treaties as those that have been handled by the annulment committees under ICSID have been decided with an entirely different outcome by national courts, which have dismissed those challenges.

This is indeed one of the great paradoxes in contemporary international dispute settlement. The system for international annulment was devised so as to escape from the intervention of national courts in international proceedings, but because of having been wrongly handled it has ended up in national courts providing a stricter safeguard of legal certainty and not admitting challenges for reasons that do not relate to their role. Sooner or later a correction will of course take place but in the meanwhile the crisis of the ICSID annulment mechanism is not helping the evolution of the international legal system in its efforts to provide the individual with dispute settlement facilities that might be both reliable and legally safe.

IV. Accessing the International Trade Dispute Resolution System

A second major issue to be examined is whether the same trend towards the privatization of international dispute settlement and the access of the individual to its own right to it might be eventually gathering momentum in a second major subject area, which is that of international

trade and the role of the World Trade Organization. Again here the role of the individual as the beneficiary of the system is gradually appearing. While it is true that States have an interest of their own in trade disputes, mainly concerning the interpretation and application of treaties, it is nonetheless true that also individuals share that interest. It is the exporters and importers who suffer the consequences of any trade dispute, most of whom are private individuals and companies.

The WTO has been moving slowly towards the recognition of the individual's interest, for now in an indirect manner. If some cases like the famous dispute between *Kodak* and *Fuji* are considered, it will be realized that the basic interest underlying the dispute was not that of the United States or Japan but of the specific companies engaged in the dispute. Another important recent example is that of the dispute between *Airbus* and *Boeing*, where the complainant parties are the European Union and the United States but where the main interest lies with the companies implicated in that dispute.

This should not be surprising as every time an individual is affected by some dispute involving trade rules or practices the first thing it will do is to approach his own government for help. The office of the United States Trade Representative or the European Union, like other bodies having a similar role, will examine whether there is ground for a complaint before the WTO. If a positive conclusion is reached then a panel will be requested. At that point it would appear that the dispute becomes wholly inter-governmental. This, however, is not quite so. Like in the earlier period of diplomatic protection, the State had to intervene in the absence of a direct right of action of the individual before an international dispute settlement body. While at first it was considered that the State was protecting its own interest, it would not take long to realize that the ultimate interest was that of the individual himself, with the result that State action came to be considered as one on behalf of the individual. As mentioned above, it would not take long to recognize the individual's right of action in international dispute settlement.

V. A Right of Action before the WTO

This same logic should govern contemporary international trade disputes. If the individual's interest is involved, why to require that the State should be the entity intervening on its behalf before dispute settlement mechanisms and not recognize its own right of action before

the WTO or other bodies? States have indeed an interest and a role but this is not to be understood as detracting from the interest and role of the individual. Some recognition of the individual's interest is found under the TRIPS agreement and the inspection system, but these are still limited examples of what is likely to become a more general trend. Also the interest of producers and the intervention of private counsel have been apparent in some WTO cases, just as briefs and *amicus curiae* are not unknown to such proceedings.

Many problems need to be solved in order to implement a system of the kind proposed. Concern has been expressed as how to avoid an overloading of the system if it is opened to claims by individuals, but the outcome should not really be different from what happened at the time international investment arbitration was opened to the participation of the individual. Institutions have also been able to well adapt to such possibility as it has become evident in the context of the European Court of Human Rights. The growth is manageable and screening systems can always be put into effect. Proposals to enlarge the panel system, to have full-time Appellate Body members and to expand the role of the WTO Secretariat have also been made in this context. The technical contribution and support of the WTO Secretariat to the work of the panels is indeed formidable and this could be always expanded to attend to the needs of an enlarged dispute settlement system.

Similar discussions have been held in the context of the International Court of Justice and other major international dispute settlement mechanisms. To the extent that the individual might be able to bring a claim to the ICJ, for example, there would evidently be an overloading of the system as can be realized from the thousands of letters received today by the Registrar requesting individual complaints to be heard. Screening mechanisms have worked well in domestic contexts. Not every case, for example, will reach the United States Supreme Court but a process of *certiorari* will ensure that only selected issues of importance come to be decided at that level. There is no reason why this should not work equally well in an international context.

VI. Centralization and Decentralization in International Dispute Settlement

There have been a number of suggestions adding new perspectives so as to strengthen international dispute settlement institutions in the light of

the need for an increased participation of individuals. One such thought has been to establish in ICSID a permanent panel of annulment committee members to the effect of minimizing the effects of excessive variations. There have also been suggestions to establish a court of international trade, an international environmental court and some other similar bodies.

The risk with this kind of superstructures is of course that there is always a problem of making them similar to judicial institutions and the accompanying bureaucratic deadweight, which can lead to arbitration losing one of its essential characteristics, which is expediency and flexibility. It is rather preferable to think in terms of functional developments, including new modalities of international arbitration, mediation, negotiations and other such developments that are well known in some domestic system of dispute resolution. In particular there appears to be no need to reshape the WTO system as a whole but it might be enough to develop a special facility for the access of individuals to such system.

Decentralization of the dispute settlement system is indeed better suited to have the individual's role fully recognized as the culmination of the long historical evolution that has been noted. As Armin von Bogdandy concluded his presentation highlighting the individual as the ultimate beneficiary of the international legal system, the same is true of the mechanisms for international dispute settlement. The rights of the individual in this other context should be recognized upfront without the need for a growing number of intermediaries. The privatization of the international dispute settlement system is an outlook that is here to stay as it reflects the realities of the international legal system as a whole.

*Comment by Christoph Schreuer**

I want to make a few remarks about the emancipation of the individual in international litigation, especially from the perspective of investment arbitration. I assume that is why I was invited to come here. First of all, I'll address three questions concerning investment arbitration.

1. The first question: is it necessary? Do we need it?

2. The second question: to whose benefit is it? Is it only to the individuals' benefit or is it also to the States' benefit?

3. Third, I want to make a few remarks about a topic that Francisco Orrego Vicuña did not touch upon today and that's nationality, which is very important in this context.

And then I'll just make a brief remark about annulment.

So the first question: Is investment arbitration necessary? Why do we need access by individuals and corporations to international arbitration? What would be the alternative? The alternative would be twofold: diplomatic protection and/or resort to domestic courts. Those are the only two alternatives that our legal systems offer. Diplomatic protection is not particularly attractive from the perspective of the investor. It is discretionary, the home State can refuse it. It can start exercising it and then give it up. The home State can enter into a settlement at the cost of the investor. And perhaps most importantly, the investor by handing over its case to the State completely loses control of the case. So that is not a particularly attractive situation, even though at first sight it might look nice to have the State taking care of your interest.

Resort to domestic courts is sometimes advocated as the better solution. There are three reasons why domestic courts are not perceived as being particularly attractive by investors. The first one is that, an independent judiciary is only available in relatively few States. That is the sad truth. Only a minority of States nowadays offer truly independent courts. The second point is that even where you have an independent judiciary, this does not mean that the courts are impartial. Investment cases usually deal with large claims against the host States and, after all, domestic courts are organs of that State. So the danger of an identification with the interests of the host State is considerable. I am not pointing my fin-

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ger at any particular type of State. Anyone who wants to know how things can go wrong before domestic courts only needs to read the famous or infamous *Loewen* case.[1] There you see how things can go wrong in Mississippi. For the same reason I would not recommend a foreign investor to bring a claim before an Austrian domestic court against Austria or before any host State's court. The third point about domestic courts is capability. Investment cases involve very difficult technical problems and a domestic court will often be overwhelmed by the technicalities of investment law. So those are the main arguments why investment arbitration fills an important gap.

The second point is: in whose interest is it? Investment arbitration is often depicted as being solely in the interest of foreign investors and as being totally one-sided. Often the charge is levelled that tribunals somehow favour the foreign investors and the State is the loser as Francisco Orrego Vicuña called it. But let's simply look at the facts, let's look at statistics. If you read the cases you will see that a substantial number of investment claims are already dismissed at the stage of jurisdiction and admissibility. That takes care of roughly a third of all cases. The remainder goes to the merits. There the outcome is relatively balanced. Some cases go in favour of the investor, some cases go in favour of the host State. So already under this very simple calculation, considerably more than half of all cases are actually decided in favour of the host State. Even if you just take the cases that are decided in favour of the foreign investor you will see that what tribunals award is usually vastly reduced compared to what the investor has demanded.

So, even if we come to the conclusion that there is no bias in favour of the investors, why do States submit to investment arbitration? Why should it be in their interest? I believe there are three reasons why investor-State arbitration is in the interest of States. The first and most obvious one is that access to investment arbitration, especially on the basis of bilateral investment treaties, creates a climate of legal security. This climate of legal security makes it more comfortable for investors to invest in a particular State. It is widely acknowledged that private investment is the most important driving force for development. In fact, the development dimension is extremely important in international investment law. If you look at the ICSID Convention, the most important document in international investment law, the very first sentence of the Preamble refers to international economic development and the role

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[1] *Loewen Group Inc v. United States of America (Award of 26 June 2003)* ICSID Case No. ARB(AF)/98/3.

of private investment therein. Of course, developing countries know this and this is one of the main reasons why they submit to this particular process. A second reason why it is advantageous to host States is that they get rid of diplomatic protection. Investment arbitration is not particularly pleasant for the respondent States, but it is still much less unpleasant than being leaned upon by the State Department or by the European Commission or even by the Deutsches Auswärtiges Amt (for some reason Germans always laugh when I refer to the potential unpleasantness of the German foreign ministry). So that's another advantage for the host State. A third reason why investment arbitration is in the host State's interest is perhaps less obvious: there is a positive spillover effect for good governance also for the internal arena of a particular State. If a country is exposed to claims for the observance of certain standards through international litigation this will also have its effect on its internal legal structure. Good governance is likely to be demanded by the domestic economic community in that particular State. This is not just fantasy. I recently heard a representative from Costa Rica who had dealt with cases against Costa Rica speak about exactly this topic. He said that the cases that had been initiated against Cost Rica have had a very positive effect on general conditions in Costa Rica even though these litigations were started by foreign investors. It is now the domestic investors, the domestic economic community, that also invokes these standards.

My third point relates to nationality. I hope I will be forgiven for raising this even though it was not discussed in Francisco Orrego Vicuña's primary paper. Nationality is extremely important in international investment law. International investment law is very much dominated by treaties. First and foremost these are bilateral investment treaties, but also regional treaties like NAFTA[2] and the Energy Charter Treaty[3] play an important role. It seems obvious that if an investor wants to benefit from one of these treaties, it must have the nationality of a State party to those treaties. If you want to rely on a BIT, you have to show that you are a national of one of the parties to the BIT. If you want to benefit from NAFTA, you have to be either Canadian or a US citizen or Mexican and so forth. Nationality plays a very important role in investment disputes. In fact, a lot of time and effort is spent on issues of

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[2] North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289.

[3] Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) OJ L380/24.

nationality. I have myself worked on a number of investment cases where half of the case, at least as far as jurisdiction is concerned, was spent on issues of nationality. I do not want to go into technical details, but I can assure you that nationality is still very important.

Once an investor has mastered the hurdle of jurisdiction and has proven that he has the right nationality, a strange thing happens. Once you reach the merits of a case, all of a sudden nationality becomes taboo. Discrimination on the basis of nationality is forbidden. Expropriation, if it is discriminatory on the basis of nationality is illegal. The fair and equitable treatment standard is violated if you discriminate on the basis of nationality. National treatment is an important standard. Most favoured nation treatment is an important standard. Isn't that odd? To get access to the system, you need to show that you have the right nationality. But then all of a sudden, once you are debating the merits, it is exactly the opposite. You must not discriminate on the basis of nationality.

An obvious answer to this strange phenomenon would be: this is a natural consequence of a system based on treaties. Well, is it really? Look at human rights. In human rights, nationality does not play a decisive role for the enjoyment of rights. The system of human rights is open regardless of nationality. Anyone can complain. For instance, anyone can rely on the European Convention on Human Rights. Therefore, the current system in investment arbitration about nationality is not a consequence of the structure of treaty relations. It is rather a consequence of the unwillingness of States to grant rights in the economic sphere except on the basis of reciprocity. It is an application of the old principle of reciprocity. To get away from this nationality hurdle would obviously require a big leap and investment law is still a long distance from taking that leap.

What about nationality planning? Most investors nowadays are not natural persons but juridical persons. You can incorporate juridical persons in an appropriate country with relative ease and that is what is actually done. In the last ten or so years, nationality planning has become very widespread, at least as widespread as tax planning. Astute investors will incorporate in a country that has favourable treaty relations. The Netherlands is very popular because it has a very attractive network of bilateral investment treaties. Is that proper? Isn't that treaty shopping? Isn't treaty shopping something really awful? If you like it you call it 'nationality planning', and if you dislike it you call it 'treaty shopping'. So is it permissible? The case law on this is still at a relatively early stage. But a first conclusion that one can draw from existing decisions is

that if you do nationality planning prospectively, i.e. at an early stage before the dispute arises, it is ok. You can seek a favourable investment climate by structuring your investment appropriately. On the other hand, if you do it retrospectively, i.e. after the dispute has arisen, then it will not work.

Finally, just a brief remark about annulment. I fully agree with Francisco Orrego Vicuña on this particular point even though I'm not personally affected. I believe that the annulment system in ICSID is designed as an emergency measure to come to grips with unusual situations, to preserve the legitimacy of the system. It is not designed to correct 'wrong' decisions. It is not the job of an annulment committee, to impose its better legal view, or its better evaluation of the facts on a particular case. Therefore, *ad hoc* committees should not play the role of appellate courts. That is simply not their task. I believe that the recent activism on annulments is actually very bad for the ICSID system and I hope that it will be reversed. Thank you very much.

*Comment by August Reinisch**

Well, I am in the rather unenviable situation to deal with the 'leftovers' of Christoph Schreuer and as usual, there are no leftovers because he has exhaustively commented on and treated the subject – even in addition to what Francisco Orrego Vicuña has given us for the investment field. So let me try to still single out a few points which I noted and allow me to start with the topic 'Privatization of International Dispute Settlement'. Of course, we heard exactly what I had anticipated, the increasing role of the individual and the individual as the ultimate beneficiary to different degrees in the actual different forms of dispute settlement. And here investment dispute settlement is at the forefront because individual parties have the opportunity to bring claims directly. Then I found very interesting Francisco Orrego Vicuña's treatment of trade disputes, which ultimately equally concern individuals, but where individuals don't have standing and where it is a real challenge how we should deal with that problem in the future. I'd like to come back to that later. But from the phrasing of the topic, 'Privatization of Dispute Settlement', you could also consider or talk about privatizing the dispute settlement process. Of course, when thinking of arbitration, we are talking about a very traditional privatized form of dispute settlement through private arbitrators, private persons who are just appointed *ad hoc* in order to settle disputes. That is not a really new development; it is something very traditional in public international law. And we've seen that before. Now having talked or having listened to the previous panels, there is of course an interesting interplay with the issue of legitimacy: Who are those *ad hoc* judges, those private individuals? How much of a difference is there between them and so-called international courts or standing bodies, which are of course also comprised of private individuals? Even if we talk about the International Court of Justice or other standing judicial bodies that perform public authority, as it was called, but because they are by definition not State organs, they are not subject to any orders or directives from their States, they are meant to be independent. Still we say it's not really private justice, it's something more institutional and it seems to be a wide spectrum, where we'll really have some interesting debate on the legitimacy of the authority that is exercised here. I just wanted to put that as a preliminary thought

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on the topic of privatization of dispute settlement, which could also underlie this notion here.

Let me move quickly to some of the points that have been raised in Francisco Orrego Vicuña's presentation: investment arbitration as the 'evil system', the potential backlash against this system, etc. Many problems have been debated already in the past. But I would fully concur with what has been said if we look at the statistics. My estimate is even more radical in that usually just 25 percent of the investors are actually successful. One reason for that is the, maybe surprising, importance of jurisdictional issues. If we look at the system, it's not just the 'nationality' problem. Of course, this is dominant in the jurisdictional phases, but there is almost an obsession with jurisdictional issues which are irritating from the point of view of giving the individual standing in the system. If we would truly turn to a system where individuals should benefit from international rules, bilateral or multilateral treaty rules protecting investors, then it seems odd that those jurisdictional formalisms are so dominant and that we seldom reach the merits. It may also be that investment arbitration is a system in its infancy, and when we talk about innovations, it could be that at some stage there will be another system – maybe a multilateral one – where nationality will play a less dominant role because by definition, if we have a multiplicity of potential nationalities, that would entitle more investors to bring claims, and there will be more claims that will go to the merits. Looking for the scarce 'leftovers', I feel we haven't really touched the trade law field. The example of *Boeing* versus *Airbus* of course could be complemented by a couple of others. I remember the old GATT case of *Kodak* versus *Fuji*. Now there are private interests which have to be channelled and some WTO members have their internal systems, whether it is the EU's trade barriers regulation or other domestic law mechanisms which trigger an almost obligation to exercise diplomatic protection. It still doesn't lead to satisfactory outcomes in many situations for individuals because as we have heard Georges Abi-Saab, I think, referred to it this morning, the system of WTO dispute settlement is aiming at a recommendation to act in conformity with the rules. It is not providing any remedies for harm, economic harm suffered by the individual exporters, importers, what have you, economic participants. So there seems to be still a very far way that we have to go in looking for compensating 'victims' of WTO violations. The current system of trade retaliation will create additional, I'm tempted to say, 'collateral damage', but not remedies for the actual economic harm that is suffered by firms that have to pay customs duties which are against GATT principles or that are suf-

fering from anti-dumping duties which are then held not to be in conformity with WTO principles. So, that seems to trigger an interesting debate in how far we could uphold the position of the individual and protect individual private interests in a system which, everyone agrees right now, works best by being filtered through States, States having exclusive standing, States being bound, as was equally mentioned earlier today, by a system which provides for an automatic jurisdictional setup, although the term is not used in the DSU. So it probably requires this kind of filter in order not to be overwhelmed, but then there seems to be a long way to go in order to link it, to have the ultimate beneficiary of the system to truly benefit from it. Let me stop here with these few remarks. Thank you.

Discussion

G. Abi-Saab: I have simply a few remarks which were triggered by the remarks of our distinguished panel, which is really distinguished, and I enjoyed hearing them. Hearing Francisco Orrego Vicuña, I was thinking: 'Who is speaking? Is it Francisco Orrego Vicuña or Georges Scelle?'. Because those of you who are old enough or scholarly enough to know Georges Scelle, would remember his *monisme radical*: he said that the individual is the final addressee of all rules of law etc. But his problem was that he forgot the State and assumed that there is an effective federalism in the world, which ended up always with the individual. But unfortunately, such an *effet direct* does not yet exist on a world level (even if it does in European law); and institutional arrangements on the national level are very much with us for some time to come and are hard to die. It's a little bit amazing that after the withering away of real communism, a Marxist theory which is the withering away of the State, is now adopted by the neoliberals, who consider that the State should wither away.

This being said, I agree with August Reinisch that of course arbitration has always been, since the Greek polis, a private affair. But it's always a private affair under the authority of the public power. In internal law, it is always under the authority of the State. It is not freewheeling. So would it be freewheeling in international law? That is the question we have to grapple with.

Now, Francisco Orrego Vicuña said that ICSID is running into trouble and we are going to other alternatives. But the other alternatives are not equal alternatives because whether it's UNCITRAL or the International Chamber of Commerce (ICC), it is embedded in a national system, there is a control by a national judge. It is never just freewheeling. While the advantage of ICSID is that you run away from a control of a national judge and you have judgments which are executory, which are not subject to immunity etc. So that was the great advantage of ICSID. And this is why ICSID was a little bit more acceptable also to the weaker partners in international economic relations, because it was perceived basically as an arbitration under international law, which means that public interest is taken into consideration to a greater extent. Whether the decisions (that I don't consider as amounting to jurisprudence), that came out of it, go this way is a controversial question. I see

that there is a unanimity here that ICSID has been very objective, but it is not perceived so in large sectors of the world. And this is a real problem. I am not taking position, but it is real.

Finally, about the criticisms of the annulment committees because they go into substance. I just happened by a freak of circumstance to sit on several ICSID panels in a short period, and it is amazing. If you have two international lawyers and one commercial lawyer, you get a very different animal than when you sit as an international lawyer with two commercial lawyers. And the result is you get a very heterogeneous outcome in spite of the great efforts of great minds like Christoph Schreuer who try to synthesize the law, but still you have great differences. And this is why I perhaps agree with you that the annulment system, which was made not as a kind of appeal, except for *ultra vires*, should be strengthened and encouraged to go further in the direction of a real appeal system, rather than receding from it completely or limiting its progress in that direction. There should be a kind of an appellate body for ICSID at least for the law to stabilize because as it is functioning now through the different heterogeneous panels, it is not stabilized. Thank you very much.

H. Hestermeyer: Thank you for the inspiring thoughts about international investment law. I particularly enjoyed the comparison with world trade law, but come to a slightly different conclusion on that issue. Of course, I agree about the role of individuals in WTO law. In the end, it is always the individual who benefits. But in dispute settlement it is not Chiquita Bananas that can make a complaint about banana trade. It must be a country. It is not Anheuser-Busch that can complain about geographical indications, it must be a country. Countries insisted on the recourse to diplomatic protection within the field of trade law and they did not feel comfortable with the idea of individuals complaining directly. Now, domestic procedures leading to diplomatic protection and a WTO case exist, but they exist in very few countries and the executive generally retains discretion at the end. As to remedies in WTO law, people thought about granting damages, but in the end they said: 'No, we can't do this. This would be too much. We don't want that system'. And why did they not want it? Sovereignty. I am astonished that we spent some minutes talking about sovereignty in the trade panel rather than in the investment one, given that investment law submits the treatment of a broadly defined category of investments (including intellectual property and probably mere applications for trade marks) to standards that could not be vaguer in their formulation, namely fair and

equitable treatment. The system is binding, there is no requirement of diplomatic protection, it grants damages and there is generally no requirement of exhaustion of domestic remedies. Within the WTO context suggestions to grant provisional measures were rejected. In investment law it seems that you can stop a criminal proceeding by way of provisional measures. So I was wondering why the sovereignty debate is so much stronger in WTO law, when it seems so much less relevant than in investment law. One of the few reasons I can come up with is that the basic idea of investment law was to replace the court system of countries whose systems we perceived as deficient. And we did not think that in the end in some cases this also meant replacing our own court systems.

F. Morrison: First, I want to make a comment about where the jurisdictional law comes from. I think it comes in this area from the succession to the diplomatic protection notion and because diplomatic protection was always asserted on the basis of the nationality of the individual. When ICSID and other things were created, they were created on the foundation of that older law. Secondly, I was going to make sort of the opposite of the point that Holger Hestermeyer made. If you've ever dealt with a diplomatic protection case, they are awful. They are awful because if you are representing the government, you have to both take a position one way with regard to the foreign government and the other way with regard to the investor. And the investor is usually a company, not an individual. And if you decide against the company or individual, at least in a country like mine, or if you start to indicate any doubts about the company or individual, you get a number of senators calling you and it becomes a very difficult internal domestic issue. So I think the answer to your question is in part the foreign officers didn't want to do it any more. They didn't want to do it any more because the domestic political complications of representing a local company in its unreasonable claim against a foreign government were simply too great. 'You go and do that yourself!' was a much easier answer and for the domestic companies, it was a much more satisfying answer because they did not feel they were insulated from the actual decision process.

I also want to second the comment that Georges Abi-Saab said with regard to the Appellate Body. The collective judgment of all of the appellate panel members is essential, if you expect to create a common standard for future cases. Creating that standard is important to provide guidance to the participating States and to the trial panels about the State of the applicable law. If different appellate panels give different

decisions on the same point of law, then the whole appellate review process becomes simply a lottery. Thank you.

M. Ioannidis: Thank you very much Francisco Orrego Vicuña for this enlightening presentation and the members of the panel for their comments. My question has also to do with the second part of the presentation and the enforcement of WTO law in particular.

Panels and the Appellate Body have declared on many occasions that individuals are among the ultimate recipients of trade rules. This is something which, as Holger Hestermeyer said before, makes absolute sense. As individuals are the actors basically making trade-relevant decisions, it is their conduct that is ultimately regulated. The issue is that, although individuals are the ultimate recipients of rights and obligations derived by WTO law, sometimes they do not have access to mechanisms effectively enforcing the respective rules.

You sketched one strategy to cope with this deficiency. That would be, if I understood you correctly, through some kind of direct access of individuals to the WTO dispute settlement mechanism – maybe after some stage of scrutiny of the relevant applications.

