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# Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach

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## Abstract

*Starting from the observation that there has long been – and continues to be – a preference for a plurality of international courts and tribunals, this article explores the emerging threads of a managerial approach in the fabric of international dispute settlement due to the increased number of fora in recent years. It argues that, while plurality remains the choice, both judges and states are actors in efforts to order this plurality as the need for judicial awareness and tools to organize jurisdiction has become more acute. In particular, judicial actors have woven common normative threads through various communicative practices and their approach to matters of procedure. Further, procedural mechanisms are being used to a greater extent to mitigate the risks of overlapping jurisdiction and parallel proceedings. In this respect, international economic law is serving as a laboratory for the development of these mechanisms. They include, among others, adapted versions of *lis pendens*, *connexité*, or *fork-in-the-road* provisions. That said, similar threads of a managerial approach can be seen to be emerging beyond international economic law. Further reflection is needed on a creative means for ensuring coordination and coherence without compromising the preference for plurality.*

## 1 Introduction

A plurality of courts and tribunals has long been a feature of the international legal order. It is the result of a consistent choice, and the legal architecture surrounding dispute settlement has more often facilitated plurality than restricted it. In recent years,

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there has been a proliferation in the number and type of international courts and tribunals. It is this phenomenon and, more particularly, the perceived risks it presents that has attracted much debate. However, I intend to show that these risks can be overstated and that a closer look at the practice of international courts and tribunals reveals a number of interesting responses by judicial and state actors to this exponential multiplication of dispute settlement fora at the international level. Moreover, despite these responses, plurality remains alive and well in the fabric of international courts and tribunals.<sup>1</sup>

As to the scope, I will consider permanent, non-permanent and *ad hoc* jurisdictional means for settling disputes. While dispute settlement through arbitration and through permanent courts is often considered to be distinct,<sup>2</sup> the common traits, values and principles that cross-cut these two means are also apparent.<sup>3</sup> This is evident, for example, in the independent and impartial status of judicial actors, the binding nature of the decisions that emanate from each form of dispute settlement, the equality of arms through an adversarial procedure and the legal (or equitable) basis on which decisions or awards must be based.<sup>4</sup> Some or all of these shared traits regularly feature in the constitutive statutes of the various dispute settlement mechanisms. Of course, this reinforces certain underlying principles by which all international dispute settlement fora will abide. As a result, these principles help to facilitate coherence and are part of the shared values among international courts and tribunals.

In this article, I will make three main arguments. First, plurality has always characterized international dispute settlement and that plurality has been intended. In this context, courts and tribunals have become aware of their presence among numerous other judicial, as well as alternative dispute settlement, mechanisms. As a result, it is apparent that judicial actors increasingly view their function as including the need to serve as guardians of the fabric of international dispute settlement by ensuring its coherence through coordination. These efforts at management are important because they have the overall efficacy of the collection of dispute settlement mechanisms as their end goal. In some areas, they have been assisted in this endeavour by state actors. This pursuit of efficacy ensures that international courts and tribunals can effectively govern legal relationships through consistent and authoritative dispute settlement. Indeed, a functional analysis of international adjudication reveals that it can be a mechanism for the promotion of certain community interests, and seeking consistency in the management of a plural world of courts and tribunals is certainly one of these interests.<sup>5</sup> This supports the view that international judges

<sup>1</sup> I do not intend to take a position on whether we can speak of a system of courts and tribunals. For a brief discussion on this issue, see Project on International Courts and Tribunals, 'The International Judiciary in Context: A Synoptic Chart', Version 3.0, November 2004, available at [www.pict-pcti.org/publications/synoptic\\_chart/synop\\_c4.pdf](http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf) (last visited 11 December 2016).

<sup>2</sup> See Pellet, 'Judicial Settlement of International Disputes', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), vol. 6, 526 (in particular regarding their treatment in Art. 33 of the UN Charter).

<sup>3</sup> *Ibid.*, at 531.

