March 2006

From the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent

Cesare P.R. Romano

Center on International Cooperation, NYU, cesare.romano@lls.edu

Follow this and additional works at: https://lsr.nellco.org/nyu_plltwp

Part of the Dispute Resolution and Arbitration Commons, International Law Commons, Jurisprudence Commons, and the Public Law and Legal Theory Commons

Recommended Citation

https://lsr.nellco.org/nyu_plltwp/20

This Article is brought to you for free and open access by the New York University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracythompson@nellco.org.
FROM THE CONSENSUAL TO THE COMPULSORY PARADIGM IN INTERNATIONAL ADJUDICATION: ELEMENTS FOR A THEORY OF CONSENT

Cesare P.R. Romano

INTRODUCTION .................................................................................................................... 3

PART I: FROM THE CONSENSUAL TO THE COMPULSORY PARADIGM .................................. 10
   A. From Arbitration to the Optional Clause ................................................................. 10
   B. From the Optional Clause to the Rise of the Compulsory Paradigm................. 14

   A. The Cases of the ICJ and IACHR. ........................................................................... 19
      1. Consent to Contentious Jurisdiction ..................................................................... 19
         i. International Court of Justice............................................................................. 20
         ii. Inter-American Court of Human Rights........................................................... 22
      2. Consent to advisory jurisdiction?.......................................................................... 26
         ii. Inter-American Court of Human Rights........................................................... 29
   B. Law of the Sea Convention .................................................................................. 31

III: LEGAL BRIC-À-BRAC: FRAGMENTATION OF INTERNATIONAL LAW, UNEVEN JUDICIALIZATION OF THE VARIOUS SELF-CONTAINED SPECIAL LEGAL REGIMES, AND DISHARMONIC, UNRELATED AND UNSYNCHRONIZED DISPUTE SETTLEMENT PROCEDURES AND INSTITUTIONS. ........................................................................................................... 33
   A. Two different legal regimes, with two different dispute settlement procedures, one based on the compulsory paradigm and the other on the consensual one. ................... 36
   B. Multiple legal regimes, all based on the compulsory paradigm............................... 38

IV: APPROACHES ............................................................................................................... 41
   A. Technocratic/legalistic approach.............................................................................. 41
   B. The sociologic/jurisprudential approach ................................................................. 44
   C. The non-engagement/disengagement approach ..................................................... 50
      1. Non-engagement................................................................................................... 51
      2. Disengagement..................................................................................................... 53

CONCLUSIONS.................................................................................................................... 57
Abstract:

Since the end of the Cold War, there has been a trend towards the judicialization of international relations, signaled by an increasing number of international judicial bodies. Yet, the most notable feature of this well-known phenomenon has been overlooked. While traditionally international litigation has taken place consensually, in the past two decades compulsion has become the prevailing paradigm. The shift is visible both in treaty regimes and in international jurisprudence. Consent has become so removed in time and substance from the exercise of jurisdiction that it can be asked whether it serves anymore a significant function in the international order. What does it mean exactly to consent to the jurisdiction of an international adjudicative body under contemporary international law?

The Article suggests that the fact that this shift has not been homogeneous across legal regimes and has not involved all States is the root problem of many predicaments affecting contemporary international law and relations. The most troubling of these is that increasingly the same disputes are litigated serially or in parallel in different international fora, thus undermining the ultimate rationale of international judicial proceedings: closure and settlement.

While issues of litispendence and forum shopping are attracting increasing attention, the shift itself is an underrated and unnoticed phenomenon. This Article proposes a different theoretical and empirical framework for understanding contemporary international adjudication and the phenomenon of the judicialization of world politics. By presenting new hypotheses and normative findings, it lays the groundwork for future research and discussion.
INTRODUCTION

As the Permanent Court of International Justice (PCIJ) held in the advisory opinion on the Status of Eastern Carelia (1923), the fundamental legal principle underpinning the settlement of disputes involving sovereign States (hereafter “international disputes”) is that “…no State can, without its consent, be compelled to submit its disputes … to arbitration, or any other kind of pacific settlement”.1 This is the so-called “principle of consent”, a rule so “…well established in international law…” that the Court felt no need to provide evidence of its existence, nor to elaborate on its precise content.2

Whereas jurisdiction of domestic courts is compulsory, that is to say the plaintiff (“applicant”, to use the international term) needs not obtain the defendant’s (“respondent’s”) consent to seize the court, jurisdiction of international adjudicative bodies depends on such consent. This is one of the most notable differences between the international and the domestic legal orders.

As a matter of fact, the principle of consent is a corollary of the principles of sovereignty and equality of States, which in turn, are the “…basic constitutional doctrine of the law of nations, which governs a community consisting primarily of States having uniform legal personality”.3 In sum, consenting to international adjudication is simultaneously expression and cession of sovereignty.4

---

1 Status of Eastern Carelia, Advisory Opinion, 1923 PCIJ (Ser. B) No. 5 (Jul. 23), 27. The scope of this article is wider than just disputes between sovereign States. It includes international adjudicative fora which have jurisdiction also over disputes where only one of the parties is a State or an International Organization. Reference, whenever appropriate, is also made to international criminal tribunals. While States as such are not parties in international criminal cases, the question of their consent to the exercise of international criminal jurisdiction is nonetheless relevant. This is what in this Article is meant for “disputes involving sovereign States”.

2 The Court reaffirmed the Eastern Carelia dictum in the Mavrommatis Palestine Concessions case (G.B. v. Greece), 1924 P.C.I.J. (ser. A) No. 2 (30 Aug.), 16, but did not elaborate upon it. See also, ibid. dissenting opinions by judges Finlay and Moore and Finlay (42 and 60). See also in this connection Mavrommatis Jerusalem Concessions case (G.B. v. Greece), 1925 P.C.I.J. (ser. A) No. 5 (26 March).

3 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (6th ed. 2003). Further evidence of this is that the principle of consent does apply only to States and international organizations, but not to other non-public entities, like individuals or corporations, which nowadays frequently have jus standi in several international jurisdictions (e.g. human rights courts, international criminal tribunals, courts of regional economic integration agreements).

4 In this Article the term “adjudication” is used in its etymological sense, from Latin adjudicatio which in its general sense merely signifies a judicial decision. It indicates both judicial settlement (i.e. by way of standing international courts and tribunals) and settlement by arbitration. JOHN BASSETT MOORE, INTERNATIONAL ADJUDICATIONS XV-XVII (1929); see also J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 88 (3rd ed. 1998) referring to arbitration and judicial settlement as two different means. However, contra Michael Reisman, The Supervisory Jurisdiction of the International Court of Justice:
The letter and the scope of the principle have changed little over the course of the twentieth century. The Eastern Carelia dictum has been a canon in international law since. It has rarely, if ever, been challenged or questioned both in legal theory and practice. Yet, over the past two decades theory and practice in relation to the compulsory exercise of international jurisdiction have increasingly grown apart. While some scholars have taken notice, to date a systemic analysis of the phenomenon has not yet been attempted, nor has it been considered whether thinking and traditional assumptions surrounding international dispute resolution need to be reconsidered.

This Article claims that towards the end of the twentieth century there has been a fundamental shift in the concept and practice of international adjudication: from a traditional *consensual paradigm* where consent is substance and must be express and specific, and adjudication largely takes place with the assent and cooperation of both parties, to a *compulsory paradigm* where consent is largely form because it is either implicit in the ratification of treaties creating certain international organizations endowed with adjudicative bodies, or is jurisprudentially bypassed and litigation is often undertaken unilaterally. It is argued that the expression of consent has become so removed in time and substance from the exercise of jurisdiction that one may consider whether consent continues to serve a significant function in the international order.


5 The most significant change to the scope of the principle is that while before World War II States had no obligation what-so-ever to settle their disputes, since the outlawing of the use of force in international relations introduced by the UN Charter States, if the dispute is one likely to endanger international peace and security they have the duty to seek settlement of disputes by any peaceful means. UN Charter, art. 33. See also the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the UN Charter, G.A. Res. 2625 (XXV), annex, 25 UN GAOR, Supp. (No. 28), UN Dec. A/5217 (1970), 121. Article 33 of the Charter codifies also the principle of free choice of means whereby States are not bound to settle disputes using any particular means unless they have agreed to do so.

6 At the end of the 1980s Eli Lauterpacht made a very prescient lecture exactly on the transformation of the principle of consent. He noted that: “The requirement is normally rigorously applied and is reflected in practice by, for example, the presumption in favour of the State against which jurisdiction is being invoked”. Yet, he also cautioned that “…some cracks in the edifice are developing”. “[E]xact consent, closely linked in time and substance to the exercise of jurisdiction, may have become so worn away as to require profound reconsideration of the fundamentals of the subject…” ELIHU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 23 - 25 (1991). However, Lauterpacht’s analysis develops in a fundamentally different direction than the one taken by this Article, suggesting that States should reconsider their position vis-à-vis compulsory jurisdiction, in particular jurisdiction of the ICJ. For an analysis of the issues discussed in this Article in the context of the law of the sea regime, see Bernard Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 A.J.I.L. 277 (2001). In the context of investment disputes, see Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, 99 A.J.I.L. 835 (2005).

7 Lauterpacht, Aspects, *supra* note 6, 25. The shift is also visible amongst quasi-judicial and implementation control procedures, as well in political processes, such as determinations of legality by the
Thus, while in the past decade the proliferation of international courts and tribunals, and the general increase in international adjudication, has been hailed as one of the most significant changes in international law and international relations of our time, this Article argues that the real revolution is actually the fact that the overwhelming majority of these fora enjoy compulsory jurisdiction and that litigation is triggered often, and in certain cases solely, unilaterally.

Currently there are more than two dozen active international adjudicative fora, where international disputes can be bindingly decided. Most rely on the compulsory paradigm and so consent to jurisdiction is a requirement of a State’s membership to an international organization or legal regime and the adjudicative process is typically started by unilateral submission. There are a few exceptions, some only partial, to this prevailing paradigm. The International Court of Justice (ICJ) and the Inter-American Court of Human Rights (IACHR) still rely on the classic consensual paradigm. Consent must be expressly accorded either before or after any given dispute arises. Dispute settlement under the United Nations Convention on the Law of the Sea (LOS Convention) partly relies on the consensual paradigm and partly on the compulsory. Finally, arbitration, which for centuries has been a quintessential consensual exercise,
has, since the end of the Cold War, been increasingly resorted to unilaterally.\(^{13}\) As we will see, even in these fora, which to varying degrees still rely on the consensual paradigm, there has been a slow but steady move towards the exercise of jurisdiction in various forms even when the States involved actively resist. Interestingly, these were conceived before 1990, before the post-Cold War “Big Bang” that gave rise to the current expanded constellation of international adjudicative fora.\(^{14}\)

It must be stressed that the shift of paradigm from consensual to compulsory does not mean that the principle of consent has been extinguished. The principle remains valid, but its significance has been gradually reduced, transforming it into a pale simulacrum of the old self. As this Article intends to illustrate, the “problem of consent”, which has been decried by generations of legal scholars as the great limitation of international adjudication,\(^{15}\) has been largely circumvented by locking-in consent or where it could not be locked-in, by a militant international jurisprudence.

Obviously, the move towards the compulsory paradigm would be rather unproblematic if it had taken place homogeneously throughout the globe, across legal regimes. Yet, legalization and even more judicialization\(^{16}\) have affected disproportionately only certain areas of international law and relations.\(^ {17}\) Some regimes provide for complex and highly-binding procedures, others rely on softer and more consensual arrangements, and the various dispute settlement procedures and institutions are disharmonic, unrelated and unsynchronized, some relying on express consent to be activated, others relying on the compulsory paradigm. More importantly, proclivity towards international courts and tribunals and willingness to confer them compulsory jurisdiction seems to vary greatly from State to State.

---

\(^{13}\) See *infra* Part II, at 18-19.

\(^{14}\) The legal structure of the ICJ is essentially that of its predecessor, the PCIJ, which was created in the aftermath of World War I. The American Convention on Human Rights, which provided for the establishment of the IACHR, was adopted on 22 November 1969. The dispute settlement system under the LOS Convention was negotiated during the Third UN Conference on the Law of the Sea between 1973 and 1982.


\(^{16}\) “Legalization [is] a particular form of institutionalization characterized by three components: obligation, precision and delegation”. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 Int. Org. 401-419 (2000). By “judicialization” we refer in this Article to a particular form of “legalization” characterized by a high-degree of delegation to adjudicative institutions.

\(^{17}\) Judith Goldstein, et al., *Introduction: Legalization and World Politics*, ibid., 386.
Contrast this with domestic legal systems. They are typically based on the compulsory paradigm because power and legitimacy are concentrated in one single source: the sovereign (be that the people, the monarch, the party or otherwise). Courts are organized in a hierarchical structure. Procedural rules regulate interactions at all levels and delimit ambits of jurisdiction. Courts exercise compulsory jurisdiction, and the plaintiff need not obtain the respondent’s consent to seize the court.

The uneven judicialization of international relations is inevitable due to the nature of the international community itself, consisting primarily of States with uniform legal personality. Unless, of course, one assumes that this is only a phase in the history of human kind, heralding a future where power will be ultimately transferred to a sort of supra-national and universal federation endowed with one international judiciary exercising compulsory jurisdiction over all States. However this vision is neither plausible nor normatively desirable from a libertarian point of view.

International law will always maintain a remarkable degree of unity at the normative level - lest it negates itself - but will also always be fractured when it comes to its governing institutions because power and legitimacy at the international level are fragmented and distributed throughout a large – and one might add increasing - number of sovereign States and, more recently, some supra-national entities.

Therefore, if there is no escape from pluralism and fragmentation, then the question arises whether such a judicial “non-system” can remain on the cusp between the lure of the “universal State” pipedream and self-destruction under the weight of its own inherent contradictions.

The question is quintessentially philosophical, but also surfaces in important practical matters. Which procedures and/or bodies are going to have precedence when two or more fora can exercise compulsory jurisdiction over the same parties for the same (or different aspects of the same) dispute? Whose consent matters the most? Additionally, what happens if one forum hinges on the consensual paradigm and the other on the compulsory? Does the compulsory forum always prevail over the consensual, or is it the reverse? This is not merely idle theoretical speculation but a problematic jurisdictional issue arising in dozens of international cases across the globe. The answer would be straightforward in a world based solely on the consensual paradigm: the procedure or body to be used is the one the parties can agree to use. Yet, the shift away from the consensual towards the compulsory paradigm has created an uncertain international environment in which international adjudicative bodies are activated not only frequently and unilaterally, but often simultaneously, or serially, to litigate essentially the same disputes.

While issues of litispendence and forum shopping are attracting increasing attention from international legal scholars and decision-makers, the qualitative transformation brought about by the expansion of compulsory jurisdiction to the detriment of consensual jurisdiction is an underrated and unnoticed phenomenon. Yet, it is easy to see how this particular spin aids several ongoing scholarly discussions, casting
them under a different light, making them more meaningful and fruitful. For instance, consider the debate over whether the proliferation of international judicial bodies is a positive or negative development. 18. *Per se* the growth in the number of fora available is not an issue: the more fora, the greater the possibility that disputes can be addressed via a law-based, impartial procedure. It reflects the complexity and diversity of international law and should not generate any anxieties except in certain courts who like to think of themselves as the center of the international judicial universe. 19 In reality, problems arise as a result of the shift to the compulsory paradigm because these fora can be engaged unilaterally and are not formally or informally coordinated, thus giving rise to phenomena of multiple or serial litigation, making closure and settlement arduous.

Or think about the debate regarding the effectiveness of international adjudication, specifically whether courts that are “more independent” are less effective than courts that are “less independent” - where independence is measured by the degree of institutional separation from the states parties more than by ethical or moral standards. 20 In a world where adjudicative bodies operate on the consensual paradigm, relying on the explicit consent and depending on the cooperation of both parties, dependence and independence are not really an issue. It does become an issue affecting effectiveness in a compulsory context because of the asymmetries between the parties that it necessarily introduces. Therefore, the effectiveness debate might result in more fruitful speculation if it was reframed and the debate instead focused on whether adjudicative fora based on the compulsory paradigm are more or less effective than those based on the consensual one.

Again, the ambivalent attitude of the United States towards international adjudication, especially since the end of the Cold War, has been subject to principled criticism, as signal of a larger repudiation of multilateralism. 21 Yet, as we will see, non-

---


acceptance of the jurisdiction of international adjudicative bodies, or conditional acceptance, or withdrawal of acceptance, are all practical and legitimate remedies to the problems created by the uneven and spotty shift towards the compulsory paradigm.22

In sum, this Article argues that the shift from a consensual to a compulsory paradigm in international litigation, and the fact that this shift has (inevitably) not been homogeneous across legal regimes and does not involve all States across of the globe, is the root problem of many predicaments affecting contemporary international law and relations. Highlighting this shift creates a different theoretical and empirical framework for understanding contemporary international adjudication and the phenomenon of the judicialization of world politics. By presenting new hypotheses and normative findings, it lays the groundwork for future research and discussion.