I was wondering, if one could see the development of another strategy to achieve an equivalent result. That could be to allow individuals to claim WTO-based rights before national courts. The key word here is 'direct effect'. Of course, this question has two limbs: do domestic courts accept that WTO rules have direct effect? Mostly, they do not. The European Court of Justice, for example, generally denies that. The other part of the equation has to do with how the WTO adjudicating bodies address themselves the same question. As it is well known, it has been declared that, so far, and I stress here the use of the phrase 'so far', WTO law has not been interpreted as constituting a legal order producing direct effect. Do you think that the question of protecting the interests of individuals through the recognition of direct effect of WTO rules might be a point for the Appellate Body in this context, even in some distant point of the development of its case law?

A. Reinisch: Let me quickly pick a few of the points. The first issue that was raised by Georges Abi-Saab concerning arbitration as a private form of dispute settlement but still under State control. I fully agree that ICSID was meant to be less under State control, more independent, truly international arbitration. But I think in Francisco Orrego Vicuña's presentation already, and Christoph Schreuer reinforced that, the inter-

esting development is that today it seems that an investment award under UNCITRAL rules stands firmer because States are more reluctant to question them and are fairly strictly applying the New York Convention and not interfering with such an award as opposed to annulment. Now, of course, you may say it still remains within the system and an annulled award will lead to the 'go back to the start' phenomenon and you could have the whole thing again, but that's exactly the damage to the system if you have an initial award being set aside and then the whole procedure being re-litigated. So in that sense, I think we are witnessing a rather unintended development currently. I agree with the interesting phenomenon that Holger Hestermeyer described that in the trade debate, the whole Uruguay Round has been 'obsessed', I could almost say, with 'sovereignty', how to be protected and how much sovereignty is lost by agreeing to dispute settlement and reinforcing it as opposed to the old GATT system. The 'sovereignty' problem apparently was not that much of a concern in investment arbitration. But the sovereignty argument is back in the current backlash debate. And the sovereignty card in a way is played quite clearly by a number of States, just demonstrating that the outcome is something which is harmful to their sovereignty. But I guess, and here we sometimes see very interesting developments, a kind of decoupling of the debate you find in UNCTAD and other development organizations which start to become very critical of the system and talk about attacks on sovereignty as a result of investment arbitration. If you look, however, at the simultaneous debate within the World Bank or other organizations, where good governance is very important, you sometimes feel that you could link investment arbitration to good governance as Christoph Schreuer has said. There is a good governance spill-over that could be the result of investment arbitration, which is in the short run costly because it leads to awards that have to be satisfied, but if it also leads to an internal legal reform, then it is beneficial – although any kind of legal reform that comes from outside may be questioned from the point of sovereignty.

I agree with Fred Morrison on nationality deriving from the diplomatic protection paradigm. But if I understood Francisco Orrego Vicuña's presentation correctly, he was pointing out that diplomatic protection was kind of the first step showing that certain individuals, certain foreigners, enjoyed rights and then human rights was the next step broadening this notion and holding that individuals enjoyed rights regardless of their nationality. So when we talk about innovation, potential innovation of dispute settlement in the field, I think the real exciting ques-

tion is whether there will ever be such an additional step where nationality becomes less important, where also economic rights are protected on a broader basis. That again has been alluded to. And the last question from Michael Ioannidis about alternatives through direct effect, of course, this has been a very long debate, particularly the US/EU debate about the direct effect of WTO law. We may be able to learn from our Swiss colleagues because I am told that Switzerland has quite a different view and allows far more broadly the direct application of WTO law. We just focus on the EU's main political argument against direct effect of WTO law, i.e. that it takes away sovereign freedom to act, including the freedom to violate WTO law rules, etc. That's fine, but what's puzzling to me is that this argument is upheld even when it comes to compensate the individuals that have suffered. I could perfectly well envisage a situation where we deny direct effect for the reasons given, in order to have the political freedom to either comply or not to comply with WTO rules, but then I don't quite see why this should be on the back of individual economic actors that have to pay for it. So, in other words, why does the European Court of Justice not allow actions in damages of those individual actors at least to compensate them for the political gain that is apparently there for the EU?

C. Schreuer: Georges Abi-Saab has championed the idea of an appellate body in ICSID. There is a technical problem to this. The ICSID Convention has an Art. 53, which says: 'The award […] shall not be subject to any appeal or to any other remedy except those provided for in this Convention'. This is a very technical answer. So why not amend the ICSID Convention? The problem is you need unanimity for that and that is almost impossible to get. I think there is an alternative, to an appellate body. I believe an appeal is not the best solution. What are we trying to achieve? The biggest problem we are confronting on this front at the moment is the inconsistency of decisions. An appellate body might deal with that, but I think the better method might be to introduce a system of preliminary rulings like before the European Court of Justice. Perhaps the biggest obstacle to that is that American lawyers are not familiar with that procedure. This is a very European thing and it would probably take some time to convince our American friends that there is some value to that. The idea would be to create a permanent body that can dispense justice without being competent for particular cases. Problems of investment law could be submitted to that body as they arise before a particular tribunal. In other words, you don't get to the stage where you have a wrong decision to have it overturned, but

you do this pre-emptively by asking for preliminary rulings. We are still very far away from that, but it is technically possible and it could be done without an amendment of the ICSID Convention.

Holger Hestermeyer's observation that there is much sovereignty debate in WTO but none in the investment arbitration system is an interesting one. My answer is twofold. First, there is a sort of sovereignty debate in investment arbitration but the debate looks different. It is about regulatory space and legitimate police powers and how far States may go in dealing with investors without infringing investors' rights. So it's a different debate, but it is also a sovereignty debate. The other aspect is that in investment arbitration, the outcome of the procedure has been 'monetarized'. In other words, monetary damages are paid. In the vast majority of cases, there is no requirement of specific performance but a sum of money is awarded and the State is usually not required to change its law or do anything of the kind. It just pays damages to the investor and that's the end of the matter. So it can buy itself off. Specific performance is not impossible in investment arbitration. There are a few cases where this is discussed and States are typically outraged when the idea comes up that there might be an obligation of specific performance, that they might have to withdraw legislation. Tribunals have said it is possible, but it is hardly ever done.

Fred Morrison, you are of course right when you say that nationality was somehow inherited from diplomatic protection. But there is an interesting phenomenon: when it comes to nationality cases and to technical details, tribunals have repeatedly said they do not feel bound or even guided by old cases dealing with diplomatic protection because those involved different issues. They address nationality more as a matter of treaty interpretation because in the BITs, you usually have some, if somewhat vague, definitions of nationality. And they tend to distance themselves from the old diplomatic protection cases.

F. Orrego Vicuña: This has been a rather fascinating debate and I must notice at the outset that although we have different views about specific issues the overall objective of recognizing the full participation of individuals in international dispute settlement appears to be well shared by all.

I fully agree with the comments made by Christoph Schreuer and August Reinisch noting in particular that remedies are a rather crucial element of international dispute settlement as the individual will seek compensation or other remedies for the eventual damage suffered.

Occasional Difficulties and Success of the System

Georges Abi-Saab is quite right in mentioning that while international arbitration raised important expectations at the beginning, this was not exempt from doubts as it is well evidenced by the history of the ICSID Convention. The important point is of course that such decisive step was given. The difficulties experienced in the working of the system have created indeed perceptions that are not always favourable, but this does not mean in my understanding that the system of investment dispute settlement as such is failing, particularly in view that its deficiencies can always be corrected.

It is interesting to note in this respect that while a few countries in Latin America have either denounced the ICSID Convention or restricted their consent to arbitration, or have undertaken some other policies as an expression of criticism to that system in particular, at the same time a number of critics have entered into Free Trade Agreements and other similar arrangements with the United States, the European Union and more recently Japan and China, to mention just a few such developments. Many such agreements also contain investment dispute settlement arrangements thus evidencing that it is not the development of the law that is questioned but only some of the institutional experiences had in the working of the system.

Another point of particular interest raised in the discussion is that concerning the annulment proceedings in respect of international arbitration. As mentioned above, to the extent that an autonomous international annulment proceeding will not be available or will not work well under customary legal standards governing the challenge of awards, the alternative that will emerge will be a renewed role for the control by national courts. On many occasions that experienced domestic courts of the seat of arbitration have intervened in this matter, their decisions have been fully consistent with the applicable legal requirements for annulment, which at this point are truly universal. Paris, London, Geneva, Madrid or New York, to mention just a few, offer good examples of serious annulment proceedings.

NAFTA also offers an interesting case study in respect of the question of international panel review of national decisions in certain areas, as evidenced in particular by the Chapter 19 mechanisms concerning subsidies, countervailing duties and other free trade issues. While an interesting mechanism of limited international review was devised to this effect, the fact is that governments are many times trying to get way from it because of alleged sovereignty issues, just as it happened with the original resistance to international arbitration. A similar experience be-

came evident with the 2001 Free Trade Commission interpretation of what was to be understood by fair and equitable treatment and its role in the light of customary international law. Governments were adopting in that respect a restrictive policy which would better protect their sovereign interests as opposed to the developments of international law in this matter.

Customary international law has turned to be a far more complex matter when applied in the silence of investment or other treaties. Recent annulment committees have in fact considered that it is wrong to rely on customary law when a treaty is silent on a given point of international law, but such conclusion evidently fails to understand that international law is a system of law and that its various sources do have a supplementary role when there is a need to identify the meaning and requirements of a particular legal issue or principle.

Functional Solutions and Paralyzing Institutional Superstructures

Fred Morrison has also raised an important consideration in respect of consistency, which is very much needed in international investment arbitration. Yet consistency should not become synonymous with paralyzing superstructures that have been proposed to supposedly ensure that end, such as appeal mechanisms of all sorts inspired in the experience of domestic supreme courts or high courts of justice. While there is a natural degree of inconsistency of arbitral awards one should not consider it to be generally detrimental to the overall trends of international law. There are in practice many ways to deal with inconsistencies that do not entail any such superstructures, an interesting example of it being the role of the WTO Secretariat in bringing to the attention of panels how some issues have been approached in other cases so as to avoid departures that might not be entirely justified.

Functional solutions are to be much preferred over institutional superstructures, a matter on which I am greatly honoured by the comparison made by Georges Abi-Saab between my thinking and that of George Scelle, whom I have greatly admired. States, however, often take a different view and very much favour the building of institutions that will help their own cause. Communism was supposed to abolish the State in the name of the people, but ended up building the most powerful States ever known. Neoliberalism also advocates diminishing the role of the State, but that is true as far as no major crises intervene, at which point everyone turns to the State seeking support and protection and the injection of trillions of dollars into the economy.

The functional approach to be desired is entirely different. The State has an important role, including in the workings of international law, and this should not be done away with. Yet, we ought not to forget that the State is just a public service, the concept of service public in the French legal tradition, whose role is to help the individual to achieve its economic and social well-being. The fact that the individual is the ultimate beneficiary of the international legal system evidences a development that the State can very much help to attend and achieve instead of its role being one of interference with the rights of the individual, as we have seen too many examples in the history of mankind and international law.

Systemic Deficiencies of ICSID Investment Arbitration? An Inspection of the Annulment Mechanism

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I. Introduction to the Development of Investment Arbitration at ICSID

1. Success Story of ICSID

In consequence of the dramatic growth of Foreign Direct Investment (FDI)[1] and the increasing number of BITs and MITs[2] throughout the past decades, conflict settlement mechanisms in the field of investment arbitration have gained significant importance. Since the 1990s, at large, there has been a considerable increase in the number of cases filed in the International Center for Settlement of Investment Disputes (ICSID). As a result, about two thirds of the overall amount involved in investment arbitration proceedings are now going through the Washington

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[1] The rather hostile attitude of various States towards international investment predominating in the 1970s was overcome during the 1980s and 1990s by the increasing awareness of its importance as an instrument for furthering economic development. In the context of advancing ideas of an open market economy, the tendency towards privatization, and the globalization of business, FDI reached two trillion USD in the world in total in 2007, and has only been slowed down by the current financial crisis. Cf. M. Dimsey *The Resolution of International Investment Disputes* (Eleventh International Publishing Utrecht 2008) 1; M. Besch *Schutz von Auslandsinvestitionen: Risikovorsorge durch Investitionsverträge* (Recht und Wirtschaft Frankfurt/Main 2008) 70; UNCTAD *World Investment Report, Transnational Corporations, Agricultural Production and Development* (2009) <http://www.unctad.org/en/docs/wir2009_en.pdf> (7 June 2011).

[2] Bilateral and Multilateral Investment Treaties; Cf. Z. Elkins, A. Guzman and B. Simmons 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' in M. Waibel et al. (eds) *The Backlash against Investment Arbitration* (Kluwer Alphen 2010) 369.

The question of whether international investment treaties may have a stimulating effect on FDI is disputed and various ecometric studies were undertaken in this regard. While early works from 1998 to 2004 came to differing conclusions, ranging from findings of no or merely a weak relationship to outcomes claiming a considerable impact of BITs on FDI flows, subsequent studies from 2005 to 2008, using improved analysis techniques and enlarged data bases, came to more consistent conclusions. They show that BITs do encourage and stimulate FDI to a certain extent. For an overview, summary and evaluation, see UNCTAD *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (2009) <http://www.unctad.org/en/docs/diaeia20095_en.pdf> (11 June 2011).

Center.[3] This continuous trend clearly indicates that international arbitration is no longer an exceptional phenomenon, but an integral part of the investment landscape.[4] The causes of its success can be traced to the significant strengths of the ICSID system, such as its administrative infrastructure, its time and cost efficiency, the expertise of its pool of arbitrators, and the direct enforceability of its awards.

2. Backlash against ICSID?

Despite the ongoing high demand for the World Bank's institutional arbitration forum, there has recently been a slight downwards trend in its use – in absolute and relative numbers – as evidenced by caseload statistics. These show that the annual number of ICSID filings in relation to the annual number of investment arbitration cases in total noticeably dropped: While in 2007, still 75% of the known treaty-based cases were filed at the ICSID (or the ICSID Additional Facility), this percentage decreased to roughly 60% in 2008 and 2009.[5] Also, the absolute number of newly initiated ICSID cases in general – based on investment contracts, treaties, or laws – sank from 37 in 2007 to 21 in 2008 and slightly rebounded to 25 in 2009.[6] In 2010, signs of recovery could be perceived.[7]

To give a complete picture, of course it is vital to stress that ICSID cases are only the most ascertainable part of investment arbitration. Many cases are also being processed by other institutions such as the International Chamber of Commerce (ICC) Court of International Arbitration, the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), and, as ICSID's main commercial

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3 UNCTAD 'Latest Developments in Investor-State-Dispute-Settlement' 1 (2008) IIA Monitor 1 (2 et seq.) <http://www.unctad.org/en/docs/iteiia20083_en.pdf> (7 June 2011).

4 UNCTAD 'Latest Developments in Investor-State-Dispute-Settlement' 1 (2009) IIA Monitor 1 (1) <http://www.unctad.org> (11 June 2011).

5 UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases <http://www.unctad.org/iia-dbcases/cases.aspx> (7 June 2011).

6 ICSID Secretariat 'The ICSID Caseload Statistics, Issue 2011-1' (2011) <http://icsid.worldbank.org> (7 June 2011).

7 Cf. UNCTAD and ICSID statistics (notes 5, 6); (status as of June 2011).

competitor,[8] under UNCITRAL[9] *ad hoc* arbitration. Even if the officially known number of treaty-based investor-State dispute settlement cases handled under the *ad hoc* UNCITRAL framework remained relatively constant in recent years,[10] one has to bear in mind that a non-trivial percentage of investor-State arbitrations processed under non-ICSID mechanisms is never disclosed to the public at all due to the lack of a central registry.[11] Hence, the number of unreported non-ICSID cases may be significantly higher.

The decision to bring an investment dispute either before ICSID or to use an alternative arbitral system is generally based on the parties' agreement. In the majority of cases, the State party's consent to the mechanism for the settlement of investment conflicts is already expressed through the underlying BITs,[12] which most commonly either specify solely ICSID procedure for arbitration or provide for a choice to the aggrieved private investor between ICSID and *ad hoc* arbitration under the UNCITRAL Arbitration Rules.[13]

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[8] UNCTAD 'Latest Developments in Investor-State-Dispute Settlement (2011), 1 IIA Issues Note, 2: Besides almost two-thirds of the total number of known treaty-based investment arbitrations filed with ICSID (or the ICSID Additional Facility), the second most common type is *ad hoc* arbitration pursuant to the UNCITRAL Arbitration Rules with more than one fourth of the cases. Institutional commercial arbitration has only a lesser significance, with e.g. 5% of the cases at the SCC and about 1,5% of the cases handled by the ICC.

[9] United Nations Commission for International Trade Law.

[10] Cf. UNCTAD 'Latest Developments in Investor-State-Dispute-Settlement' (2009) 1 IIA Monitor/ (2008) 1 IIA Monitor/ (2006) 4 IAA Monitor <http://www.unctad.org> (7 June 2011).

[11] G. Born and E. Shenkman 'Confidentiality in International Arbitration' in C. Rogers and R. Alford (eds) *The Future of Investment Arbitration* (OUP New York 2009) 5 (28).

[12] C. Schreuer et al. *The ICSID Convention: A Commentary* (2nd edn. CUP Cambridge 2009) 190 et seq.

[13] Cf. OECD 'Documentation of Negotiating Group on the Multilateral Agreement on Investment (MAI) DAFFE/MAI(95)9' (21 November 1995) <http://www.oecd.org/daf/mai/pdf/ng/ng951e.pdf> (7 June 2011): 'Possible variants include, inter alia, the applicable rules under ICSID, UNCITRAL, the ICC and the Stockholm Arbitration Institute. European BIT's tend to specify ICSID procedures for arbitration whereas the U.S. and Canada provide a choice as between ICSID and UNCITRAL rules. The NAFTA provides a choice between ICSID or UNCITRAL rules and the ECT provides a choice

Thus, the indicated slight trend away from ICSID arbitration in the past years could imply that some investors tend to prefer other fora, namely commercial arbitral tribunals or even national domestic courts. It can be interpreted as a signal that they find alternative avenues for the settlement of investor-State dispute more attractive. Of course, the reasons for this so far still minor tendency are complex and manifold. Yet, part of them are seemingly attributable to procedural advantages inherent to the respective other sets of arbitral rules, mirroring the corresponding disadvantages incidental to ICSID.

The focus of this article will be on these ICSID weaknesses, which will provide a point of departure for an analysis of the above-described development. It will first give a brief overview of the currently discussed shortcomings of the ICSID regime (II). In a further step, the ICSID annulment system and jurisprudence will particularly be singled out and explained, as it is presently one of the most controversial features of investment arbitration procedure (III). Given the fact that the annulment mechanism in ICSID Convention Art. 52 (1)[14] is the only way to escape the enforcement of a defective award, it has received argus-eyed attention of the investment community throughout its past and current development. While in the recent past, the trend in ICSID practice was towards curtailing the scope of annulment review, the latest annulment decisions have departed from this established approach and thereby have reignited debate over the limited function of annulment committees and their role in balancing the competing desire for both the finality and correctness of arbitral awards. In response to this development, which has lead to increased legal uncertainty thus presumably adding to a potential backlash tendency against the ICSID regime, reform proposals intending to tackle these deficiencies in the annulment process will be presented in brief (IV). The improvement of the ICSID regime is of particular importance as it was especially created for investment arbitration. It is often deemed to be the most suitable arbitral system for settling disputes of semi-public nature. For this reason, reforming

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between ICSID, UNCITRAL or the Arbitration Institute of the Stockholm Chamber of Commerce. Where a choice of forums is provided, it is the investor making the claim who makes the choice as to the applicable regime.'; cf. also ICSID *Investment Treaties, Loose Leaf Collection* (ICSID Washington D.C. 2001), containing the texts of investment promotion and protection treaties concluded by over 165 countries during the period from 1959 to 2007.

[14] Article citations without further specification refer to those of the ICSID Convention.

the ICSID will help to maintain and refine an appropriate mechanism for the resolution of investment disputes in the future.

II. Overview of Deficiencies

There are multiple areas of concern in the ICSID regime which are considered to threaten the Center's current status as the most popular system for the settlement of investment disputes.[15]

1. Timing of Proceedings

One of these aspects is the timing of proceedings, in particular the average amount of time needed from registration of an arbitral request until constitution of an ICSID tribunal as well as time passing from closure of an ICSID proceeding until the award is rendered.

Regarding the first timeframe, the ICSID process is vulnerable to delaying tactics. The generous procedural time limits set out in the ICSID Convention and Arbitration Rules [16], which eventually culminate in the default method of appointment, leave considerable room for counterproductive manipulation by one or both of the parties.[17] Nevertheless, the ICSID Secretariat meanwhile managed to bring down the time for the tribunals' constitution to six weeks on average.[18]

The main challenge now lies in reducing the second time period, as such delays stand in stark contrast to time efficiency – the characteristic for which arbitration is famous for.

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[15] UNCTAD (note 8) 2.

[16] If the parties cannot agree on the number of the arbitrators and the method of their appointment, Rule 2 foresees a period of 60 days after the registration of a request until the default method in Art. 37 (2) applies. In addition, if the parties cannot agree upon the constitution of the tribunal within 90 days, Art. 38 and Rule 4 provide that either party may request the ICSID Chairman to appoint the arbitrator(s) not yet appointed.

[17] S. Jagusch and J. Sullivan 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Waibel (note 2) 79 (81).

[18] Cf. M. Kinnear, ICSID Secretary General, in her Keynote Speech at the 5th Juris Annual Investment Treaty Arbitration Conference (Washington D.C. 2011).

2. Jurisdiction

In ICSID arbitration, consent of the parties – by way of a bilateral or multilateral investment treaties, contracts, or laws – constitutes only one element of its double jurisdictional requirement. The second element marking the outer limits of jurisdiction of the Center is contained in Art. 25.[19] Due to its permissive language, the latter provision leaves open the definition of the crucial term 'investment'. In addition, it fails to specify the scope of the term 'nationality'. Thus, objections to jurisdiction *ratione materiae* or *ratione personae* often result in a bifurcation of the arbitral proceedings into a jurisdictional phase and a phase on the merits, leading to time and cost consequences as well as to increased legal uncertainty.[20]

3. Provisional Measures

The power of an ICSID arbitral tribunal to grant provisional measures is contained in Art. 47. However, the legal authority of such measures is quite unsettled because the relevant norm provides only that a tribunal 'may […] recommend' that certain provisional measures be taken, giving rise to doubt as to whether these can be binding on the parties.[21] To date, the express wording of Art. 47[22] and the practice of tribunals[23] are

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[19] D. Krishan and A. Sinclair 'Are the ICSID Rules Governing Nationality & Investment Working? – Panel Discussion' in T. Weiler (ed.) *Investment Treaty Arbitration and International Law* (Juris Huntington 2008) 120.

[20] Jagusch and Sullivan (note 17) 88; See also D. Krishan 'A Notion of ICSID Investment in Investment Treaty Arbitration and International Law' in Weiler (note 19) 61–84; A. Sinclair 'ICSID's Nationality Requirements' in Weiler (note 19) 85–118.

[21] Schreuer (note 12) 764–65.

[22] Notwithstanding the fact that the word 'recommend' was eventually inserted into Art. 47, the legal effect of provisional measures had already been debated during the drafting history of the Convention. Cf. C.N. Brower and R. Goodman 'Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings' (1990) 6 ICSID Rev/FILJ 431 (440–43).

[23] Cf. e.g. *Emilio Agustín Maffezini v. Kingdom of Spain (Procedural Order of 28 October 1999)* ICSID Case No. ARB/97/7 para. 9; *Víctor Pey Casado v.*

drifting apart, so that the uncertainty surrounding this question has not yet been overcome.

4. Procedural Transparency vs. Confidentiality

While on the one hand, the increase in procedural transparency heralded by the 2006 amendments to the ICSID Convention[24] was welcomed in view of the semi-public nature of investment disputes, on the other hand, the ongoing want for a certain degree of confidentiality remains critical.[25] In the course of promoting a transparent arbitral process, it was recognized that public scrutiny and control can also result in a re-politicization of proceedings and thus in an aggravation of the dispute.[26] Hence, there is a continuing need to evaluate and reflect the ICSID legal standard on transparency and to discuss possible further reform measures.[27] Only in this way, a proper balance of transparency and confidentiality of ICSID arbitration will be achieved.

Republic of Chile (Decision on Provisional Measures of 25 September 2001) ICSID Case No. ARB/98/2 paras 17–26.

[Unless stated otherwise, all arbitral decisions and awards are available online on the ICSID webpage at <http://www.worldbank.org/icsid> (11 June 2011), on the Investment Treaty Arbitration webpage at <http://ita.law.uvic.ca> (11 June 2011), or on the Investment Claims webpage at <http://www.investmentclaims.com> (11 June 2011)].

[24] The amendments of the ICSID Arbitration Rules in 2006 modified the provisions in Rule 32 (2) (public attendance at oral hearings), Rule 37 (2) (*amicus curiae* submissions by third parties), and Rule 48 (4) (automatic publication of excerpts of every award).