<sup>4</sup> *Ibid.*

<sup>5</sup> Von Bogdandy and Venzke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals', in C.P.R. Romano, K.J. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2013) 519.

and arbitrators ought to be tasked with ensuring the legitimacy of the international judicial system.<sup>6</sup> Moreover, this interpretation of the judicial function resonates with Hersch Lauterpacht's argument that judges may need to be creative where gaps in the law exist, although obviously within carefully prescribed limits.<sup>7</sup>

Lauterpacht further suggests that courts must not be removed from the realities of the international community but, rather, should be engaged in 'a creative activity' while taking into consideration the 'entirety of international law and the necessities of the international community'.<sup>8</sup> In this way, judges are crucial actors in the design, construction and repair of the architecture of international dispute settlement. They are in this sense both architects and builders and, as such, can be said to have an important role to play in maintaining order and legitimacy. Overall, therefore, it is judicial actors and – to a lesser extent – state actors who are responsible for the emergence of a managerial approach in the fabric of international dispute settlement. This is an informal approach,<sup>9</sup> but an apparently necessary one, and it is ultimately concerned with solving problems and challenges through cooperation with other actors.<sup>10</sup>

Second, I argue that 'internal communication' occurs between different actors involved in the world of international dispute settlement. This can take the form of judicial dialogue. Such dialogue is apparent through various means, including, but not limited to, cross-referencing between judicial decisions, opinions or awards. The substance and very existence of this communication also reveals that the actors who are part of this fabric are concerned with its coherence for the sake of those subject to it and for its legitimacy and authority. Furthermore, such communication can also be used to serve judicial economy, for example, by sharing the load of fact-finding endeavours.

Third, the coordination of the system of international courts and tribunals by judicial and state actors is evident. In particular, this is by the recourse to certain tools that have the effect of managing proceedings before a diverse set of fora. It would appear that these procedural tools are being developed especially in the area of international economic law, which is serving as something of a laboratory in this respect. More specifically, it is evident that consideration has been given to doctrines traditionally

<sup>6</sup> Helfer, 'The Effectiveness of International Adjudicators', in Romano, Alter and Shany, *supra* note 5, 465.

<sup>7</sup> H. Lauterpacht, *International Law, Collected Papers*, vol. 2: *The Law of Peace*, edited by E. Lauterpacht (1975), at 237; H. Lauterpacht, *The Function of Law in the International Community* (1933), at 64–65, 100–104.

<sup>8</sup> Lauterpacht, *Function of Law*, *supra* note 7, at 319–320 (footnote omitted).

<sup>9</sup> I am aware of the risks of managerialism (see Koskeniemi, 'The Politics of International Law – 20 Years Later', 20(1) *European Journal of International Law (EJIL)* (2009) 7; Koskeniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', 1(1) *European Journal of Legal Studies* (2007) 8), but it is important to refer to an emerging 'managerial approach' to underline the deliberate choices that are being made by judges and states with the purpose of ordering the fabric of international dispute settlement.

<sup>10</sup> On this approach, see A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995). See also Brunnée, 'Multilateral Environmental Agreements and the Compliance Continuum', in G. Winter (ed.), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (2006), at 391–394.

developed and applied as part of domestic and private international law. These doctrines include, for example, *lis alibi pendens*, *connexité*, *res judicata* or *electa una via*, to name some of the more well-known procedural mechanisms. In addition to these judicially crafted tools, it is also apparent that state actors are inserting coordinating tools in their negotiation and conclusion of new treaties. Once again, the area of international economic law has been particularly interesting in this regard, given the recent frequency and creativity with which such tools are being created.

Further to these main arguments, I observe that, even as attempts continue to be made at coordination, plurality will remain a fundamental characteristic of international dispute settlement. The most recent trends towards the management of plurality show that judicial actors are aware of the desire of states and non-state actors for multiple fora as well as the need to ensure coherence through communication between judicial actors and the coordination of jurisdiction. This has been sought more through the design of structures to facilitate choice between dispute settlement mechanisms than through the cultivation of a hierarchical system. The continuing choice available for litigants was recently illustrated, for example, by several cases over Atlanto-Scandian herring stock involving Denmark (in respect of the Faroe Islands) and the European Union (EU). This dispute was brought before both the Permanent Court of Arbitration, on the basis of Article 279 (failure to settle a dispute peacefully) and Article 63 (failure to cooperate in relation to shared and/or straddling stock) of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>11</sup> and the World Trade Organization (WTO), on the basis of Articles I:1, V:2 and XI:1 (most favoured nation [MFN], transit and quantitative restrictions) of the General Agreement on Tariffs and Trade (GATT).<sup>12</sup> This is characteristic of the menu of options that states have to resolve their international disputes and provides insight as to why states have been keen to preserve the choice they have.