Though the analysis in this Article is largely positive in nature, the normative implications are not ignored. Thus, Part IV carefully maps the reactions, both amongst international courts and tribunals, States and legal scholars to the problems created by the “compulsory shift”. These reactions are gathered under three large headings: the “technocratic/legalistic approach”, which relies on legal rules and procedural solutions; the “sociologic/jurisprudential approach”, which mostly relies on epistemic communities made of international judges and arbitrators; and the “non-engagement/disengagement approach”, which is the negative reaction to the disruptive forces unleashed by the unsynchronized and uneven development of the international judicial function and the sapping of the principle of consent. For each we provide an assessment and expose the limits, dangers and inconsistencies, and draw normative inferences.

The remainder of this article will proceed as follows. Part I describes how there has been a move away from the consensual to the compulsory paradigm in international adjudication over the course of two centuries. Part II, will analyze how the principle of consent has been gradually eroded and transformed even in the case of those adjudicative fora still based on the consensual paradigm (i.e., ICJ, IACHR, LOS Convention dispute settlement system, and arbitration). Particular attention will be given to the jurisprudence of the ICJ and IACHR. Part III will illustrate some of the problems caused by the unsynchronized and uneven shift to the compulsory paradigm and the thinning of the principle of consent. Several international cases will be presented to highlight the legal and practical implications. Part IV, as mentioned, will discuss three possible antidotes to these problems, while the Conclusions provide normative findings of both a policy-making and jurisprudential value.

Finally, it should be stressed that this Article does not intend to explain why there has been a move towards the compulsory paradigm. Rather, it intends to analyze the consequences of a patchy and inhomogeneous shift that has occurred across the globe and possible antidotes. The philosophical, political, and cultural forces driving the shift towards the compulsory paradigm deserve full consideration and for sake of conciseness, will not be addressed here.

22 See infra Part IV.C.
PART I: FROM THE CONSENSUAL TO THE COMPULSORY PARADIGM

In order to properly understand the extent and depth of the move towards a compulsory paradigm it is necessary to provide a brief account of the modern history of international adjudication. The transition has gradually taken place over more than two centuries, which may explain why it has largely gone unnoticed. As a matter of fact, typical accounts of international adjudication tend to focus more on form (i.e. the institutionalization first and, later towards the end of the twentieth century, multiplication of international jurisdiction) rather than on substance. The qualitative transformation brought about by the increasing compulsory nature of adjudication is typically not highlighted.23 Hence, this section will focus on how the principle of consent to adjudication has been conceived and construed in the various ages.

A. From Arbitration to the Optional Clause

Although arbitration of international disputes dates back to the earliest recorded times, the idea that disputes involving sovereign states can be settled peacefully, bindingly, and on the basis of international law is essentially a product of the age of the Enlightenment.24 Towards the end of the seventeenth century and during the eighteenth century, a number of Western thinkers articulated schemes to provide alternatives to war as an instrument to settle international disputes.25 However, if an intellectual forefather of modern international adjudication is to be designated, no one deserves the title more than Immanuel Kant (1724-1804) who first rationalized the need for a compulsory and permanent international jurisdiction.26

Throughout the nineteenth century arbitration was the only form of binding international dispute settlement practiced. States could give their consent to arbitral proceedings essentially in two ways: ad hoc (by way of the so-called compromis); or ante hoc (by adopting treaties containing clauses whereby, should a dispute arise between the parties in the future, that dispute would be submitted to arbitration, which is the so-called compromissory clause). Regardless of how consent was expressed, in the early years no form of compulsory arbitration existed. Earlier treaties either specified the need for


24 See JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO (1929).


26 See IMMANUEL KANT, PERPETUAL PEACE (1795) and METAPHYSICS OF MORALS (1797), in HANS S. REISS (ed.), KANT: POLITICAL WRITINGS (15th ed. 2004).
express consent of both parties (i.e. the so-called “agreement to agree”), or were silent on the point, which has virtually the same effect since the canonical view of international law is that consent cannot be presumed.27

Obviously an “agreement to agree” does not necessarily ensure that parties will actually agree on having the dispute settled by arbitration. It is just a naked promise. Eventually some treaties started providing that either party could trigger arbitration unilaterally to overcome the problem of the stonewalling party.28 This was a significant departure from the strictly consensual paradigm. True, consent was always at the very basis of proceedings, but this way a State could enter into an open-ended commitment to arbitrate which would not depend on consent given on any particular dispute, nor could consent be withdrawn without amending the treaty (which requires consent of all parties) or denouncing the whole treaty altogether. Consent no longer had to be given upfront. It still needed to be specific and the dispute needed to be framed within the confines of that expression of consent lest jurisdiction would be lacking, but it could no longer be used as a bargaining chip once a dispute had arisen. Any party could start compulsory arbitration.

For sometime the development was only theoretical. When States had the option of triggering arbitration unilaterally, they still invariably sought the consent and cooperation of the other party.29 For over two centuries unilaterally-triggered arbitration has been rare and cases where jurisdiction has been contested because the respondent claimed not to have consented to jurisdiction even rarer.30

Though the creation in 1899 of the Permanent Court of Arbitration (PCA) is usually hailed as the commencement of the history of modern international dispute settlement it is not a significant landmark in our narrative as it did not alter the prevailing

27 Lauterpacht, Aspects, supra note 6, at 23.

28 The first treaties of this kind were concluded in the 1820s and 1830s between various Latin American States. However, their effect was very limited as until 1880 the actual practice of arbitration between Latin American countries was almost unknown. HELEN MAY CORY, COMPULSORY ARBITRATION OF INTERNATIONAL DISPUTES (1932).

29 Cory considers that in the period 1899-1914 about 80 ad hoc arbitral tribunals were set up. In about 20 of these instances there existed a treaty of compulsory arbitration between the States in question, but in only seven of them were these treaties referred to in the compromise as the reason for the agreement to arbitrate. Of these seven cases six were referred to the PCA. As Cory recognizes “it is impossible to determine whether, if there had been no treaty obligation to arbitrate, the States in question would have arbitrated these particular cases”. Ibid. 99-100.

30 PHOTOINI PAZARTZIS, LES ENGAGEMENTS INTERNATIONAUX EN MATIÈRE DE RÈGLEMENT PACIFIQUE DES DIFFÉRENTS ENTRE ÉTATS 190 (1992). The only example Pazartzis reports is the one of the Radio Orient case, between the States of the Levant under the French Mandate and Egypt. UNITED NATIONS, 3 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 1873 (1948-). Louis Sohn, Settlement of Disputes Relating to the Interpretation and Application of Treaties, 150-II HAGUE ACADEMY COLLECTED COURSES 236-237 (1976).
strict consensual paradigm. 31 It is only in the aftermath of the First World War, with the advent of the PCIJ, that significant changes were introduced and the shift toward the compulsory paradigm began. 32

The Covenant of the League of Nations was silent as to whether the jurisdiction of the PCIJ should be compulsory or consensual. The question was left to be determined by the Assembly of the League on the basis of proposals by the League’s Council. 33 In turn, the Council delegated the drafting of the Statute of the Court, including the key question of consent, to a group of ten legal scholars: the Advisory Committee of Jurists. 34 Besides being eminent, the jurists were also independent and took full advantage of their lack of restraint by political considerations by boldly stepping in the direction of compulsory jurisdiction. In a dramatic departure from previous practice, the draft Statute provided for far-reaching compulsory jurisdiction. 35

The quasi-totality of the Committee supported this position 36. There appeared to be general agreement in the group that compulsory jurisdiction is a characteristic of a “true” court. It has been argued that the Committee’s thinking on international organizations had been conditioned by the 1899 and 1907 Hague conferences and the predominantly legal approach that had been taken towards the problem of international conflicts before 1914. According to the members of the Committee, the PCIJ was going to be different, as it would not engage in arbitration, as it had hitherto been understood.

---


32 In theory the first permanent international judicial body to exercise compulsory jurisdiction is the short-lived Central American Court of Justice (1908-1918). In reality of ten cases in which it was involved during its existence only one was of a certain importance (on the legality of a treaty concluded between Nicaragua and the U.S. about building an inter-oceanic canal across Nicaragua), but Nicaragua refused to accept the Court’s decision. On the CACJ, see Allain, supra note 23, 67-92.

33 Covenant of the League of Nations, art. 14, 28 June 1919, 225 C.T.S. 188.

34 Nationals of the five big powers (U.S., Great Britain, Japan, France and Italy) sat in the Committee, along with those of three European neutrals (Sweden, Norway and the Netherlands), plus Belgium and Brazil.

35 Art. 34 of the draft PCIJ Statute. The draft Statute and the commentary reporting the debates within the Committee can be found in James Brown Scott, The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists 97-100 (1920).

36 The exception was Mr. Adatci of Japan who, reportedly, was “…as unwavering in his opposition to compulsory jurisdiction as his colleagues were in its support”. Lorna Lloyd, “A Springboard for the Future: A Historical Examination of Britain’s Role in Shaping the Optional Clause of the Permanent Court of International Justice”, 79 AJIL 28 (1985). Mr. Ricci-Bussati, of Italy, was also opposed to compulsory jurisdiction, voting against art. 34 of the draft Statute, but then he voted in favor of the draft as a whole without formal reserves. Brown Scott, supra note 35, 99, n. 6.
and institutionalized by the PCA, but rather in judicial settlement. Compulsory jurisdiction, in their view, was one of the factors distinguishing the former from the latter.37

The bold draft prepared by the Committee did not receive much traction with the great powers, particularly with the British Foreign Office as it was considered a drastic departure from the prevailing consensual paradigm. Eventually the debate was transferred to the Assembly of the League of Nations where great powers (e.g. Great Britain, France and Japan foremost) opposed to compulsory jurisdiction clashed with small powers (e.g. Belgium, Portugal and South American nations) who believed that compulsory jurisdiction would be advantageous to them because it would create a level-playing field by giving less powerful States the possibility of unilaterally submitting to the PCIJ disputes with more powerful States.38

A compromise was found with the invention of the “optional clause”. Besides being able to confer the Court jurisdiction by way of ad hoc agreement or a compromissory clause contained in a treaty, as had been the case hitherto with arbitral tribunals, States now could “… recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court…” by way of a unilateral declaration39. The difference with a treaty-based compromissory clause providing for unilateral resort to adjudication is obvious. Since the jurisdiction of the World Court is general and not restricted to any treaty, filing an optional declaration is a momentous step that exposes a State to the risk of legally unstoppable litigation about both obligations under general international law and potentially many treaty-based obligations.40 The declaration could also be made at any time and therefore compulsory jurisdiction over disputes does not necessarily have to be consented to at the time the treaty is negotiated.

The optional clause was a major innovation in international practice, albeit not as radical as the Advisory Committee of Jurists might have wished. On the one hand, States might lose control about when, with whom, and for what they might litigate before an international adjudicative body whose decision is binding under international law. On the other, States did not have any obligation to make use of the optional clause and could word their optional declaration as narrowly as they wished by way of qualifications and reservations. It should not be surprising that it was only towards the end of the 1920s that the Great Powers of the League of Nations decided to subscribe to the optional clause

37 Id., 32-34.
38 Id., 40.
40 In this Article the term “World Court” is used as state-of-the-art term to refer collectively to both the PCIJ and ICJ.
system by filing their own declarations and that those declarations were replete with reservations.

**B. From the Optional Clause to the Rise of the Compulsory Paradigm**

The really dramatic change took place only after the Second World War. In the aftermath of one of the most devastating wars it ever suffered, Europe experienced a truly “Kantian epiphany”: the dawn of an international federation of States organized along the lines of the tripartite republican structure (legislature/executive/judiciary) and endowed with a judicial body enjoying compulsory jurisdiction: the Court of Justice of the European Communities (hereinafter “European Court of Justice” or “ECJ”).\(^1\) Granted, the building of Europe started *sotto voce*. It took decades for the full-fledged federalist plan to unfold and it remains a work-in-progress, but the ECJ fundamentally broke with the consensual paradigm hitherto prevailing. Apart from minor categories of direct actions where jurisdiction might be conferred by consent of the parties,\(^2\) the Court was given wide and, most importantly, compulsory jurisdiction to ensure that the law is observed in the interpretation and application of the Treaties establishing the European Communities and of measures adopted by the competent Community institutions. Non-compliance with the Court’s decision carries with it fines and sanctions that can be directly enforced by national courts.

As the economic and political success of the European Communities led to emulation to various degrees and in various forms, the seed of the “compulsory revolution” gradually spread around the globe.\(^3\) As States outside Western Europe began creating regional economic and political integration areas, they tended to follow the basic template of the European Communities, providing for judicial bodies endowed with compulsory jurisdiction over disputes arising out of the implementation of the given regime’s obligations and/or decisions of the regime’s organs. Examples abound, such as the Caribbean Court of Justice,\(^4\) the European Free Trade Agreement (EFTA) Court\(^5\),

---

\(^1\) See, in general, Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991). The ECJ was established first by the Treaty Establishing the European Coal and Steel Community, 18 Apr. 1951, 261 U.N.T.S. 140. After the creation of the European Atomic Energy Agency and the European Economic Community, on 25 March 1957, the Court became the common judicial organ of the three communities.


the Court of Justice of the Common Market for Eastern and Southern Africa; the Court of Justice of the Economic Community of West African States (ECOWAS); the Mercosur Permanent Review Tribunal; and the Court of Justice of the Andean Community; not to mention more than a dozen other courts that are either relatively little active or dormant, or have been created but later discontinued, or whose constitutive instrument is pending ratification.

In the field of human rights a “Kantian” Europe led the way towards compulsory jurisdiction as well, but this took longer. For about the first forty years (1959-1994), disputes over the implementation of the European Convention on Human Rights and Fundamental Freedoms (hereafter: European Convention) could be submitted to the European Court of Human Rights (ECHR) by contracting States against other contracting States or by the European Commission on Human Rights on behalf of individual applicants, but only as regards those States which had expressly recognized the jurisdiction of the Commission and the Court by a declaration analogous to the “optional declaration” under the ICJ Statute.

The great majority of the States party to the European Convention eventually accepted the compulsory jurisdiction of the Court, but it was a slow progress. As we

---

45 Agreement on the European Economic Area and Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, 2 May 1992, No 94/L344/1, 37 O.J. 1 (31 December 1994).


50 For a comprehensive list see Synoptic Chart, supra note 9.

51 Convention for the Protection of Human Rights and Fundamental Freedoms art. 25 and 46, 4 Nov. 1950, E.T.S. No. 5 [hereafter: European Convention]. The original text, before the amendments introduced by Protocol 11, can be found in COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS (5th ed 1966).

52 For a chart of declarations made pursuant to former arts. 25 and 46 of the European Convention, with dates, see http://conventions.coe.int/treaty/en/Treaties/Html/005-1.htm (site last visited 1 March 2006).
will see, this is the template on which the IACHR is still based. It is only in 1994 that the European system was fundamentally overhauled by Protocol 11 to the European Convention, which abolished the Commission and transformed the system from consensual to fully compulsory. Moreover, membership to the Council of Europe now is conditional upon ratification of the European Convention.

The same trajectory, from the consensual to the compulsory paradigm, has been followed in the international trade field. Much like the case of the ECHR, the dispute settlement system of the General Agreement on Tariffs and Trade (GATT) remained largely consensual for more than four decades relying on diplomacy and consensus to function for its operation. The switch to the compulsory paradigm took place about the same time as the European human rights regime was reformed. In 1994, members of the GATT adopted the final act of the Uruguay Round, creating the World Trade Organization (WTO). Membership to the WTO requires acceptance of the dispute

---

53 See infra at 22. The African Court of Human and Peoples’ Rights follows more or less the same pattern. The court can be seized by the African Commission of Human and Peoples’ Rights; the State Party, which had lodged a complaint to the Commission; the State Party against which the complaint has been lodged at the Commission; the State Party whose citizen is a victim of human rights violation and African Intergovernmental Organizations. Moreover, “[t]he Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it” if the State in question has filed an optional declaration of acceptance of the Court’s jurisdiction. Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights art. 5 and 34.6, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), reprinted in OELLERS-FRAHM & ZIMMERMANN, 1 DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW 625 (2nd rev. ed. 2001).


55 “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council”. Statute of the Council of Europe, art. 3, E.T.S. No. 001. “Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to [the European Convention] under the same conditions”. European Convention, art. 65. Currently, Belarus is the only major European State that has not yet ratified the European Convention and is not member of the Council of Europe. The Parliamentary Assembly of the Council of Europe has determined that Kazakhstan could apply for full membership, because it is partially located in Europe, but that they would not be granted any status whatsoever at the Council unless democratic and human rights record improve.


settlement system of the organization. In a radical departure from previous practice, States can no longer veto the establishment of panels or the adoption of dispute rulings under the new system. To block them, a so-called negative consensus of all members is now needed, which makes the process automatically de facto. In addition, the creation of a new, standing Appellate Body to hear appeals against panel rulings has added significantly to the further judicialization of the process. Also, the level of discipline imposed both on recalcitrant respondents and unruly applicants has been significantly increased.