[25] N. Rubins 'Opening the Investment Arbitration Process: At What Cost, for What Benefit?' in R. Hoffmann and C. Tams (eds) *The International Convention on the Settlement of Investment Disputes (ICSID) - Taking Stock after 40 Years* (Nomos Baden-Baden 2007) 179 (217–22).

[26] Ibid.

[27] One reform proposal addresses the apportionment of transparency in the different stages of the arbitral process. It suggests a higher degree of confidentiality while proceedings are pending, in order to maintain their integrity, and enhanced transparency in the post-award stage to enable the development of a more consistent jurisprudence. Cf. Born and Shenkman (note 11).

5. Consistency of Awards

Finally, a more general point of criticism as to the inconsistency of ICSID arbitral awards largely relates back to the rather incoherent interpretation of investment treaties and the protective standards contained therein, of the relationship between such treaty obligations and other international law obligations in the sense of Art. 42 (1) sentence 2,[28] and of the ICSID Convention itself. In view of the latter regulatory framework, the diverging interpretation of, *inter alia*, the jurisdictional requirements and the legal authority of provisional measures has been heavily criticized. Another significant subject of this debate is the incoherent annulment jurisprudence under Art. 52 (1),[29] which will be addressed below in greater detail. All these aspects create legal uncertainty and risk to undermine the legitimacy of the system.

III. Focus on Illegitimate Annulment Decisions

1. Functioning and Basic Principles of the ICSID Annulment Mechanism

As the ICSID machinery is designed to preserve the finality of its awards,[30] Art. 53 (1) provides for their binding effect upon parties and prohibits submitting them 'to any appeal or to any other remedy except those provided for in this Convention'. This implies that the parties, nonetheless, are not unprotected against defective or arbitrary awards. The remedies to ensure the correctness of a decision are foreseen within the self-contained review system of the ICSID Convention, namely interpretation, revision, and annulment, which is the most drastic

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[28] A. Leeks 'The Relationship between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach' (2007) 65 University of Toronto Faculty of Law Review 1.

[29] W. Burke-White and A. Von Staden 'Private Litigation in a Public Sphere: The Standards of Review in Investor-State Arbitration' (2010) 35 YaleLJ 283 (299).

[30] G. Delaume 'The Finality of Arbitration Involving States: Recent Developments' (1989) 5 Arbitration International 21 (29–30).

means.[31] According to Art. 52 (1), a request for annulment may be filed to an *ad hoc* committee of three persons appointed by the Chairman of the Administrative Council on specific and limited grounds.[32] If a violation of one or more of these grounds is found, the panel is authorized to annul the award.

Thus, there are two basic principles, finality and correctness, which stand in opposition to each other and which need to be balanced by the annulment system. Its task is to provide relief in emergency situations involving severe violations of fundamental policies and, at the same time, to preserve the finality of a ruling in all possible respects.[33]

As to the nature of annulment, it is important to bear in mind that it is distinct from appeal in two ways: The first difference lies in the result of the process. While an appeals body may modify the decision under review and hence is able to replace deficient rulings by its own views on the merits, annulment only allows invalidation in whole or in part, requiring the dispute to be resubmitted to a new tribunal.[34] The second difference relates to aspects of the award under review. Appeal can be concerned with the substantive correctness of a legal decision, but annulment, in contrast, merely considers the legitimacy of the process of decisions, regardless of legal or factual errors.[35]

Despite this principally narrow conception of the ICSID annulment mechanism, the use of this review tool has become a serious cause for concern. The problems which have arisen within this provisional framework will be developed in the following section.

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[31] Art. 50 (Interpretation), Art. 51 (Revision), Art. 52 (Annulment); For further details see L. Reed, J. Paulsson and N. Blackaby *Guide to ICSID Arbitration* (Kluwer The Hague 2004) 97–105.

[32] Art. 52 (1) contains the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

[33] Schreuer (note 12) 903.

[34] D. Caron 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal' (1992) 7 ICSID Rev/FILJ 21 (23–27).

[35] Ibid.

2. Continued Shortcomings in Annulment Case Law: *Klöckner I*'s and *Amco I*'s Comeback in *Sempra* and *Enron*?

Until the very early years of this millennium, the history of annulment proceedings under the ICSID Convention used to be classified into three groups: the first generation in 1985/ 1986 comprising *Klöckner I*[36] and *Amco I*[37], two decisions heavily criticized for their undue extension of the scope of annulment review, the second generation represented by the more cautious *Klöckner II*[38], *MINE*[39], and *Amco II*[40] from 1989–1992, and the third generation with *Wena*[41] and *Vivendi*[42] in 2002, which were lauded for their balanced approach between the opposing principles of finality and correctness. Since then, all the annulment decisions rendered in the aftermath were designated as modern law of annulment, including the polarizing rulings in *Mitchell*[43] (2006) and *MHS*[44] (2009), as well as the *CMS*[45] decision (2007).[46]

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[36] *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon (Decision on Annulment of 3 May 1985)* [hereinafter *Klöckner I*].

[37] *Amco Asia Corp. v. Republic of Indonesia (Decision on Annulment* of *16 May 1986)* ICSID Case No. ARB/81/1 [hereinafter *Amco I*].

[38] *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon and Société Camerounaise des Engrais (Decision on Annulment of 17 May 1990)* ICSID Case No. ARB/81/2 [unpublished; hereinafter *Klöckner II*].

[39] *Maritime International Nominees Establishment (MINE) v. Republic of Guinea (Decision on Annulment of 22 December 1989)* ICSID Case No. ARB/84/4 [hereinafter *MINE*].

[40] *Amco Asia Corp. v. Republic of Indonesia (Decision on Annulment of 17 December 1992)* ICSID Case No. ARB/81/1 [hereinafter *Amco II*].

[41] *Wena Hotels Limited v. Arab Republic of Egypt (Decision on Annulment of 5 February 2002)* ICSID Case No. ARB/98/4 [hereinafter *Wena*].

[42] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Decision on Annulment of 3 July 2002)* ICSID Case No. ARB/97/3 [hereinafter *Vivendi I*].

[43] *Patrick Mitchell v. Democratic Republic of the Congo (Decision on Annulment of* 1 November 2006) ICSID Case No. ARB/99/7 [hereinafter *Mitchell*].

[44] *Malaysian Historical Salvors, SDN, BHD v. Malaysia (Decision on Annulment of* 16 April 2009) ICSID Case No. ARB/05/10 [hereinafter *MHS*].

[45] *CMS Gas Transmission Company v. the Argentine Republic (Decision on Annulment of 25 September 2007)* ICSID Case No. ARB/01/8 [hereinafter *CMS*].

The dyad of annulment decisions rendered in the summer of 2010, *Sempra*[47] and *Enron*[48] seem to veer out of these emerging structures. They backslide to old habits of expanding the scope of review, thereby causing considerable legal uncertainty and dismay in expert circles. In reference to this re-abandonment of the tried and tested higher annulment threshold in these most recent decisions, some commentators already refer to these cases as the 'fourth generation' of ICSID annulment awards.[49]

The varying approaches adopted in the so far rendered decisions are of enormous significance for the general functioning of the annulment mechanism. They reflect the way the appointed *ad hoc* committees see themselves and are hence of importance for the perception and reputation of ICSID in the investment community. Therefore, it is useful to shed further light on the interpretation and application of the different grounds for annulment in the most prominent cases of ICSID annulment jurisprudence.

a. A Difficult Start – The First Generation

The first two annulment decisions in the ICSID history, *Klöckner I* and *Amco I*, caused mainly negative reactions and led some commentators to call into question the effectiveness of ICSID arbitration as a whole.[50] They were criticized for having undertaken a substantial review on the merits, thereby crossing the line between annulment and appeal and undermining one of the superior goals of arbitration – the finality of awards.[51] Some commentators even spoke of a 'breakdown of the con-

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[46] Terminology according to C. Schreuer 'Three Generations of ICSID Annulment Proceeding' in E. Gaillard and Y. Banifatemi (eds) *Annulment of ICSID Awards* (CUP New York 2004); Schreuer (note 12) 913.

[47] *Sempra Energy International v. Argentine Republic (Decision on Annulment of 29 June 2010)* ICSID Case No. ARB/02/16 [hereinafter *Sempra*].

[48] *Enron Creditors Recovery Corp. (formerly Enron Corp.) v. Argentine Republic (Decision on Annulment of 30 July 2010)* ICSID Case No. ARB/01/3 [hereinafter *Enron*].

[49] P. Nair and C. Ludwig 'ICSID Annulment Awards–The Forth Generation?' (11 October 2010) <http://www.globalarbitrationreview.com> (11 June 2011).

[50] E. Gaillard 'Introduction' in Gaillard and Banifatemi (note 46) 5 (6).

[51] Schreuer (note 12) 912, with further references.

trol mechanism in ICSID arbitration'[52] or of 'ICSID losing its appeal'.[53] Only a few voices were raised in support of these rulings.[54]

The *Klöckner I ad hoc* committee, it will be recalled, annulled the award on two of the three invoked grounds. It held that the Tribunal had failed to apply the proper law by postulating basic legal principles without reference to the applicable national law as is required by Art. 42. Consequently, it manifestly exceeded its powers in the sense intended by Art. 52 (1) (b).[55] Furthermore, the panel found that the award had failed to state reasons pursuant to Art. 52 (1) (e) because it neglected to provide answers to every question which had been submitted to it.[56]

As to the first ground, critics pointed out that the Tribunal had not failed to apply the proper law, but had only failed to substantiate it in an adequate way.[57] Regarding the second ground, concerns were raised that this approach would allow nullification when there was only an insufficient statement of reasons, leading to the possibility to nullify whenever the panel actually disagrees with the tribunal's material reasoning.[58] More generally, criticism centered on the extremely broad interpretation of the grounds for annulment[59] and on the committee's

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[52] W.M. Reisman 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) 4 Duke Law Journal 739.

[53] D.A. Redfern 'ICSID—Losing its Appeal?' (1987) 3 Arbitration International 98.

[54] Schreuer (note 12) 912–13, with further references.

[55] *Klöckner I* (note 36) paras 67–79.

[56] Ibid. para. 79.

[57] J. Paulsson 'ICSID's Achievements and Prospects' (1991) 6 ICSID Rev/FILJ 380 (388–89); B. Pirrwitz 'Annulment of Arbitral Awards under Art. 52 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1988) 23 TexasILJ 73 (103–07); Schreuer (note 12) 966–67.

[58] W.L. Craig 'Uses and Abuses of Appeal from Awards' (1988) 4 Arbitration International 210. In addition, it was pointed out that the Convention provides its own, different remedy for correcting such kind of failure in Art. 49 (2); cf. Delaume (note 30) 31.

[59] *Klöckner I* (note 36) paras 58–59. The *ad hoc* committee read Art. 52 (1) as a type of *renvoi* to the rest of the Convention and thus interpreted this provision as authorizing it to examine a challenged award with all the standards contained in the Convention.

'hair trigger' approach[60], which appeared to support automatic nullification once any defect were established.

In *Amco I*, the *ad hoc* committee annulled the award on the same basis. In respect to the excess-of-powers ground, it held that the tribunal, despite properly identifying the applicable national law, had failed to apply some of its fundamental provisions when making calculations relevant to the dispute,[61] amounting to both an error of fact and of law. In addition, a failure to state reasons was seen in the tribunal's omission to provide reasons for its calculations.[62] Again, this decision was criticized by numerous commentators for the above reasons. Concretely, it was pointed out that the tribunal had not, in fact, failed to apply the proper law, but had only misapplied one provision of that law,[63] so that an annulment for excess of powers would not be justified. Despite all these reprehensions very similar to the *Klöckner I* challenges, the *Amco I* panel distinguished itself from its predecessor in one of its constitutive rulings. In contrast to the 'hair trigger' mechanism requiring nullification *per se* in case of any technical discrepancy, it applied a 'material violation' standard,[64] which required an inquiry into whether a formal mistake in fact caused injury to the party alleging it or distorted the award.

In total, the critics of both annulment decisions stressed that the ramifications were drastic. They effectively turned what was intended to be an emergency supervision tool to vindicate a party's basic rights in case of outrageously irregular awards into an appellate-type of mechanism. Because this first generation of annulments were considered likely to be foundational to later proceedings, it was feared that *Klöckner I* and *Amco I* would counteract the finality of awards – one of arbitration's

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[60] *Klöckner I* (note 36) para. 179. According to the *ad hoc* committee, no qualitative aspects of a defect like significance or gravity were to be taken into account. Cf. also Reisman (note 52) 762.

[61] *Amco I* (note 37) paras 95–98.

[62] Ibid. paras 97–98.

[63] Paulsson (note 57) 388; Pirrwitz (note 57) 108–09; Schreuer (note 12) 942–43, 960.

[64] *Amco I* (note 37) paras 75, 78, 79. Cf. also Reisman (note 52) 775–78.

primary goals[65] –, and thereby throw doubt upon the ICSID system as a whole.[66]

b. A Seemingly Balanced System

The criticisms of the first generation of ICSID annulment jurisprudence having been unequivocal, subsequent *ad hoc* committees acted with significantly more moderation and thereby established a seemingly balanced system. A leading commentator[67] subdivided this process into a further two phases, the second and the third generation of annulment awards, followed by the so far not further classified 'modern law of annulment'.

aa. The Second and Third Generation

The *MINE* decision, as part of the second generation, demonstrated a much more cautious approach. It helped to clarify the annulment function by reflecting on the question of how narrow or how broad the interpretation of the annulment grounds in Art. 52 (1) should be. The panel held that 'Art. 52 (1) should be interpreted in accordance with its object and purpose, which excludes on the one hand […] extending its application to the review of an award on the merits, and, on the other, an unwarranted refusal to give full effect to it […]'.[68] It hence addressed the concerns raised by the interpretive breadth that had been suggested in the earlier decisions. This shift away from the old interventionist approach was also reflected by the refusal to annul in *Klöckner II* and *Amco II*.

Ten years passed until *Wena* and *Vivendi I*, the decisions representing the third generation, resumed this more moderate way of dealing with applications for annulment. The *ad hoc* committees carefully stayed

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65 Schreuer (note 12), 912, with further references.

66 Redfern (note 53) 117. ICSID itself acknowledged this when Secretary General Ibrahim Shihata, at the 1986 Annual Meeting of the Administrative Counsel, referred to *Klöckner I* and *Amco I* and warned of the danger that 'parties, dissatisfied with an award, make it a practice to seek annulment' and that this might put the ICSID's effectiveness into question, deterring both investors and States.

67 Schreuer (note 46); Ibid. (note 12) 913.

68 *MINE* (note 39) para. 4.05.

within the limits prescribed by Art. 52 (1) and rejected an overly strict approach.[69] They demonstrated that an ICSID annulment committee will generally intervene on a party's request, but only in a limited way, to correct fundamental, non-trivial errors[70] and without reviewing the substantive correctness of an award.[71] Thereby, both panels aimed to balance the tension between the competing goals of complete fairness and absolute finality.[72] All in all, these two cases show that the ICSID control system had – at least temporarily – found its proper *modus operandi.* In consequence, annulment was no longer seen as unpredictable device but as a useful remedy.[73]

bb. Modern Law of Annulment

Since 2002, the bulk of the annulment decisions classified as the modern law of annulment have adhered to the more sensitive method. Accord-

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[69] In both decisions, the applications for annulment were rejected for the most part. Only in *Vivendi I*, there was one area in which annulment had occurred. The annulment committee took a decision which was considered to be of high relevance for future arbitrations, as it clarified the difference between treaty disputes and contractual disputes. In particular, the panel stated that a contractual Domestic Forum Selection Clause does not preclude advancing claims for breach of a BIT in international arbitration, because coexisting contract claims and treaty claims are governed by different legal standards. Cf. S.A. Alexandrov 'The Vivendi Annulment Decision and the Lessons for Future ICSID Arbitrations – The Applicant's perspective' in Gaillard and Banifatemi (note 46) 97 (114). Nevertheless, *Vivendi I* has been criticized for having undertaken 'a kind of analysis that clearly goes beyond the line that separates what is correct from what is illegitimate'. Cf. C.I. Suarez Anzorena 'Vivendi v. Argentina: on the Admissibility of Requests for Partial Annulment and the Ground of a Manifest Excess of Powers' in Gaillard and Banifatemi (note 46) 123 (174).

[70] Both tribunals rejected the 'hair trigger' approach, which referred to formal discrepancies, in favour of the 'material violation' approach, which accords discretion to the annulment committee and which was first introduced in *Amco I*. Cf. *Wena* (note 41) para. 58 and *Vivendi I* (note 42) para. 63.

[71] Schreuer (note 12) 913.

[72] Cf. H. van Houtte 'Article 52 of the Washington Convention – A Brief Introduction' in Gaillard and Banifatemi (note 46) 11 (15), who described the handling of these opposing concepts as navigating between 'the Scylla of complete fairness and the Charybdis of absolute finality'.

[73] C. Schreuer 'ICSID Annulment Revisited' (2003) 30 Legal Issues of Economic Integration 121.

ingly, the 'ICSID experiment seem[ed] back on track'.[74] A whole range of annulment committees, for instance those in *CDC*[75], *Repsol*[76], *MTD*[77], *Soufraki*[78], *Lucchetti*[79], *Azurix*[80], or *MCI*[81], adopted this balanced, rather restrained approach and entirely rejected the annulment applications. Their argumentation constantly reflected their consciousness of the limited and narrow mandate conferred by Art. 52.

A further modern annulment decision, *CMS*[82], has caused some concern. The panel was criticized[83] for having entered into the discussion of how to interpret and apply the defense of 'necessity' with regard to the underlying relationship of treaties and customary international law.[84]

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[74] M. Reisman 'Control Mechanisms in International Dispute Resolution' (1994) 2 U.S.-Mexican Law Journal 129 (133).

[75] *CDC Group plc v. Republic of Seychelles (Decision on Annulment of 29 June 2005)* ICSID Case No. ARB/02/14 [hereinafter *CDC*].

[76] *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador) (Decision on Annulment of 8 January 2007)* ICSID Case No. ARB/01/10 [hereinafter *Repsol*].

[77] *MTD Equity Sdn. Bhd. v. Republic of Chile (Decision on Annulment of 21 March 2007)* ICSID Case No. ARB/01/7 [hereinafter *MTD*].

[78] *Hussein Nuaman Soufraki v. United Arab Emirates (Decision on Annulment of 5 June 2007)* ICSID Case No. ARB/02/7 [hereinafter *Soufraki*].

[79] *Industria Nacional de Alimentos S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru (Decision on Annulment of 5 September 2007)* ICSID Case No. ARB/03/4 [hereinafter *Luchetti*].

[80] *Azurix Corp. v. Argentine Republic (Decision on Annulment of 1 September 2009)* ICSID Case No. ARB/01/12 [hereinafter *Azurix*].

[81] *M.C.I. Power Group L.C. v. Republic of Ecuador (Decision on Annulment of 19 October 2009)* ICSID Case No. ARB/03/6 [hereinafter *MCI*].

[82] *CMS* (note 45).

[83] M. Reisman commented *CMS* as 'very strong move towards a more substantial appraisal of whether an award was correct'; R.D. Bishop criticized the *CMS* committee members for 'making gratuitous statements that they didn't have to make' and for having 'effectively de-legitimised the award', both quoted in: S. Perry 'Annulment Committees and Nosferatu Awards' (24 May 2010) <http://www.globalarbitration review.com> (31 October 2010).

[84] In contrast to the tribunal's ruling, the panel found the necessity exception contained in Art. XI of the BIT and the concept of necessity under customary international law contained in Art. 25 of the ILC Articles on State Re-

Nevertheless, the committee only annulled part of the award[85] and upheld the original tribunal's award of damages, stating that even in case that an 'award contained manifest errors of law […] [a] Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal', except if in accordance with in the annulment grounds of Art. 52 (1).[86] It thereby emphasized the continuing practice in annulment proceedings 'to distinguish between failure to apply the law and error in its application'.[87] In view of this consistent adherence to the established annulment jurisprudence, the *CMS* decision can eventually be considered as joining the consensus on the strict limits of the ICSID annulment function by highlighting the difference between annulment and appeal.[88]

However, two outliers clouded this so far homogenous picture of the modern law of annulment: In *Mitchell*[89], the *ad hoc* committee also expressed its disagreement with the tribunal's reasoning, namely the approach used to determine whether an 'investment' for purposes of Art. 25 (1) had occurred. Though, in contrast to the subsequent and more cautious *CMS* ruling, it annulled the award on the ground that the tribunal mistakenly had accepted that an investment existed.[90] Given the fact that the definition of the term 'investment' was explicitly left open by the drafters of the Convention and is still unsettled in ICSID case law,[91] the investment community received this decision as an attempt to

sponsibility to be 'substantially different' and consequently held that the tribunal had committed a 'manifest error of law'. Cf. *CMS* (note 45) para. 130.

85 The application for annulment was rejected on all grounds but with regard to the tribunal's ruling that the host State had breached the 'umbrella clause' in the applicable BIT. As the committee pointed out, this partial annulment left the award as a whole unaffected. Cf. *CMS* (note 45) para. 99.

86 *CMS* (note 45) para. 158.

87 Ibid. para. 50.

88 Schreuer (note 12) 915.

Nevertheless, despite its formal conformity with the ICSID Convention, one should be aware of the ambiguity the committee creates by leaving intact an arbitral award it previously declared as suffering from grave deficiencies.

89 *Mitchell* (note 43).

90 Ibid. para. 41. The committee arrived at this conclusion as it found one of the 'four characteristics' of an investment in the sense of Art. 25 (1) to be missing, namely the substantial contribution to the economic development of the host State.

91 Schreuer (note 12) 114.

impose the committee's own views on the merits.[92] Similar criticism can be voiced in reaction to the *MHS*[93] annulment award. The panel of the latter decision turned on exactly the same issue, but assumed that an investment had occurred and hence based its ruling on an opposite conclusion as to the *ratione materiae* issue. By referring to the appropriateness and coherence of the tribunals' reasoning, as commentators admonished,[94] both panels engaged in a substantive review of the award at hand. In this way, they adopted a role which was otherwise inconsistent with the general trend in annulment jurisprudence.[95]

At that time, these two deviations from the trend might still have been seen as inevitable and scattered malfunctioning of an evolving dispute settlement mechanism, most notably with regard to the predominantly balanced approaches in modern annulment awards before and after. Nevertheless, commentators have also considered the above annulment decisions, all dealing with the tribunal's interpretation of the corresponding investment treaties, as indicative of a trend[96] to 'something similar to an appellate review in international investment law'.[97]

c. A Return to Old Habits – The Fourth Generation?

The two ICSID annulment awards rendered very recently throughout the summer of 2010, *Sempra*[98] and *Enron*[99], have raised a further storm of criticism with regard to the scope of review adopted by the panels. They were perceived as undermining the well established limited character of the emergency review mechanism rooted in Art. 52 (1)[100] by

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92 W.B. Hamida 'Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control' (2007) 24 Journal of International Investment Arbitration 303.

93 *MHS* (note 44).

94 E. Gaillard 'A Black Year for ICSID' (2007) 4/5 Transnational Dispute Management 4, comment on *Mitchell*.

95 Schreuer (note 12) 915, comment on *Mitchell*.

96 Gaillard (note 94) 4, in his comment on *Mitchell.*

97 Michael Reisman's comment on *CMS* and *MHS*, quoted in Perry (note 83).

98 *Sempra* (note 47).

99 *Enron* (note 48).

100 S. Smith and K. Rubino 'Investors Beware: Enron and Sempra Annulment Decisions Bolster the State Necessity Defense While Showing New Un-

converting it into *de facto* appellate proceedings.[101] Some commentators have already asked whether there is an emerging 'fourth generation' of ICSID annulment jurisprudence and whether this new wave of annulment awards will necessitate reform.[102] Others, by contrast, consider these decisions as a result of the increasingly complex contentious issues to be addressed by ICSID tribunals and as still proportionate to the growing volume of arbitral requests. [103] In their opinion, the annulments should not be overestimated.

Both cases were based on similar circumstances and facts. They arose out of Argentina's unauthorized modifications and breaches of license contracts carried out by the government to deal with an unprecedented economic crisis in 2001. As a reaction, *Sempra* and *Enron* initiated ICSID arbitrations alleging that Argentina had violated its obligations under the US-Argentina BIT.[104] In defense, Argentina justified its emergency measures by pleading defenses under domestic law, international law, and under the treaty. Among other matters, it referred to Art. XI of the BIT, which provides that the treaty 'shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the Protection of its own essential security interests'. A further similarity is that the arbitral tribunals concerned with these two cases both rejected Argentina's plea of a state of necessity and rendered unanimous awards in favor of the claimant-investors. The tribunals considered the standards under Art. 25 of the ILC Articles[105] as relevant in determining the customary international law requirements as well as the conditions set out in Art. XI of the BIT, and they ended up finding these were not met.