## 2 Plurality as an Inherent Part of the Fabric of International Dispute Settlement

Plurality has always been present in the fabric of international courts and tribunals. It is also evident that it has been a deliberate choice to allow for a variety of means of dispute settlement. As early as the 19th century, various tribunals populated the fabric of international dispute settlement.<sup>13</sup> In fact, as it has been pointed out, '[f]or as long as no such international institution existed, arbitration had to assume the burden for the resolution of all disputes which could not be settled by negotiation, those which were political in nature and those which were essentially of a legal nature'.<sup>14</sup> Indeed, the

<sup>11</sup> PCA, *Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in Respect of the Faroe Islands v. The European Union)*, PCA Case no. 2013-30, 23 September 2014. UN Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 397.

<sup>12</sup> WTO, *European Union – Measures on Atlanto-Scandian Herring*, 21 August 2014, WT/DS469. General Agreement on Tariffs and Trade (GATT) 1994, 55 UNTS 194.

<sup>13</sup> R. Kolb, *The Elgar Companion to the International Court of Justice* (2014), at 5.

<sup>14</sup> *Ibid.*, at 4.

*Treaty of Amity, Commerce, and Navigation (Jay Treaty)* of 1794<sup>15</sup> has been considered by some as marking the eve of a surge in the settlement of international disputes by arbitration.<sup>16</sup> This treaty was signed after the War of Independence in the USA and ushered in new approaches to dispute settlement, including decisions by joint mixed tribunals, which were binding. The *Alabama Arbitration*,<sup>17</sup> which took place in 1872, is widely understood to represent the advent of contemporary international arbitration. Indeed, this favourable sentiment towards international arbitration is reflected by the content of the First Hague Peace Convention of 1899, of which Article 16 reads:

In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.<sup>18</sup>

Confirming the preference for arbitral settlement of international disputes, Article 20 of the 1899 Hague Convention sought to establish the Permanent Court of Arbitration, to which parties could have recourse at any time, for the purpose of offering services towards the resolution of international disputes that were not possible to solve through diplomatic means.

In light of the popularity of voluntary arbitration, prior to the Second Hague Conference of 1907, some had argued for compulsory arbitration of international disputes so as to ensure all differences were resolved by this means of dispute settlement.<sup>19</sup> At this conference, a Court of Arbitral Justice was seriously mooted as a possibility, and this was envisaged to be a permanent court to which states could submit their disputes.<sup>20</sup> It would be established as a distinct and separate institution.<sup>21</sup> Article I of the Second Hague Peace Convention of 1907 that would create the Court of Arbitral Justice provided that ‘the Contracting Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various judicial systems of the world and capable of insuring continuity of arbitral jurisprudence’.<sup>22</sup> The intention was that the Permanent Court of Arbitration would remain unaffected by the introduction of this new arbitration facility.<sup>23</sup> However, this proposal to create a Court of Arbitral Justice was to be finalized at a third conference, which was never convened owing to the outbreak of World War I.<sup>24</sup> It is nevertheless evidence of both

<sup>15</sup> Treaty of Amity, Commerce, and Navigation (US-Great Britain) (Jay Treaty) 1794, 8 Stat. 116.

<sup>16</sup> Roelofsen, ‘International Arbitration and Courts’, in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012), at 160.

<sup>17</sup> ‘Alabama Claims Arbitration 1872’, in J.B. Moore (ed.), *History and Digest of the International Arbitrations to which the United States has been a Party* (1898).

<sup>18</sup> Hague Convention for the Pacific Settlement of International Disputes 1899, 1 *American Journal of International Law (AJIL)* 103 (1907).

<sup>19</sup> Roelofsen, *supra* note 16, at 146.

<sup>20</sup> *Ibid.*, at 165.

<sup>21</sup> See S. Rosenne, *The Hague Peace Conferences of 1899 and 1907: Reports and Documents* (2001).

<sup>22</sup> Hague Convention for the Pacific Settlement of International Disputes 1907, 2 *AJIL Supp.* (1908).