Finally, it is obvious that the rise of international criminal bodies drove another nail in the coffer of the consensual paradigm. Over the last fifteen years, several international criminal courts and tribunals were created. There are currently two ad hoc international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); a permanent international criminal court: the International Criminal Court (ICC); and number of hybrid national-international bodies.

While typically it is States’ consent that directly or indirectly determines an international adjudicative body’s jurisdiction and its scope, it is less so in the case of international criminal bodies. Both the ICTY and ICTR have been established by the UN Security Council acting under Chapter VII of the UN Charter, which gives them binding powers. Their jurisdiction comprises all international crimes committed respectively in the territory of the former Socialist Republic of Yugoslavia and of Rwanda for a specific time period. Yet, consent of Rwanda or the states of the former Yugoslavia was not necessary to establish them. Also, because both tribunals have been established under Chapter VII, all UN members are bound to comply with their decisions and orders.

---


60 DSU, arts. 6.1, 16.4, 17.14.

61 Article 23 of the DSU obliges all WTO members to submit their WTO complaints to the WTO dispute settlement procedure only, and not to pursue them unilaterally. In other words, complainants unhappy with the progress or result in WTO dispute settlement can no longer exit the WTO system or resort to self-help.

62 On hybrid criminal tribunals, see CESARE P.R. ROMANO, ANDRÉ NOLLKAEMPER & JANN KLEFFNER, INTERNATIONALIZED CRIMINAL TRIBUNALS (2004) [hereafter, Romano, Internationalized].

63 Actually, at the time the Security Council adopted Resolution 955 (1994) creating the ICTR, Rwanda was a member of the Security Council. It was the only State voting against the resolution. China abstained.

Granted, consent still lies at the core for it is by becoming a member of the United Nations that a State has given authority to the Security Council to create the tribunals, but the degrees of separation between that original act of consent and the exercise by the tribunals of jurisdiction have significantly increased.

The point is even clearer in the case of the ICC. The Court was created by a treaty and, as such, it should not create legal obligations for third party States as is consistent with the principle *pacta tertiis*. However, there are several ways in which the sovereignty of third-States might be nonetheless affected. For instance, nationals of States not party to the Rome Statute may be prosecuted by the Court if they have committed international crimes against nationals of States party or on the territory of States party. Also, the Security Council acting under Chapter VII of the Charter of the United Nations can refer a situation in which such crimes appear to have been committed to the ICC Prosecutor regardless of where, by whom and against whom alleged violations have been committed and regardless of whether the concerned State is party to the ICC Statute. The case of Sudan, which has recently been made object of such a referral by the Security Council for international crimes committed by Sudanese against Sudanese in Darfur (Sudan), without Sudan being a party to the Rome Statute, is illustrative of how far the system has shifted towards the compulsory paradigm.


Although significant, the multiplication of international courts and tribunals *per se* has not fundamentally changed the structure of international law and relations. The real discontinuity with the past is the fact that most and actually all of the new international courts and tribunals enjoy compulsory jurisdiction. There are still some exceptions, but in this section we will show that even in the case of those adjudicative fora still technically relying on the consensual paradigm, in practice the observance of the principle of consent and deference to States’ will has significantly decreased.

We mentioned previously that for two centuries arbitration has been typically initiated with the agreement of both parties and that jurisdiction has rarely been

---


67 *Id.*, art. 13.b.

challenged.\textsuperscript{69} Since the 1990s, this is increasingly no longer the case. Although there are no exact statistics, it is safe to say that unilateral resort to arbitration and contestation of jurisdiction for lack of consent has become rather frequent.\textsuperscript{70} As we will see, there are several instances of major international arbitrations that have been unilaterally triggered and where the question of consent was raised in preliminary objections.\textsuperscript{71}

In this section, we will look at the cases of the ICJ and the IACHR. It will be shown that the IACHR has taken a strong “compulsory bend” though the system was designed on the consensual paradigm. The ICJ also has shown signs of moving in the same direction, albeit not so brashly as the IACHR, but rather hesitantly and \textit{sotto voce}.

There is also a third partial exception: the dispute settlement system under the United Nations Convention on the Law of the Sea. The case of the LOS Convention is unclear as in one landmark case an ad hoc arbitral tribunal adopted an award, which points towards the consensual paradigm. However, since no other arbitral tribunal, nor the International Tribunal for the Law of the Sea (ITLOS), has yet had the chance to return to the issue, the precedential value of that award is still to be tested. Accordingly, we will first analyze the cases of the ICJ and IACHR, and then return to the special case of the LOS Convention.

\textbf{A. The Cases of the ICJ and IACHR.}

Both the ICJ and the IACHR exercise two main forms of jurisdiction: contentious and advisory. Decisions over disputes in contentious cases are binding, while advisory opinions are non-binding, albeit authoritative interpretations of international law. Yet, consent is relevant in both cases as will be shown.

1. Consent to Contentious Jurisdiction

Consent can be given to contentious jurisdiction of the ICJ and IACHR substantially in the same way, either \textit{ad hoc} or \textit{ex ante}, by inserting a clause in treaties conferring jurisdiction should any dispute arise, or by a declaration under the “optional

\begin{itemize}
\item Supra at 11.
\item The challenge of extracting such data is also compounded by the fact that there are no collections of international arbitral awards both comprehensive and up-to-date. The authoritative compilations by Coussirat-Coustère and Stuyt stop respectively at 1988 and 1989 (\textsc{Alexander M. Stuyt, Survey of International Arbitrations 1794-1989} (3rd ed. 1990); \textsc{Vincent Coussirat-Coustère & Pierre M. Eissmann, Répertoire de la jurisprudence arbitrale internationale} (1991). The Reports of International Arbitral Awards by the United Nations is more up to date (Volume 24 was published in 2004), but it is less comprehensive than those compilations. None indicates whether a case was initiated unilaterally or consensually.
\item See \textit{infra} Part III.
\end{itemize}
Consent to jurisdiction by ad hoc agreement does not warrant consideration, as it follows the quintessential consensual paradigm. Compulsion is an issue, however, when jurisdiction is found either in a compromissory clause in a treaty, or in an optional declaration. The fundamental difference between the two is that while the former is a negotiated act, the latter is unilateral, producing its binding effects only when matched with a similar declaration by another State. Also, being a unilateral act, the optional declaration can be equally unilaterally modified or withdrawn and States can qualify it with reservations and declarations, subject to the terms of the applicable legal instruments. Be that as it may, one must also keep in mind that another fundamental principle of international adjudication is that the court itself decides of its own competence (i.e. the so-called compétence de la compétence principle) and therefore is the master of the interpretation of declarations and their effects.

i. International Court of Justice

Of all international judicial bodies, the ICJ is probably the one that still adheres to the consensual paradigm the closest, at least on the face of it. It is the forum where sovereignty is still treasured and where the limits imposed by the principle of consent are felt the most, which is probably because jurisdiction ratione materiae is the widest possible, encompassing any dispute between sovereign States on any matter of international law.

The “optional clause”, introduced first by the PCIJ and then inherited by the ICJ, has not met the expectations of its inventors. In the aftermath of the creation of the World Court, States did not rush to make optional declarations. Even worse, the number of declarations relative to the number of States has steadily decreased being set to about one-third of all UN members today. Second, as reciprocity is the underlying principle of the optional clause mechanism, jurisdiction is scaled down to the lowest common denominator of the declarations of the two parties. States can, and very often do, restrict

---


73 VCT, supra note XXX, art. 19 (a) and (b).


75 Supra at 13.

76 During the PCIJ period (1920-1945) 32 out of 52 signatories of the PCIJ Statute had made an optional declaration. In 1952, those 32 declarations of acceptance were carried over to the ICJ, but the members of the UN were now 64. Today, only 66 out of 191 UN members have made a declaration. http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm (site last visited 1 March 2006).
the scope of declarations with reservations and “interpretative declarations”, thus much reducing the area of overlap. Also, although treaties in force worldwide number in the thousands, the ICJ currently reports only 268 treaties, both bilateral and multilateral, containing clauses relating to the jurisdiction of the Court in contentious proceedings.

Yet, despite the fact that the number of entities able to litigate before the Court is very limited (i.e. only sovereign States) and that only a minority is willing to accept the jurisdiction of the Court ante hoc, in sixty years of existence only one out of seven cases put on the docket has been submitted by way of agreement between the parties. Thus, it should be no wonder that preliminary objections to jurisdiction are extremely frequent.

Be that as it may, it is a fact that the Court rarely finds against its own jurisdiction. Unless jurisdiction is manifestly lacking, it tends to err in favor of the applicant and against the objections of the respondent, proceeding to the merits rather

77 However, reservations and declarations cannot be incompatible with the object and purpose of the treaty. VCT, supra note 65, art. 19 (c). On the functioning of the “optional Clause” see J.G. Merrills, The Optional Clause at Eighty, in ANDONIKUSE ET AL., LIBER AMICORUM JUDGE SHIGERU ODA 435-450 (2002).

78 http://www.icj-cij.org/icjwww/ibasedocuments/ibasicext/ibasicexttreatiesandotherdocs.htm (site last visited 1 March 2006). Note that it does not say how many of those provide for unilateral activation of the Court and how many contain just a commitment to agree eventually, but not necessarily, to submit disputes to the Court.

79 ICJ Statute, supra note 72, art. 34.1.

80 The ICJ has been submitted 105 cases, of which only 15 by way of ad hoc agreement. The other 90 have been submitted unilaterally, either on the basis of a compromissory clause included in a bilateral or multilateral treaty, or on the basis of the optional declaration, or both. Some cases have also been referred relying on the forum prorogatum doctrine. http://www.icj-cij.org/icjwww/idecisions.htm (site last visited 1 March 2006).


than dismissing the case. In those cases where jurisdiction is not clearly lacking, jurisdiction has often been fiercely debated, both in and outside the courtroom.

ii. Inter-American Court of Human Rights

Membership to the Council of Europe these days is conditional upon ratification of the region’s central human rights treaty: the European Convention. That is still not the case in the Western hemisphere. While the Organization of American States (OAS) has 35 members, currently only 24 have ratified the 1969 American Convention on Human Rights [hereafter: American Convention].

The IACHR has jurisdiction over disputes regarding the interpretation and implementation of the American Convention that have been submitted to it by individuals, from the Inter-American Commission of Human Rights, or by other States party to the Convention. To date, 18 States, just half of all OAS members, have made optional declarations accepting the jurisdiction of the IACHR.

Of the 71 cases submitted to the Court, all have originated from complaints by individuals filed with the Commission and jurisdiction has been exercised on the basis of

---

83 E.g., in the Military and Paramilitary activities in and against Nicaragua, Jurisdiction and Admissibility (Nicar. v. U.S.A), 1984 I.C.J. 393 (26 Nov.) [hereafter: Nicaragua case], the Court, by majority, and in the face of a very strongly argued dissent by the U.S., held that the optional declaration of acceptance of the PCIJ jurisdiction by Nicaragua was capable of founding the jurisdiction of the ICJ, albeit it had not been ratified by the Nicaraguan legislature. Famously, the U.S., not persuaded by the Court’s finding, left the courtroom. The same predisposition to find a source of consent even when its existence is not crystal clear reappeared in the Court’s subsequent and related case brought by Nicaragua against Honduras (Border and Transborder Armed Actions (Nicar. vs. Hond.), 1988 I.C.J. 69 (20 Dec.). Also, there are other examples of relaxation of the imperatives of consent. In 1990, in the Land, Island and Maritime Frontier Dispute, which had been submitted by way of a special agreement between El Salvador and Honduras, the Court allowed Nicaragua to intervene even in the absence of a specific jurisdictional link between the applicant State and the original parties (Land, Island and Maritime Frontier Dispute (El Sal./Hond.), 1990 I.C.J. 92 (Application to Intervene, 13 Sept.).


85 See supra at 16.

86 American Convention, supra note 72. Ratifications can be found at http://www.cidh.oas.org/Basicos/basic4.htm (site last visited 1 March 2006).

87 I.e., Chile; Ecuador; Uruguay; Argentina; Colombia; Costa Rica; El Salvador; Guatemala; Honduras; Mexico; Nicaragua; Panama; Surinam; Venezuela; Brazil; Paraguay; Bolivia; Haiti.
optional declarations. Rulings on preliminary objections have been made in 30 cases. In only two of them, objections to jurisdiction were upheld and the cases dismissed. While some objections may have been upheld in other cases, enough ground for exercising jurisdiction was found nonetheless.

Two observations arise from the foregoing. First, for an OAS member to be subject to IACHR jurisdiction, express consent is required twice: first by ratifying the American Convention and second by making an optional declaration. The system was designed in the 1960s and it was clearly meant to be highly consensual. However, it is also clear that the IACHR has gradually gained the upper hand in the tug-of-war with Latin American governments, showing a remarkable willingness, considerably more than the ICJ, to find jurisdiction despite States’ objections. Since the end of the 1990s, the IACHR has been operating on the basis of a truly “compulsory doctrine” and it has increasingly refined this doctrine, which has become a fundamental element of its jurisprudence.

The landmarks in this regard are two sets of cases, decided in 1999 and 2001: the Ivcher-Bronstein and the Constitutional Court cases, against Peru, and the Hilaire, Benjamin and Constantine cases, against Trinidad and Tobago. In the case of Peru, the Court faced the issue of a State trying to disengage itself from the Court’s binding

---

88 International judicial bodies sometime decide to rule on preliminary objections at the same time they rule on the merits. This is part of their procedural implied powers. A separate and previous ruling on preliminary objections is typically made only when the court decides that the objections are of such a relevance to warrant separate treatment. Hence, the figure of 30 preliminary objection rulings should be regarded only as a floor.


90 E.g. in the Case of the Serrano-Cruz Sisters v. El Salvador, Inter-Am Ct. H.R. (ser. C) No. 118 (Prelim. Obj., 23 Nov. 2004), the Court upheld El Salvador’s objection that some facts fell outside the scope ratione temporis of its declaration, but at the same time found that other facts did not and therefore could be subject to adjudication.

91 Case of Ivcher-Bronstein v. Peru, Inter-Am Ct. H.R. (ser. C) No. 54 (Competence, 24 Sept. 1999); Case of the Constitutional Court v. Peru, Inter-Am Ct. H.R. (ser. C) No. 55 (Competence, 24 Sept. 1999); Case of Hilaire v. Trinidad and Tobago, Inter-Am Ct. H.R. (ser. C) No. 80 (Prelim. Obj., 1 Sept. 2001); Case of Benjamin et al v. Trinidad and Tobago, Inter-Am Ct. H.R. (ser. C) No. 81 (Prelim. Obj., 1 Sept. 2001); Case of Constantine et al. v. Trinidad and Tobago, Inter-Am Ct. H.R. (ser. C) No. 82 (Prelim. Obj., 1 Sept. 2001). Note that in the Ivcher-Bronstein and Constitutional Court cases, and the Hilaire, Benjamin and Constantine cases, the Court rendered identical judgments on the same date for each cases cluster. Therefore, hereafter we will refer to only the Ivcher-Bronstein and Hilaire cases as the leading cases for each cluster [hereafter: Ivcher-Bronstein and Hilaire]. See also Serrano Cruz Sister, supra note 90.
contentious jurisdiction by withdrawing its optional declaration, while in the case of Trinidad it was a matter of reservations to the declaration.

In 1981, Peru recognized the contentious jurisdiction of the Court using the standard formula, without any significant reservations.\textsuperscript{92} The Court was seized by the Commission for both the \textit{Ivcher-Bronstein} and the \textit{Constitutional Court} cases respectively in May and June 1999, but Peru notified the Court and the General Secretariat of the OAS in July that the Congress of the Republic had approved, with immediate effect, the withdrawal of Peru’s recognition of the contentious jurisdiction of the Court.\textsuperscript{93}

The Court found unanimously in favor if its jurisdiction by observing first that acceptance of the Court’s binding jurisdiction is “… an ironclad clause” to which there can be no limitations except those expressly provided for in the American Convention. Further, “…it cannot be at the mercy of limitations not already stipulated but invoked by States Parties for internal reasons”.\textsuperscript{94} The Court concluded that withdrawal was not allowed since there is no provision in the Convention that expressly permits States to withdraw declarations recognizing Court’s binding jurisdiction. Peru’s original declaration did not provide for that either.\textsuperscript{95} The only way Peru could “… disengage itself from the Court’s binding contentious jurisdiction is to denounce the Convention as a whole…”\textsuperscript{96} According to the unanimity of the IACHR judges, the Court does not have compulsory jurisdiction over a State that has ratified the American Convention but has not filed an optional declaration. However, for a State to avoid the jurisdiction of the Court it is not enough to withdraw the declaration but it must also denounce the treaty as a whole.