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certainty Regarding the Finality of ICSID Arbitral Awards' (11 August 2010) <http://www.mondaq.com/unitedstates/article.asp?articleid=107480> (7 June 2011).

[101] Nair and Ludwig (note 49).

[102] Ibid.

[103] Cf. Kinnear (note 18).

[104] Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (signed 14 November 1991; entered into force 20 October 1994) <http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf> (7 June 2011).

[105] UNGA Res. 56/83 'Responsibility of States for Internationally Wrongful Acts' (12 December 2001) GAOR 56th Session Supp 49 vol 1, 499.

Interestingly, even if the committees dealt with similar facts and reviewed almost identical underlying awards[106] and even if both panels examined the necessity defense advanced by the host State, they followed entirely different paths in reaching their annulment decisions based on the excess-of-powers ground in Art. 52 (1) (d).

The *Sempra* committee, which is comparable to *CMS* in this respect, expressed its view on the content and relationship of the relevant BIT and the ILC Articles referring to customary international law principles of necessity.[107] It held that the tribunal had erred when it interpreted the BIT Art. XI on 'necessity' as being governed by ILC Art. 25[108] and consequently did not consider the applicability of the BIT provision.[109] The committee then continued to characterize this failure of the tribunal to 'conduct its review on the basis that the applicable legal norm is to be found in Article XI of the BIT' [110] as complete failure to apply the applicable law and thus as manifest excess of its powers in the sense of Art. 52 (1) (b).

This conclusion stands in contradiction to the statement in the original award, which was actually quoted by the *ad hoc* committee. The concerned finding of the tribunal expounded that

> '[…] Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under

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[106] *Enron Creditors Recovery Corp. (formerly Enron Corp.) v. Argentine Republic (Award of 22 May 2007)* ICSID Case No. ARB/01/3; *Sempra Energy International v. Argentine Republic (Award of 28 September 2007)* ICSID Case No. ARB/02/16.

[107] *Sempra* (note 47) paras 192–204. In the panel's opinion, the tribunal wrongly conflated the relationship between necessity under a treaty and under customary international law. Following *CMS*, the *ad hoc* committee applied the Primary-Secondary-Rule distinction, which identifies the BIT Art. XI as self-judging and thus as the primary applicable legal norm when examining the necessity defense.

[108] *Sempra* (note 47) para. 201.

[109] Ibid. para. 196.

[110] Ibid. para. 209.

> Article XI given that this Article does not set out conditions different from customary law in such regard'.[111]

In view of this passage, it seems not clear at all that the *Sempra* tribunal in fact did apply customary international law to the exclusion of the BIT.[112] It rather appears that it proceeded on the assumption that the two regimes were equivalent.[113] An impartial and unbiased reader, who would be able to perceive this statement in a fair and reasonable manner, is indeed very likely to understand that the original tribunal actually did apply Art. IX of the BIT and that it noticed a similar outcome to the one inferred from ILC Art. 25. Hence, the impression given is that the *ad hoc* panel just tried to find a convenient excuse for annulling the tribunal's adverse conclusion. This way of interfering with the original tribunal's decision strongly conflicts with the strictly limited annulment review permitted by Art. 52.

The *Enron* panel took a different route. It had an opposite attitude regarding the competences assigned by Art. 52 (1) as it held that '[t]he role of an annulment committee is not to reach its own conclusions on these issues'. Therefore, the panel was of the opinion that the tribunal was permitted to apply its own interpretation of the legal relationship between the BIT and the ILC Articles.[114] Nevertheless and irrespective of how the relation of these two legal texts was viewed, it found that the tribunal had failed to apply properly the various elements contained in ILC Art. 25, which are essential in determining the necessity of a State's actions under customary international law.[115] The committee held, *inter alia*, that instead of relying on expert evidence[116] the tribunal should have engaged in the legal analysis of what 'the only way' requirement or the expression 'contributed to the situation of necessity' in that provi-

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111 *Sempra* (note 106) para. 388.

112 Nair and Ludwig (note 49).

113 Ibid.

114 *Enron* (note 48) para. 405.

115 Ibid. para. 355.

116 Ibid. paras 361–67 and 392. Regarding the question of whether the emergency measures adopted by the host State to deal with the financial crisis were 'the only way' to safeguard an essential security interest and whether Argentina 'contributed to the situation of necessity' or not, the panel noted that the tribunal dealt with this issue in a cursory manner by uncritically relying on the opinion of an economic expert.

sion meant.[117] According to the *ad hoc* panel, this amounted to a failure to apply the applicable law, which constitutes an annullable error pursuant to Art. 52 (1) (b).[118]

As to both elements, the committee effectively disregarded the tribunal's decision on evidence and replaced it with its own, differing determination of its probative value.[119] Furthermore, in order to clarify what it considered as the 'proper construction of ILC Art. 25',[120] it introduced new inquiries and theories as to what the 'correct interpretation'[121] should have involved. The *ad hoc* panel did not criticize the tribunal for failing to apply settled law, because there was not any settled law at that time.[122] It rather decided to annul the award for the tribunal's failure to observe its retroactively formulated schemes of legal analysis,[123] which again stands in strong contrast to the limited annulment function as provided for in Art. 52.

In addition to the individual criticism of each of these two recent annulment decisions, there are also several common aspects of arbitral failure to be addressed.

One concern was caused by the fact that the committees at least partially[124] overturned the tribunal's awards for a mere erroneous interpretation or non-application of a single rule of law, which – no matter how

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[117] *Enron* (note 48) paras 369–72 and 393. In these paragraphs, the committee set forth the details of the inquiry and reasoning the tribunal should have followed.

[118] Ibid. paras 377, 393, 395. In addition, the committee also annulled the finding that the BIT Art. XI was inapplicable in this case, because this ruling was based on the committee's prior finding that the requirements of ILC Art. 25 were not satisfied. Cf. ibid. para. 405.

[119] This decision of the *ad hoc* committee clearly violates ICSID Arbitration Rule 34 (1), which states that '[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value'.

[120] *Enron* (note 48) para. 377.

[121] Ibid. paras 369, 386.

[122] R.D. Bishop 'The Fundamental Role of Fundamental Rules of Procedure, Recent Developments in Investment Arbitration Procedure, Keynote Address, BIICL, 15th Investment Treaty Forum Public Conference' (10 September 2010) 9–10 <http://www.biicl.org/Fifteenth_ITF_Public_Conference> (11 June 2011).

[123] Ibid.

[124] While the *Sempra* committee entirely annulled the award, the *Enron* panel only rendered a partial annulment.

serious – normally could not be a basis of annulment.[125] Yet, these errors of law were considered as a failure to apply the proper law and hence as having triggered the manifest excess-of-powers ground in Art. 52 (1) (b).[126] Moreover, on the occasion of these findings, the arbitrators sitting on the *ad hoc* panels thus put forward their own understanding of the law. This sharply contradicts the meaningful *CMS* decision, which held in support of the limited annulment jurisdiction that '[a] Committee cannot simply substitute its own view of the law […] for those of the Tribunal'.[127] In consequence, the *Sempra* and *Enron* committees committed the cardinal error of blurring the distinction between an exhaustive error-of-law review and the narrow jurisdictional review under the ICSID regime.[128]

Another concern relates to the long-standing principle that new issues or arguments, in the sense that they had not been advanced before the tribunal by a party, can under no circumstances be admitted by annulment committees.[129] This derives from the fundamental procedural right to be heard, which is not only a basic rule of fairness, but also puts limits on what an annulment committee can examine.[130] Despite this established principle, the *ad hoc* panels in both *Sempra* and *Enron* did the exact opposite by allowing the applicant to raise new arguments or even by creating their own arguments in support of the applicants and as a basis for their annulment decisions.[131]

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[125] Nair and Ludwig (note 49); Schreuer (note 12) 959, 964.

[126] Nair and Ludwig (note 49).

[127] *CMS* (note 45) para. 136.

[128] Nair and Ludwig (note 49).

[129] Cf. the statements in *MTD* (note 77) paras 52–54: '[…] an annulment proceeding […] is a form of review on specified and limited grounds which take as their premise the record before the tribunal.'; *Soufraki* (note 78) para. 37: 'the structure within which an ICSID tribunal has to remain is defined by three elements: the imperative jurisdictional requirements, the rules on applicable law and the issues submitted to the arbitral tribunal'; *CDC* (note 75) para. 40: 'Common examples for such excesses [of powers] are a Tribunal deciding questions not submitted to it […]'. Cf. also Bishop (note 122) 10–11.

[130] Bishop (note 122) 9–10.

[131] Ibid. 11. Cf. also *Sempra* (note 47) para. 184: In reply to respondent's claim that several of the arguments raised by applicant were new and therefore inadmissible, the committee found that 'in so far as the arguments of Argentina can be said to be "new", they are a permissible development of Argentina's arguments […] and therefore admissible'; *Enron* (note 48) paras 353, 393, 395:

Moreover and finally, the fact that the *Sempra* and *Enron* committees found a 'manifest excess of powers' invites a critique based on the already existing, substantiated and well-established ICSID annulment jurisprudence in comparable scenarios, according to which the term 'manifest' in Art. 52 (1) (b) does not indicate the seriousness of an excess of powers, but rather relates to its ease of perception.[132] This means that the excess must be self-evident and readily identifiable. Conducting a detailed and extensive analysis of the issues in question is and should not be necessary to detect such an excess within the meaning of Art. 52 (1) (b). Yet, this was done by the present committees and it is hence not justifiable to speak of a 'manifest' excess. Therefore, the reasoning undertaken by the *Sempra* and *Enron* panels casts doubt on the integrity and legitimacy of their annulment decisions.[133]

Altogether, the above decisions suggest that the scope of annulment review may be more expansive than previously understood.[134] They mark the latest in a row of fluctuating positions on the scope of permissible review, which exacerbate the much-criticized problem of inconsistencies in ICSID jurisprudence and inevitably amount to increased legal uncertainty[135] with respect to the outcome of ICSID proceedings. Moreover, they counteract the supposed finality of ICSID arbitral awards.

During the proceedings, the applicant never argued that the tribunal had failed to apply ILC Art. 25 as ground for annulment, and yet, this was the principal ground cited by the committee for its annulment pursuant to Art. 52 (1) (b).

[132] Schreuer (note 12) 938–43, on the manifest nature of excess of powers.

[133] So far, the *Enron* committee is the only one to see a 'manifest excess of powers' in the fact that the original tribunal examined ILC Art. 25 with reference to the evidence and arguments brought before it. In addition, the *Sempra* committee stands alone in considering a tribunal's discussion of BIT Art. XI as non-application of the latter.

[134] Smith and Rubino (note 100).

[135] In particular to the extent that the recent annulments demonstrated a greater receptivity to the host State's arguments in favor of its right to regulate via 'emergency', 'this casts doubt on the original expectation that resort to investor-State dispute settlement would "depoliticize" such disputes – and the ensuing law'; cf. J.E. Alvarez 'More on the Transparency of the International Investment Regime' (27 September 2010) <http://opiniojuris.org/2010/09/27/my-summer-vacation-part-ii-more-on-the-transparency-of-the-international-investment-regime/> (7 June 2011).

Reforms approaching this particular weakness are therefore a worthwhile undertaking in order to achieve enhanced consistency of the ICSID case law and to strengthen the regime as a whole in the competition of systems.

IV. Overview of Reform Proposals

The proper and coherent functioning of the Art. 52 (1) annulment device is a crucial factor in forthcoming decisions of whether to choose ICSID or UNCITRAL as the arbitration mechanism for investment disputes. Accordingly, the overzealous activities of the latest annulment committees are likely to impair the ICSID regime's attractiveness. They significantly lengthen proceedings and stand in tension with the demand to preserve finality as one of the virtues of ICSID investment arbitration, which is known for not going through the jurisdictional levels of comparable domestic litigation. In total, they risk undermining the general confidence in the supposed efficiency and reliability of the Washington Center. Aiming to counteract the *ad hoc* committees' second-guessing of the tribunals' interpretation of facts and of law and to support consistency of annulment awards, repeated calls for reform[136] of the ICSID annulment regime have become louder.

1. Reform Approaches requiring Amendment of the ICSID Convention

One remedy to control the problems created by *Klöcker I* and *Amco I*, which have now recurred in *Sempra* and *Enron*, is the creation of a standing body of jurists – in opposition to *ad hoc* panels – as a permanent review institution.[137] Such a facility could eliminate the volatile and

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[136] The following only provides an overview of the mostly discussed reform proposals. Various further approaches have been developed in specialist literature, as e.g. a party consultation as informal procedure before appointing an annulment committee in order to keep up the characteristic of a party-appointed arbitration system, or the option to submit ICSID disputes to the International Court of Justice in order to seek for an advisory opinion. Cf. Reisman (note 52) paras 787–807.

[137] Schreuer (note 12) 1034, with further references; cf. also A. Bjorklund 'The Continuing Appeal of Annulment, Lessons from Amco Asia and CME' in

discontinuous character of the current annulment committees, which are, by definition, composed for each single request for annulment. They are therefore not capable of exercising a kind of control that develops and applies precisely defined standards with the objective to establish predictable, coherent and conclusive investment treaty jurisprudence.[138] Hence, apart from various problems related to its implementation,[139] a permanent annulment body could provide for 'consistent case law through consistent committees'.[140]

Another way to attain the objective of mitigating the deficiencies of annulment jurisprudence would be to express the exclusivity of the annulment grounds by inserting the term 'only' in Art. 52 (1) and by specifying in Art. 53 (3) that an annulment of an award is only permitted in case of 'a material violation and not in case of a technical discrepancy'.[141] As a consequence, the annulment remedy would be unavailable for an inclusive interpretation by reference to other parts of the Convention.[142] Moreover, it would no longer be available upon the mere ostensible applicability of one of the specified grounds for annulment, but, in addition, would require its substantial impact upon the parties

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T. Grierson-Weiler (ed.) *International Investment Law and Arbitration* (Cameron May London 2005) 512; Reisman (note 52) 804–05; T. Wälde 'Improving the Mechanisms for Treaty Negotiation and Investment Disputes' in K. Sauvant (ed.) *Yearbook of International Law & Policy 2008–2009* (OUP New York 2008/09) 549.

138 E. Gaillard 'CIDRI Chronique des Sentences Arbitrales' (1987) 114 Journal du Droit International 135 (190–91).

139 The downside of this proposal is its practical implementation: Besides the need of an amendment of the ICSID Convention (see below, section IV. 2., note 154) and the determination of the number of permanent review panels as well as their quantitative composition, there is also the question of whether arbitrators sitting on such panel should be excluded from acting as 'first instance' arbitrators. Cf. G. Kaufmann-Kohler 'In Search of Transparency and Consistency: ICSID Reform Proposal' (2005) 2 Transnational Dispute Management 1 (5–6).

140 A. Broches 'Observations on the Finality of ICSID Awards' (1991) 6 ICSID Rev/FILJ 321 (373).

141 J. Clapham 'Finality of Investor State Arbitral Awards: Has the Tide turned and is there Need for Reform?' (2009) 26 JIntlArb 459.

142 Cf. Reisman (note 52) 788–92, 806, who contrasts the exclusivity of annulment grounds in Art. 52 (1) with the *Klöckner I* committees ruling, which opted for such inclusive interpretation.

with respect to the outcome of the case.[143] In spite of the problems connected to the practical implementation of this reform proposal,[144] it could be an effective way to prevent *ad hoc* panels from acting like higher courts, which use to reprimand tribunals for perceived legal errors.[145]

The most prominent in this category of reform proposals to mitigate the deficiencies of the Washington Center's annulment jurisprudence pleads for a widening of the scope of review beyond the narrow annulment grounds listed in Art. 52.[146] Hence, it implies a fundamental modification of the current review system. The concrete idea behind this rather abstract objective is the creation of an appellate body under the auspices of the ICSID, whose main functions are to ensure the correctness of a particular decision and the consistency of the decisions in the context of the overall system.[147] As to this approach, the ICSID itself has released a discussion paper[148] in 2004. Its proposal of an appeals mechanism, to which the disputing parties could agree to refer any post-award challenge, caused heated debates[149] with respect to the

[143] C. Schreuer 'Revising the System of Review of Investment Awards' (2009) <http://www.univie.ac.at/intlaw/wordpress/pdf/99_rev_invest_awards.pdf> (12 February 2011) 3–4.

[144] See below, Section IV. 2., note 154.

[145] Schreuer (note 143) 3.

[146] Ibid. 2.

[147] Ibid.

[148] ICSID Discussion Paper 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement 14> (12 February 2011).

[149] Schreuer (note 12) 1034, with further references, *inter alia* Bjorklund (note 137) 510; C. Tams 'Is There a Need for an ICSID Appellate Structure' in Hofmann and Tams (note 25) 223; T. Walsh 'Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?' (2006) 24 BerkeleyJIL 444 (454–60).

For reasoned opinions, cf. B. Legum and J. Paulsson in opposition, and S.D. Franck and G. Van Harten in support of an appellate body: B. Legum 'Options to Establish an Appellate Mechanism for Investment Disputes' in K. Sauvant (ed.) *Appeals Mechanism in International Investment Disputes* (OUP New York 2008) 231; J. Paulsson 'Avoiding Unintended Consequences' in Sauvant (ed.) ibid. 241; S.D. Franck 'ICSID Institutional Reform: The Evolution of Dispute Resolution and the Role of Structural Safeguards' in A. Fijalkowski

pros[150] and cons[151] of such permanent review institution. Albeit being temporarily off the agenda,[152] these discussions are still ongoing.[153]

When it comes to their implementation *in concreto*, all of the above reform models would, sooner or later, require amendments to the Washington Convention, which is known to be extremely difficult to achieve.[154] They are hence not very promising.[155]

2. Reform Approaches based on the *Status Quo* of the ICSID Convention

An alternative approach to promote finality of ICSID awards without such obligatory modifications of the Convention involves the issuing of

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(ed.) *International Institutional Reform: Proceedings of the Hague Joint Conference on Contemporary Issues in International Law* (TMC Asser Press The Hague 2007) 268; G. van Harten 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection' (2005) 12 Review of International Political Economy 600.

[150] Pro-arguments refer to e.g. the improvement of consistency and correctness of ICSID jurisprudence, or the enhancement of authority and legitimacy of investment awards. Cf. Tams (note 149) 231–46.

[151] Contra-arguments encompass e.g. the already existing, narrowly limited review option in Art. 52 (1) and the exclusion of any other form of review remedy in Art. 53 (1), or the increase of the amount of time lapsed and cost generated in a two-tiered system. Cf. Tams (note 149) 224–31.

[152] The result of the ICSID Secretariat's consultation process with member States, private investors, NGOs, scholars and others to gather their views on such appeals mechanism was that 'it would be premature to attempt to establish such an ICSID mechanism at this stage', cf. ICSID Secretariat 'Suggested Changes to the ICSID Rules and Regulations' (12 May 2005) 3 <http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf> (31 October 2010).

[153] Cf. Tams (note 149) 224, who stresses that 'the debate about an ICSID appellate system is not over', but also admits that 'much more time is needed properly to evaluate the pros and cons of an appellate structure'.

[154] Pursuant to Arts 65 and 66, an amendment of the Convention requires the acceptance of a two-thirds majority of the membership of the Council. If this majority is given, the proposed amendment will be circulated for ratification, acceptance or approval by all 147 current contracting States (status as of June 2011).

[155] Schreuer (note 12) 1034.

an interpretive note[156] by the Administrative Council, which would refer to Art. 52 (1). This comprehensive paper, based upon the history of and the case law so far generated under the Convention,[157] should confirm the general principles of annulment proceedings established to date[158] and also set out an interpretation of each of the annulment grounds listed.[159] What would be problematic in this regard is the unlikeliness that an interpretive note would be treated as having binding effect on *ad hoc* committees, given that the ICSID Convention does not assign any binding effect to such notes[160] and given that the Vienna Convention will hardly require an *ad hoc* committee to follow an interpretation of this nature.[161] Yet, it can be expected that *ad hoc* committees would pay a certain degree of deference to such note when applying Art. 52.[162]

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156 Clapham (note 141) 464; Delaume (note 30) 32.

157 The interpretive approach could also be of law comparative nature, taking into account the interpretation of comparable grounds for setting aside an award in the UNCITRAL Model Law as well as in most modern domestic legislations.

158 These basic principles could encompass that (i) awards should only be annulled for fundamental jurisdictional error, (ii) Art. 52 (1) lists exclusive annulment grounds, (iii) Art. 52 (1) does not allow a review on the merits, (iv) *ad hoc* committees have discretion of whether to annul an award where an annulment ground has been established, (v) in case of partial awards, subsequent tribunals shall not reconsider any finding of law or fact that has not been nullified. Cf. Clapham (note 141) 464; Reisman (note 52) 806.

159 For instance, with respect to the manifest-excess-of-powers ground in Art. 52 (1) (b), the note could provide that the two main categories of this annulment ground concern the tribunals jurisdiction and the failure to apply the proper law and then could proceed to explain further details. In addition, it could point out that the term 'manifest' does not necessarily indicate the gravity of an excess of powers, but that it rather relates to the ease of its perception. Cf. Schreuer (note 12) 937–77.

160 In contrast, the NAFTA foresees a binding effect for an interpretive note issued by the Free Trade Commission. Cf. Clapham (note 141) 464.

161 The Vienna Convention on the Law of Treaties in Art. 31 (3) (a) provides that 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' shall be taken into account when interpreting the treaty. Nevertheless, it is improbable that the members of the ICSID Administrative Council would be regarded as being able to make such kind of agreement on behalf of a State party. Cf. Clapham (note 141) 464.

162 Clapham (note 141) 465.

Another reform proposal without need to amend the Convention suggests a waiver of Art. 52 (1) procedures to be adopted by the parties to an investment agreement even before an award has been rendered, except for issues of public order like fraud or corruption, which are not at the parties' disposal.[163] However, it is doubtful whether advance waivers, be it in total or to a specific extent, are permissible at all in the light of a literal, systematic, and teleological interpretation of the Convention.[164] In any case, by doing so, the parties would accept to lose the minimum of safeguards provided by the ICSID regime, which excludes any recourse to external review. As it is impossible to predict to whose benefit such waivers – if effective – will operate, a party might ultimately pay a high price in order to preserve the finality of an arbitral award.[165]

Finally, a recently discussed method envisages avoiding inconsistent arbitral awards even before they are rendered through preventive action, thereby obviating a potential need of review. The *ex-ante* approach of a preliminary rulings structure has been developed along the lines of European Community law.[166] It proposes to create a right vested in the parties to request the arbitral tribunal to suspend its proceedings and to submit fundamental legal questions[167] in dispute to an authoritative body established for that purpose. That body would then issue an opinion on that question of law, which could be of binding or merely recommendatory character.[168] Such reference system would not subject ICSID awards 'to any appeal' and would thus not conflict with Art. 53. For that reason, it could also be created without amendments to the

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163 Reisman (note 52) 805. Cf. also Broches (note 140) 374; G. Delaume 'Reflections on the Effectiveness of International Arbitral Awards' (1995) 12 JIntlArb 5; ibid. (note 30) 33–34.

164 Schreuer (note 12) 920.

165 Reed, Paulsson and Blackaby (note 31) 104.

166 Cf. Art. 267 of the Treaty on the Functioning of the European Union (TFEU, Consolidated Version, OJ C 083/164, 3 March 2010), which is the ex Art. 234 of the Treaty Establishing the European Community (TEC, Consolidated Version, OJ C 321E/147, 29 December 2006).

167 Such kind of question should be concerned with a fundamental issue of international investment law, e.g. with issues that have been ruled on by previous tribunals with differing outcomes or that induce the competent tribunal to depart from a 'precedent'. Cf. Schreuer (note 143) 5.

168 C. Schreuer 'Preliminary Rulings in Investment Arbitration' in Sauvant (note 149) 212.

Convention.[169] Despite the considerable advantages of this idea,[170] there are still plenty of problems tied to its legal repercussions and its practical implementation, which need to be resolved.[171]

In summary, there is not yet a perfect solution with which to tackle the deficiencies of the ICSID annulment mechanism. Most of the reform approaches should be analyzed with caution, as 'the cure could be worse than the disease'.[172] Whatever tool of repair will be chosen, the basic policies of the ICSID control system should be considered thoroughly[173] during the process of shaping and implementation. It should always be kept in mind that the main purpose of control is to maintain the vitality and integrity of the arbitral proceedings and to ensure that awards are fair and consistent.[174] Only if supervision is understood as a functional one at a minimum level to guard against an outrageous miscarriage of justice, so to speak as a *garde-fou*,[175] ICSID investment arbitration will preserve the characteristics it is famous for, namely an efficient, proficient and fair dispute resolution mechanism, which provides justice to the parties and fosters economic prosperity.[176] In addition, a proper functioning of the ICSID review system could slow down the recent minor trend of defections to alternative forms of arbitration.[177]

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169 A preliminary rulings mechanism could be established through a decision of the ICSID Administrative Council pursuant to Art. 6, or through an additional protocol to the ICSID Convention. Cf. Schreuer (note 143) 6.