<sup>23</sup> Brown Scott, ‘The Central American Peace Conference of 1907’, 2(1) *AJIL* (1908) 121.

<sup>24</sup> Rosenne, ‘The Permanent Court of International Justice (PCIJ)’, *Max Planck Encyclopedia of Public International Law* (October 2006), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e72> (last visited 12 December 2016).

the intention to propagate the mechanisms to which international disputes could be submitted and the fervent enthusiasm for arbitration at the time.

A plurality of international dispute settlement mechanisms continued up to and beyond the establishment of the Permanent Court of International Justice (PCIJ) in 1920. Even with the creation of permanent courts, other jurisdictional means such as arbitration were conceived as co-existing mechanisms. Indeed, Article 1 of the Statute of the Permanent Court of International Justice (PCIJ Statute) stated that '[t]his Court shall be in addition to the Court of Arbitration organized by the Conventions of the Hague of 1899 and 1907 and to the special tribunals of arbitration to which States are at liberty to submit their disputes for settlement'.<sup>25</sup> This provision made it clear that states remained free to choose the means for settling their disputes.<sup>26</sup> Interestingly, no consideration was given to bringing international arbitration within the remit of the PCIJ in the way that, for example, arbitration in domestic law is subject to the jurisdiction of domestic courts.<sup>27</sup>

It is also important to note that, during the same period, several other initiatives were launched for establishing international jurisdictional mechanisms. As such, discussions took place that led to the adoption of the Convention Relative to the Creation of an International Prize Court, although the convention, and, thus, this court, never came into effect.<sup>28</sup> Similarly, a High Court of International Justice having jurisdiction over international crimes was considered by the Assembly of the League of Nations but, again, was ultimately shelved.<sup>29</sup> Prior to these developments on the universal plane, a Central American Court of Justice was established in 1907 and was active for 10 years at the regional level.<sup>30</sup> The Court assumed jurisdiction over a wide range of matters, including those arising between contracting states as well as those arising from a violation of treaties or conventions and other cases of an international character. There was also an individual complaints mechanism. The Court was not intended to be solely a court for the settlement of disputes between the governments, and between the governments and individuals, of Central America, but, rather, it was intended to be an international court in a broad sense, as Article IV of the 1907 Convention for the Establishment of a Central American Court of Justice confirms:

<sup>25</sup> Statute of the Permanent Court of International Justice 1920, 6 LNTS 379, 390.

<sup>26</sup> Oellers-Frahm, 'Article 95 UN Charter', in A. Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, 2012) 204.

<sup>27</sup> Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', 31 *New York University Journal of International Law and Politics* (NYUJILP) (1999) 919, at 922. Notwithstanding, the International Court of Justice (ICJ) can have an indirect role to play in international arbitration (e.g., the ICJ President as an appointing authority in arbitral procedures). That said, there is no comparison with the role played by domestic courts in arbitration.

<sup>28</sup> On the establishment of an international prize court, see Gregory, 'The Proposed International Prize Court and Some of Its Difficulties', 2(3) *AJIL* (1908) 458.

<sup>29</sup> Roelofsen, *supra* note 16, at 166; League of Nations, *Records of the First Assembly, Committees* (1920), vol. 1, at 494, 505.

<sup>30</sup> On the Central American Court of Justice, see Pellet, *supra* note 2.

[B]ut the jurisdiction of the Court is broadened so that the Court may likewise take cognizance of the international questions which by special agreement any one of the Central American governments and a foreign government may have determined to submit to it.

Moreover, Article 1 of its Convention delimited the jurisdiction of the Central American Court of Justice very widely, giving it a mandate to determine 'all controversies or questions which may arise ... of whatever nature and no matter what their origin may be' and also included 'questions which individuals of a Central American Country may raise against any of the other contracting Governments' (Article II).<sup>31</sup>

That said, the breadth of its jurisdiction was perhaps part of its downfall. The wide jurisdiction of the Court tended to limit the freedom of choice of action of the parties subject to its jurisdiction. Choice in recourse to jurisdictional means is of course central to the notion of plurality. It has been asserted that this was the main reason the Court was not continued after its mandated 10-year period ran out,<sup>32</sup> although other reasons have also been put forward for its discontinuation, including the refusal of Nicaragua to renew the 1907 Convention.<sup>33</sup>