Unlike Peru, Trinidad and Tobago had attached reservations to its declaration of acceptance of the Court’s jurisdiction. It particularly recognized the Court’s jurisdiction “… only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private

\textsuperscript{92} “… the Government of Peru hereby declares that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of the Convention. This recognition of jurisdiction is for an unspecified period and on condition of reciprocity.” \textit{Ivcher-Bronstein, supra} note 91, para. 30

\textsuperscript{93} \textit{Ibid.}, para. 23. Legislative Resolution 21152 of July 8, 1999.

\textsuperscript{94} \textit{Ibid.}, para. 36.

\textsuperscript{95} \textit{Ibid.}, para. 53. The Court also cited principles of the law of treaties (i.e., good faith and requirement of allowing reasonable delay before withdrawal) in support of its conclusion. Interestingly, in support it cited the dictum of the ICJ in the \textit{Nicaragua} case (\textit{supra} note 83).

\textsuperscript{96} \textit{Ibid.}, para. 40.
citizen." The Court found the reservation to be manifestly incompatible with the object and purpose of the Convention and thus invalid. It was general in scope and it subordinated the application of the American Convention to the internal legislation of Trinidad and Tobago as decided by its courts. However, invalidity of the reservation did not mean that Trinidad’s declaration was void ab initio. Only the reservation was invalid, while the acceptance of jurisdiction stood.

In sum, with the Ivcher-Bronstein and the Constitutional Court cases, and the Hilaire, Benjamin and Constantine cases, the IACHR has turned on its head the principle of consent. While the principle, in its classical rendering, implies a presumption in favor of the State against which jurisdiction is being invoked, the San José court has claimed the existence of a sort of opposite presumption, at least in the case of human rights. In fact, the Court has been careful with distinguishing international settlement of human rights cases (entrusted to bodies like the IACHR and ECHR), from the peaceful settlement of international disputes involving purely interstate litigation (entrusted to a body like the ICJ), the former dealing with human rights and abusive governments trying to weasel away from their obligations towards individuals, and the latter disputes between States on any point of international law. It holds that human rights regimes because of their nature must derogate from the classical consensual paradigm.

---

97 Hilaire, supra note 91, para. 43.

98 Ibid., para. 85-93.

99 Id.

100 The influence the ECHR had on the IACHR cannot be overlooked. Ivcher-Bronstein case, supra note 91, para. 47; Hilaire, supra note 91, para. 69. It is clear that the transformation of the European human rights system from consensual to compulsory during the 1990s has encouraged the San José court to grow bolder. In a 1995 landmark case the ECHR invoked the peculiar nature of human rights regime to justify departures from observance of the strictures of the optional clause. In its judgment on preliminary objections in the case of Loizidou v. Turkey, it warned that, in the light of the letter and the spirit of the European Convention the possibility cannot be inferred of restrictions to the optional clause relating to the recognition of the contentious jurisdiction of the European Court, by analogy with the permissive State practice under Article 36 of the Statute of the ICJ; under the European Convention, a practice of the States Parties was formed precisely a contrario sensu, accepting such clause without restrictions. To that it added, moreover, the fundamentally distinct context in which different international tribunals might operate, the ICJ being "a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention". Loizidou v. Turkey 15318/89 [1995] ECHR 10 (Prelim. Obj., 23 March 1995), para. 82, and para. 68. See also the Court's obiter dicta in its previous decision anterior, in the case Belilos v. Switzerland 10328/83 [1988] ECHR 4 (Prelim. Obj., 29 April 1988).

101 See supra note 27.

2. Consent to advisory jurisdiction?

Both the ICJ and the IACHR have, besides contentious jurisdiction, an advisory jurisdiction, that is to say the capacity to give a formal legal opinion on a point of law outside adversarial proceedings. They are not the only international judicial bodies to have this capacity. Yet, of all they are probably the two bodies whose advisory jurisdiction is most open-ended and most often resorted to. In almost sixty years the ICJ has received 24 advisory opinion requests. The PCIJ, in less than twenty years rendered 27 of them, while the IACHR rendered 18 over twenty-five years of operation.

Advisory opinions of international judicial bodies do not usually bind the petitioner, and requesting advisory opinions is not obligatory but a mere faculty. In the case of the ICJ, only certain UN organs and some of its specialized agencies have this power. However, in the case of the IACHR, both certain OAS organs and OAS member States can request opinions.

The rationale for the advisory jurisdiction is to give the main organs of the organization, or a member State, the possibility of obtaining an expert legal opinion on the meaning of the organization’s constitution, or the compatibility of certain proposed acts or laws, before acting. An example of this canonical use is the opinion requested by the UN General Assembly in the early years of the organization on its competency to admit a State to the UN, or the opinion requested by the Inter-American Commission about the exceptions to the exhaustion of local remedies rule, or the one requested by Costa Rica on the compatibility with the American Convention of some legislation it planned to adopt.

---

105 http://www.corteidh.or.cr/seriea_ing/index.html (site last visited 1 March 2006).
106 UN Charter, art. 96.
It is also true that some abstract “constitutional questions” may arise from an actual dispute between the organization and some of its members, as it happened when some UN members in the 1960s refused to pay their assessed contributions,[^111] or when the Inter-American Commission raised the issue of international responsibility for the promulgation and enforcement of laws in violation of the Convention[^112].

As contrasted to these two types of “constitutional” or “quasi-constitutional” use of the advisory jurisdiction there is a third, more problematical, one: the use of the advisory opinion to overcome the stumbling block of consent. If consent means “consent to be subject to judicial proceedings” instead of “consent to be bound by decisions” of international adjudicative bodies, then a discussion of advisory procedures is warranted for it is evident that an international body may scrutinize a State even though it has not consented to that body’s jurisdiction.

The most recent and obvious instance of employing advisory jurisdiction to force an issue before the ICJ, though some or all the States involved have not accepted its jurisdiction, is the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[^113] The opinion was requested by the UN General Assembly.[^114] Again, not being a contentious case, there are no “applicants” and “respondents” as such. However, it is clear that the de facto respondent was Israel who has had no optional declaration standing since 1985.[^115]

Taking advantage of the possibility of submitting information to the Court regarding the opinion asked, Israel tried to convince the Court that it could not exercise advisory jurisdiction because the request concerned a contentious matter between Israel and Palestine, and Israel has not given consent to jurisdiction. It also emphasized that it has never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contended that the parties


[^113]: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (9 July), 43 ILM 1009 (2004) [hereafter: Legal Consequences].

[^114]: It should be noted that in order to find the necessary majority to adopt the resolution requesting the opinion, the General Assembly resorted to an extraordinary meeting convened pursuant to UNGA Resolution 377 A (V) entitled “Uniting for Peace”. *Ibid.*, para. 18-42.

[^115]: Israel filed an optional declaration in 1951, replaced it in 1956, and withdrew it on 21 November 1985, following the *Nicaragua* case. The text of the Israeli declarations can be found in Shabtai Rosenne, Documents on the International Court of Justice (1991), 697-702.
repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that to arbitration.\textsuperscript{116}

The unconvinced Court gave the UN General Assembly the opinion it had requested clarifying that no State can block an advisory opinion that the UN considers desirable in order to obtain enlightenment as to the course of action the organization should take.\textsuperscript{117} However, it equally recognized that the Court has a margin of discretion in deciding whether to give an opinion and it might decline to do so if the opposition of “certain interested States” raised issue of “judicial propriety”, especially when it regards a State that has not accepted the Court’s jurisdiction.\textsuperscript{118} Clearly the Court found this was not the time to exercise such restraint.\textsuperscript{119}

This was not the first time the Court had decided to plow ahead despite the objection of interested States.\textsuperscript{120} Yet, there are also precedents in which it decided not to. Curiously enough, it did so exactly in the Status of Eastern Carelia advisory opinion, that very seminal precedent in which the principle of consent was affirmed first.\textsuperscript{121} In 1923, the Council of the League of Nations requested the PCIJ an advisory opinion about whether an agreement between Finland and Russia on the region of Eastern Carelia constituted an engagement of an international character placing “…Russia under an obligation to Finland as to the carrying out of the provisions contained therein.”\textsuperscript{122} The Court declined to give the opinion because it found that the request “…bears on an actual dispute between Finland and Russia.”\textsuperscript{123} Russia had “…on several occasions, clearly declared that it accepts no intervention by the League of Nations in the dispute between

\textsuperscript{116} Legal Consequences, supra note 113, para. 46 ff.

\textsuperscript{117} Ibid., para. 47.

\textsuperscript{118} Id. See also, Western Sahara, Advisory Opinion, 1975 I.C.J. 25 (16 Oct.), paras. 32-33.

\textsuperscript{119} “In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.” Legal Consequences, supra note 113, para. 50.


\textsuperscript{121} Status of Eastern Carelia, supra note 1.

\textsuperscript{122} Ibid., 7.

\textsuperscript{123} Ibid., 27.
Finland … [and] the refusals which Russia had already opposed … have been renewed upon the receipt by it of the notification of the request for an advisory opinion…”. The Court continued stating that there are “…other cogent reasons…” why it could not entertain the request, but Russia’s opposition to the court’s jurisdiction remained the first central reason for the request’s denial. 

Granted, while Israel is a member of the United Nations, Russia was not a member of the League of Nations – at least at the time of the opinion. This may explain why the World Court felt the need to depart from its own precedent. However, if the principle of consent was and still is a fundamental and unquestioned centerpiece of international law, one would have expected greater consideration of Israel’s objections. Most likely, the real explanation as to why the Court felt the need to decline the requested opinion regarding Russia then, while it did not now, is that those opinions were requested in two different eras of public international adjudication: the consensual and the compulsory.

ii. Inter-American Court of Human Rights

In the IACHR context, two recent examples of bending the consent principle arise: the advisory opinions on the Right to Information on Consular Assistance and the Undocumented Migrants. Both opinions were requested by Mexico. In each case, the questions asked were generally framed and no particular State was named explicitly, but it is obvious that the de facto respondent was the United States. The U.S. has not ratified the American Convention nor has it made any optional declaration; thus it is not subject to the IACHR’s binding jurisdiction. However, this did not prevent the San José court from scrutinizing U.S. actions and laws.

The first opinion is clearly part of the general dispute pitting the U.S. against several countries over the implementation of the Vienna Convention on Consular

\[\text{\cite{124} Ibid., 28.}\]

\[\text{\cite{125} Ibid., 28-29.}\]


\[\text{\cite{128} It should be noted that the Inter-American Commission routinely receives petitions against the U.S. and issues reports. See IACHR Reports, at http://www.cidh.org/annual.eng.htm (site last visited 1 March 2006). The legal basis for doing so is the OAS Charter, to which the U.S. is a party. Charter of the Organization of American States, 30 Apr. 1948, 2 U.S.T. 2394. The full text of the OAS Charter, as amended by all four protocols now in force, can be found at 33 I.L.M. 989 (1994). In such cases, the Commission applies the standards set forth in the American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21, rev. 6 (1948), which is a non-binding legal instrument.}\]
Relations. It was requested while the ICJ had on its docket two cases on the same issue filed by Paraguay and Germany and against the U.S. (Breard and LaGrand). It should also be remarked that four years later Mexico submitted its own case, always on the same issue, to the World Court. The second regards a long-standing row between Mexico and the U.S. regarding treatment of undocumented Mexican migrants entering the United States illegally.

If the San José court pushed the legal envelope in overcoming reservations to its contentious proceeding, it performed a sort of legal triple-somersault to justify rendering the opinions Mexico requested, U.S. objections to their rendering notwithstanding. We single these instances out of several previous cases where the Court was asked to render opinions on disputed matters because the U.S. is notoriously opposed to being subjected to the IACHR’s jurisdiction; hence, these are even clearer examples of bending the consensual paradigm.

In both the Right to Information on Consular Assistance and the Undocumented Migrants, the IACHR resorted to the same arguments typically used by the ICJ: that advisory opinions are not binding; that the existence of a dispute concerning the interpretation of a norm does not, per se, constitute an impediment to the exercise of advisory functions; that the question asked is of a general nature; and that issues presented are only examples and not charges upon which the Court had been called to rule. Like the ICJ, it conceded that by way of advisory opinions it could make determinations on an issue that might eventually be submitted as part of a contentious case. Of course, it found this was not the case.

However, there is a notable difference between the two Courts. In the case of the ICJ, the most effective argument against dismissal is typically that no State can prevent the Court from delivering an advisory opinion that the UN considers desirable. Here the

---


133 A delegation from the U.S. Department of State and Department of Justice presented written and oral comments on the advisory proceedings on the Right to Information, supra note 126, para. 26, p 13-19, para. 27, p. 26-30, para. 28, p. 33-34. It should be noted that the U.S. did not bother sending a delegation presenting objections during the subsequent hearings on the Undocumented Migrants opinion, supra note 127.

will of the individual State has to give way to the collective interest of the whole UN membership as expressed by the relevant organs. In the case of the IACHR, where opinions can be and often are requested by States, this justification might not always be utilized. Often the will of the State requesting the opinion has to be weighed against that of the State whose behavior is de facto at issue. The outcome is typically in favor of the former.

The Right to Information on Consular Assistance and the Undocumented Migrants opinions are clearly ill-disguised attempts by Mexico to seize the Court of a dispute it had with another State, that State’s objections to the Court’s jurisdiction notwithstanding. The fact that the Court did not feel the need to exercise the discretion it has to deny requests is consistent with and reinforces the trend towards the “compulsory” paradigm seen in the contentious field.

B. Law of the Sea Convention

The Law of the Sea Convention dispute settlement regime is the result of a compromise between states favoring a comprehensive and compulsory dispute settlement system and those in favor of a consensual system where the parties retain control over which forum will hear the dispute. While the ICJ and the IACHR are formally based on the classical negative notion of international jurisdiction (i.e. it does not exist unless there is express consent), the LOS Convention has a mixed approach providing for a comprehensive duty to settle disputes and compulsory jurisdiction, mitigated by several opt-out and choice of forum clauses.

Parties to the Convention have a general duty to peacefully settle disputes. To do so, they are free at any time to agree on any means they choose. However, if settlement is not reached and if it is not on a matter for which the Convention excludes binding procedures, then either party is entitled to trigger the compulsory dispute settlement procedures of the Convention. However, if “…States … parties to a dispute … have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for [in the LOS Convention], unless the parties to the dispute otherwise agree”.


136 LOS Convention, supra note 12, art. 286-296 (Compulsory Procedures) and 297-299 (Limitations and Exceptions).

137 Id., art. 279 and 283.

138 Id., art. 286.

139 Id., art. 282.
These provisions were recently at the core of the *Southern Bluefin Tuna* dispute, pitting Japan against Australia and New Zealand. In 1993, the three states concluded a convention over the conservation and management of southern bluefin tuna stocks. The agreement contains a typical dispute settlement clause that is found in many environmental agreements. Article 16 provides that in case of dispute “...with the consent in each case of all parties to the dispute, [it will] be referred for settlement to the International Court of Justice or to arbitration.”

As often happens, the parties could not agree to have the dispute referred to the ICJ or arbitration. However, all three states were also parties to the LOS Convention. As previously noted states have a general duty to peacefully settle disputes under the Convention by any means they can agree upon, but if settlement is not reached, and the parties have explicitly excluded no other procedure, then *either party* is entitled to trigger the compulsory dispute settlement procedure. Which dispute settlement procedure was to be applied? The LOS Convention procedure providing for unilateral activation (i.e. the compulsory paradigm), or the procedure in the 1993 Convention providing for agreed upon activation (i.e. the consensual paradigm)? The answer depends on whether the relevant provision in the 1993 agreement is interpreted as an actual agreement to a procedure in lieu of that of the Convention, or whether it is a mere “agreement to agree” and therefore no actual agreement.

Two separate adjudicative bodies looked into the question and reached antithetical conclusions. First, the International Tribunal for the Law of the Sea (ITLOS) considered the matter while deciding whether it could order provisional measures pending constitution of an Annex VII ad hoc Arbitral Tribunal. It found that the fact that the 1993 Convention applied to the parties did not preclude them from recourse to the dispute settlement procedures of the LOS Convention. Only in the event that the parties could agree to submit the dispute to arbitration under the 1993 Convention would the LOS Convention be overridden.