170 Pro-arguments refer to e.g. the furtherance of finality of arbitral awards, the avoidance of costly and time consuming review proceedings, or the harmonization of annulment jurisprudence without depriving the tribunals of their basic competence to adjudicate submitted cases. Cf. Schreuer (note 168) 211–12.

171 Contra-arguments encompass e.g. the difficulties in determining the types of question to be submitted, the composition of the competent institution, the scope of its analysis, or the effect of its rulings. Cf. Schreuer (note 168) 212; Tams (note 149) 249.

172 Legum (note 149) 231.

173 Reisman (note 52) 787.

174 Ibid.

175 Craig (note 58) 208.

176 Reisman (note 52) 788.

177 D. Caron's comment on *Sempra* in: T. Toulson 'ICSID Committee annuls Argentina Award' (2 July 2010) <http://globalarbitrationreview.com> (7 June 2011).

V. Conclusion

Even if it is disputed whether one can speak of a systemic crisis of the Washington Center,[178] there is little doubt that the ICSID regime as a whole and its annulment mechanism in particular[179] face remarkable challenges. The controversies and criticism surrounding the system stress both procedural and substantive weak points[180] and indicate that ICSID investment arbitration, as currently practiced, no longer lives up to the expectations of the international community.[181] Hence, there is a strong need to explore possible solutions for improvement. Effective reforms curing the present deficiencies are of enormous importance in preserving ICSID's attractiveness in comparison to alternative forms of investment arbitration. Of course, this is not to say that these competing regimes are free of considerable shortfalls.[182] In fact, they are similarly demanding of improvement.[183]

However, if ICSID wants to maintain its place as the leading jurisdiction of international investment dispute settlement,[184] it needs to be ahead of its competition. Such ongoing success of the ICSID regime is of special interest because it has been tailor-made for the settlement of investor-State disputes and their semi-pubic nature.[185] Its body of rules

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178 M. Waibel et al. 'The Backlash against Investment Arbitration, Perceptions and Reality' in M. Waibel (note 2) x1viii, with further elaboration on the points of criticism in detail.

179 A. Parra 'ICSID and the Rise of BITs: Will ICISD be the Leading Arbitration Institution in the Early 21st Century?' (2000) 94 ASIL Proceedings 41.

180 Waibel et al. (note 178) xxxix.

181 Ibid. x1viii.

182 One frequently discussed aspect within the system of commercial arbitration is the scope and possible interpretation of the 'public policy' ground for setting aside an award during review by a domestic court. This ground is contained in the UNCITRAL Model Law on International Commercial Arbitration (1985), Art. 34 II (b) (ii), and in the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Art. V II (b). Cf. J.-P. Beraudo 'Egregious Error of Law as Grounds for Setting Aside an Arbitral Award' (2006) 23 JIntlArb 351.

183 For instance, the release of the new UNCITRAL Arbitration Rules in 2010 reflects that this set of rules previously contained a range of deficiencies and that, in all likeliness, it still has not reached a state of perfection.

184 Parra (note 179) 42.

185 ICSID Convention, Preamble.

is structured to meet most closely the interests of all parties involved. In addition it has set out as one of its primary goals the need to foster a beneficial climate for private international investment,[186] – a cornerstone for global economic development.

[186] Ibid.

New Challenges for the ICSID Annulment System: Another Private-Public Problem in the International Investment Dispute Settlement

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I. Introduction

Under the ICSID annulment system, 43 requests for annulment have been registered as of 15 February 2011. Among these, 6 proceedings were discontinued, 26 decisions were rendered by *ad hoc* committees and 11 cases are pending.[1] *Ad hoc* committees, established under Art. 52 of the ICSID Convention[2] to examine requests for annulment, are quite 'active' in the sense that in 12 cases out of 26 cases decided so far, the original awards were annulled either entirely or partially.[3]

Not only active, the ICSID annulment system seems now embarking also on a new phase, following Christoph Schreuer's celebrated 'three generations'.[4] In particular, *Mitchell v. Congo* (2006), *CMS v. Argentina* (2007), *MHS v. Malaysia* (2009), *Sempra v. Argentina* (2010) and *Enron v. Argentina* (2010) raise a new problem – or revive an old problem which was believed to have been solved for good – with which *ad hoc*

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[1] Information available on the ICSID's website <http://icsid.worldbank.org/> (20 April 2011).

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

[3] Three out of 26 annulment decisions have not been made publicly available yet: *Consortium R.F.C.C. v. Kingdom of Morocco (Decision of 18 January 2006)* ICSID Case No. ARB/00/6 [hereafter *RFCC v. Morocco*]; *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic (Decision of 11 May 2010)* ICSID Case No. ARB/04/5 [hereafter *CECFT v. Gabon*]; *Fraport v. Philippines (Decision of 23 December 2010)* ICSID Case No. ARB/03/25. It is however reported that the *ad hoc* committees rejected the request for annulment in the first two cases, while it annulled the original award in the last case. See D. Vis-Dunbar 'ICSID Committee Rejects Request for Annulment in R.F.C.C. v. Morocco' (29 March 2006) Investment Treaty News <http://www.iisd.org/pdf/2006/itn_mar29_2006.pdf> (10 June 2011); J. Hepburn 'In an Unpublished ICSID Annulment Decision Upholding Railway Consortium Victory over Republic of Gabon, Committee Discusses Complex Issues of Nationality and Control' (4 November 2010) Investment Arbitration Reporter Vol. 3 No. 17 <http://www.iareporter.com/categories/20100326_2> (10 June 2011); N.R. Melican and A.M.G. Roa 'Gov't to Look at German Firm's Proposal' (5 January 2011) Business World (on *Fraport v. Philippines*) [available on Lexis/Nexis].

[4] C. Schreuer 'Three Generations of ICSID Annulment Proceedings' in E. Gaillard and Y. Banifatemi (eds) *Annulment of ICSID Awards* (Juris Publishing Huntington 2004) 17.

committees are more and more often faced: how to deal with the original award whose interpretation of the applicable treaty is, to the committee's eyes, patently wrong.

It is well known that the ICSID annulment system experienced some initial failure. The decisions of *ad hoc* committees in *Klöckner I* (1985) and *Amco I* (1986) were sharply criticized for practically undertaking a *révision au fond* and thus overstepping the limit inherent to the annulment procedure, which is not an appeal. This initial failure was however rapidly redressed and subsequent *ad hoc* committees scrupulously respected the distinction between a non-application and misapplication of the applicable law by the original arbitral tribunal: the former would entail the annulment of the award for an *excès de pouvoir*, while the latter would not.

The recent resurgence of *ad hoc* committee decisions exercising *de facto révision au fond* needs to be understood in light of this past experience. We will thus begin with a brief account of the original design and the past experience of the ICSID annulment system (II.) before entering into an analysis of the recent evolution (III.).

II. An Inherently Imperfect System

The ICSID annulment system was designed not to be an appellate procedure (1.). Although the recent evolution of international investment law stirred up considerable interest in the creation of such a procedure, no court of appeals will be established in the foreseeable future (2.).

1. The Original Design

a. Why révision au fond *Was Rejected: Finality of Awards*

Since the *travaux préparatoires* of the ICSID Convention have been already extensively examined by a number of authors,[5] a brief account is sufficient for the purpose of the present study.

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[5] See e.g. C. Schreuer et al. *The ICSID Convention: A Commentary* (2nd edn. CUP Cambridge 2009) 890–1095 ('Art. 52') especially 937–38 paras 130–33.

The Preliminary Draft, submitted by the staff of the World Bank to the Consultative Meeting of Legal Experts in 1963, provided in its Art. IV, Section 13, as follows:

> 'Section 13. (1) The validity of an award may be challenged by either party on one or more of the following grounds:
>
> (a) that the Tribunal has exceeded its powers […]'.[6]

A member of the Consultative Meeting suggested that the clause 'the tribunal exceeded its powers' could be improved if the words 'including failure to apply the proper law' were added. According to the member, '[A]s the parties were entitled to agree on the applicable law, failure of the tribunal to apply that law would frustrate that agreement'.[7] The Chairman replied that in such a case 'the award could be properly challenged on the ground that the arbitrators had gone against the terms of the compromis'.[8] Since no further argument was made in this regard, it seems that there was a consensus in the meeting that the failure to apply the proper law could constitute an *excès de pouvoir* as provided in the Preliminary Draft.

On the other hand, it was made clear during the debate in the meeting that a mistake in the interpretation or application of the applicable law would not constitute an *excès de pouvoir*. When the Legal Committee examined the Draft Convention,[9] whose Art. 55 (1) basically corresponds to Art. 52 (1) of the ICSID Convention,[10] a member suggested to add a provision making annulment possible on the grounds of an error in the application of the proper law by the Tribunal. This sugges-

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[6] 'Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States' Doc. No. COM/AF/WH/EU/AS/1 (15 October 1963) in ICSID *Documents Concerning the Origin and the Formulation of the Convention* Vol. II Part. 1 (ICSID Washington 1968) 184, 217 [hereafter *Documents*].

[7] Mr. Tsai (China) *Documents* Vol. II Part. 1, 517.

[8] The Chairman (A. Broches) ibid. 518. *See also* Mr. Ghanem (Lebanon) ibid.

[9] 'Draft Convention on the Settlement of Investment Disputes between States and Nationals of Other States' Doc. No. Z 12 (11 September 1964) *Documents* Vol. II Part 1, 610.

[10] Art. 55 (1) (e) of the Draft Convention was drafted in a language slightly different from that of today's Art. 55 (1) (e). *Documents* Vol. II Part 1, 635. The difference is, however, not material to the present study.

tion, criticized by several members for endangering the finality of arbitral awards,[11] was rejected by a majority.[12]

Despite this clear record in the *travaux préparatoires* of the Convention, the ICSID annulment system experienced some initial failure. We do not need to go into details of the *ad hoc* committees' decisions belonging to Schreuer's 'first generation'[13]: it is sufficient here to recall that these *ad hoc* committees, which were almost unanimously[14] criticized for exercising a *révision au fond*,[15] nevertheless recognized, at least in theory, that '[i]l est clair que l'*error in judicando*' [l'application erronée du droit] ne saurait être admise comme une cause de nullité, sous peine de réintroduire indirectement l'appel contre les sentences arbitrales'.[16] There thus existed, from the very beginning of the ICSID's activities, a solid consensus that an erroneous application of the applicable

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[11] Mr. Burrows (United Kingdom): '[I]t would be unfortunate to open endless possibilities for one party to frustrate or delay the proceedings' *Documents* Vol. II Part 2, 852. *See also* Mr. van Santen (Netherlands) ibid.; Mr. Tsai (China) *Documents* Vol. II Part 1, 518.

[12] *Documents* Vol. II Part 2, 853–54.

[13] Schreuer (note 4) 17.

[14] The *ad hoc* committee decisions in *Klöckner I* and *Amco I* however found a defence, though isolated, in a no less prominent authority than Aron Broches, who had chaired the drafting process of the ICSID Convention. A. Broches 'Observation on the Finality of ICSID Awards' (1991) 6 ICSID Rev./FILJ 321 (360–69); A. Broches 'On the Finality of Awards: A Reply to Michael Reisman' (1993) 8 ICSID Rev./FILJ 92.

[15] This criticism applies particularly to the annulment decision in *Amco v. Indonesia (Decision on Annulment of 16 May 1986)* ICSID Case No. ARB/81/1. Among many others, E. Gaillard *La jurisprudence du CIRDI* (Pedone Paris 2004) 195–96; M.B. Feldman 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards' (1987) 2 ICSID Rev./FILJ 85 (102); T. de Berranger 'L'article 52 de la Convention de Washington du 18 mars 1965 et les premiers enseignements de sa pratique' (1988) Revue de l'arbitrage 93 (112) ; G.R. Delaume 'The Finality of Arbitration Involving States: Recent Developments' (1989) 5 Arbitration International 21 (31–32); W.M. Reisman 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) DukeLJ 739 (785–87); J. Paulsson 'ICSID's Achievements and Prospects' (1991) 6 ICSID Rev./FILJ 380 (389–90).

[16] *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon (Decision on Annulment of 3 May 1985)* ICSID Case No. ARB/81/2 [hereafter *Klöckner I*] in E. Gaillard (see note 15) 166 para. 61; *Amco v. Indonesia* (note 15) para. 23.

law by the tribunal would not constitute an *excès de pouvoir* of the tribunal and therefore would not result in an annulment of the award.

b. Why the Finality of the Award Prevails over the Correct Application of Law: An Essentially Private 'Depoliticized' System

One may however be tempted to say that no arbitral tribunal is vested with the power to wrongly apply relevant rules and that a wrong application necessarily constitutes an *excès de pouvoir*: 'no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction'.[17] Why, then, an overwhelming majority of opinions consider that a wrong application of the applicable law does not constitute an *excès de pouvoir*?

It is in fact not a literal interpretation of Art. 52 (1) (b) of the ICSID Convention that leads most of the authors to this conclusion. It is generally considered that, in addition to the aforementioned *travaux préparatoires* of the ICSID Convention, a balancing of interests between the finality of awards and the correct application of law is decisive: if an erroneous application of legal rules is to be considered to amount to an *excès de pouvoir*, 'then possible annulments of ICSID awards will be unlimited'.[18]

The question to be asked is, therefore, why the finality of the award prevails over the correct application of law. In this respect, it is interesting to find that those who consider that an erroneous application of the applicable law does not constitute an *excès de pouvoir* frequently refer to the doctrine and domestic jurisprudence dealing with the annulment of awards in international commercial arbitration.[19] As regards this branch of arbitration, it is often stated that '[l]'exclusion de l'appel proprement dit, qui permettrait à la cour d'appel de connaître du fond du

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[17] *Pearlman v. Harrow School (C.A.)* [1979] 1 QB 56, 70 [Lord Denning]. Note that no question of international investment law was dealt with in this case.

[18] B. Pirrwitz 'Annulment of Arbitral Awards under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1988) 23 TexasJIL 73 (109).

[19] Ibid. 103–07. See also de Berranger (note 15) 113–14.

litige, allait de soi en matière [d'arbitrage commercial international]'.[20] The choice of arbitration by the parties to the dispute will indeed become meaningless if domestic courts, i.e. judges not selected by the parties, have the power to review the arbitral award.[21] Another reason to deny the *révision au fond* by domestic courts is the difficult conceivability of 'wrong' award in international commercial arbitration due to the broad leeway that arbitrators enjoy in interpreting and applying the applicable law: 'What seems rational for the international arbitrators who are familiar with the underlying economic interest of a particular highly specialized branch of trade or international commerce might seem irrational for the judge'.[22]

However, if the principle is well established, there are exceptions as always. In England, a party may appeal an arbitral award on a point of law under the conditions set forth by Section 69 of the Arbitration Act of 1996.[23] The appeal cannot be brought unless the court grants leave to appeal, which the court should grant if 'the question is one of general public importance and the decision of the tribunal is at least open to serious doubt'.[24] In Switzerland, although the Swiss *Loi fédérale sur le droit international privé* of 1987 does not have similar provisions, the Federal Tribunal recognizes the possibility that 'une erreur de droit manifeste' signifies 'une incompatibilité avec l'ordre public' which leads the Tribunal to review the original award under Art. 190 of the *Loi*.[25]

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[20] P. Fouchard et al. *Traité de l'arbitrage commercial international* (Litec Paris 1996) 930.

[21] 'La reconnaissance de l'efficacité de la convention d'arbitrage n'aurait en effet aucun sens si le litige devait nécessairement trouver son épilogue devant les juridictions étatiques', ibid.

[22] K.P. Berger *International Economic Arbitration* (Kluwer Deventer 1993) 679–80. *See also* domestic judgments refusing to set aside an arbitral award for errors of law, quoted by Berger, ibid. 678 n. 187.

[23] Available at <http://www.legislation.gov.uk/ukpga/1996/23/contents> (20 April 2011).

[24] Section 69 (3) (c) (ii). Therefore, the English court does not have any power to grant leave appeal if no question of the law of England arises out of the challenged arbitral award. *Reliance Industries Ltd v. Enron Oil and Gas India Ltd* [2002] 1 All ER (Comm) 59 para. 33.

[25] *Rhône-Poulenc Rorer Pharmaceuticals c. Roche Diagnostic Corporation (17 février 2000)* Tribunal fédéral, I[ère] Cour civile (2002) 12 RSDIE 584–85. Art. 190 (2) (e) provides that the arbitral award may be challenged 'lorsque la sentence est incompatible avec l'ordre public'.

The rationale for the possible review by domestic courts recognized by the English Act and the Swiss Federal Tribunal[26] is clear enough: they try 'to strike a balance between the need for finality in the arbitral process and the wider public interest in some measure of judicial control, if only to ensure consistency of decisions and predictability of the operation of the law'.[27]

This suggests that the original design of the ICSID annulment system, in which the *ad hoc* committee has no power of *révision au fond*, presupposes the essentially private character of the investor-State dispute settlement before ICSID tribunals. When ICSID was established in 1965, it was supposed to settle disputes between an investor and a host State arising from contracts concluded between them.[28] Each arbitral award dealing with a contract or a set of contracts particular to the dispute, issues 'of general public importance' or relating to 'l'ordre public' seldom arise and there was no need to ensure consistency of decisions. As is well known, this situation would be drastically modified when treaty-based arbitration became the norm in the late 1990s.

2. Improbable Restructuring

a. Necessary Appeal: Legitimacy Debate and Unsuited Annulment System

The generalization of treaty-based arbitration radically altered the landscape of international investment law. An investor is now qualified to institute an arbitration against the host State without an arbitration clause included in a contract that he/she concluded with the host State,

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[26] Some US court decisions consider that a 'manifest disregard of the law' by the arbitral tribunal may form the basis of a challenge to the award. See *Stolt-Nielsen v. AnimalFeeds International Corp* (2nd Cir. 2008) 548 F. 3d 85. However, it is not clear whether 'manifest disregard' still is a ground for set aside under US law. See *Hall Street Associates LLC v. Mattel Inc.* (2008) 552 U.S. 576. See also T. Várady et al. *International Commercial Arbitration: A Transnational Perspective* (West St. Paul 2009) 821.

[27] N. Blackaby and C. Partasides *Redfern and Hunter on International Arbitration* (5th edn. OUP Oxford 2009) 607.

[28] I. Fadlallah 'La distinction treaty claims – contract claims et la compétence de l'arbitre CIRDI' in C. Leben (ed.) *Le contentieux arbitral transnational relatif à l'investissement* (LGDJ Paris 2006) 205 (211).

provided that his/her mother State and the host State have concluded a treaty stipulating such a possibility.[29] It resulted in a large number of arbitration cases brought by an investor against the host State. While, according to publicly available information, less than five cases were brought to arbitration every year until 1995, more than 30 arbitrations are instituted every year since 2002.[30] The increase in the number of arbitrations, together with a lack of co-ordination mechanism among mutually independent arbitral tribunals, resulted in various inconsistent arbitral findings. The most conspicuous examples, among others, are the definition of investment[31], the scope of the obligations observance ('umbrella') clause,[32] the applicability of the most-favoured-nation treatment to the dispute settlement clause,[33] the conditions of the state of necessity under customary international law[34] and the relationship between the national security clause contained in investment treaties and the state of necessity under customary international law.[35]

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[29] For early studies indicating potential impacts of treaty-based investment arbitration, see G. Burdeau 'Nouvelle perspectives pour l'arbitrage dans le contentieux économique intéressant les Etats' (1995) Revue de l'arbitrage 3 (13–14); J. Paulsson 'Arbitration without Privity' (1995) 10 ICSID Rev./FILJ 232 (236–41).

[30] UNCTAD 'Investor-State Dispute Settlement and Impact on Investment Rulemaking' (2007) UN Doc. UNCTAD/ITE/IIA/2007/3, 7; UNCTAD 'Latest Developments in Investor-State Dispute Settlement' (2010) 1 IIA Issues Note, UN Doc. UNCTAD/WEB/DIAE/IA/2010/3, 3.

[31] See W. Ben Hamida 'La notion d'investissement: le chaos s'amplifie devant le CIRDI' (2009) Gazette du Palais (Doctrine 3615–21).

[32] See S.W. Schill 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (2008) 9 IILJ Working Paper 1.

[33] See S.W. Schill *The Multilateralization of International Investment Law* (CUP Cambridge 2009) 151–96.

[34] See M. Raux 'Les circonstances excluant l'illicéité dans le cadre du contentieux investisseurs-Etats' 14 au 16 décembre 2008 Gazette du Palais 41 (41–47).

[35] See W.W. Burke White and A. von Staden 'Non-precluded Measures Provisions, the State of Necessity, and the State Liability for Investor Harms in Exceptional Circumstances' in M.H. Mourra and T.E. Carbonneau *Latin American Investment Treaty Arbitration* (Kluwer Alphen aan den Rijn 2008) 105–62.

Some of these inconsistencies may be explained by the co-existence of literally thousands of international investment agreements (IIAs).[36] A same measure taken by the host State may well constitute an indirect expropriation under an IIA without falling into such a category according to another IIA.[37] However, inconsistent arbitral 'jurisprudence' produces serious problems when it relates to an identical rule. For example, certain tribunals and *ad hoc* committees consider that 'investment' under Art. 25 (1) of the ICSID Convention covers only those which contribute to the economic development of the host State,[38] while others find that no such condition exists for the definition of investment under the same article.[39] In addition, many IIAs contain similar, if not identical, norms. Arbitral tribunals, when asked to interpret an article of the applicable IIA, are more than inclined to take into account awards rendered by other tribunals on the basis of a similar article stipulated in a different IIA. The evolution of the arbitral jurisprudence on the fair and equitable treatment[40] is the best evidence for this.[41]

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[36] According to UNCTAD, the total number of bilateral investment treaties rises to 2,679 at the end of 2008. UNCTAD 'Recent Developments in International Investment Agreements (2008-June 2009)' (2009) 3 IIA Monitor, UN Doc. UNCTAD/WEB/DIAE/IA/2009/8, 1.

[37] The diametrically opposite conclusions arrived at by *CME* and *Lauder* tribunals concerning disputes arising from the same facts (*Lauder v. Czech Republic [Award of 3 September 2001]* [2006] 9 ICSID Rep. 66; *CME v. Czech Republic [Partial Award of 13 September 2001]* [2006] 9 ICSID Rep. 121; *CME v. Czech Republic [Final Award of 14 March 2003]* [2006] 9 ICSID Rep. 264) may be explained by different wordings adopted by relevant BITs. S. Manciaux *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats* (Litec Paris 2004) 465.

[38] *Patrick Mitchell v. Democratic Republic of Congo (Decision on the Application for Annulment of the Award of 1 November 2006)* ICSID Case No. ARB/99/7 para. 27 [Antonias Dimolitsa (president), Robert S.M. Dossou, Andrea Giardina].

[39] *Malaysian Historical Salvors v. Malaysia (Decision on the Application for Annulment of 16 April 2009)* ICSID Case No. ARB/05/10 para. 80 [Stephen M. Schwebel (president), Mohamed Shahabuddeen (dissenting), Peter Tomka].

[40] See generally I. Tudor *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP Oxford 2008).

[41] In theory, even when there are two IIAs which respectively contain an identically-worded provision, the two 'same' provisions may well be differently interpreted as they are necessarily placed in different contexts. However, arbitral tribunals tend to dispense with a verification whether any difference of con-

If, therefore, inconsistent arbitral jurisprudence persists with regard to identical or similar rules provided in various IIAs, legal certainty and predictability will be heavily compromised and the legitimacy of treaty-based arbitrations will be put into question.[42] The treaty-based system of investment arbitration thus has to find a way to ensure the consistency of arbitral jurisprudence at least to a certain degree.

The legitimacy of treaty-based investment arbitration is also being challenged from another angle. An arbitral tribunal may be requested to examine the conformity with an IIA of a measure taken by the host State in perfect accordance with its domestic law enacted to attain highly public purposes such as environmental protection.[43] Why should three arbitrators, who are selected *ad hoc* by the parties to the dispute but have no constitutional status in the host State, be vested with the power to examine the legality of legislative and/or administrative measures taken for public purposes?[44] This question is apparently more political than legal, since the status of the arbitrators is firmly based on the IIA to which the host State consented. However, unless the arbitral tribunal renders an award 'good' and convincing enough, the legitimacy of the treaty-based investment arbitration will be, here again, put into doubt. A certain system of quality control is thus needed.