As is becoming evident, different judicial mechanisms were thus foreseen or established independently from each other throughout the history of international dispute settlement. It is in this way that judicial dispute settlement has always been conceived in terms of diversity and plurality. The *travaux préparatoires* of the Covenant of the League of Nations and the PCIJ Statute illustrate the intention of the drafters to ensure the establishment of the Permanent Court was without prejudice to the extensive practice of arbitration that had built up.<sup>34</sup> It was underlined by members of the Advisory Committee of Jurists in discussions on the establishment of a PCIJ in 1920 that:

[d]isputant Members of the League, when submitting their dispute to arbitration, are not bound as a general rule to select the projected Permanent Court of International Justice.<sup>35</sup>

This Permanent Court will not be ... a Court of Arbitration, but a Court of Justice. The Court of Arbitration, whose eminent services we all remember, will certainly not cease to function in all the cases for which it was set up. But it has a special character and its range of action is already determined. There is between the sentence in arbitration and the judgment of a tribunal an essential difference, a difference as profound as that which exists between equity and

<sup>31</sup> Convention for the Establishment of a Central American Court of Justice 1907, 2 AJIL Supp. 239 (1908).

<sup>32</sup> Pellet, *supra* note 2 at 529.

<sup>33</sup> Caflisch, 'Cent ans de règlement pacifique des différends interétatiques', 288 *Recueil des cours de l'Académie de droit international de la Haye (RCADIH)* (2001) 314. In particular, the Court had found that the Bryan-Chamorro Treaty of 1914 between Nicaragua and the USA, authorizing the latter to construct a canal across the territory of Nicaragua, breached other conventional obligations of Nicaragua in respect of Costa Rica and El Salvador. As explained by Caflisch, '[d]ans la première affaire, le Nicaragua refusa de comparaître, arguant de l'incompétence de la Cour; dans la seconde, il comparut, mais simplement pour plaider le même argument d'incompétence. Sur la base de ce dernier, le Nicaragua – allié voire satellite des Etats-Unis à cette époque – excipia ensuite de la nullité des arrêts de la Cour et en refusa l'exécution' (at 314).

<sup>34</sup> Covenant of the League of Nations 1919, 13 AJIL Supp. 128 (1919).

<sup>35</sup> Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice* (1920), at 11, available at [www.icj-cij.org/pcij/serie\\_D/D\\_documents\\_to\\_comm\\_existing\\_plans.pdf](http://www.icj-cij.org/pcij/serie_D/D_documents_to_comm_existing_plans.pdf) (last visited 12 December 2016).

justice. Arbitration can take advantage of a thousand elements of fact and a thousand contingencies, and often of certain necessities of a political kind. The decrees of justice take account only of a rule defined and fixed by law. In every State the domain of justice properly so-called has spread step by step as the body of legislation, extending itself and penetrating more deeply into the interplay of individual relations defined for each one of these relations the rights and obligations of every citizen.<sup>36</sup>

Several articles of the Covenant of the League of Nations would come to emphasize the freedom that was intended for member states of the League of Nations to submit disputes to the PCIJ or any other tribunal. First, Article 12(1) of the Covenant provided:

The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.

Here we can see clearly that the drafters intended member states to have the choice of either the PCIJ or ‘any other tribunal’ to resolve their international disputes. Using similarly explicit language, Article 13 provided:

The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

This was then plainly epitomized in Article 1 of the PCIJ Statute. While various recommendations and proposals were made by the *Institut de droit international*, the League Assembly and the League Committee of Jurists to endow the PCIJ with the power to review arbitral awards or serve as a mechanism of appeal from arbitration, these initiatives never gained traction.<sup>37</sup>

Around this time, the field of commercial arbitration also embraced plurality, as can be seen by the prevalence of institutions such as the London Court of International Arbitration, the Arbitration Society of America, the International Court of Arbitration

<sup>36</sup> Advisory Committee of Jurists, speech delivered by M. Léon Bourgeois, *Procès-Verbaux of the Proceedings of the Committee of 16 June – 24 July 1920* (1920), at 8, available at [www.icj-cij.org/pcij/serie\\_D/D\\_proceedings\\_of\\_committee\\_annexes\\_16june\\_24july\\_1920.pdf](http://www.icj-cij.org/pcij/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf) (last visited 12 December 2016).