The ad hoc Arbitral Tribunal found differently. It concluded that it lacked jurisdiction and dismissed the case holding that the absence of an express exclusion of any procedure is not decisive. According to the ad hoc tribunal, the fact that Article 16 makes resort to binding settlement conditional upon agreement makes it clear that it was

---


141 ITLOS, *Southern Bluefin Tuna cases* (N.Z. v. Japan; Austl. v. Japan), 38 I.L.M. 1624 (1999), (Provisional Measures, 21 Aug. 1999). Note that ITLOS reached this conclusion while seized by a request for provisional measures, where it needed only prima facie jurisdiction to proceed, while the Arbitral Tribunal had to rule on whether it actually had jurisdiction. LOS Convention, supra note 12, art. 290.5. The threshold of prima facie jurisdiction is much lower than the one in the merits phase. For a finding of prima facie jurisdiction, it is simply necessary that lack of jurisdiction not be manifest.
the intent of the parties to remove proceedings from the reach of compulsory procedures of any kind, including the compulsory procedures of the LOS Convention.\textsuperscript{142}

Since the \textit{Southern Bluefin Tuna} dispute, there have not been any further cases touching on the issue. The system is still in its early years, as the LOS Convention entered into force only in 1994, and thus it remains to be seen whether the system will move towards the prevailing compulsory paradigm or back towards the consensual standard. Considering the criticism that the Arbitral Tribunal’s award has attracted and the general trend, chances are that the \textit{Southern Bluefin Tuna} award will not establish a significant precedent.\textsuperscript{143}

\textbf{III: LEGAL BRIC-À-BRAC: FRAGMENTATION OF INTERNATIONAL LAW, UNEVEN JUDICIALIZATION OF THE VARIOUS SELF-CONTAINED SPECIAL LEGAL REGIMES, AND DISHARMONIC, UNRELATED AND UNSYNCHRONIZED DISPUTE SETTLEMENT PROCEDURES AND INSTITUTIONS.}

In the previous sections we claimed that over the course of two centuries there has been a progressive judicialization of international relations, and that the most relevant aspect of this phenomenon is the fact that there has been a shift from a consensual to a compulsory paradigm. Consent to jurisdiction has gradually moved from ad hoc expression to locked-in choice. We showed that even in the case of those few courts where consent must still be expressed explicitly, the requirements of consent have been gradually diluted and that courts have exercised jurisdiction even when States involved ostensibly and unmistakably expressed the desire not to be subject to the jurisdiction (both \textit{stricto} and \textit{lato senso}) of that tribunal.

Admittedly, the judicialization of international politics can be overstated and blown out of proportion. Linear narrations tend to give the reader the impression that the phenomenon is moving progressively away from chaos and lawlessness towards the rule of law in international relations and the oversight of international judges. The march looks unidirectional and the destiny of humanity scripted. Yet, the move from the consensual to the compulsory paradigm has been far from homogeneous or global, nor is inexorable. Firstly, one could point that legalization and judicialization have disproportionally affected only certain areas of international law and relations. Economic and trade agreements have proven to be particularly fertile ground for international


judicial bodies. Human rights is also an area that has been increasingly legalized and judicialized, and the creation of a number of international criminal tribunals in recent years has turned international criminal law into a reality. Then again, there are many areas of international relations which, while showing increasing degrees of “legalization”, have not been “judicialized” and where diplomatic bargaining still plays the predominant role, like international financial and monetary relations, the protection of the environment, military and security affairs, the regulation of migrations, cooperation in the field of health, energy and telecommunications, just to name some.

More importantly, proclivity towards international courts and tribunals seems to vary greatly across the globe. Democracies seem to be much more likely to establish or submit to the jurisdiction of international courts and tribunals than non-democratic regimes. Smaller states appear to prefer international judicial bodies as they provide a level-playing field on which to engage major powers. Major Powers tend to be more reluctant, the major exception being the United Kingdom. The United States has an ambivalent attitude towards international judicial bodies, favoring judicialization in certain areas like trade, but not when it can create the possibility, albeit often only theoretical, that U.S. citizens might be subject to criminal trials outside U.S. courts before international judges, or to give the last word over whether human rights are violated in the U.S. not to the Supreme Court but to a bench of “foreign judges”.144

Different regions of the globe are also judicializing at varying degrees and pace. After the devastations of the Second World War, western Europeans launched a project for the building of continental peace, security, and prosperity. It rested on two main judicial pillars: the European Court of Justice and the European Court of Human Rights. Africa, in the struggle to achieve a certain degree of stability and prosperity, has also given birth to a large number of international judicial institutions. The fact that many have been non-starters, foundered after a few years, or are languishing with a paltry docket, also indicates a shallow commitment to independent third-party adjudication, at least for the ruling elites of many States.145

No international judicial body has ever been created in Asia or the Pacific region, with the partial exception of the Serious Crimes Unit/Panel in East Timor.146 Should the Extraordinary Chambers in the Courts of Cambodia be established to try former Khmer Rouge leaders, it would be a first for the continent. However, the extremely convoluted and faulty process through which it has been conceived casts doubt over its forthcoming launch.147

---

144 See, in general, Murphy, supra note 21.

145 For a comprehensive overview of international courts and tribunals in Africa, see www.aict-cmia.org (site last visited 1 March 2006)

146 See, generally, Romano, Internationalized, supra note 62.

147 Id., pp. 181-232.
While there are several states that have accepted the jurisdiction of multiple international judicial bodies, most are subject to the jurisdiction of only one or two. It is a fact that the overwhelming majority of people in the world do not have the chance to submit their cases of rights violations to the scrutiny of an international judicial body, after having exhausted domestic remedies. Forty-five European States are subject to the ECHR jurisdiction. As previously mentioned only 18 out of a total of 35 OAS members have accepted the IACHR’s jurisdiction. To date, more than 90 UN members have still not accepted the jurisdiction of the ICC, albeit the Security Council can decide to submit alleged crimes to the Court’s scrutiny regardless of the given State’s consent. The ICTY and the ICTR have limited jurisdiction as it extends only over the territory of the former republic of Yugoslavia (today fragmented in five independent States plus the UN protectorate of Kosovo), and Rwanda. The same applies in the case of the Special Court for Sierra Leone, although effects of this Court have also been felt in neighboring Liberia. Still, to a Chinese, a Fijian, or an Eritrean, protection of her or his human rights by way of an international judicial body is still not an option.

The process of judicialization is neither unidirectional nor irreversible. In fact, there are signs that the world is reaching a saturation point with regards to international judicial bodies as the neck-breaking pace of the 1990s is giving way to smaller and less dramatic developments. In areas, which have made headlines for the drive towards judicialization, like international trade, some are already arguing that governments should consider bringing politics back to the fore and center.

It is obvious that the building of an “international judiciary” has been by and large an unplanned affair, thus giving rise to a possibly uncontrollable series of legal, political and practical problems that were not anticipated by legal philosophers, scholars, or policy-makers. This is because the real world problems often straddle boundaries and disciplines, simplistic as it may sound. Indeed, what would happen when there are multiple international legal regimes, each endowed with own procedures and bodies, touching upon different aspects of the same dispute? Which procedure and bodies will be used? In a world based solely on the consensual paradigm the answer would be straightforward: whatever the parties can agree to use. In the contemporary world,

148 http://conventions.coe.int/ (under full list→05→Chart of signatures and ratifications) (site last visited 1 March 2006).
149 Supra at 22.
151 Supra at 18.
152 Romano, Internationalized, supra note 62, pp. 125-180.
153 See Pauwelyn, supra note 56.
however, where consent to jurisdiction may be locked-in and the principle of consent enfeebled, the question becomes particularly complex.

Treaties should ideally contain provisions to this end, identifying which dispute settlement procedure or forum takes precedence. When there are none, general principles of law like the *lex specialis* and the *lex anterior* principles, or rules contained in the 1969 Vienna Convention on the Law of the Treaties could help solve the riddle. Yet because of the abstract and general nature of these principles and rules, their application to concrete cases may not be automatic and parties to the dispute may disagree on them as well. This creates a sort of circular situation in which a third-party is needed to make a binding decision about which dispute settlement procedure will be used to settle the dispute. But which is the international adjudicative body that can legitimately make this decision? The first to be activated? The first to which consent was given? Or the latest? The one with the largest jurisdiction? Should UN-based international judicial bodies have the final word, or rather judicial bodies of particular regimes?

Several disputes illustrate how these are real problems, not idle conjecture, that are assuming worrisome proportions and extending to legal regimes, both regional and global, regardless of the subject matter. In the past few years, there have been several instances where the same dispute has been subject to parallel or serial decisions of multiple international and sometimes domestic courts and tribunals, giving rise to a cacophony of judgments and where the question of the will of sovereign States looms large and unaddressed.

*A. Two different legal regimes, with two different dispute settlement procedures, one based on the compulsory paradigm and the other on the consensual one.*

First, there are the cases raising the question of what is the legitimate forum to decide a dispute when there are two different legal regimes with two different dispute settlement procedures, where one is based on the compulsory paradigm and the other on the consensual one. The previous section made reference to the *Southern Bluefin Tuna* case. It is interesting to note that in the 1930s, the PCIJ faced a similar dilemma in the *Electricity Company of Sofia and Bulgaria* case. The Court was confronted with two

---

154 VCT, see *supra* note 65.

155 It is still unclear whether the increase of multiple proceedings necessarily threatens the unity of international law, or less dramatically creates a concrete risk of diverging or contrasting judgments on the same points of law between different fora. In the second half of the 1990s Jonathan Charney researched international jurisprudence and found little evidence of this. Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 HAGUE ACADEMY COLLECTED COURSES 101 (1998). Yet, that study was carried out in the early days of the “compulsory” revolution and since no other equally authoritative and comprehensive study has been carried out.

156 *Supra* note 140.

different sources of jurisdiction: a Belgian-Bulgarian treaty of conciliation, arbitration and judicial settlement, and the optional declarations made by the two countries. The treaty made resort to the ICJ conditional upon agreement of the parties. As in the *Southern Bluefin Tuna* case, the Belgian declaration excluded cases where the parties had agreed to have recourse to another method of pacific settlement. Unlike the Arbitral Tribunal in the *Southern Bluefin Tuna*, the World Court decided it had jurisdiction, rejecting Bulgarian objections. Two passages of that judgment are of particular significance. In the first, the Court observed that the multiplicity of agreements concluded accepting the compulsory jurisdiction was evidence that the contracting Parties intended to create new ways to access the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain.158 In the second, it remarked that in concluding the treaty the intent of the two countries was to institute a complete system of mutual obligations with a view to the settlement of any disputes which might arise between them. The Court held that there was no justification for holding that in so doing they intended to weaken the obligations which they had previously entered into with a similar purpose, and especially where such obligations were more extensive that those ensuing from the Treaty.159

It is not difficult to imagine other situations where similar problems might arise. For instance, what would happen if a dispute arises over certain biotechnologies, involving the decoding and patenting of genetic resources, involving, say a U.S. company and a developing country where the resources in question are found? Would it be resolved within the framework of the WTO, thus using WTO laws and the compulsory dispute settlement procedures? Or would it be resolved within the framework of the Convention on Biodiversity and its Biosafety protocol, which provide for optional recourse to judicial or arbitral settlement?160 Or would it be settled within the framework of the Biosafety Protocol’s compliance procedure, which can be triggered unilaterally, but which lacks binding effects?161 What happens if the WTO and the Convention on Biodiversity procedures are activated simultaneously or serially?

158 *Ibid.*, 76. The decision was not unanimous. Judge Van Eysinga concluded that, because of the existence of this reservation in the Belgian declaration, the declaration was “intended to be subsidiary; it is not to apply when and insofar as another method of pacific settlement has been established” and “the Treaty of 1931 does in fact establish another method for the pacific settlement,” *ibid.*, Van Eysinga Dissenting Opinion 109, 111. Judge Hudson, concurred with the latter point and concluded that “the reciprocal declarations ... are not to be applied as a source of jurisdiction in this case, and the Court’s jurisdiction may be sought only in the 1931 Treaty,” *ibid.*, Hudson Dissenting Opinion 118, 124.

159 *Ibid.*, 76.


161 Cartagena Protocol art. 34. The compliance procedure was adopted by Decision BS-I/7 of the Parties to the Protocol, available at http://www.biodiv.org/ (site last visited 1 March 2006).
B. Multiple legal regimes, all based on the compulsory paradigm.

Because compulsory jurisdiction has become the prevailing paradigm; there are even more actual examples of problems created by disputes arising under various legal regimes all based on the compulsory paradigm. There are several instances that can be mentioned. The Swordfish dispute, between Chile and the EC, has been submitted unilaterally by the EC to the WTO dispute settlement procedure and to a five-judge Special Chamber of ITLOS (but only after Chile threatened to refer the matter to ITLOS unilaterally).162 The Bosphorus Airlines dispute, between a Turkish airline and Ireland, has been considered first by the ECJ and then the ECHR.163 It should be made clear that the ECHR does not have appellate jurisdiction over judgments of the ECJ. They are two courts of two different organizations, each having a different, albeit partially overlapping membership. The ECJ had first been seized by the Irish High Court for a preliminary ruling on the compatibility of actions of the Irish Government with EC laws, while the ECHR was seized directly by the Turkish company raising the question of a possible violation by Ireland of the rights protected by the European Convention on Human Rights.

In the MOX Plant dispute, between Ireland and the United Kingdom, Ireland seized no less than three different international adjudicative bodies.164 In all cases, the United Kingdom could do nothing to oppose proceedings because it had given consent a priori, when ratifying the relevant conventions. At the same time the European Commission initiated infringement proceedings against Ireland before the ECJ, claiming that by submitting the dispute to a tribunal outside the Community legal order, Ireland had violated the exclusive jurisdiction of the Court of Justice about issues concerning the interpretation or application of EC law.165

---


165 Action brought on 30 October 2003 by the Commission of the European Communities against Ireland, (Case C-459/03), OJ 2004/C 7/39.
Recently, a row between Canada and the U.S. over softwood lumber has brought about a flurry of uncoordinated legal proceedings, both international and domestic. Canada initiated legal proceedings under both the North American Free Trade Agreement (NAFTA) and WTO agreements, which both provide for unilateral activation in a dispute pitting it against the United States. On 10 August 2005, a NAFTA Extraordinary Challenge Committee confirmed an earlier NAFTA (Chapter 19) panel conclusion in favor of Canada. Yet on 15 November 2005, a WTO panel ruled in favor of the U.S. because it found that Canadian imports of softwood lumber do threaten to cause material injury to U.S. competitors. To complicate matters further, Canada sued the United States before the U.S. Court of International Trade to have the duties removed and the deposits returned. In response, the U.S. Coalition for Fair Lumber Imports challenged the constitutionality of NAFTA Chapter 19 before the U.S. Court of Appeals for the District of Columbia. Moreover, should the United States refuse to comply with NAFTA Chapter 19, Canada could request the establishment of a Special Committee under NAFTA Article 1905. Finally, three Canadian lumber companies have, in their capacities as investors in the U.S., each invoked the investor-state dispute mechanism of NAFTA Chapter 11, claiming, inter alia, that U.S. treatment of Canadian lumber imports is discriminatory and constitutes “indirect expropriation”.

In the early 2000s, Brazil and Argentina were locked in a dispute over trade in frozen poultry. The dispute was at first addressed within the framework of the Mercosur legal regime. Brazil activated the Protocol of Brasilia’s dispute settlement procedure, asking unilaterally for the establishment of an ad hoc arbitral tribunal. In 2001, the

---


170 Ibid.


tribunal rendered its award in favor of Argentina. Having lost the case in one forum, Brazil then referred the dispute to the WTO dispute settlement procedure, which eventually led to the establishment of a Panel to consider the matter. During the proceedings, Argentina argued that Brazil failed to act in good faith by first challenging Argentina's anti-dumping measure before a Mercosur ad hoc tribunal and then, having lost that case, initiating WTO dispute settlement proceedings against the same measure. It also argued that Brazil is estopped from pursuing the present WTO dispute settlement proceedings. Argentina asserted that alternatively the Panel should be bound by the ruling of the Mercosur arbitral tribunal. The Panel eventually rejected Argentina's claims finding that it had failed to prove both the lack of good faith and the existence of the preconditions for the invocation of the principle of estoppel. Consequently, it also declined Argentina's request that the panel follow the ruling of the Mercosur arbitral tribunal. On the merits of the case, and unlike what had been done by the Mercosur arbitral tribunal, the Panel ruled against Argentina finding violations of a fundamental nature of the WTO agreements.

There are many other examples that one could cite, and one could arguably find examples in international criminal law and humanitarian law area, too. For instance, while the ICTY has and still is considering whether certain indictees are guilty of having committed genocide in the territory of the former Yugoslavia, there are two separate cases pending before the ICJ filed by Bosnia–Herzegovina and Croatia against Serbia Montenegro claiming violation of the Convention on the Prevention and Punishment

---


175 A number of other WTO members intervened as third party, some of which presenting observations on the question of serial proceedings. The EC argument is particularly interesting because it turned the principle of consent on its head. It argued that the facts alleged by Argentina were not sufficient to conclude that Brazil had consented, whether explicitly or implicitly, not to bring this dispute before the WTO. It pointed out that the Protocol of Brasilia contains no provision which limits in any manner the right of the parties to request a panel under the WTO agreements with respect to a measure that has already been the subject of a dispute under that Protocol. Ibid., WT/DS241/R, Annex C-2, para 17-18.