In sum, treaty-based investor-State arbitrations take on a public character, while contract-based investor-State arbitrations are relatively private in nature.[45] The experience of international commercial arbitration suggests, as mentioned above, that a certain type of mechanism to pro-

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texts leads to different results. See e.g. *AES Summit Generation Ltd v. Hungary (Award of 23 September 2010)* ICSID Case No. ARB/07/22 paras 9.3.8–9.3.12, referring to several arbitral awards dealing with the fair and equitable clause [Claus Werner von Wobeser (president), Brigitte Stern, J. William Rowley].

42 See S.D. Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham LRev 1521 (1545–46).

43 See generally S. Robert-Cuendet *Droits de l'investisseur étranger et protection de l'environnement* (Nijhoff Leiden 2010).

44 This criticism is often delivered by NGOs which consider that the investor-State arbitration is hardly compatible with democracy. See e.g. Public Citizen 'NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy' (September 2001) especially a section entitled 'NAFTA Corporate Dispute Resolution: Private Enforcement of a Public Treaty' at 6.

45 See G. van Harten 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 ICLQ 371 (374).

ceed to the *révision au fond* of an arbitral award will be needed if the arbitration deals with issues affecting public interests. The ICSID annulment system is, however, regrettably far from sufficient to assume such a role because, as we have seen above, it is supposed not to proceed to a *révision au fond* of the original award. An *ad hoc* committee has no power to annul the original award for the reason that the latter either is not in conformity with the *jurisprudence constante* or wrongly applied the rules of applicable law. It is thus understandable that some States started to advocate an idea for the creation of appeal mechanism in investment arbitration.

b. Unfeasible Appeal: Practical and Institutional Problems

It is in this context that the United States Congress in 2002 passed a law granting the President the power to negotiate a treaty with investment provisions 'providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements'.[46] The 2004 version of the United States model BIT include an annex according to which the parties to the BIT shall consider whether to establish a bilateral appellate body.[47] Several IIAs to which the US is a party in fact include a provision to that effect.[48]

In response to this US initiative, the ICSID Secretariat prepared a discussion paper that proposed an 'ICSID Appeals Facility' in 2004.[49] As

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[46] Section 2102 (b)(3)(G)(iv) of the US Trade Act of 2002, Public Law No. 107–210, 116 Statutes at Large 933 (2002), <http://www.govtrack.us/congress/billtext.xpd?bill=h107-3009> (18 April 2011).

[47] Annex D of the 2004 Model BIT <http://ustraderep.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html> (18 April 2011).

[48] Art. 28 (10) of the US-Uruguay BIT (signed 4 November 2005; entered into force 1 November 2006) <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/Uruguay_BIT.asp> (18 April 2011); Art. 28 (10) of the US-Rwanda BIT <http://ustraderep.gov/Trade_Agreements/BIT/Rwa/Section_Index.html> (18 April 2011). See also Art. 15.19 (10) of the US-Singapore Free Trade Agreement (signed 6 May 2003, entered into force 1 January 2004) <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_007049.asp> (18 April 2011); Art. 10.19 (10) of the US-Chile FTA (signed 6 June 2003, entered into force 1 January 2004) <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000984.asp> (18 April 2011).

[49] ICSID Secretariat 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004).

soon as in 2005, however, the Secretariat decided not to proceed towards the establishment of an ICSID appeal mechanism, in face of opinions considering it premature to establish such a mechanism 'in view of the difficult technical and policy issues raised in the Discussion Paper'.[50] Among various considerations militating against the establishment of an appeal mechanism,[51] the most important seems to be that of the cost. Since arbitral tribunals interpret and apply not only IIAs but also the ICSID Convention and customary international law rules, the appeal mechanism would have to be permanent and accepted all States which are party to IIAs equipped with investor-State arbitration in order to secure consistency of arbitral jurisprudence. It is however unlikely that many States would be interested in such a system which would require a considerable amount of maintenance cost for a permanent court of appeals as well as accumulated legal fees for the appellate procedure.[52] Although heatedly debated for a moment following the ICSID Secretariat's proposal in 2004, the possibility of the establishment of an appeal mechanism is no longer a hot issue,[53] though not totally abandoned.

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[50] ICSID Secretariat 'Suggested Changes to the ICSID Rules and Regulations' (12 May 2005) para. 4.

[51] See K. Yannaca-Small 'Improving the System of Investor-State Dispute Settlement' (2006) 1 OECD Working Papers on International Investment (February 2006) <http://www.oecd.org/dataoecd/3/59/36052284.pdf> (18 April 2011) paras 46–56. For various pros and cons of a possible appeals mechanism, see K.P. Sauvant (ed.) *Appeals Mechanism in International Investment Disputes* (OUP New York 2008).

[52] It is often indicated that claims by smaller investors and defences by developing countries will become financially difficult. See T. Wälde 'Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?' in F. Ortino et al. (eds) *Investment Treaty Law: Current Issues* (British Institute of International and Comparative Law London 2006) vol. 1 135 (140). See also A.H. Qureshi 'An Appellate System in International Investment Arbitration?' in P. Muchlinski et al. (eds) *The Oxford Handbook of International Investment Law* (OUP Oxford 2008) 1154 (1156).

[53] Even an ardent advocate for an Additional Annulment Facility acknowledges that it would take time such a project to gain momentum. J. Clapham 'Finality of Investor-State Arbitral Awards: Has the Tide Turned and Is There a Need for Reform?' (2009) 26 JIntlArb 437 (463).

III. How to Make Most of the Inherently Imperfect System

The unfeasibility of the establishment of an appeal mechanism means that we have to continue to live with the inherently imperfect ICSID annulment system. We need a coherent arbitral jurisprudence of high quality, which the current ICSID annulment system cannot ensure. On the other hand, an appellate mechanism which would ensure coherence and quality is far from feasible and will not be realized in a foreseeable future. It is then only natural that some *ad hoc* tribunals endeavour to adopt 'creative' approaches to cope with the problem within their limited powers (1.). The success of these 'creative' approaches, however, is anything but guaranteed (2.).

1. Treaty Arbitration and Quest for a 'Right' Decision

a. De facto révision au fond *without Annulment*

CMS v. Argentina is one of the long series of arbitrations instituted by investors frustrated by several measures that Argentina adopted to cope with the economic crisis that had erupted towards the end of the 1990s. The claimant complained particularly of the termination of the right granted to it as a licensee of public utilities to adjust tariffs calculated in USD according to the US-PPI.[54] The arbitral tribunal held that Argentina had violated several provisions of the Argentina-US BIT[55] and rejected the respondent State's argument that those violations should be justified by Art. 11 of the BIT (security exception)[56] as well as the state

[54] *CMS* invested in gas transportation industry in Argentina. Argentinean laws and decrees stipulated that tariffs were to be calculated in dollars, conversion to pesos to be effected at the time of billing and tariffs adjusted every six months in accordance with the United States Producer Price Index (US-PPI). *CMS v. Argentina (Award of 12 May 2005)* ICSID Case No. ARB/01/8 (2005) para. 57 [Francisco Orrego Vicuña (president), Marc Lalonde, Francisco Rezek].

[55] Argentina-US Bilateral Investment Treaty (signed 14 November 1991, entered into force 20 October 1994) <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000897.asp> (18 April 2011).

[56] 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests'.

of necessity under customary international law. The tribunal first examined customary international law as reflected in Art. 25[57] of the Articles on State Responsibility[58] and held that requirements to invoke necessity were not met.[59] It then turned to Art. 11 of the BIT.[60] Although the respondent's argument based on this article was not explicitly rejected, it seems that the tribunal, considering that Art. 11 set the same conditions as the state of necessity under customary international law,[61] did reject it because it finally found violations by the respondent of various provisions of the BIT.

The *ad hoc* committee thoroughly reviewed the original award which it considered patently wrong. It first found that the tribunal made 'a manifest error of law' in assimilating the conditions necessary for the implementation of Art. 11 of the BIT to those concerning the existence of the state of necessity under customary international law.[62] It further

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[57] '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity'.

[58] UNGA Res. 56/83 'Responsibility of States for Internationally Wrongful Acts' (12 December 2001) GAOR 56th Session Supp 49 vol. 1, 499.

[59] *CMS v. Argentina* (note 54) para. 331.

[60] The *ad hoc* committee points out that the respondent State's presentation dealt with the defense based on customary law before dealing with the defense drawn from Art. 11 of the BIT. *CMS v. Argentina (Decision on Annulment of 25 September 2007)* ICSID Case No. ARB/01/8 para. 128 [Gilbert Guillaume (president), Nabil Elaraby, James R. Crawford].

[61] Ibid. para. 357.

[62] Ibid. para. 130. For the *ad hoc* committee, Art. 11 of the BIT and the state of necessity under customary international law have a different operation and content. 'Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 [of the Articles

pointed out that the tribunal made 'another error of law' in applying both Art. 11 of the BIT and the state of necessity under customary international law without entering into an analysis of their relationship.[63] 'These two errors made by the Tribunal could have had a decisive impact on the operative part of the Award'.[64] Nevertheless, the *ad hoc* committee declared:

> 'The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers'.[65]

It thus refused to annul the original award on the basis of Art. 52 (1) (b) of the ICSID Convention.[66]

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on State Responsibility] is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations. Furthermore Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. […] In other terms the requirements under Article XI are not the same as those under customary international law as codified by Article 25', ibid. paras 129–30.

63 Ibid. para. 132. According to the *ad hoc* committee, 'if state of necessity means that there has not been even a *prima facie* breach of the BIT, it would be, to use the terminology of the ILC, a primary rule of international law. But this is also the case with Article XI. […] Article XI and Article 25 thus construed would cover the same field and the Tribunal should have applied Article as the *lex specialis* governing the matter and not Article 25. If, on the contrary, state of necessity in customary international law goes to the issue of responsibility, it would be a secondary rule of international law […]. In this case, the Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI'. Ibid. paras 133–34 [footnotes omitted].

64 Ibid. para. 135.

65 Ibid. para. 136.

66 The *ad hoc* committee annulled the tribunal's finding on Art. 2 (2) (c) of the BIT (the 'umbrella' clause) for failure to state reasons (Art. 52 (1) (e) of the ICSID Convention). Ibid. para. 97. This question is out of the scope of the present study.

b. De facto révision au fond *through Annulment*

Enron v. Argentina[67] and *Sempra v. Argentina*[68] arose from essentially the same facts and were brought to arbitration on the basis of the same BIT and for the same grounds as in *CMS v. Argentina*. The *Enron* and *Sempra* tribunals followed basically the identical line of argument to arrive at the same conclusion as did the *CMS* tribunal.[69] When considering the plea of emergency advanced by the respondent State, the *Enron* and *Sempra* tribunal thus first examined whether the requirements of the state of necessity under customary international law were fulfilled and arrived at a negative conclusion.[70] They then proceeded to deal with the plea of emergency under Art. 11 of the Argentina-US BIT.[71] Here, in response to the claimant's arguments criticizing the *CMS* award, the two tribunals entered into an examination of the relationship between the state of necessity under customary international law and Art. 11 of the BIT, and explicitly confirmed what the *CMS* tribunal implied, i.e. the identity of requirements to invoke the two exceptions.[72] Since the requirements of the state of necessity under customary international law had already been held to be unfulfilled, the two tribunals declared that there was no need to undertake a further review under Art. 11 of the BIT.[73]

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67 *Enron v. Argentina (Award of 22 May 2007)* ICSID Case No. ARB/01/3 [Francisco Orrego Vicuña (president), Albert Jan van den Berg, Pierre-Yves Tschanz].

68 *Sempra v. Argentina (Award of 28 September 2007)* ICSID Case No. ARB/02/16 [Francisco Orrego Vicuña (president), Marc Lalonde, Sandra Morelli Rico].

69 It is to be noted that both *Enron* and *Sempra* awards had been rendered before the *CMS ad hoc* committee handed down its decision.

70 *Enron v. Argentina* (note 67) paras 303–13; *Sempra v. Argentina* (note 68) paras 344–55.

71 In *Sempra v. Argentina*, the respondent State again argued the plea of necessity under customary international law before proceeding to the matter of preclusion under Art. 11 of the BIT. *Sempra v. Argentina* (note 68) para. 176. (note 60).

72 *Enron v. Argentina* (note 67) paras 333–34; *Sempra v. Argentina* (note 68) paras 376, 378, 388.

73 *Enron v. Argentina* (note 67) paras 334, 341; *Sempra v. Argentina* (note 68) para. 388.

Both cases were brought to *ad hoc* committees by Argentina. The *Sempra* committee, as did the *CMS* committee, criticized the original award for confusing the conditions for the operation of Art. 11 of the BIT with those of the state of necessity under customary international law.[74] It also criticized, again as did the *CMS* committee, the award for not understanding that these two rules dealt with quite different situations: the state of necessity is invoked as a ground for precluding the wrongfulness of an act, while where Art. 11 of the BIT applies, the taking of measures envisaged there is not wrongful.[75] It then proceeded, here again as did the *CMS* committee, to consider whether 'the error in law' constituted an *excès de pouvoir*. At this point, however, the *Sempra* committee parted company with the *CMS* committee. The former held that the *Sempra* tribunal had made a fundamental error in identifying and applying the applicable law by adopting the state of necessity under customary international law as the primary law to be applied, rather than Art. 11 of the BIT.[76] This failure to apply Art. 11 of the BIT was considered by the *Sempra* committee to constitute an *excès de pouvoir* and the award was thus annulled.[77]

The *Enron ad hoc* committee also annulled the original award but on quite different grounds. The *Enron* tribunal relied on the views expressed by an economist when it considered the questions whether the measures taken by Argentina were 'the only way for the State to safeguard an essential interest against a grave and imminent peril' (Art. 25 (1) (a) of the ILC Articles)[78] and whether Argentina had 'contributed to the situation of necessity' (Art. 25 (2) (b) of the ILC Articles).[79] This means for the *Enron* committee that the tribunal did not in fact apply Art. 25 (1) (a)/(2) (b) of the ILC Articles but instead applied an expert

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74 Ibid. paras 197–99.

75 Ibid. para. 200.

76 Ibid. para. 208.

77 Ibid. para. 209. See also para. 219.

78 *Enron v. Argentina* (note 67) paras 300, 308–09.

79 Ibid. paras 300, 311–12.

opinion on an economic issue.[80] The award was thus annulled for an *excès de pouvoir.*[81]

2. In Search of the Least Evil

a. Advantages and Drawbacks of the Approaches Adopted

aa) *De facto révision au fond* without Annulment

The *CMS ad hoc* committee thoroughly reviewed and severely criticized the original award. It also proceeded to indicate solutions that the tribunal should have adopted. Taking into account the original design of the ICSID annulment system, one could not but agree with Emmanuel Gaillard who argues cogently that:

> '[c]ontrairement à une instance d'appel, un comité *ad hoc* est chargé de s'assurer qu'aucun dysfonctionnement n'a affecté la conduite de la procédure et que la sentence n'est entachée d'aucun vice grave. Il ne doit, par définition, pas se préoccuper du reste: un raisonnement peut être juste ou faux, une constatation de fait erronée ou non, l'articulation d'un raisonnement convaincante ou pas. Dans un tel système de contrôle, le comité *ad hoc* ne gagne rien à souligner tous les points sur lesquels, à tout ou à raison, il aurait jugé différemment'.[82]

It is however difficult to imagine that the *CMS ad hoc* committee did not anticipate this sort of criticism. It is submitted that the *ad hoc* committee decided to make most of its powers within the limits set forth by the ICSID Convention, i.e. without annulling the original award for errors of law, to rectify it because the tribunal's findings on Art. 11 of the Argentine-US BIT and the state of necessity under customary international law were so wrong, to the committee's eyes, that they would cause serious damages to the legitimacy of the treaty-based

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[80] *Enron v. Argentina (Decision on the Application for Annulment of 30 July 2010)* ICSID Case No. ARB/01/3 paras 376–77, 392–93 [Gavan Griffith (president), Patrick L. Robinson, Per Tresselt].

[81] The committee also found a failure to state reasons (para. 384) but the *dispositif* of the decision refers only to Art. 52 (1) (b) of the ICSID Convention.

[82] E. Gaillard *La jurisprudence du CIRDI* vol. II (Pedone Paris 2010) 427.

arbitration system.[83] Gilbert Guillaume, president of the *CMS* committee, later stated that:

> 'Annuler la sentence litigieuse en censurant cette erreur eut été agir en un domaine dans lequel le Comité n'avait pas compétence. Mais ne pas relever la confusion opérée eut été encourager les quelques quarante tribunaux arbitraux constitués dans les affaires concernant l'Argentine à poursuivre dans une voie manifestement erronée. La solution de l'*obiter dictum* était la seule qui permettait d'orienter la jurisprudence future sur le fond tout en respectant la jurisprudence passée sur la compétence'.[84]

This option adopted by the *CMS ad hoc* committee[85] is in conformity with the original design of the ICSID annulment system to the extent that the *ad hoc* committee avoids annulling the arbitral award for errors of law and thus assuming the role of a court of appeals. From a practical standpoint, however, it will lead to a desperate situation. Since the original award is not annulled, the respondent State is now under the obligation to enforce the award in accordance with Art. 54 of the ICSID Convention. However, is it politically possible or realistic for the respondent State to enforce the award of an ICSID tribunal which was later declared to be grievously deficient by an ICSID *ad hoc* committee?[86] Even when the government of the respondent State is ready,

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[83] 'In view of the lack of an appeals procedure, the need for clarification of ambiguities or even misinterpretations could be regarded as an additional role of the ICSID annulment process'. I. Marboe 'ICSID Annulment Decisions: Three Generations Revisited' in C. Binder et al. (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP Oxford 2009) 200 (217).

[84] G. Guillaume 'Le recours en annulation dans le système CIRDI: De l'insuffisance de motifs dans les sentences du CIRDI' in E. Gaillard (ed.) *The Review of International Arbitral Awards* (Juris Huntington 2010) 349 (355).

[85] *See also* the *Vivendi II ad hoc* committee's decision, which explicitly put into question the independence of a member of the original tribunal but refused to annul the original award on the ground of Art. 52 (1) (d) of the ICSID Convention ('a serious departure from a fundamental rule of procedure'), considering, among others, 'the extraordinary length of the present case'. *CAA & Vivendi v. Argentina (Decision on the Argentine Republic's Request for Annulment of 10 August 2010)* ICSID Case No. ARB/97/3 paras 232, 238–42 [Ahmed S. El Kosheri (president), Jan Hendrik Dalhuisen, Andreas J. Jacovides].

[86] A. Crivellaro 'Actualité du contrôle des sentences arbitrales CIRDI' in C. Leben (ed.) *La procédure arbitrale relative aux investissements internationaux* (Anthemis Paris 2010) 221 (242).

which is not necessarily always the case, to fulfil its obligations under the ICSID Convention, how can it convince opposition parties and the general public that their State should accept an award held by an impartial organ to be utterly defective?[87]

bb) *De facto révision au fond* through Annulment

It goes without saying that the approach adopted by the *Sempra* and *Enron ad hoc* committees is hardly in conformity with the original design of the ICSID annulment system. One may of course disagree with the *Sempra* tribunal regarding the relationship between the state of necessity under customary international law and Art. 11 of the Argentina-US BIT. It is nonetheless extremely difficult to consider that the Sempra tribunal failed to apply the applicable law, i.e. Art. 11 of the BIT. It explicitly mentioned and interpreted the Article as setting forth the same conditions for operation as the state of necessity under customary international law. One may also criticize the Enron tribunal for arriving at the conclusions with only cursory examinations. However, it reached the conclusions explicitly on the basis of Art. 25 (1) (a)/(2) (b) of the ILC Articles as well as of the opinions of economic experts. These are arguably 'wrong' awards but the tribunals arrived at 'wrong' conclusions through an application of the applicable law.[88]

That said, it would be naïve to believe that the *Sempra* and *Enron ad hoc* committees were ignorant of this kind of criticism. We have to admit that their approach carries obvious advantages. It annuls defective arbitral awards so that the respondent State will not be required to enforce awards declared to be 'wrong'. Furthermore, it may enhance the 'quality' of awards and ensure a greater coherence of arbitral jurisprudence in a far more efficient manner than the *CMS ad hoc* committee's approach. The fact that several recent *ad hoc* committees, in addition to

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[87] As for *CMS v. Argentina*, Blue Ridge Investments, which is the purchaser and assignee of the award rendered in favor of CMS, asked a US court to enforce the original award. *Blue Ridge Investments v. Argentina (Petition for an Order Confirming Foreign Arbitral Award and Entering Judgment Thereon)* U.S.Dist.Ct.S.D.N.Y. (8 January 2009). Following a settlement reached by the parties, the court dismissed the request. *Blue Ridge Investments v. Argentina (Order)* U.S.Dist.Ct.S.D.N.Y. (31 August 2009). Relevant documents, but not the content of the settlement, are available at <http://ita.law.uvic.ca/> (9 June 2011).

[88] See the quotation from the *CMS ad hoc* committee's decision (note 65).

the *Sempra* and *Enron* committees, do not hesitate to annul original awards that they consider to be 'wrong' for an *excès de pouvoir*[89] or for a failure to state reasons[90] indicates that this 'creative use of the ICSID annulment procedure'[91] enjoys certain support.[92] It is therefore submitted that the *Sempra* and *Enron ad hoc* committees were perfectly aware and considered it justified that they would overstep the limit of the original design of the ICSID annulment system.

b. Embracing Imperfectness: Annulment, Not révision au fond

We consider that the *CMS ad hoc* committee's approach shall be avoided for the reasons indicated above. It will gravely hinder the settlement of the dispute by making it politically impossible for the government of the respondent State to comply with the arbitral award that has been severely criticized but stays valid.

It is also difficult to follow the *Sempra* and *Enron ad hoc* committees. Besides its dubious conformity with the original design of the ICSID annulment system mentioned above, their approach will hardly achieve their objectives, i.e. to maintain quality and coherence of arbitral jurisprudence. As a perspicacious expert stated as early as in 1987:

> 'le mode de désignation d'un Comité *ad hoc* […], malgré les précautions prises, ne naît pas du consensus des parties, ne représente pas

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[89] *Patrick Mitchell v. Democratic Republic of Congo* (note 38) paras 46–48; *Malaysian Historical Salvors v. Malaysia* (note 39) para. 80; *Helnan v. Egypt (Decision of the* ad hoc *Committee of 14 June 2010)* ICSID Case No. ARB/05/19 paras 46–57 [Stephen M. Schwebel (president), Bola Ajibola, Campbell McLachlan].

[90] *Patrick Mitchell v. Democratic Republic of Congo* (note 38) paras 38–41.

[91] See K. Yannaca-Small 'Annulment of ICSID Awards' in K. Yannaca-Small (ed.) *Arbitration under International Investment Agreements* (OUP Oxford 2010) 603 (622–23).

[92] Though not annulling original awards, several *ad hoc* committees stated that misinterpretation or misapplication of the applicable law would in certain situations amount to failure to apply the applicable law. See *Soufraki v. United Arab Emirates (Decision of 5 June 2007)* ICSID Case No. ARB/02/7 paras 86, 98–102 [Florentino P. Feliciano (president), Omar Nabulsi, Brigitte Stern]; *MCI v. Ecuador (Decision of 19 October 2009)* ICSID Case No. ARB/03/6 paras 43, 51–57. See also *MTD Equity Sdn. Bhd. v. Republic of Chile (Decision of 21 March 2007)* ICSID Case No. ARB/01/7 paras 67–71 [Gilbert Guillaume (president), James Crawford, Ordóñez Noriega].

> vraiment la communauté des Etats parties à la Convention de Washington comme le sont les juges à la Cour internationale de Justice; le caractère temporaire (une affaire) de cette désignation […] fragilise la jurisprudence qui pourrait s'établir'.[93]

To put it bluntly, '[w]hy should we think that a second panel of three arbitrators will yield a better decision than the first panel of three arbitrators?'.[94] The fact that the *Mitchell* and *MHS ad hoc* committees arrived at precisely opposite conclusions as regards the notion of 'investment' stipulated in Art. 25 of the ICSID Convention[95] clearly illustrates the inherent limit of the 'creative' approach proposed by various *ad hoc* committees mentioned in the previous section. Contrary to a court of appeals, the *ad hoc* committee does not enjoy a hierarchically higher status and is vested, neither *de jure* nor *de facto*, with the power 'to impose their own views'[96] upon the arbitral tribunal.[97]

It is therefore submitted that the *ad hoc* committee should stick to the original design of the ICSID annulment system. It is certainly full of shortcomings, but any 'creative' approach is most likely to cause more harms than good. If quality and coherence need to be pursued, we should be content with far less dramatic methods, such as the publication of award that ensures a critical legal debate.[98]

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[93] P. Kahn 'Le contrôle des sentences arbitrales rendues par un tribunal CIRDI' in Société française pour le droit international *La juridiction internationale permanente* (1st edn. Pedone Paris 1987) 363 (377).

[94] D.D. Caron 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal' (1992) 7 ICSID Rev./FILJ 21 (54).