<sup>37</sup> See Reisman, ‘Reflections on the Control Mechanism of the ICSID System’, in International Arbitration Institute and Juris, *The Review of International Arbitral Awards* (2010) 207.



and many others. These were institutions created to settle commercial disputes that arose between parties regardless of their location or legal systems. These arbitral courts often had their own governing rules and offered flexibility regarding the applicable law. By 1923, the League of Nations adopted a Protocol on Arbitration Clauses, which was intended to underline the validity of arbitration clauses and to ensure that arbitral awards were executed by relevant parties. This was reinforced by the Convention for the Execution of Foreign Arbitral Awards of 1927.<sup>38</sup>

Particularly from the inter-war period, it is notable that many international mechanisms were established and that some began to be opened more frequently to individuals. For example, in 1927, the Administrative Tribunal of the International Labour Organization (ILO) was created, which was the predecessor to the Administrative Tribunal of the League of Nations. Until 1946, the ILO Administrative Tribunal could hear complaints from both the ILO and the Secretariat of the League of Nations. Other tribunals set up during this period and afterwards included the claims commissions established in the aftermath of both world wars. These gave a forum for individuals who had suffered loss as a result of the wars to claim compensation. Latterly, mechanisms for individual complaints based on human rights violations were established at the regional levels.

While the creation of the United Nations (UN) ushered in a new international order, plurality remained unaffected. In fact, the deliberate preference for plurality is evident in the very foundations of the New International Economic Order built after World War II, including the creation of multiple institutions.<sup>39</sup> Similarly, the intention is apparent not least in the wording of Articles 33, 92 and 95 of the UN Charter. Given that the UN Charter does not specify the nature of a dispute, except that it should be likely to endanger international peace and security, or distinguish between political or legal disputes, commentators have suggested that a wide interpretation should be adopted *vis-à-vis* the choice of dispute settlement mechanisms.<sup>40</sup> This means that states, while abiding by their obligation to settle their disputes through pacific means, are free to choose the means for settling their disputes. Indeed, the breadth of choice stands out, and a non-exhaustive list of mechanisms is provided. This may include diplomatic, jurisdictional or institutional means. Among the jurisdictional means, arbitration and the resort to permanent jurisdictions for judicial settlement are identified in the provision. In this respect, that Article 33 refers to both 'arbitration' and to 'judicial settlement' separately has been said to reveal that they are considered distinct and that they have a distinct character.<sup>41</sup>

<sup>38</sup> Protocol on Arbitration Clauses 1923, 27 LNTS 158; Convention for the Execution of Foreign Arbitral Awards 1927, 92 LNTS 301.

<sup>39</sup> See Boisson de Chazournes, 'Relationships of International Organizations with Other Actors', in J. Katz Cogan, I. Hurd, and I. Johnstone (eds), *The Oxford Handbook of International Organizations* (2016) 691. More generally on the issue of functionalism, see Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', 26(1) *EJIL* (2015) 9.

<sup>40</sup> Ascencio, 'Article 33', in J. Pierre Cot, M. Forteau, and A. Pellet (eds), *La Charte des Nations Unies: Commentaire article par article* (3rd edn, 2005) 1049.

<sup>41</sup> Pellet, *supra* note 2, at 526.

Article 92 indirectly confirms the notion that the International Court of Justice (ICJ) is one, albeit an important one, of many judicial mechanisms in recognizing that '[t]he International Court of Justice shall be the principal judicial organ of the United Nations'. Indeed, the use of the word 'principal' suggests that there may be other judicial organs. That said, it could be argued that the word 'principal' also suggests some form of hierarchy. However, while this judicial organ does have a special importance (particularly within the UN system),<sup>42</sup> it is fair to say that no hierarchy has in fact ever been envisaged. As the International Criminal Tribunal for the Former Yugoslavia (ICTY) said of itself: '[T]his Tribunal is an autonomous international judicial body, and although the ICJ is the "principal judicial organ" within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts'.<sup>43</sup> Moreover, there are many tribunals that have been established in connection with the UN system that have not been endowed through their statutes with a formal link to the ICJ.