176 See, e.g. Prosecutor v. Milosevic (IT-02-54) "Kosovo, Croatia and Bosnia", http://www.un.org/icty/cases-e/index-e.htm, (site last visited 1 March 2006).

of the Crime of Genocide, which contains a clause conferring the ICJ compulsory jurisdiction. While the ICTY determines the criminal responsibility of individuals, the ICJ is called to determine the international legal responsibility of a sovereign state, and hence it is not possible to talk properly of litispendence, the issues, and arguably much of the evidence that the two bodies must consider is largely the same. Can the ICJ determine that Serbia Montenegro has not violated the convention on the right of genocide when the Serbian leadership is tried and sentenced for doing exactly that? Technically and legally it could, but what would that say about the credibility of international adjudication and international law?

IV: APPROACHES

In sum, the shift from the consensual to the compulsory paradigm has led not only to increased resort to international adjudication, but also to States litigating simultaneously or serially on essentially the same dispute in multiple fora. How can the disruptive forces unleashed by the inhomogeneous judicialization of international relations and the shift to the compulsory paradigm be reined back? A careful survey of the most recent scholarly literature and international practice points to three possible antidotes. We have labeled them the “technocratic/legalistic”, the “sociologic/jurisprudential”, and the “non-engagement/disengagement” approach. In this section will try to illustrate the nature of these antidotes and provide a critique of their shortcomings.

A. Technocratic/legalistic approach.

When confronted with the problems arising out of the multiplication of international judicial fora and the shift to the compulsory paradigm, the first reaction of legal scholars and practitioners has been, of course, to rummage in the legal toolbox to find techniques or principles that could counteract the disruptive forces at play.179

The checklist to be used is very familiar to international law scholars.180 First, one must determine if any specific rules written in relevant treaties that could be applied to the cases at hand exist. Second, legal scholars consider whether international practice could offer any guidance and whether there are any principles of international law that

---


179 See generally YUVAL SHANY, COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003); ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION (2003).

180 See ICJ Statute, supra note 72, art. 38.
could help. Finally, one must check which principles of law could be borrowed from national legal systems and whether these could be applied internationally.

There are a few provisions addressing issues of forum selection and multiple proceedings in international legal instruments such as constitutive instruments of the various international judicial bodies, general dispute-settlement treaties compromissory clauses, instruments of ratification of international agreements, and declarations of acceptance of jurisdiction. For instance, there are examples of exclusive jurisdiction clauses. Some allow no exception, while others are less strict, and others give the parties the possibility of referring the dispute to any other fora if they can agree to do so. There are also examples of provisions providing for complementarity or primacy of certain jurisdictions over others. Further examples exist regarding jurisdiction-regulating provisions dealing with multiple proceedings, which correspond to the legal doctrines of *lis alibi pendens*, *res judicata*, and *electa una via*.

However, it has been observed that the problems highlighted in this paper are only partially regulated by these kinds of provisions and even where regulated the provisions are often of an inconclusive nature and there is not enough established practice to make definitive statements about their implementation. Besides, these principles, when properly understood, are too narrow to be of much use. For these tools to be properly applied, the parties, the subject matter, and the legal claims must be the same. Identity of the parties and the underlying dispute is not enough, since in cases of multiple

---

181 E.g. EC Treaty, *supra* note 42, art. 292 (former art. 219).

182 E.g. WTO DSU, *supra* note 59, art. 23.

183 E.g. European Convention, *supra* note 51, art. 55 (former art. 62).

184 For complementarity, see Rome Statute, *supra* note 66, Preamble, art. 1. For primacy, see ICTY Statute art. 9; ICTR Statute art. 8 (annex to the Security Council Resolutions that established them, *supra* note 64). However, one should stress that the ICC, ICTY and ICTR Statutes regulate the potentially competing jurisdictions with national courts, while remain silent about the problem of the potential conflicting jurisdiction with international jurisdictions or some internationalized criminal courts. See generally MARKUS BENZING & MORTEN BERGSIMO, “Some Tentative Remarks on the relationship between Internationalized Criminal Jurisdictions and the International Criminal Court”, in Romano, Internationalized,* supra* note 62, 407-416.


187 E.g. European Convention, *supra* note 59, art. 35.2 (ex art. 27.1)

proceedings in self-contained legal regimes the subject matter or the legal claims might not necessarily be the same.\textsuperscript{189}

Falling back on customary international law, the general principles, and the case law of international courts and tribunals does not help much either. State practice, as said earlier, is far from consistent and international courts and tribunals have not yet developed sufficiently large and consistent jurisprudence to suggest any practical solution. The ongoing work of the International Law Commission about principles of international law (such as those codified in the Vienna Convention on the Law of the Treaties) that could counteract the problems is unlikely to have much practical impact, especially in the case where both parties have consented to multiple obligatory jurisdictions where the same dispute could be considered\textsuperscript{190}. Indeed, because of the abstract and general nature of these principles and rules, their application to concrete cases might be far from self-evident.

Also, while both domestic and international courts exercise the same kind of functions, they operate in radically different contexts, which make the transfer lock, stock and barrel of legal procedures and principles from one system to the other impracticable. For instance, anti-suit injunctions, a tool well known in Anglo-American legal systems, have limited application internationally, at least in the public international domain.\textsuperscript{191} Due to the lack of hierarchy and formal linkages before international courts, an international tribunal could not formally order another to refuse to hear a claim, nor

\textsuperscript{189} To use the \textit{Soft Lumber} dispute as example (\textit{supra} at 38-39), the parties are not the same in all proceedings. The NAFTA Chapter 11 cases are between private Canadian investors and the U.S. government. In contrast, the WTO and NAFTA Chapter 19 disputes are between Canada and the U.S. as states. The subject matter is not the same, since the NAFTA panel rejecting a U.S. finding of threat of material injury was made with reference to a U.S. determination of May 2002. In contrast, the WTO panel accepting a U.S. finding of threat of material injury relates to a December 2004 re-determination concerning the same period of investigation but made on the basis of a different (i.e., reopened) record. And, finally, the different proceedings do not exactly involve the same legal claims. WTO panels examine claims of violation of WTO rules, while NAFTA Chapter 11 tribunals examine claims of violation of those of NAFTA. Crucially, while the WTO panel accepting a U.S. finding of threat of material injury did so pursuant to WTO rules, the NAFTA Chapter 19 panel rejecting a U.S. finding of threat of material injury did so pursuant to the United States’ trade laws, since the applicable law under NAFTA Chapter 19 is not NAFTA but the domestic law of the defending country.

\textsuperscript{190} In 2000, the topic was placed on the long-term work agenda of the International Law Commission (ILC). Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), para. 729. The Study Group aims to issue a report, probably towards the end of 2006, containing both a substantive study and a concise summary containing conclusions and possibly some policy-making recommendations that could give judges and administrators guidance when coping with questions of conflicting or overlapping obligations emerging from different legal sources. International Law Commission, Report on the work of its fifty-seventh session, General Assembly Official Records, Sixtieth Session, Supplement No. 10 (A/60/10), para. 447.

\textsuperscript{191} For some applications in private international law see PETER NORTH & J.J. FAWCETT, CHESHIRE AND NORTH’S PRIVATE INTERNATIONAL LAW (13th ed. 1999) at 359; Daniel Tan, \textit{Anti-Suit Injunctions and the Vexing Problem of Comity}, 45 \textit{VIRG. J. INT’L L.} 283 (2005).
lacking enforcement power, could it credibly order parties (often sovereign States) not to engage other fora in the matter.

In sum, law as is (lex lata) does not help much. It is always possible, in theory, to design better provisions and then either include them in future international legal instruments to address future problems, or retrofit existing instruments. Yet, it is evident that these are also not viable alternatives. Renegotiating and amending several dozen high-profile treaties to synchronize and harmonize their dispute settlement procedures is politically and diplomatically unthinkable.\textsuperscript{192} There are no precedents of such a sweeping, cross-treaty, international law-making activity. It is not even clear what would be the appropriate forum to carry out such negotiations and how to treat the complex matrix created by differing memberships of the various regimes. Second, while scholars can and should provide normative guidance to policy-makers to help them design better dispute settlement provisions to prevent future problems, the international community is still left with a complex jumble dispute settlement clauses and regimes which pose actual problems now, and will continue to so as long as they remain in force or until they are amended.

Irrespective of how sophisticated technical legal solutions could be introduced, the fact remains that whenever there is disagreement as to what the dispute settlement procedures provide for and which procedure takes precedence in the instance that both rely on the compulsory paradigm, a third-party is needed to take a binding decision. The \textit{compétence de la compétence} principle gives the ultimate authority to a judicial body, although, again, it might not be clear \textit{which} judicial body.\textsuperscript{193}

\textbf{B. The sociologic/jurisprudential approach}

The second approach is, in a way, a reaction to the shortcomings of the legalistic/technocratic tack. Recognizing that the \textit{compétence de la compétence} principle creates a sort of catch 22 situation, and that in the absence of a structured judicial system legal certainty cannot be achieved, a growing part of international legal scholarship puts the stress on the capacity, if not legal duty, of international judges to tame the disruptive forces unleashed by the multiplication of international judicial fora and the shift to the compulsory paradigm.

\textsuperscript{192} Introducing amendments that do not require harmonization across regimes is feasible, although still politically burdensome. For instance, in the wake of the Argentine/Brazil dispute on frozen poultry (\textit{supra} at 39-40), litigated both before a Mercosur arbitral tribunal and the WTO, Mercosur member states adopted the Protocol of Olivos which provides that disputes “...that may also be referred to the dispute settlement system of the [WTO] or other preferential trade systems that the Mercosur State Parties may have entered into, may be referred to one forum or the other, as decided by the requesting party...Once a dispute settlement procedure pursuant to the preceding paragraph has begun, none of the parties may request the use of the mechanisms established in the other fora”. Protocol of Olivos, \textit{supra} note 48, art. 1.2.

\textsuperscript{193} See \textit{supra} at 20.
In a nutshell, what we dub the “sociologic/jurisprudential approach” calls for judges of international (and also national) courts and tribunals to reach across divides and, in the absence of clear-cut norms and principles that can frame their relations, build spontaneously a sort of informal judicial system. As much as the technocratic/legalistic approach is top-down, requiring the action of States and international decision makers, the sociologic/jurisprudential approach is grassroots and bottom up.

While fundamentally different, the two approaches have common ground in the legal doctrine of judicial comity, which postulates that courts in a jurisdiction should show respect and demonstrate a degree of deference to the decisions of judicial bodies operating in other jurisdictions. Comity is often invoked before and applied by national courts, especially common law systems, to resolve problems created by overlapping jurisdictions within the same legal system. It is also used to settle problems of conflicting jurisdictions between courts of different nations, as a principle of private international law.

Yet, there is very little practice as to the utilization of the concept in relations between international courts and tribunals, and it seems there is consensus on the fact that comity, in the sphere of public international law, does not impose a legal obligation on courts. There are sound reasons why it is not so. Domestic courts can be mandated to respect and demonstrate deference to the proceedings and decisions of other courts within the same legal and political system. In the U.S., comity will ordinarily prevent a federal court from interfering with a pending state criminal prosecution. Domestic courts can also be mandated, or encouraged, to respect and demonstrate deference to the proceedings and decisions of foreign courts, although reciprocity is far from guaranteed and it happens more on a case-by-case basis rather than systematically. But international courts and tribunals are the expression of different sovereign wills. Often the number and identity of the States party to their constitutive instruments differs; they are organs of different international organizations; their legal basis lies in different international legal instruments; they are paid for and supported by different groups of States. The only things they have in common are the fact that they operate within the same legal space -

---

194 177 U.S. 485, 488.


196 See Joel Paul, Comity in International Law, 32 HARV. INT’L L. J. 1 (1991). The Restatement does not provide any evidence that comity as a rule limiting jurisdiction in private transactions is compelled by customary international law. Restatement, § 101 comment (c); id. at part IV, introductory note. While Shany points out that there have been a number of situations in which “…the doctrine [of comity] was relied upon directly or indirectly by international institutions, or at least invocation was considered or advocated…” he stops short of claiming its binding force, as he writes that “…[c]omity should arguably be acknowledged as a positive device in the promotion of the systematic nature of international law”. Shany, Competing Jurisdictions, supra note 179, 261 [italics added].

197 401 U.S. 37, 43-54.
that is to say the international legal order, although this space is fragmented - and the fact that they all carry out the same function - the judicial function. This common ground is arguably too thin to provide grounding for a principle mandating the various international judicial bodies to apply comity as a matter of international law in their relations.

It is probably because of this inherent limitation that comity, legally understood, has not attracted much attention in public international law, while legal scholarship has preferred to focus on meta-legal arguments to connect disparate international jurisdictions. Some have suggested that a sort of “global community of courts”, encompassing both domestic and international courts, is emerging.\footnote{E.g. Anne-Marie Slaughter, \textit{A Global Community of Courts}, 44 HARV. INT’L L.J. 191 (2003); Jenny S. Martinez, \textit{Towards an International Judicial System}, 56 STAN. L. REV. 429 (2003); William W. Burke-White, \textit{A Community Of Courts: Toward A System Of International Criminal Law Enforcement}, 24 MICH. J. INT’L L. 1 (2002); Helfer & Slaughter, Towards a Theory, supra note 20, 372 (referring to a “recognition of a community of courts around the world, units engaged in a common endeavor”); A.-M. Slaughter, \textit{A Real New World Order}, 76 FOREIGN AFF. 183, 187 (1997) (noting that citing international decisions helps courts ”gain legitimacy by linking [themselves] to a larger community of courts”).} This community is nothing formally organized, but it is rather based on a sort of “class-consciousness”, to use a term once popular, a “self-awareness of the national and international judges who play a part”.\footnote{Slaughter, Global Community, \textit{supra} note 198, 192.} It is argued that the members of this “epistemic community” do not see each other only as servants and representatives of a particular polity, but also as fellow professionals in a common judicial enterprise that transcends national borders.\footnote{In international anthropology and studies of global governance, these aggregations made of transnational networks of knowledge-based experts are called “epistemic communities”. See, Peter Haas, \textit{Introduction: Epistemic Communities and International Policy Coordination}, 46 INT. ORG. 1 (1992).} They are bound together because they face common substantive and institutional problems; they pay attention to each other’s judgments, beyond what might formally be mandated by any \textit{stare decisis} principle or judicial structures, and learn from one another’s experience and reasoning. Most of all, they tend to work as a team, cooperating directly to resolve specific disputes.

Some recognize that this “judicial band of brothers” might not necessarily be so harmonious and open-minded, and therefore feel the need to argue in favor of the adoption of anti-parochial canons and plead in favor of cross-court dialogues. Lacking action by the legislator (national and international), judicial system-enhancing principles and rules should be adopted and implemented by the judges belonging to this community out of functional necessity.\footnote{See Martinez, \textit{supra} note 198, 434.}
At least in the sphere of public international law, there are plenty of signs that such a community is not imaginary. International courts and tribunals are indeed engaged in such a system-enhancing dialogue, as they tend to pay attention to each other’s jurisprudence. Sometimes they even cite each other, and very often respectfully omit to take cognizance of judgments that do not support the reasoning chosen, although they have no obligation to do so. Much as in the case of domestic courts, in case of multiple proceedings, serial or parallel, cooperation is also sometime justified on the basis of the legal principles just mentioned (e.g. *litis pendency, electa una via, comity*, etc.), or when deference is not desirable, by distinguishing cases carefully so as not to violate the requirements of *litis pendency* or exclusive jurisdiction clauses.

This community is as much spontaneous as artificial. It is brought about by the fact that while there is a large demand for international judges, the number of qualified people to fill the job is still quite limited. Consequentially, there are several judges who over the course of their career have served in multiple international judicial bodies, both regional and global. Although they are drawn from different countries, international judges often have similar educational backgrounds, having studied, at least at the graduate level, in the same universities and schools. Also, the epistemic community of

203 See generally *ibid.*, Slaughter, Global Community, supra note 198, and Burke-White, supra note 198.


205 E.g. In the *MOX* dispute (supra at 38) the Annex VII ad hoc arbitral tribunal decided to suspend proceedings while the question of the exclusive jurisdiction of the European Court of Justice over disputes between EC member states was pending before the Luxemburg court: “…bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further”. *Dispute Concerning the MOX Plant*, supra note 164, Order No. 3, 25 June 2003, para 28, suspension reiterated by Order No. 4, 14 Nov. 2003. Also, in the *Soft-Lumber* dispute, to avoid the risk of further inconsistent rulings by the three Chapter 11 panels, on 7 September 2005, a NAFTA panel consolidated three claims advanced by private companies against the U.S. (supra 38-39) in one single proceeding. *In the Matter of NAFTA and a Request for Consolidation*, supra note 171.