[95] *Patrick Mitchell v. Democratic Republic of Congo* (note 38) paras 27–31; *Malaysian Historical Salvors v. Malaysia* (note 39) para. 80.

[96] W.B. Hamida 'Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control' (2007) 24 JIntlArb 287 (303).

[97] 'The Chairman of the arbitral tribunal in *Klöckner I* was a public international lawyer. The Chairman of the annulment committee in *Klöckner I* was a private international lawyer. So one might be tempted to say that every single sic was a message from the private international [lawyer] to the public international lawyer. You do not know what you are doing. Stay off my turf. This couldn't possibly be right'. J. Paulsson 'comment' in Ortino et al. (note 52) 69.

[98] I. Kalnina and D. Di Pietro 'The Scope of ICSID Review: Remarks on Selected Problematic Issues of ICSID Decisions' in Binder (note 83) 221 (241).

IV. Conclusion

The appearance and generalization of treaty-based investor-State arbitration made us understand the essentially public character of this mode of dispute settlement. It is apparent that the ICSID annulment system, designed originally for contract-based arbitrations, is today lagging behind this rapid evolution of treaty-based investor-State arbitration as it can satisfactorily ensure neither quality nor coherence of arbitral jurisprudence. However, the creation of an investment court of appeals has to overcome a number of political and institutional problems and is thus not expected to be realized in a foreseeable future.

Against this background, it is certainly understandable that several *ad hoc* committees endeavour to make most of their power for the purpose of maintaining the quality and coherence of arbitral jurisprudence. These attempts are however destined to fail, since *ad hoc* committees are not equipped with qualifications necessary to accomplish such a purpose. It is therefore submitted that *ad hoc* committees go back to the original design of the ICSID annulment system as clearly enounced by the *INA (Luccetti) ad hoc* committee:

> 'It is no part of the Committee's function […] to purport to substitute its own view for that arrived at by the Tribunal. The interpretation […] adopted by the Tribunal is clearly a tenable one. Clearly also there are other tenable interpretations. The Committee is not charged with the task of determining whether one interpretation is "better" than another'.[99]

Such an attitude may seem excessively modest for those advocating more 'creative' use of the ICSID annulment system, but we quite often have to be content with the least evil in a world full of imperfectness.

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[99] *Industria Nacional de Alimentos v. Peru (Decision on Annulment of 5 September 2007)* ICSID Case No. ARB/03/4 para. 112 [Hans Danelius (president), Franklin Berman, Andrea Giardina].

The Diversity of Applicable Law before International Tribunals as a Source of Forum Shopping and Fragmentation of International Law: An Assessment

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Since the 1990s, problems arising from the so-called 'proliferation of international tribunals' have been dealt with extensively by international legal study.[1] They have been generally analysed within a systematic and

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[1] The ILC decided not to preempt the debate when it began to work on the topic, for wise reasons: see UN ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc. A/CN.4/L.682 para. 13: 'The previous paragraph raises both institutional and substantive problems. The former have to do with the competence of various institutions applying international legal rules and their hierarchical relations *inter se*. The Commission decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves. The Commission has instead wished to focus on the sub-

holitistic approach (whether the international settlement *system* is threatened by the multiplication of tribunals). Under this heading many authors have assessed whether this proliferation entails some fragmentation of international law (and whether, as a result, it has to be deplored for such a reason) and what could be done to reach some coordination between international tribunals in contemporary international society.

The purpose of the present paper is not to explore yet again these ontological questionings – albeit crucial for the unity of the law of international society. Our intent is rather to try to turn the question on its head by starting from the more practical question of the applicable law before international tribunals[2] to see, first, whether there is nowadays a diversity of applicable laws before international tribunals and, second, whether this diversity could give rise to some forum shopping (or some 'functional approach' of judicial settlement of disputes) in the public international sphere in the sense that litigants would base their choice of an international tribunal, when more than one is available, on the specific nature of 'the international law' applicable before it. It may be the case indeed that making an application before the European Court of Human Rights rather than before an ICSID Tribunal or the ICJ entails legal consequences on the outcome of a given dispute due to the diverse nature of applicable laws before these courts and tribunals.

At first sight, this approach would perhaps seem rather surprising to international lawyers. Within the classical approach of international law, there was little room for forum shopping since there were too few international tribunals (at best, litigants could choose between *ad hoc* arbitration or the ICJ) and since international tribunals applied nearly the same rules, i.e. general international law and special international law applicable to the parties to the dispute. Applicable law did not change therefore depending on the tribunal used for settling the dispute. Variations of applicable law depended exclusively on the nature of the parties and of their bilateral obligations, not on the nature of the tribunal to which they decided to resort to.

In recent years, many changes have occurred however, especially when the situation is compared with the one existing at the time of the 1907

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stantive question – the splitting up of the law into highly specialised "boxes" that claim relative autonomy from each other and from the general law'.

[2] The definition of applicable law is a practical question which has to be resolved in each dispute through a concrete examination conducted according to the rules of judicial process.

Hague Conference.[3] Three evolutions have to be noticed in particular which could give rise to the development of some kind of forum shopping in the international sphere: (i) the specialisation of several tribunals; (ii) the 'fragmentation of international law' into distinct and autonomous fields (trade, investment, human rights, environment, etc.); and (iii) the opportunity sometimes open to resort to domestic or international courts (and then to domestic or international law) to settle international disputes, without any hierarchy between these fora, but only, at best, the obligation to make a definitive choice between them (see, in the context of investment arbitration, the well-known *fork in the road* provision[4]).

Due to these evolutions, we think it necessary to complete the traditional normative (the theory of sources of international law) and institutional (the law of international institutions and their powers) analysis of international law by some 'litigation approach' which seems more appropriate to understand the functioning of a legal society and a legal order which are today much more judicial-oriented than they have ever been.

If such a method is followed, two conclusions can be reached: applicable law before international tribunals proves to be relative in essence (I.) but in practice minor divergences appear between applicable laws before international tribunals (II.). It seems therefore that forum shopping and fragmentation are a fear rather than an actual risk in contemporary international society, at least when applicable law is at stake. We will try to demonstrate the validity of these two assertions in the present paper.

I. Applicable Law is Something Relative in Essence before International Tribunals

The main difference between public international law and private international law has been generally defined as follows:

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[3] See J. Crawford and N. Schrijver 'The Institution of Permanent Adjudicatory Bodies and Recourse to *Ad Hoc* Tribunals' in Y. Daudet (ed.) *Topicality of the 1907 Hague Conference, The Second Peace Conference* (Nijhoff Leiden 2008) 153–75.

[4] On which see for instance C. Santulli *Droit du contentieux international* (Montchrestien Paris 2005) 87–89; M. Sornarajah *The International Law on Foreign Investment* (3rd edn. CUP Cambridge 2010) 320–22.

> 'Whereas [public international law] governs the relations of States and other subjects of international law amongst themselves, [private international law] consists of the rules developed by States as part of their domestic law to resolve the problems which, in cases between private persons which involve a foreign element, arise over whether the court has jurisdiction and over the choice of the applicable law'.[5]

There would be then within international law only one applicable law (international law would be precisely the applicable law of international society and of its tribunals) while within private international law, there would be applicable laws between which a choice would have to be made using the rules of private international law (which would constitute therefore a kind of 'secondary' set of rules whose function would be to select primary rules applicable to the merits of the case). If this were true, then every international tribunal would apply the same rules ('the' international law) while domestic courts would apply (when facing an international legal question) various applicable laws, depending on the nature of each case. For the reasons set out below, this distinction however does not prove totally accurate. Applicable law *is not* necessarily the same before international tribunals.[6]

Admittedly, every student (at least in France) who attends his/her first lectures on international law is generally informed that there is something like 'the' international law and that Art. 38 of the ICJ Statute is like the 'open sesame' to it.[7] But Art. 38 of the Statute of the principal judicial organ of the United Nations cannot be considered as a universal, mandatory 'constitutional' provision defining once and for all the sources of international law as our poor junior student might think.

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[5] Sir R. Jennings and Sir A. Watts (eds) *Oppenheim's International Law*, vol. 1, *Peace* (9th edn. Longman London 1996) 5–6. See also M. Virally *La pensée juridique* (LGDJ Paris 1960) 201–02.

[6] Beyond the fact that when two States try to settle their dispute by peaceful means, the applicable law to the negotiations as defined by the Parties is not necessarily the same as the applicable law by an international tribunal (see on that point *Maritime Delimitation in the Black Sea [Romania v. Ukraine]* [2009] ICJ Rep. 78 para. 41).

[7] 'Scholars usually describe Art. 38, para. 1, as listing the "sources" of international law'; 'as has been noted, "[w]hen discussing the problem of the 'sources' of international law, most [international lawyers] begin their argument by referring to Article 38 of the ICJ's Statute"', A. Pellet 'Article 38' in A. Zimmermann et al. (eds) *The Statute of the International Court of Justice. A Commentary* (OUP Oxford 2006) 677 para. 74 (quoting Onuma).

Quite to the contrary, Art. 38's objective is mainly functional; it is oriented toward the question of applicable law *before the Court* and not the sources of international law in the abstract. Pierre-Marie Dupuy and Yann Kerbrat are perfectly right when they write on that point that:

> 'L'article 38 du Statut de la Cour internationale de Justice [...] est généralement cité […] pour présenter la typologie des sources du droit international. La constance avec laquelle l'article 38 est ainsi invoqué en relation avec les sources du droit international oblige à quelques rappels élémentaires.
>
> a) En premier lieu, on ne doit pas perdre de vue la nature éminemment *contractuelle*, c'est-à-dire *relative* de cette disposition, annexée à la Charte des Nations Unies. […]
>
> b) En second lieu, cette disposition présente en elle-même un caractère étroitement fonctionnel, ou, si l'on préfère, *opératoire*. Il s'agissait avant tout pour ses rédacteurs d'indiquer comment le juge international doit procéder pour déterminer les règles de droit applicables à un litige déterminé'.[8]

Applicable law under Art. 38 of the ICJ Statute is indeed in two ways relative: first, it can be different in each case, depending especially on the treaties entered into by the parties to the dispute; second and more importantly, the methodology set forth in Art. 38 to define the applicable law before the Court only applies to the Court. Nothing prevents States from establishing other tribunals for which Statute would provide another concept of applicable law. To take only one example, States could decide that a new Tribunal would have to apply jurisprudence as an autonomous source of law and not only as a subsidiary means for the determination of rules of law as is the case according to Art. 38.

This interpretation is fully corroborated by the Model Rules on Arbitral Procedure adopted in 1958 by the International Law Commission in which it incorporated the substance of Art. 38 subject to a fundamental limit which was expressed very clearly at the beginning of Art. 10 of the Model Rules: '1. *In the absence of any agreement between the parties concerning the law to be applied*, the tribunal shall be guided' [and then Art. 10 was a copy and paste of Art. 38 of the ICJ Statute][9];

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[8] P.-M. Dupuy and Y. Kerbrat *Droit international public* (Dalloz Paris 2010) 293–94.

[9] UN ILC 'Arbitral Procedure' [1958] vol II ILC Yearbook 1 para. 16.

then States can always adopt another system of applicable law than the system contemplated *for the Court* in Art. 38.

Art. 38 of the ICJ Statute is also relative in a third sense. Before the ICJ itself States can limit or expand applicable law within or beyond Art. 38 of the ICJ Statute.

(i) They can limit it by making some reservations to their acceptance of the jurisdiction of the Court, like the United States in the *Nicaragua* case as far as multilateral treaties were concerned. As the Court put it in 1986, the effect of the American reservation was 'to barring the applicability of the United Nations Charter and Organization of American States Charter as multilateral treaty law', even if this exclusion had 'no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply' – i.e. the Court could apply customary international law instead of multilateral treaty law.[10]

(ii) States can also extend applicable law before the ICJ beyond Art. 38 if the Parties to the dispute adopt an agreement to that purpose. It can be done by defining which particular international rules have to be applied beyond the general formula of Art. 38 of the ICJ Statute – in that case, it is in fact doing nothing more than describing one of the special rules applicable on the grounds of customary or treaty law as already contemplated by Art. 38 of the ICJ Statute.[11] Defining applicable law can also be done by adding to the sources of Art. 38 something that apparently it had not included such as *soft law*. In the *Case Concerning the Continental Shelf (Tunisia/Libya)*, the Court made the following argument to justify such an extension of applicable law:

'Under Article 1 of the Special Agreement, the Court is required first to state "the principles and rules of international law [which]

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[10] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep. 14 para. 56.

[11] See for instance Art. 6 of the Special Agreement in the *Frontier Dispute (Burkina Faso/Niger)* case: 'Les règles et principes du droit international qui s'appliquent au différend sont ceux énumérés au paragraphe 1er de l'article 38 du Statut de la Cour internationale de Justice, y compris le principe de l'intangibilité des frontières héritées de la colonisation et l'Accord du 28 mars 1987', *Frontier Dispute (Burkina Faso/Niger) (Special Agreement of 21 July 2010)* <http://www.icj-cij.org/docket/files/149/15986.pdf> (14 April 2011).

> may be applied for the delimitation of the area of the continental shelf" appertaining to each of the two countries respectively. The Court is specifically called upon, in rendering its decision, to take into account of the following three factors, expressly mentioned in the Special Agreement: *(a)* equitable principles; *(b)* the relevant circumstances which characterize the area; and *(c)* the new accepted trends in the Third United Nations Conference on the Law of the Sea. *While the Court is, of course, bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute of the Court in determining the relevant principles and rules applicable to the delimitation, it is also bound, in accordance with paragraph 1 (a), of that Article, to apply the provisions of the Special Agreement.* [...] The Court is thus authorized by the Special Agreement to take into account "new accepted trends"' which can be considered, as the term "trends" suggests, as having reached an advanced stage of the process of elaboration'".[12]

For the reasons set above, it proves to be correct then to state that in essence, international tribunals are never the judges of 'the' international law; they are only the judges of 'an' international law, the one applicable to the dispute as defined according to the particular concept of applicable law encapsulated in the statute of each tribunal and by the parties.

The relative nature of applicable law explains why within international judicial settlement of disputes, as within private international law, the question of 'applicable law' is a crucial phase of the judicial process (which could give rise before some tribunals to an annulment proceeding if the Tribunal has not applied the relevant applicable law[13]). As applicable law is (potentially) never the same, it has to be established on a case-by-case basis.[14] This is also the reason why, frequently, and (it has

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[12] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep. 18 paras 23–24 (italics added).

[13] See for instance ICSID *ad hoc* Committee *Sempra Energy International v. Argentine Republic (Decision on Annulment of 29 June 2010)* ICSID Case No. ARB/02/16 paras 160–65 and paras 173 et seq.; or ICSID *ad hoc* Committee *Azurix Corp. v. Argentine Republic (Decision on the Application for Annulment of 1 September 2009)* ICSID Case No. ARB/01/12 paras 45–48.

[14] See G. Ripert 'Les règles du droit civil applicables aux rapports internationaux' (1933) 44 RdC 565 (648): 'Devant les juridictions internes, le demandeur n'a pas à établir les règles de droit applicables. Le juge doit connaître la loi, et s'il est bon en fait de lui en rappeler l'existence, ou même de la lui expliquer, il

to be underscored) more and more often, even before a 'general' court such as the ICJ, the stage devoted to the identification of applicable law is formalised in the judgment as an autonomous and preliminary step. This formalisation is *quasi* systematic in investment arbitration, for obvious reasons, or before the ECtHR. It can also occur before the ICJ (see the *Genocide* case in 2007, point IV of the Judgment, entitled 'The Applicable Law'[15], or the *Romania v. Ukraine* case in 2009, point 3.3. of the Judgment, entitled 'Applicable Law'[16]).

The fact that applicable law never exists as such, '*en soi*', is ultimately confirmed by the inclusion of provisions (which are drafted frequently differently) in the Statutes of many international tribunals defining the particular international law applicable before those tribunals.

International practice is very diversified as regards the formulation and the content of these provisions. It is neither feasible nor useful to present exhaustively all the provisions in force today on that matter, but some global overview can easily be done which shows how diverse judicial practice is.

To begin with, before international tribunals provisions defining applicable law do not always confine themselves to refer to *international* rules or sources. Domestic law can also be a part of or the only applicable law before international tribunals. Four scenarios can be isolated in contemporary practice:

(i) the 'alternative' scenario, within which the provision bestows a choice on the parties between the application of any (potentially domestic) law chosen by themselves or, if no such choice has been made, the application of international law[17];

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n'y a pas sur ce point d'exigence légale. Devant le juge international, la question est plus complexe. Il n'y a pas, en effet, de règle de droit fixée par l'autorité supérieure dont le juge dépende. Il faudra donc établir l'existence de règles qui donnent compétence au juge et de règles que le juge doit appliquer'.

[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)* [2007] ICJ Rep. 43, point IV, paras 142–201.

[16] *Maritime Delimitation in the Black Sea (Judgment)* [2009] ICJ Rep. 61 paras 31–42, point 3.3. See also in the case *Ahmadou Siado Diallo (Republic of Guinea v. Democratic Republic of Congo) (Judgment of 30 November 2010)* ICJ Doc. 2010 General List No. 103 paras 63 et seq., point II.B.2 'Consideration of the facts in the light of the applicable international law'.

[17] See Art. 33 (1) of the PCA Optional Rules for Arbitrating Disputes between Two States (effective of 20 October 1992) <http://www.pca-

(ii) the 'accumulation' scenario, within which national and international law jointly form part of applicable law and therefore have to be applied together, by the same tribunal,[18] subject possibly to some strict conditions.[19] In other cases, some transnational law is designated as applicable law together with domestic law[20] or together with domestic and international law[21];

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cpa.org/upload/files/2STATENG.pdf> (16 April 2011) or PCA Optional Rules for Arbitration Involving International Organizations and States (effective of 1 July 1996) <http://www.pca-cpa.org/upload/files/IGO2ENG.pdf> (16 April 2011).

[18] See the well-known Art. 42 (1), second sentence, of the ICSID Convention.

[19] See Art. 21 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90: the Court may apply 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards'.

[20] See Art. 14.1 of the Procedural Rules on Conciliation and Arbitration of Contracts Financed by the European Development Fund (adopted by Decision No. 3/90 of the ACP-EC Council of Ministers [29 March 1990] OJ L 382): 'The tribunal shall apply the law of the State of the contracting authority to the matters in dispute, unless otherwise specified in the contract, in which case the tribunal shall apply the law so specified. In all cases, the tribunal shall decide in accordance with the terms of the contract, and may take into account the usages of the trade applicable to the transaction'.

[21] See Art. 33 (1) of the Iran-US Claims Tribunal's Rules of Procedure ([3 May 1983] 2 Iran-US CTR 405), which states that applicable law is made of 'such choice of law rules and principles of commercial and international law [...] taking into account relevant usages of the trade, contract provisions and changed circumstances', or the Art. 33 of the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (effective 6 July 1993) <http://www.pca-cpa.org/upload/files/1STATENG.pdf> (16 April 2011) or PCA Optional Rules for Arbitration between International Organizations and Private Parties (effective of 1 July 1996) <http://www.pca-cpa.org/upload/files/IGO1ENG.pdf> (16 April 2011).

(iii) the 'distribution' scenario, within which applicable law depends on the nature of the cause of action submitted to the international tribunal[22];

(iv) finally, the 'uncertainty' scenario, within which, though the inclusion of a specific provision on applicable law has been foreseen, the enigmatic nature of the tribunal and of the dispute – are they international or domestic? – and the ambiguous wording of the provision hinders the tribunal and the parties from easily determining if domestic or international law has to be applied. In such a case, the tribunal has to settle the question on the basis of objective clues such as the skills of the members of the tribunal and of the counsels or the nature of the dispute – is it domestic or international in essence?. This was the very interesting (and unorthodox) approach followed by the Arbitral Tribunal recently in the *Abyei Arbitration*.[23]

Even when applicable law is only constituted by international law, the relevant provisions can be construed differently. The provision can be more or less precise, the sources to which it is referred to can be different in nature, or some normative hierarchy between the elements of applicable law can be established. There are many differences for instance, at least at first sight[24] between (to take only those examples) Art. 38 of the ICJ Statute, Art. 293 of UNCLOS, Art. 21 of the Rome Statute of the ICC, Art. 20 of the Protocol of the Court of Justice of the African

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[22] See Art. 340 of the Treaty on the Functioning of the European Union, which distinguishes two causes of action in matters of EU's liability and two different sets of applicable laws: 'The contractual liability of the Union shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'.

[23] *The Government of Sudan v. The Sudan People's Liberation Movement/Army (Abyei Arbitration) (Final Award)* PCA (22 July 2009) paras 425–35. See also in the same vein the award in the *Norwegian Shipowners' Claims (Norway v. United States of America)* (1922) 1 RIAA 307 (330–33).

[24] For a less fragmented approach to these provisions see below p. 429 et seq.

Union[25] or Art. 21 of the Protocol on the Southern African Development Community (SADC) Tribunal.[26]

Art. 38 (1) of the ICJ Statute reads as follows:

> 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

Art. 293 (1) of UNCLOS states more briefly but also more selectively that '[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention'.

According to the more elaborate Art. 21 of the Rome Statute:

> '1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

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[25] Protocol of the Court of Justice of the African Union (adopted 11 July 2003, entered into force 10 February 2008) (2005) 13 African Journal of International and Comparative Law 115.

[26] Protocol on the SADC Tribunal and the Rules of Procedure Thereof <http://www.sadc.int/index/browse/page/163#rulesofprocedure> (16 April 2011).

> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.

For its part, Art. 20 (1) of the Protocol of the Court of Justice of the African Union mixes the general model of Art. 38 of the ICJ Statute with the peculiarities of regional law:

> 'The Court, whose function is to decide in accordance with international law such disputes, as are submitted to it, shall have regard to:
>
> (a) The Act;
>
> (b) International treaties whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (c) International custom, as evidence of a general practice accepted as law;
>
> (d) The general principles of law recognized universally or by African States;
>
> (e) Subject to Article 37 of this Protocol, judicial decisions and the writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the Union as subsidiary means for the determination of the rules of law'.

Finally, and as a last example of the diversity of contemporary practice, Art. 21 of the Protocol on the Southern African Development Community (SADC) Tribunal asks it to:

> 'a) apply the Treaty, this Protocol and other Protocols that form part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols; and
>
> b) develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States'.

The essential relative nature of applicable law before international tribunals is confirmed by these varied wordings. But are these varied formulas really significant in practice?

II. There are Only a Few Divergences in Practice between Applicable Laws before International Tribunals

The fact that applicable law provisions differ from each other in wording does not necessarily imply that in substance they require different rules to be applied to different disputes depending on the Tribunal to which the Parties have submitted their dispute (1.). This last assertion admittedly apparently contradicts the fact that nowadays, international tribunals are frequently specialized and that, therefore, they are the judge of 'their' convention rather international law judges. The ECtHR is above all the judge of the European Convention on Human Rights, the Dispute Settlement Body the judge of the WTO Agreements and ICSID Tribunals the judges of investment treaties. But it does not mean that the conventions which specialized tribunals have to assess are the sole area of applicable law before them. It is of the uppermost importance to make a distinction on that point between the competence of international tribunals, which is indeed more and more specialized, and applicable law before them, which is for its part never restricted to specialized rules (2.).

1. In Substance, Applicable Law Provisions Seldom if Ever Depart from Each Other

The fact that applicable law provisions are worded differently, as it is clear from the examples quoted above[27], does not mean that they embody radically different concepts of international law which would result in its fragmentation when applied before international tribunals. In substance, applicable law provisions generally do not depart from the general framework set up in Art. 38 of the PCIJ Statute in 1920 which became Art. 38 of the ICJ Statute in 1945. This is true at least in three respects.

To begin with, despite their different wording, it appears that provisions of applicable law generally have recourse to the same type of sources. Even when one of them is not expressly mentioned in the provision, it does not imply that it is not applicable and that therefore there would be a discrepancy between provisions expressly resorting to that source and another one which does not expressly mention it. Substan-

[27] See p. 419 et seq.

tive applicable law is something more subtle than its mere textual definition in applicable law provisions.

It would be a mistake to consider on the basis of an *a contrario* argument that Art. 38 of the ICJ Statute for instance does not encompass decisions of international organizations for the sole reason that it does not mention it contrary to Art. 21 of the Protocol on the SADC Tribunal which includes unilateral acts of the SADC in applicable law.[28] As the case-law of the Court very clearly shows, decisions of international organizations are part of applicable law before it.[29] In reality, it is always possible to consider, even if the argument is somehow artificial, that 'resolutions of organs of international organizations are rooted in the constituent instrument of the organization from which they draw their binding force'.[30] This way of reasoning is in line with the one followed by the Court in 1982 as regards the inclusion of *soft law* in applicable law on the basis of the agreed decision of the parties.[31]

The same can be said as far as regional rules are concerned. Again, Art. 38 of the ICJ Statute does not refer to regional treaties, nor to regional custom or general principles of law. By contrast, Art. 20 (1) of the Protocol of the Court of Justice of the African Union includes in applicable law '[t]he general principles of law recognized universally *or by African States*'. But again, the non-inclusion of this last category as a source of international law in the ICJ Statute did not prevent it from recognizing and applying regional sources of law, first of all in the *Asylum Case* where the ICJ had recourse to the concept of 'regional or local custom'.[32] As far as regional law can be assimilated to special law, it matches the definition of applicable law set forth in Art. 38 of the Statute.