The a-hierarchical nature of the relationship between the ICJ and other international tribunals is also demonstrated by the fact that acceptance of the ICJ's jurisdiction is often conditioned on a state not having accepted the jurisdiction of another means of dispute settlement. In fact, there are numerous states that have made such a declaration.<sup>44</sup> Alternatively, some treaties make provision for other means of dispute settlement to be agreed upon during a set time limit if the parties do not wish to have their dispute settled by the ICJ. Where such an agreement is not made, parties may bring the dispute to the ICJ. This is the case, for example, with Article II of the Optional Protocol to the 1961 Vienna Convention on Diplomatic Relations, which states:

The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.<sup>45</sup>

The idea that the ICJ would exist in a plural world of dispute settlement is very explicitly reinforced by Article 95 of the UN Charter. It provides that '[n]othing in

<sup>42</sup> See, e.g., *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980. ICJ Reports (1980) 3, para. 40, in which the Court noted that '[i]t is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between the parties to a dispute'. See also *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 26 November 1984, ICJ Reports (1984) 392, para. 94: 'It is clear that the complaint of Nicaragua is not about ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two states. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement.'

<sup>43</sup> Judgment, *Prosecutor v. Kvočka* (IT-98-30/1), Appeals Chamber, 25 May 2001, para. 15; see also, e.g., the affirmation of the Inter-American Court of Human Rights (IACtHR) that it is 'an autonomous judicial institution'. IACtHR, *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion), 1 October 1999, Case no. OC-16/99, para. 61.

<sup>44</sup> See Gaja, 'Relationship of the ICJ with Other International Courts and Tribunals', in Zimmermann *et al.*, *supra* note 26, at 575.

<sup>45</sup> Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95.

the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future'. It is interesting that at the time of the ICJ's predecessor – the PCIJ – mention was only made of the Permanent Court of Arbitration and of special arbitral tribunals in Article 1 of the PCIJ Statute. In Article 95 of the UN Charter, in contrast, reference is made to other tribunals as well. Plurality came to be understood in this provision in an even more general manner. It takes into account existing agreements that had established tribunals at the time of the adoption of the UN Charter as well as agreements providing for judicial mechanisms to be concluded in the future.

Article 95 was inserted in the UN Charter as a saving clause and does not affect the relationship between acceptance of the ICJ's jurisdiction and alternative means of dispute settlement. It expresses no preference for international dispute settlement at the ICJ or elsewhere as far as the parties are concerned.<sup>46</sup> That said, it should be noted that Article 36(3) of the UN Charter does express a preference that, '[i]n making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court'. However, this is concerned with disputes arising under Chapter VI of the UN Charter, and it has been confirmed that parties may resort to other means and fora should they deem these to be more appropriate for the settlement of their dispute.<sup>47</sup>

Interestingly, the *travaux préparatoires* to the UN Charter and Statute of the International Court of Justice (ICJ Statute) underline the proposition that the drafters were interested in maintaining a reference to the liberty states had in submitting their disputes to a tribunal of their choice.<sup>48</sup> As was recorded by a summary of a meeting of the United Nations Committee of Jurists in 1945:

A question arose as to a difference between the English and French versions of Article 1 as submitted by the Subcommittee: the English text omitted the words 'of arbitration' from the clause of the existing Statute, 'and to the special Tribunals of Arbitration to which states are always at liberty to submit their disputes'; the French text did not. Dr. De Bayle (Costa Rica) thought the matter of some importance, and wished to know whether the omission was deliberate. It was explained that it was, the purpose of the Subcommittee being to generalize the existing draft, recognizing that there might be special tribunals other than arbitral tribunals. The matter was entrusted to the drafting committee.<sup>49</sup>

Similarly, in one of the early proposals for what was envisaged to become Article 1 of the ICJ Statute, it was suggested that the wording of the second sentence of Article 1 of the PCIJ Statute be retained, namely that '[t]his Court shall be in addition to the Court

<sup>46</sup> *Ibid.*, at 574; See also Y. Shany, *The Competing Jurisdiction of International Courts and Tribunals* (2003), at 196; Oellers-Frahm, *supra* note 26, at 204ff.