206 In the *Iron Railway* arbitration, between the Netherlands and Belgium, an Arbitral Tribunal found that Article 292 of the EC Treaty (supra note 42) did not prevent it to rule on the merits because the dispute did not involve questions of EC law. *In the Arbitration Regarding the Iron Rhine (“Ijzeren Rijn”) Railway*, (Belg./Neth.), Award of the Arbitral Tribunal, 24 May 2005, para. 120, 137 and 141. http://www.pca-cpa.org/ (site last visited 1 March 2006).

207 E.g. Judge Thomas Burgenthal of the ICJ has been judge of the IACHR (1979-1991). Georges Abi Saab, member of the WTO Appellate Body, has been member of the ICTY/ICTR Appeals Chamber and judge ad hoc at the ICJ; Mohammed Shahabudeen, member of the ICTY/ICTR Appeals Chamber, has been judge at the ICJ (1988-1997); Judge Elizabeth Odio Benito of the ICC served at the ICTY (1993-1998), so did Judge Claude Jorda (1994-2003, ICTY President between 199-2003), Navanethem Pillay was President of the ICTR (1995-2003). Judges Jerzy Makarczyk, Pranas Kuris, Uno Lohmus and Egils Levits of the ECJ, have been judges at the ECHR.
international judges is the result of the fact that the pools from which judges are drawn are epistemic communities themselves: academia, judiciary, and civil and diplomatic service. Finally, increasingly judges from various international courts meet regularly, both in official and unofficial capacity.208

Yet, this idyllic picture hides some troubling realities. First the dialogue takes place almost exclusively in English. Understandably judges (both of domestic and international courts) take notice only of judgments of other courts if they can read them (let alone if they can find them). This provides arguments to those fretting about the emergence of an Anglo-American (less Anglo and very American) legal empire.209 While some judges (actually many international judges) might be polyglot, the reality is that it is an eschewed dialogue involving only some judges and courts, and that uses terms and ideas mostly belonging to the common law tradition.210

The second problem is that the community is far from egalitarian. There is an informal and unconscious but tangible pecking order among international courts and tribunals. Some courts prefer talking, or worse lecturing, to listening and when it comes to listening, the level of attention depends on which court is doing the talking.211 Also, pecking orders tend to reflect old rifts between former colonial powers and formerly colonized states, or in contemporary terms, developed-developing or rich-poor divides. But while hierarchies might be inevitable, they emerge in a system that by definition should have no hierarchies, or which, if hierarchies should exist, should be controllable or at least designed by States qua the ultimate source of legitimacy in the international legal order.

And this leads to the third, fundamental problem. Epistemic communities of judges lack both democratic and international legal legitimacy. International judges have only the powers that have been conferred to them by States, which are codified in the constitutive instruments of the court or tribunal. They may also have some residual

208 E.g. since the late 1990s the President of the European Court of Human Rights is present at the opening of the judicial year of the ECJ and the two courts visit each other on a regular basis. Judges or regional economic integration agreements courts have visited on several occasions the ECJ. Judges of the IACHR have visited the ECHR. Outside the inter-court framework, one should point out the “Brandeis Institute for International Judges”, an annual initiative of the Brandeis International Center for Ethics, Justice and Public Life that brings together justices from several international judicial bodies for a week-long retreat. http://www.brandeis.edu/ethics/international_justice/bijj_2006.html (site last visited 1 March 2006).


210 See Romano, Americanization, supra note 81, pp. 115-118.

211 Miller, supra note 204, pp. 489-490.
powers that are implicit in the judicial function.\textsuperscript{212} As it has been remarked, “… the fact is that proliferating tribunals, overlapping jurisdictions and “fragmenting” normative orders arise as effects of politics and not as technical mistakes or unfortunate side-effects of some global logic”.\textsuperscript{213} International courts and tribunals are not created accidentally or spontaneously and if they are not legally and functionally related to each other, or to the extent that they are, it is because there has been a specific and deliberate (albeit sometimes arguable) will to make it so.

But it is also true that international courts and tribunals once created, like international organizations, tend to develop their own logic, agenda and politics, which at times reflect the views of those of the States which support them, but often do not. The struggle for hegemony takes place both between international courts, as previously demonstrated, but also between courts and States,\textsuperscript{214} and courts and the organization of which they are organs.\textsuperscript{215}

International judges at present are too little understood by the public and studied by scholars to be given, individually, as a bench, or as a whole class, any mandate broader than the one narrowly defined by the constitutive instruments. Who are these judges? How are they groomed and trained? But most of all: where is their allegiance? Domestic judges take an oath of office by which they swear to uphold the ultimate source of sovereignty and power of the respective state (e.g. the constitution, the sovereign, the party).\textsuperscript{216} But what kind of oath can international judges take since the ultimate source of their power is collective State action? Allegiance, then, inevitably tends to be toward procedure and due process, to the honorable exercise of judicial functions, toward


\textsuperscript{213} Koskenniemi, \textit{supra} note 19, 561.

\textsuperscript{214} “If a human rights treaty body or a WTO panel interprets the 1969 Vienna Convention on the Law of Treaties so as to reinforce that body’s jurisdiction or the special nature of the relevant treaty, and in so doing deviates from the standard interpretation, then this is bound to weaken the authority of that standard interpretation and to buttress the interests or objectives represented by the human rights body or the WTO panel. The interpretations express institutional moves to advance human rights or free trade under the guise of legal technique. In the language of political theory, the organs are engaged in a \textit{hegemonic} struggle in which each hopes to have its special interests identified with the general interest.” Koskenniemi, \textit{supra} note 19, 561-562.


\textsuperscript{216} E.g., 28 U.S.C. § 453
independently and impartially and the keeping secret all deliberations.\textsuperscript{217} While this might appear a satisfactory guarantee \textit{per se}, the fact is that international courts and tribunals operate in a context where checks and balances are often lacking or weak, and where guaranteed independence of the judge from his or her own country relies on goodwill more than anything else.\textsuperscript{218} Procedures to discipline judges who break their (modest) oath are weak, almost totally controlled by the judge’s respective bench, and rarely used.

Under this light, epistemic communities ominously begin to resemble secret societies, in which interaction takes place along unclear and eschewed lines, behind curtains, and most importantly, possibly at odds with the ultimate source of all international legitimacy – sovereign states’ will and consent – and a detrimental lack of democratic legitimacy – the will of people freely expressed through democratic State governments. Granted, one might point to the fact that far too many governments still lack democratic legitimacy themselves and that overzealous respect for the will of governments might not necessarily be beneficial for the furtherance of human rights, peace and security, free trade or to ensure punishment of international crimes. In certain cases the judgment of an international judge, however unknown and mysterious he or she is better than the decision of a well-known dictator. However, it should be equally noted that international courts and tribunals are generally created by States that are run by freely-elected governments, while they tend to receive little attention amongst dictatorships.

In sum, if international judges are to be entrusted with the crucial task of weaving the international judicial web and decide which consent to jurisdiction of which State should prevail in any given circumstance they need must be legitimized to do so.

\textit{C. The non-engagement/disengagement approach}

The principle of consent to adjudication implies that as much as States are free to accept third-party binding adjudication, they are free not to do so (hereafter “non-engagement”), or once they have done so, they can always remove themselves from jurisdiction (hereafter “disengagement”).\textsuperscript{219}

\textsuperscript{217} E.g., Rules of the ECHR (1998), art. 3: “‘I swear’ – or ‘I solemnly declare’ – ‘that I will exercise my functions as a judge honorably, independently and impartially and that I will keep secret all deliberations’”. Rules of the International Court of Justice, art. 4 “I solemnly declare that I will perform my duties and exercise my powers as judge honorably, faithfully, impartially and conscientiously.” Rules of Procedure and Evidence of the ICC, art. 5. The Rules of these three bodies can be found in Oellers-Frahm, \textit{supra} note 53, 456-I, 52-I and 1957-II.


\textsuperscript{219} In this article we use the term “disengagement” as a more flexible and generic placeholder for the legal terms "denunciation" or "withdrawal". It is used to refer to the act by which a state unilaterally discontinues its membership to a treaty (including a treaty that establishes an intergovernmental organization endowed with an international judicial body) pursuant to the terms of that treaty, or “withdraws” or “denounces” a unilateral declaration of acceptance of an international courts’ jurisdiction.
Non-engagement and disengagement are the third reaction to the problems created by the multiplication of international judicial bodies and the shift towards the compulsory paradigm. Of the three, this category is also the least explored by scholars of international law and international relations.\(^{220}\) The neglect is obvious and it has perhaps more to do with ideological than scientific reasons. Maybe non-engagement and disengagement are considered to be anti-social practices that weaken the structure of treaty-created international obligations and the international legal fabric,\(^{221}\) or maybe they are perceived as antipodal to the idea of a law-based international legal order administered by third-party adjudicators.\(^{222}\) Yet, it is evident that non-engagement and disengagement (or the mere threat of these), far from being pure expressions of “anti-social” behavior, provide States with useful mechanisms to increase their voice within international legal regimes and the possibility of influencing judicial bodies’ future jurisprudence.\(^{223}\) They are an essential part of the ongoing dialectic interaction between States and international judicial bodies. As they are lawful options, exercised in current practice, and increasingly likely, they deserve greater attention if the consequences of the shift from the consensual to the compulsory paradigm are to be properly understood.

1. Non-engagement

States have the option of not accepting the jurisdiction of an international judicial body. If the body is based on the compulsory paradigm, States can avoid being subject to jurisdiction by simply not ratifying the relevant treaty.\(^{224}\) When China became a member of the WTO in 2001, it departed from a long tradition of not subjecting itself to international judicial bodies. Iran, North Korea, Vietnam, Laos, Azerbaijan, Yemen, and Belarus are some of the countries that are not party to any treaty providing for compulsory adjudication through a regime-based judicial body.\(^{225}\) If one also considers


\(^{221}\) See e.g., C. Wilfred Jenks, *A New World of Law? A Study of the Creative Imagination in International Law* 180 (1969).

\(^{222}\) In his study of exit from treaties, Helfer sharply observed: “…To a profession anxious to prove that nations obey international legal obligations, a state's right to unilaterally abrogate its treaty obligations - often without substantive restraint or meaningful sanction - is not something to be advertised. In fact, major public international law treatises (and even most specialized studies of treaty law and practice) all but ignore exit or give the issue only passing attention”. Helfer, *supra* note 220, 1592

\(^{223}\) See *Id.*, 1587.

\(^{224}\) In the case of systems based on the compulsory paradigm, conditional engagement is typically, and logically, not an option. Reservations to the jurisdiction of the regimes’ judicial body are not allowed for the very same reasons why the judicial body has been given compulsory jurisdiction.

\(^{225}\) It must be said that, qua members of the UN, all these States have a duty to cooperate with the ICTY and ICTR. That is implied in the fact that the two tribunals have been created by the Security Council under Chapter VII compulsory powers. *Supra* note 64. However, for all practical purposes they are not subject to the jurisdiction of those two tribunals as the tribunals have jurisdiction restricted only to the
that there are certain international judicial bodies that exist only on paper (e.g. the tribunals of the Arab Maghreb Union or the Organization of Arab Petrol Exporting Countries), or are active at very minimal levels (e.g. the Court of the Commonwealth of Independent States), then one could add to the list also Syria, Iraq, Kazakhstan, and Uzbekistan.

While non-engagement is a possibility in theory, it obviously has a tangible price. Non-engagement, indeed, carries a reputational cost similar to a track record of violating treaty commitments. It signals not only the intent to avoid multilateral interactions with other nations, but also a general dislike of the very idea of rule of law. Indeed, it is evident that many of the States that are not subject to the jurisdiction of any international judicial body happen also to be pariahs in the contemporary international community.

Also, to the extent that the work of international courts and tribunals can be considered a public good, States not engaging could be accused of reaping the benefits of engagement by others without incurring any corresponding burdens. Stated another way, if the world is less violent, more protective of fundamental human rights, and more law-based, and if international law expands, deepens and its content becomes more specific as a result of international adjudicative activity, it is because of those States participating in the “international judicial system”.

If the judicial body is based on the consensual paradigm, obviously acceptance of jurisdiction is voluntary. As we have seen, more than two-thirds of States have not made any optional declaration of acceptance of the ICJ jurisdiction. Even taking account of the fact that jurisdiction can also be accepted ad hoc, still the majority of States have

---

226 Helfer, supra note 220, 1623. For scholarship discussing the significance of reputation, see, e.g., George W. Downs & Michael A. Jones, Reputation, Compliance, and International Law, 31 J. LEGAL STUD. S95, S97 (2002); Andrew T. Guzman, A Compliance-Based Theory of International Law, 90 CAL. L. REV. 1823, 1827 (2002).


228 This yields an important prescriptive insight for treaty makers. When negotiating agreements creating courts whose output can be considered mostly as a public good, the consensual paradigm might be more appropriate than the compulsory as it will encourage broader ratification or enhance depth. Cf. Helfer, supra note 220, 1636-1639.

229 Supra at 20.
never appeared before the World Court. Few States have opted for fora other than the
default Annex VII arbitral tribunal under the LOS Convention.\footnote{For a comprehensive table, see http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm (site last visited 1 March 2006).}

In the case of systems based on the consensual paradigm, the alternative to non-engagement is carefully worded engagement. States can and often do qualify their acceptance of jurisdiction of international judicial bodies to a great degree by attaching reservations and declarations, although there are limits to how far reaching these can be.\footnote{I.e. those imposed by the VCT, \textit{supra} note 65.}

It should also be mentioned that systems based on the consensual paradigm are potentially affected by a peculiar problem: that of “opportunistic engagement”, that is to say the case of States accepting the jurisdiction of a judicial body solely with the aim of litigating a specific case with another States which has conversely made an open-ended declaration of acceptance.\footnote{E.g. \textit{Certain Phosphate Lands in Nauru} (Nauru v. Austl.), 1992 I.C.J. 240 (Prelim. Obj., 26 June 1992). Australia had accepted the jurisdiction of the International Court of Justice without any major reservation. In 1987 Nauru, which at the time was not a member of the United Nations, applied to become party to the Statute of the International Court of Justice (Summary Statement by the Secretary-General on Matters of Which the Security Council is Seized and on the Stage Reached in their Consideration, Addendum, UN Doc. S/18570/Add.42 (1987)). In 1988, it deposited with the UN Secretary General a declaration of acceptance of the Court’s jurisdiction which closely mirrored that of Australia. Finally, in 1989, it instituted proceedings against Australia before the ICJ. To protect from this kind of opportunistic behavior, certain States have qualify acceptance of the ICJ jurisdiction by reserving that “…this declaration shall not apply … to disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court”. See declarations of Austr. (22 Mar. 2002); Cyprus (3 Sept. 2002); N.Z. (22 Sep. 1977); Slovakia (28 May 2004); U.K. (5 July 2004). http://www.icj-cij.org/icjwww/ibasedocuments/ibasictext/ibasicdeclarations.htm (site last visited 1 March 2006).} It might be that States engaging opportunistically are subject to lesser reputational costs than States not-engaging at all.\footnote{This will happen as long as international litigation is perceived to be a better and superior form of settling disputes than other non-adjudicative means, including diplomacy.}

2. Disengagement

In theory, as much as States are free to subject themselves to third-party binding adjudication, once they have done so they should always be able to withdraw from it. Disengagement, however, raises different legal problems and takes place according to different dynamics whether it is within a context characterized by the consensual paradigm or the compulsory paradigm.
In dispute settlement systems based on the compulsory paradigm, often for a State to avoid judicial scrutiny the only possibility is withdrawal from the legal regime’s central treaty or treaties, or even the organization itself.\(^{234}\) Express preclusion of unilateral disengagement is uncommon. Usually, conditions and procedures for withdrawal are regulated, or, less often, not mentioned at all.\(^{235}\) Yet, upon closer look, it is evident that disengagement might be relatively more or less burdensome and/or possible depending on the structure of the given legal regime. Hence, in order not to be subject to the jurisdiction of the WTO dispute settlement system, a State must withdraw from the organization altogether. It seems that a State could withdraw from the European Convention on Human Rights, and still remain member of the Council of Europe.\(^{236}\) Typically, in the case of judicial bodies created by regional economic and political integration agreements, for a State to avoid jurisdiction of the legal regime’s judicial body, withdrawal from the organization is the only option.

International criminal tribunals are a particular case because of the peculiar role played by the UN Security Council and the UN Charter in the international legal order. It is more difficult to avoid jurisdiction of these judicial bodies. As aforementioned, while in principle the ICC has jurisdiction only over crimes committed by or against nationals of States that have ratified the Rome Statute or on the territory of those States, and States can denounce the Statute, it retains jurisdiction even in the case of States that have not ratified the Rome Statute (and also arguably withdrawn from it) if the matter has been referred to the Court by a decision of the UN Security Council.\(^{237}\)

It is unlikely, but not impossible, that new governments might one day take power in States of the former Yugoslavia or Rwanda, and that these governments might place shielding certain individuals, who have been indicted or are being investigated by the ICTY or ICTR, from prosecution high on their agenda. Could they avoid the jurisdiction of those tribunals by withdrawing from the United Nations? The answer is not

\(^{234}\) However, jurisdiction remains, even after withdrawal, over disputes that arose prior to the date that its denunciation or withdrawal took effect, or situations that arose prior to that date and continue in the present. See VCT, supra note 65, art. 70(1). See, e.g., Papamichalopoulos and others v. Greece, Prelim. Obj., 14556/89 [1993] ECHR 28 (24 June 1993), para. 40, Loizidou v. Turkey, supra note 100, para. 41.