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[28] See also Art. 34 of the Olivos Protocol for the Settlement of Disputes in MERCOSUR (signed 18 February 2002, entered into force 1 January 2004) (2003) 42 ILM 2, defining the applicable law before the Mercosur Tribunal.

[29] See A. Pellet 'Article 38' in A. Zimmermann et al. (eds) *The Statute of the International Court of Justice. A Commentary* (OUP Oxford 2006) 677 paras 96–101.

[30] Ibid. para. 96.

[31] See above p. 419 et seq.

[32] A*sylum Case (Colombia/Peru) (Judgement)* [1950] ICJ Rep. 266 (276); see also *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* [1952] ICJ Rep. 176 (200).

The status of jurisprudence is a last example of the strong convergence of applicable law provisions despite their different wording. Two main classes of applicable law provisions can be opposed in that regard: on the one hand, provisions which make no specific reference to judicial decisions (Art. 293 (1) of UNCLOS or Art. 42 of the ICSID Convention) or which only treat them as 'subsidiary means for the determination of rules of law' (Art. 38 of the ICJ Statute); on the other hand, provisions which give some higher (albeit not precisely defined) legal status to judicial decisions as Art. 21 (2) of the Rome Statute ('The Court may apply principles and rules of law as interpreted in its previous decisions'), Art. 21 of the Protocol on the SADC Tribunal (the Tribunal shall 'develop its own Community jurisprudence') or Art. 20 (3) of the 2002 Statute of the Special Court for Sierra Leone ('The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone'[33]).

But these various formulas do not involve substantive differences, for two reasons.

First, international tribunals before which judicial decisions are not considered as autonomous sources of applicable law have not refrained from setting them on a nearly equal footing with 'classical' sources of international law – at least to give them more importance than the one they would deserve on the sole basis of the text of applicable law provisions. This obviously emerges nowadays from ICSID awards or from WTO Dispute Settlement Body case-law.[34] This has also been recognized by the Arbitral Award in the *Barbados/Trinidad Arbitration* where the Tribunal pointed out that the 'apparently simple and imprecise formula' of Art. 293 of UNCLOS

> 'allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have

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[33] Statute of the Special Court for Sierra Leone (16 January 2002) annexed to the Agreement on the Establishment of a Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137.

[34] See P Daillier, M. Forteau and A. Pellet *Droit international public* (LGDJ Paris 2009) 438–39.

made to the understanding and interpretation of this body of legal rules'.[35]

Second, and conversely, international tribunals which have received the power to take into account judicial decisions as an autonomous source of law have considered it wiser not to give them too much importance and therefore to minimize the reference made to them in their applicable law provision. In the *Norman* case especially, the Special Court for Sierra Leone decided that the wording of Art. 20 (3) of its Statute (the Court 'shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda') does not imply that it would be legally bound by the decisions of ICTY and ICTR.[36]

The legal effect of variations in the wording of applicable law provisions must not be overestimated either as regards the mandatory hierarchy established between sources of international law in some applicable law provisions. It has been recalled previously that, contrary to Art. 38 of the ICJ Statute which set on an equal footing all the sources listed, according to Art. 293 of UNCLOS or Art. 21 of the Rome Statute some rules take precedence over others in cases of conflict. But this kind of provision does not convey any distinctive concept of applicable law since *in any case*, even if the applicable provision does not include any rule of conflict, the general (and even 'structural') rule of international law *lex specialis derogat generali* applies, even if it has not been expressly foreseen – the ICJ recently even allocated (from our point of view, excessively) to this principle a very large and absolute effect in the *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*.[37]

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[35] *Barbados and the Republic of Trinidad and Tobago (Award)* PCA (11 April 2006) (2006) 45 ILM 800 para. 222.

[36] *Prosecutor v. Norman (Decision on Interlocutory Appeals against Trail Chamber Decision Refusing to Subpoena the President of Sierra Leone)* SCSL-2004-14-T (11 September 2006) paras 12–13.

[37] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (Judgment of 19 July 2009)* ICJ Doc. 2009 General List No. 133 paras 35–36: 'Indeed, even if categorization as an "international river" would be legally relevant in respect of navigation, in that it would entail the application of rules of customary international law to that question, such rules could only be operative, at the very most, in the absence of any treaty provisions that had the effect of excluding them, in particular because those provisions were intended to define completely the régime applicable to navigation, by the riparian States

Moreover, and as will be explained later, it cannot be avoided to give precedence to the rules on which the international tribunal has jurisdiction as opposed to the rules which only form part of the applicable law. The difference between the two sets of rules explains the solution mentioned in Art. 293 of UNCLOS as well as the supremacy granted by the Court of Justice of the European Union to its constituent treaties over any other rule of law.[38]

The last element supporting the relative function of applicable law provisions follows from the fact that in many cases, there is no such provision in the rules governing the task of the tribunal and that this *lacuna* has never proved problematic. International tribunals can always reform applicable law using general directives provided by secondary rules of international law (especially the law of treaties) which are in essence always (or automatically) applicable before any international tribunal.[39] The ICJ notably pointed out in the *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* that '[e]ven if there had been no reference [in the provision on applicable law] to the "rules and principles of international law", the Court would in any event have been entitled to apply the general rules of international treaty interpretation for the purposes of interpreting the 1890 Treaty'.[40]

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on a specific river or a section of it. That is precisely the case in this instance. The 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan river that is in dispute in respect of navigation. Interpreted in the light of the other treaty provisions in force between the Parties, and in accordance with the arbitral or judicial decisions rendered on it, that Treaty is sufficient to settle the question of the extent of Costa Rica's right of free navigation which is now before the Court. Consequently, the Court has no need to consider whether, if these provisions did not exist, Costa Rica could nevertheless have relied for this purpose on rules derived from international, universal or regional custom'.

[38] For instance the UN Charter: see the *Kadi* cases, especially the Judgment of the European Court of 28 September 2008: Joined Cases C–402/05 P and C–415/05 P *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351. See below p. 435 et seq.

[39] C. Santulli *Droit du contentieux international* (Montchrestien Paris 2005) 332–33; C. Amerasinghe *Jurisdiction of International Tribunals* (Kluwer The Hague 2003) Chapter 10.

[40] *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep. 1045 para. 93. See also, as far as the secondary rules of State responsibility are concerned, Stockholm Chamber of Commerce, *Renta 4 S.V.S.A. v. Russian Federation*

International tribunals could resort in particular to two major guidelines: the principle[41] according to which international tribunals apply international law; and the general rule codified in Art. 31(3)(c) of the Vienna Convention on the Law of Treaties which states that any treaty – but this is equally true for any rule of international law – has to be interpreted taking into account 'any relevant rules of international law applicable in the relations between the parties'. This standard is currently applied by the ECtHR whose Statute and Rules of Procedure contain no provision on applicable law and it constitute a kind of applicable law provision by default.[42]

To conclude, it appears that despite the differences in the wording of applicable law provisions (when they exist), these differences do not entail major discrepancies in substance. Since international tribunals can always open the spectrum of applicable law by basing some sources on others (decisions of international organizations on constituent treaties,

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(Award on Preliminary Objections) SCC Case No. 24/2007 (20 March 2009) paras 19–67.

41 Which is only a principle, which could therefore be ruled out (see on the possibility for an international tribunal to apply domestic law M. Forteau 'Le juge CIRDI envisagé du point de vue de son office: juge interne, juge international, ou l'un et l'autre *à la fois*?' in *Le procès international: Liber amicorum Jean-Pierre Cot* (Bruylant Bruxelles 2009) 95–129.

42 See for instance ECtHR *Behrami v. France (Decision as to the Admissibility of Application)* App. No. 71412/01 (2 May 2007) para. 122: the Court 'recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969; *Al-Adsani v. the United Kingdom* [GC] No. 35763/97, § 55, ECHR 2001-XI; and the above-cited decision of *Banković and Others*, at § 57)'. See also Art. 3 (2) of the Rules and Procedures Governing the Settlement of Disputes annexed to WTO Agreements which could be analysed as an applicable provision which limits itself to a *renvoi* to Art. 31 of the Vienna Convention on the Law of Treaties ('The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law [...]').

for instance) and by using the general rules of interpretation, especially the principle of systemic interpretation, the wording of applicable law provisions could hardly be a real source of fragmentation of applicable international law. And even if the intent of its authors were to lock the tribunal into a limited concept of applicable law, it could be predicted that 'the judges will interpret the text, at least partially, so as to recover the powers inherent in all courts, of which the drafters of the Statute clearly wanted to deprive them'.[43]

2. Before International Tribunals, only Competence, not Applicable Law, is Fragmented

How to conciliate however the idea according to which applicable law would be nearly the same before any international tribunal with the indisputable fact that international tribunals are more and more often specialized in contemporary international society? Could unity coexist with fragmentation? The answer is 'no' provided that applicable law and competence (jurisdiction) are clearly distinguished.

First of all, it has to be noticed that the alleged fragmentation of international law ('the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and from the general law'[44]) is not really a normative but rather an institutional phenomenon. It affects the domain within which international tribunals exercise their judicial powers, rather than the rules governing the relationship between subjects of law. There could be no such a thing as an *autonomous* international law of human rights (or law of the European Union) without the existence of a specific judge totally devoted to the enforcement of that law. To say it differently, in the pure normative sphere, it makes no sense to consider that a set of rules is autonomous. It is only through enforcement that it can result in such an effect.

To understand that first idea, a second, decisive element has to be introduced. To summarize the nature of fragmentation of international law, it is generally said that specialized tribunals 'apply' specialized rules: the ECtHR 'applies' the European Convention on Human Rights, while

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[43] A. Pellet 'Applicable Law' in A. Cassese et al. (eds) *The Rome Statute of the International Criminal Court: A Commentary* (OUP Oxford 2002) 1051 (1053).

[44] See above (note 1).

the Court of Justice of the European Union 'applies' the law of the EU, the international criminal tribunals the international criminal law, the Dispute Settlement Body international trade law or ICSID Tribunals the law of foreign investments. Each of these tribunals would therefore exacerbate the fragmentation of international law by focusing on specific rules and by adopting different or at the very worst contradictory answers to the same situations due to the 'application' of different (specialized) rules.

However this is not an accurate description of the legal situation. The problem here derives from the ambivalence of the word 'application' or 'apply', which can mean two different things.

In the general meaning of the word, two different set of rules are 'applicable' before international tribunals depending on the nature of *who* applies them:

– the rules that the applicant and/or the defendant have to apply (i.e. their obligations): as regards these rules, any international tribunal does not have to apply them in the strict meaning of the word but it has 'only' to check the correct application of these rules *by the parties involved*; these rules form part therefore, not of the 'applicable law', but of the jurisdiction *ratione materiae* of the international tribunal (it has been given the competence to settle any dispute on the application of these rules);
– the second category of rules, which only corresponds to the notion of 'applicable law', includes all the rules that the Tribunal itself can use ('apply') to settle the dispute over which it has jurisdiction.[45]

Of course, the first rules are included in the second ones. But the opposite is not true. If the ECtHR, whose competence is limited to the European Convention on Human Rights, can apply any rule of international law, including (of course) the Convention itself, to decide if the Convention has been violated by the defendant, the opposite is not

[45] In some cases, due to the unorthodox wording of the relevant provisions, the distinction can be more elaborate and of a triple nature. In the *Eurotunnel* case, the Tribunal pedagogically made a distinction between the 'jurisdiction of the Tribunal', the 'source of the Parties' rights and obligations' and the 'Applicable law' (see *Eurotunnel [The Channel Tunnel Group Ltd. et al v. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland et al] [Partial Award]* PCA [30 January 2007] paras 97–99). See also UN ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (note 1) para. 45.

true: it cannot extend its jurisdiction beyond the Convention by invoking the applicable law. If it could do that, any international tribunal could extend its jurisdiction over the entire international law on the basis of Art. 31(3)(c) of the Vienna Convention[46] which would be heresy.

Unfortunately, the confusion between the two set of rules and the two legal questions sometimes occurred. In the *Guyana/Suriname* Arbitration the Arbitral Tribunal decided that it had jurisdiction not only on the UNCLOS, but also on the 'alleged violations of the UN Charter and general international law' on the basis of Art. 293 of UNCLOS defining the applicable law.[47] This was a misconception of the jurisdiction of the Tribunal which was limited to the UNCLOS by Art. 286 of that Convention. This was moreover an absurd decision: since Art. 293 covers international law as a whole, its interpretation as a provision on jurisdiction, not on applicable law, would mean that every Annex VII Tribunal, or the ICJ, or the ITLOS, would be by the sole effect of Art. 293 of UNCLOS 'all-competent' international tribunals, which they are clearly not.

On the contrary, the Inter-American Court of Human Rights rightly refused in the *Las Palmeras* case in 2000 to admit its jurisdiction on the 1949 Geneva Conventions (contrary to what the Commission requested it to do on the basis of the combined applicability in cases of armed conflict of the law of human rights and the law applicable to armed conflicts) by pointing out that the American Convention 'has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions'.[48]

The distinction between applicable law and jurisdiction does not prohibit, of course, the use of rules of applicable law in order to define the extent of the jurisdiction of the tribunal. To assess for instance whether 'the Treaty' establishing the Southern African Development Community deals with human rights and whether therefore human rights claims are included in the jurisdiction of the SADC Tribunal, the sources of law defined in the applicable law provision (Art. 21) can be

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[46] See above p. 429 et seq.

[47] *Guyana v. Suriname (Award)* PCA (17 September 2007) paras 402–06.

[48] *Case of Las Palmeras v. Colombia (Preliminary Objections)* IACtHR Series C No. 67 (4 February 2000) para. 33.

resorted to to interpret the meaning of Art. 14 ('Basis of Jurisdiction').[49] But the applicable law provision cannot be used *instead* of the jurisdictional provision.[50]

The fact that the rules on which the Tribunal has jurisdiction are not the same as the rules forming part of the applicable law by the Tribunal entails legal consequences.

First, it gives to the first set of rules a specific status which explains why they always supersede any other applicable rules. When Art. 293 of UNCLOS states that '[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law *not incompatible with this Convention*' or when the CJEU gives Community Law the precedence over international law and even the UN Charter and the decisions of the UN Security Council, the reason is not to be found primarily in the *lex specialis* principle or the dualist doctrine, but in the legal impossibility for the relevant international courts not to give priority to the rules on which they have jurisdiction, i.e. the rules which they have to decide if they have been correctly en-

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[49] See *Mike Campbell (Pvt) Ltd. et al. v. the Republic of Zimbabwe (Judgment of 28 November 2008)* SADC Tribunal Case No. 2/2007 point IV. See also the approach followed by the Inter-American Court of Human Rights in the case *González et al. ("Cotton Field") v. Mexico* (Judgment) IACtHR Series C No. 205 (16 November 2009) paras 31–81.

[50] See the telling example of the *Oil Platforms* case before the ICJ: the Court decided in 1996 that it had not jurisdiction over the question of the use of force in this case since the bilateral treaty forming the basis of its jurisdiction was only a commercial treaty and since its Article 1 could not be interpreted as prohibiting the use of force (see *Oil Platforms [Islamic Republic of Iran v. United States of America] [Preliminary Objections]* [1996] ICJ Rep. 803 paras 24–31). But it decided in 2003 that to assess, on the merits, if the commercial obligations of the treaty have been violated, it could interpret them taking into account, 'under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, [...] "any relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty' (*Oil Platforms [Islamic Republic of Iran v. United States of America]* [2003] ICJ Rep. 161 para. 41).

forced. This is not a question here of normative hierarchy, it is the product of the gap existing between the content of the jurisdiction (the UNCLOS, Community Law, *only*) and the content of the applicable law (which is always larger than the rules on which the tribunal has jurisdiction but which cannot by itself extend the Tribunal's competence *ratione materiae*[51]).

Second, and as a result, there is another fundamental difference between the rules pertaining to applicable law and the rules pertaining to jurisdiction. Since the former rules are the only ones which could be judicially enforced (i.e. their violation could be sanctioned by the tribunal) and since, by contrast, the rules of applicable law are only used to incidental ends (essentially to interpret the rules on which the Tribunal has jurisdiction), then the content of applicable law can be fixed very liberally. If international tribunals only have jurisdiction over 'hard rules' (that is to say, obligations in force), there is nothing which precludes them to include in the applicable law more soft laws according to an open-minded concept of applicable law and of the relevant 'context' used to interpret the commitments of the parties.

Actually it seems that nowadays, the potential divergence between applicable laws before international tribunals does not result from the *specialisation* of international law (since in any case, it is always possible to include in applicable law the international law as a whole[52]) but rather from the degree of *openness* of the applicable law between the parties that international tribunals are ready to accept. The core of the question on this point is mainly to determine what Art. 31(3)(c) of the VCLT means when it refers to 'any relevant rules of international law applicable in the relations between the parties'. The two following examples

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[51] Such a gap can result in difficult issues: see for instance the case before an ICSID Tribunal where the defendant (the State) invokes as a circumstance precluding the wrongfulness of its act within the law of foreign investment the adoption of a legitimate countermeasure adopted under *GATT Law* against the *State of nationality* of the applicant before ICSID. In such a case, the Tribunal does not have jurisdiction to assess whether such a countermeasure could be validly invoked and then it left the dispute submitted to it partially unresolved (see ICSID [NAFTA] *Archer Daniels Midland Co. v. United Mexican States [Award of 21 November 2007]* ICSID Case No. ARB(AF)/04/05 paras 128–33; *contra* ICSID [NAFTA] *Corn Products v. United Mexican States [Decision on Responsibility of 15 January 2008]* ICSID Case No. ARB (AF)/04/1 paras 180–92).

[52] See above p. 429 et seq.

clearly show the nature of the legal difficulty and the varied possible interpretations which can be delivered from Art. 31(3)(c) of the VCLT.

According to the WTO Dispute Settlement Body, only the obligations entered into by, at least all the parties to the dispute, perhaps also all the members of the WTO, could be included in applicable law under this provision:

> '[...] Article 31(3)(c) indicates that it is only those rules of international law which are "applicable in the relations between the parties" that are to be taken into account in interpreting a treaty. This limitation gives rise to the question of what is meant by the term 'the parties'. [...] This understanding of the term "the parties" leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members. [...]
>
> Before applying our interpretation of Article 31(3)(c) to the present case, it is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account'.[53]

According to the ECtHR on the other hand, Art. 31(3)(c) of the VCLT would justify including in applicable law *soft law* as well as international obligations which the defendant State *has not* entered into. In the *Demir* case especially the ECtHR went on to say, when recounting its practice of interpreting Convention provisions in the light of other international texts and instruments, that:

> 'In a number of judgments the Court has used, for the purpose of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly [...]. These methods of interpretation have also led the Court to support its reasoning by reference to norms emanating

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[53] See WTO *EC – Approval and Marketing of Biotech Products (Panel Report of 29 September 2006)* WT/DS291/R paras 7.68, 7.70 and 7.72 for the quotations and broadly paras 7.49–7.96.

> from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies'

and that:

> 'when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty. [...] The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State'.[54]

This is surely fragmentation since these two international tribunals do not share the same concept of 'applicable law'. But it is surely not the 'classical' fragmentation of international law (the one described in the International Law Commission's Report on the topic and discussed intensively since the 1990s). This 'new fragmentation' is too subtle to encourage litigants to avail of forum shopping, it does not really affect the unity of international law and it has nothing to do with the debate on the specialisation of international law. This 'fragmentation' rather gives birth to new questionings concerning above all the limits of contemporary international *law* and of the normative powers of international tribunals.

These new questionings remain to be fully explored. This is another good reason to substitute the classical approaches of fragmentation of international law with a more 'judicial-and-pragmatic-oriented' one. The present paper was intended to show how fruitful this approach could be.

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[54] *Demir v. Turkey* (ECtHR) Reports 1998-VI 2640 paras 74–75 and paras 76 and 78.

Final Remarks and Conclusions

Rüdiger Wolfrum

Now it falls upon me, according to the programme, to formulate final remarks including conclusions, which is more or less a hopeless undertaking considering the very rich and controversial discussion we had.

The topic for us was 'International Dispute Settlement: Room for Innovations?'. What actually is international dispute settlement? As a starting point, it consists of an institution. We did not touch upon the institutional side of international dispute settlement and we equally did not discuss the merits in standing courts or arbitral tribunals and the alternatives thereto.

International dispute settlement also concerns procedure. Here, we touched upon the role of counsel in our third panel, and we discussed the procedure as such, particularly in the first panel with Georges Abi-Saab and David Unterhalter explaining the WTO and the particularities of that procedure. The views were mixed as to whether it was possible to generalize some of the WTO particularities. Apart from that we heard some criticism on the WTO system as such.

Several panels concentrated on judges and arbitrators. Several issues were discussed in this context – the nomination or selection procedure, the influence of parties on the selection, the qualification of judges and arbitrators (lawyers or also economists), the question of impartiality and independence. One may identify two conflicting tendencies as far as selection and independence is concerned. There seems to be a growing interest of States to control the selection process and at the same point there is an increasing interest in safeguarding the independence of judges or arbitrators.

A further point concerns deliberations. Again, this was touched upon in the first panel by David Unterhalter and Georges Abi-Saab, both of whom explained the deliberations and how conclusions were reached. It

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was done in the advisory opinion panel, but it was also touched upon, briefly at least, in the third panel dealing with counsel. Here, the interaction of the counsel and the judges may result in deliberations. It was considered as the merit of the advisory opinion by this particular panel, namely that here the deliberations are most open, the hearing is all embracing, whereas in the contentious cases, the hearing is less open or less comprehensive and the deliberations are definitely behind closed doors.

Let me come to the next point, which is particular for dispute settlement decisions or judgments or advisory opinions. In my view one has to take a differentiated view depending on the format of the various decisions taken by international courts or tribunals. Judgments in contentious cases are meant to decide legal disputes whereas the interpretation of particular norms is a side aspect. One should not forget that in these situations the court in question deals with facts as well as norms. An advisory opinion constitutes an interpretation based on law. And I could even go further in provisional measures cases. Here again you have a different set of decisions.

We have not touched upon a very interesting issue, namely to what extent can provisional measures be used as a mechanism to finally settle a legal dispute. This is an approach pursued in some national systems and there are certain examples, particularly in ITLOS in the *Land Reclamations* case, where a provisional measure has been used to come to a final decision. This approach has certain merits: being quick, not overdoing it with the facts and very much concentrating on the law.

What was very much discussed – nearly in all panels – is the impact of decisions (judgments or advisory opinions) on international law. Is it lawmaking as Armin von Bogdandy has put it? Or is it interpreting law? Is it further developing law? This was referred to by Marjan Ajevski in his paper on the *stare decisis* question. This is an element which is worthwhile considering in detail. Here we should be more specific. I believe that certain questions of the courts, the tribunals, have different implications for the development of international law. Advisory opinions certainly differ from judgments. In my personal view one should be more careful in declaring decisions by international courts or tribunals as lawmaking. Although the impact on the development of international law is beyond dispute, it significantly differs from lawmaking through international agreements. The impact of international court decisions on international law is always accessory which means it is developed in the context of existing norms whereas concluding a new international treaty is more freestanding.

Finally, let me come to the beneficiaries of decisions of international courts or tribunals. If the beneficiaries are, as Francisco Orrego Vicuña put it, increasingly individuals, then this brings us closer to the question Armin von Bogdandy has raised, namely the question of legitimacy. There is a very strong interconnection. If the decision is only referring to States and only States are beneficiaries, then the question of legitimacy puts itself in a different fashion than when we have individuals or the privatization of cases. Sure, international criminal courts are a totally different system, where it is always the individual which is facing the judgment.

Perhaps we have not come to a conclusion how we should change the system or whether we should change it at all, but one thing we should certainly consider is to make use of the very flexible system of dispute settlement existing. International dispute settlement is more than just the ICJ; it is a variety of dispute settlement mechanisms ranging from the ICJ to arbitration and contains very different facets. These systems are to some extent competing. The various institutions have several means to modify the procedure as to accommodate the interests of the parties and thus to render the very system more competitive. The ICJ has introduced some modifications over the years and Art. 138 of the Rules of Procedure of ITLOS providing for the possibility of advisory opinions should be seen from this point of view.

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