\(^{235}\) In the case of treaties that are silent as to withdrawal, the Vienna Convention on the Law of Treaties introduced a rebuttable presumption that states may not unilaterally exit from a treaty that lacks a denunciation or withdrawal clause. VCT, supra note 65, art. 56(1). Yet, scholars writing after the VCT’s adoption in 1969 continue to debate whether the presumption accurately reflects customary law. See generally Kelvin Widdows, The Unilateral Denunciation of Treaties Containing No Denunciation Clause, 53 BRIT. Y.B. INT’L L. 83 (1982).

\(^{236}\) E.g., Greece joined the Council of Europe in 1949. It ratified the European Convention on Human Rights and its Protocol No. 1, on 28 March 1953. In the aftermath of the military coup of 1967, Greece denounced them in 1969 (under art. 58.1, former art. 65.1, of the Convention). After democracy was re-established, Greece ratified them anew in 1974. However, whether that could be done nowadays, under the new human rights regime, is far from clear.

\(^{237}\) Supra at 18.
straightforward, as it mainly hinges upon the interpretation of article 2.6 of the UN Charter, whereby “The Organization shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security”.238 It is evident that the answer depends on whether prosecution by the ICTY and ICTR is considered “necessary for the maintenance of international peace and security”.239

In systems based on the consensual paradigm, in theory disengagement should be easier than the case of systems based on the compulsory paradigm. Hence, acceptance of the jurisdiction of the ICJ and membership to the UN are totally separated. A State can withdraw acceptance of the jurisdiction of the ICJ and remain a member of the UN, and States that are not a member of the UN can accept the Court’s jurisdiction.240 Yet, as the IACHR signaled in the Ivcher Bronstein case, in the inter-American human rights system it is not enough to withdraw the optional declaration of acceptance of jurisdiction in order for a State to remove itself from the Court’s jurisdiction. Denunciation of the American Convention itself is necessary.241 The judgment did not go as far as affirming that a State needs to withdraw from the OAS itself not to be subject to the Court’s jurisdiction, but the fact that the Court has, time and again, questioned the compatibility of acts of certain States which are OAS members but not party to the American Convention (namely the United States) with the regional human rights regimes, leaves ample room for doubt.242

From the foregoing it should not be surprising that there are few examples of states disengaging from the jurisdiction of international adjudicative bodies,243 and that amongst the few, there are probably more examples of states pulling out of judicial systems based on the consensual paradigm, or considering doing so,244 than those of

---

238 According to Simma, “[t]wo opposing views towards this question can be identified. According to one opinion, art. 2.6 is a particular legal expression of the comprehensive authority of the principles laid down in the UN Charter and, as such, takes precedence over the principle of non-interference in the domestic affairs of other States….According to the other opinion, art. 2.6 is no more capable of imposing obligations on third States without their consent than any other international treaty”. BRUNO SIMMA (ED.), THE CHARTER OF THE UN: A COMMENTARY (2nd ed. 2002), 141.

239 The ICTY/ICTR Appeals Chamber has answered the question affirmatively in The Prosecutor v. Tadić (IT-94-1-T), Appeals Chamber (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995), para. 28-48.

240 UN Charter, art. 93.2. See e.g. the case of Nauru, supra note 232.

241 Supra at 24.

242 Supra at 29.

243 However, there are many more examples of states exiting treaties. See Helfer, supra note 220, 1603, fig. 1 and at 1605, fig. 3.

244 Since 1951, twelve declarations relating to the jurisdiction of the International Court of Justice have expired, been withdrawn or been terminated without being subsequently replaced. These were the declarations of: Bolivia, Brazil, China, El Salvador, France, Guatemala, Iran, Israel, South Africa,
states pulling out of systems based on the compulsory paradigm.\textsuperscript{245} It is also evident that the cost of non-engagement, conditional engagement or disengagement necessarily varies from State to State and that it might be inversely proportional to the power of a country. Hence, this might explain why most examples in this field relate to the behavior of the United States.

Finally, it should be pointed out that disengagement from a system based on the compulsory paradigm has different effects than disengagement under the consensual paradigm. In the former, when a State disengages, to use game-theory parlance, it becomes a “non-player”. It does not contribute anymore to the functioning of the judicial body. It might lose the privilege of candidating judges for election, and it might also lose the control and power over the court that comes from being a contributor to the budget. In other words, it is foreclosed from the mechanisms that can be used to influence both future judicial decision-making as well as other parties' current behavior (insofar as those parties take into account the jurisprudence of the body in question). In the case of the latter, loss of voice is much less momentous, as States retain the right and duty to participate to the institutional life of the judicial body, still without being subject to its jurisdiction.\textsuperscript{246}

From these simple observations some interesting hypotheses and normative inferences arise. First, the shift from the consensual to the compulsory paradigm has raised the opportunity-cost for lawful disengagement, both in the case of consensual and compulsory systems.\textsuperscript{247} As States become aware of the shift, it is likely that they will

\textsuperscript{245} One example is that of Greece and the European Convention, \textit{supra} note 236. There are also examples of “near-withdrawals”. E.g. two times legislation was introduced in the U.S. House of Representatives to establish a commission to review dispute settlement decisions taken by the WTO against the U.S.: the so-called Dole-Moynihan proposal of 1994 (HR 4706 introduced by Rep. Benjamin L. Chardin (D-Md.)), and again in June 2000 (\textit{International Trade Reporter} 997-998, 29 June 2000). The so-called WTO Dispute Settlement Review Commission would consist of five federal appellate judges who would review all approved WTO dispute settlement reports. If the Commission reported that the WTO had acted improperly, any member of Congress would be able to introduce a joint resolution calling on the President to renegotiate the dispute settlement procedure, or withdraw from the WTO.

\textsuperscript{246} E.g. the U.S. is the largest contributor of the IACHR’s budget, being the largest contributor of the OAS budget, and although it does not have a judge, nothing in the statute prevents it from putting forward a U.S. candidate to be elected.

\textsuperscript{247} This reduces the cost (in comparative terms) of disengaging in violation of the rules and procedures, or not cooperating in proceedings or not complying with judgments. See, e.g. Iceland not appearing in proceedings before the ICJ brought by West Germany and the U.K. (\textit{Fisheries Jurisdiction} (U.K. v. Ice.) and (F.R.G. v. Ice.), 1973 I.C.J. 3 and 49 (Jurisdiction of the Court, 2 Feb.)); France not appearing in the
negotiate harder and longer whenever new legal regimes endowed with an institutionalized dispute settlement procedure are created, because they realize that exit is becoming more difficult. This will likely further slow down the judicialization of international relations.

It is also likely that in a system based on the compulsory paradigm, where disengagement has high opportunity-costs, States that disagree with the regime’s judicial body jurisprudence will focus on modifying the rules of the legal regime, trying to restrict the judges’ inherent interpretative leeway, or filling gaps that could be filled later on by case-law. Conversely, in a system based on the consensual paradigm, as disengagement is relatively less costly, States are more likely to criticize the judicial body, questioning its competence, legitimacy and the reasoning, and possibly disengage, rather than spend time and energy in trying to modify the underlying legal regime.

CONCLUSIONS

To summarize, over the past two centuries the settlement of international disputes has undergone a fundamental transformation, from what has been dubbed the “consensual” to the “compulsory” paradigm. Yet, because the judicialization of international relations has been far from complete and homogeneous the international community is facing a disturbing phenomenon of litigation in multiple fora, serially or in parallel, of essentially the same disputes. Granted, the various fora will not necessarily reach different conclusions as to the underlying points of law or the dispute, nor are the cases the same, legally speaking, as parties might be different, different aspects of the dispute might be considered, different violations of different norms might be invoked, etc. Yet, if one abandons the narrow legalistic approach and rises to a higher level of analysis, it becomes clear that the current state of affairs is unsatisfactory, as it falls short of one of the fundamental overarching goals of judicial proceedings (be they domestic or international): closure. It also goes against the grain of other fundamental legal principles like certainty of law, and encourages opportunistic State behavior bordering abuse of rights, in defiance of the principle of good faith.

Part IV of this article illustrated the forces that are currently at work to counteract this unsettling phenomenon, yet also hinted at the many shortcomings that affect each of them. The first normative finding that emerges from the foregoing is that clearly for any strategy to successfully address the contemporary ailments of international adjudication, it must rely on a combined therapy. The three antidotes (technocratic/legalistic; sociologic/jurisprudential; non-engagement/disengagement) ought to be resorted to simultaneously. It is clear that reliance on just one, or predominantly one, will not suffice. This is not intuitive since, as this Article has shown, so far policy-makers and

international legal scholars have explored one solution to the detriment of the others. It seems that a complex blend of the three, balanced in such a way that their respective weaknesses cancel out each other, is in order. Most importantly, the mix might vary from State to State. While the current U.S. administration has largely preferred the non-engagement/disengagement approach, it is clear that the “international judicial system” at large, and ultimately the U.S. itself, would greatly benefit from more American voices and participation to the advancement of the other two approaches.

Each of the three approaches considered is flawed in some fundamental way and that progress in each of the three areas ought to be made before they can produce their beneficial effects. First, there is an urgent need for more and better thinking about the design of dispute settlement clauses. The law and procedure of international dispute settlement has for long been the Cinderella of international law, neglected both by mainstream international legal scholarship and diplomats.248

Diplomats hope to never venture into this terrain. Indeed, dispute settlement is to international law what pathology is to medicine. It is about the worst-case scenario, when the consensus that made it possible for rules to be created does not exist anymore and parties disagree as to what these rules actually mean and if, by whom, to what extent, and with which consequences, they have been violated. Thus, after lengthy negotiations on the substance of an agreement, diplomats tend to cut and paste dispute settlement procedures from previous treaties without much thought about what would happen if these procedures actually needed to be used. In many regards, most dispute settlement clauses are coarse and could be greatly improved.

International procedural law and its mechanics have understandably less appeal to scholars than research into substantive international law. Moreover, serious enquiries into what happen when States do not agree on what they ought to do and not to do, tend inevitably to run into the enduring problem of the horizontal nature of international society, the “original sin” of the international system. Evidently, international legal scholars are still far too ashamed of this and self-conscious, especially when confronting with their colleagues in domestic law areas, to be able to engage without major unconscious reservations in perfecting the system within its structural limits. These limits should however be subject to rigorous and intense discussion. (e.g. “is an international judicial system possible? If so, how should it be structured?”) rather than being whished away.

Second, it is evident that the “sociologic-jurisprudential approach” falls short of what is needed, as well. Some of the problems have already been mentioned, the most significant of which is probably the legitimacy deficit. If international judges are to be entrusted with the crucial task of weaving the international judicial web and decide which consent to jurisdiction of which State should prevail in any given circumstance they need must be legitimized to do so. Legitimacy is particularly important, as these judges are exercising these functions in the absence of an explicit mandate and are instead relying on implicit powers. To credibly do that and appear to be acting in the interest of the overall system, rather than this or that State, or worse their own whim, they must be not only be truly independent, but also perceived to be so, for in the administration of justice, and this is all the more where courts lack real coercive powers, perception of independence matters as much as actual independence.

Much can be done to improve the mechanisms by which international judges are elected, and different mechanisms to select candidates and elect international judges could increase both their perceived and actual independence, and increase overall legitimacy. Also, as long as seats on the bench are allocated by the equitable geographical representation, or the one-state-one-judge criterion, the claim that international judges are independent will always sound less than fully credible.

Moreover, the inherent and natural parochialism of international courts and tribunals cannot be wished away. Since the “international judiciary” is made of several courts lacking formal coordination, each having jurisdiction over different aspects of essentially the same disputes, it is unlikely that comity will produce any results - as long as it is not mandatory, of course. It is not only a question of prestige or self-perception and a courts’ vision of its position within the international judicial Olympus. The funding of international judicial bodies is strictly correlated to their caseload. A court whose caseload stagnates or decreases will see its usefulness questioned and suffer budgetary cuts. Especially in the case of those courts whose yearly caseload can be counted on one or two hands, like the ICJ, ITLOS, IACHR, or the WTO appellate body, deferring to another jurisdiction can have important practical consequences, besides legal and political ones. Ensuring more stable financing over longer periods of time instead of the current one or two-year cycles, would further discourage parochialism than any generic exhortation, and it will also discourage courts from consciously or unconsciously pandering to those States holding the majority, or having the decisive voice, in the body that approves their budget.

Third, as shown, the “non-engagement/disengagement approach” can have significant political and reputational costs, as well as steep opportunity-costs, while conditional engagement is a gamble because the final word as to whether jurisdiction can be exercised is ultimately had by the court by virtue of the compétence de la compétence principle. Non-engagement/disengagement is obviously a viable strategy only for a few States, either those who are already at the fringe of diplomatic relations (e.g. Syria, Iran, Myanmar, or Zimbabwe), or those who have the political, economic or military weight to bear the costs (e.g. the United States, China, India, Japan, Russia). But then again, one has to wonder whether in the contemporary world a State can really pull itself out of the
growing web of agreements and jurisdictions, and avoid judicial deliberation about its behavior as contrasted to mere diplomatic talk. The examples of the exercise of advisory jurisdiction by the ICJ and IACHR, as well as the capacity of the UN Security Council to establish jurisdictions *de imperio*, show that no state is beyond international judicial reach. It is not farfetched to think that one day the General Assembly might request the ICJ for an advisory opinion about the legality of the Chinese occupation of Tibet; or that the Security Council might create an international criminal tribunal for Zimbabwe or decide to refer the situation to the ICC. This is why governments who merely follow the non-engagement/disengagement approach are ill-advised. Instead of ignoring, at their own peril, the realities and complexities created by the judicialization of international politics, they would be better off by judiciously engaging and steering.

Is there a fourth antidote, the silver bullet capable of fixing the problems created by the uneven and partial judicialization of the international sphere? Logically, if the judicialization was complete and universal, the problems addressed in this article would not exist. Not only one international legal system, but also one international judiciary would exist. Coordination between international courts and tribunals would take place through carefully crafted international procedural norms, even before epistemic communities are enlisted. When Kant claimed that compulsory and permanent international jurisdictions are not so much an optional means to resolve disputes, alternative to other instruments like mediation and conciliation, but rather a *commandment of the reason* ([vernunftgebot]) necessary to achieve an international order founded on peace, he evidently implied that for peace to be universal the jurisdiction of international courts and tribunals should be universal as well. The judicialization of inter-European international relations was not only conceivable, but also possible, as history proved two centuries later. Yet, from Kant’s perspective and in his time, understandably the only world that really mattered was Europe. A judicialization of the European space would have been enough to ensure universal peace. He was not interested in exploring what would happen at the fringe of the phenomenon where the judicialized area overlaps with the non-judicialized one. Yet, the Kantian dream, which lives on

---


250 Kant himself recognized that universality is a lofty, but probably unattainable, aim. “…Only within a universal union of states … can such rights and property acquire peremptory validity and a true state of peace be attained. But if an international state of this kind extends over too wide area of land, it will eventually become impossibly to govern it…. It naturally follows that perpetual peace, the ultimate end of all international right, is an idea incapable of realization”. Metaphysics of Morals §61. “Just like individual men, [States] must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an international state, which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present concept of international right…the positive idea of a world republic cannot be realized”. Perpetual Peace, Second Section, Second Article, last paragraph. Still, Kant also wrote: “If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation…” *ibid.*, and “…the political principles which have this aim … are not impracticable. For this is a project based upon duty, hence also upon the rights of man and of states, and it can indeed be put into execution”. Metaphysics of Morals §61.
especially amongst the supporters of the ICC and admirers of the WTO dispute settlement system, presupposes a degree of centralization and concentration of power that is clearly unattainable (and undesirable) for the time being at a global level. History teaches that the creation of a unified and coordinated judiciary always follows that of the unification of political power, not the reverse. It is not by accident that the contemporary “international judicial system” is incomplete and fragmented as it simply reflects the reality of a society still made of sovereign States, many of which are in no hurry to transfer sovereignty.

Ultimately, there is the need for a general cultural change. Kantian posturing should be abandoned, and non-engagement and disengagement should be recognized as a legitimate option, especially as long as the other two antidotes are not improved. It is because of this that it would be desirable for international courts and tribunals, and especially those still relying on the consensual paradigm, to practice greater judicial restraint and opt for declining jurisdiction whenever States involved have motivated and clear reasons why they do not want to be subjected to jurisdiction.