<sup>47</sup> See, e.g., GA Res. 2625 (XXV), 24 October 1970, Annex, at para. 1; See also Gaja, *supra* note 44, at 574.

<sup>48</sup> Statute of the International Court of Justice 1945, 1 UNTS 993.

<sup>49</sup> United Nations Committee of Jurists, 'Summary of Eighth Meeting', 14 *Documents of the UN Conference on International Organizations (DUNCIO)* (1945) 175, at 187.

of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special tribunals of arbitration to which States are always at liberty to submit their disputes for settlement'. However, the Cuban delegate on the UN Committee of Jurists suggested that the words 'of arbitration' be omitted from the phrase 'the special tribunals of arbitration to which States are always at liberty to submit their disputes' as he had 'thought the words an unnecessary limitation', and this was subsequently accepted by the Committee.<sup>50</sup> Ultimately, given that the drafting of Article 1 required a decision on whether the PCIJ would be continued or whether a new International Court of Justice would be created, the drafting of the article was left to the UN conference in San Francisco.<sup>51</sup>

The discussions surrounding the Model Rules of Arbitral Procedure project of the International Law Commission's (ILC) Special Rapporteur Georges Scelle and, in particular, his desire to link arbitration to the ICJ in having the latter intervene in case of a deadlock in arbitral proceedings, building on the initiatives that had been unsuccessfully pursued in the era of the PCIJ, providing yet further evidence of a plural world of dispute settlement. These discussions reveal that states wished for arbitration to remain an autonomous procedure – that is, autonomous from the ICJ.<sup>52</sup> The UN General Assembly rejected the proposals to have the ICJ serve as a mechanism for review of, or appeal from, arbitral awards.<sup>53</sup> They saw these mechanisms as living independently from each other. All of this, however, does not imply that other international courts and tribunals do not show deference to the ICJ. They do, and, indeed, the ICJ is likely something akin to a *primus inter pares* in that it has a special status in the fabric of international dispute settlement.<sup>54</sup> Further still, the harmonizing force of its gravitational pull is necessary if there is to be coalescence towards a coherent international judicial system, as we will explore more fully later in this article.<sup>55</sup>

More generally, international courts have in fact long recognized each other's existence, as the *Société Commerciale de Belgique* case of the PCIJ and the *Ambatielos* and *Interhandel* cases of the ICJ demonstrate.<sup>56</sup> In 1939, Belgium instituted proceedings against Greece before the PCIJ for failure to pay an arbitral award owed to one of Belgium's nationals. Greece had asked whether the Court could confirm that it could

<sup>50</sup> United Nations Committee of Jurists, 'Subcommittee on Articles 1 and 2, Summary of First Meeting (11 April 1945)', 14 *DUNCIO* (1945) 249, at 251.

<sup>51</sup> United Nations Committee of Jurists, 'Report on Draft of Statute of an International Court of Justice Referred to in Chapter VII of the Dumbarton Oaks Proposals (25 April 1945)', 14 *DUNCIO* (1945) 249, at 821.

<sup>52</sup> See 'Report of the Commission to the General Assembly Covering the Work of Its Tenth Session 28 April – 4 July 1958, Doc. A/3859', (1958) 2 *Yearbook of the International Law Commission* 78; See also Charney, 'Is International Law Threatened by Multiple International Tribunals?', 271 *RCADIH* (1998) 125.

<sup>53</sup> 'Report of the Commission to the General Assembly', *supra* note 52; see also Reisman, *supra* note 37, at 207–209.

<sup>54</sup> Oellers-Frahm, *supra* note 26, at 1972.

<sup>55</sup> Abi-Saab, *supra* note 27, at 929.

<sup>56</sup> *Société Commerciale de Belgique (Belgium v. Greece)*, 1939 PCIJ Series A/B, No. 78; *Ambatielos (Greece v. UK)*, Judgment, 15 June 1939, ICJ Reports (1953) 10; *Interhandel (Switzerland v. United States of America)*, Preliminary Objections, 21 March 1959, ICJ Reports (1959) 6.

pay the award in a way that was fair and equitable in light of its financial situation at that time. In considering whether the Court could interfere with an arbitral award, it noted that:

since the arbitral awards to which these submissions relate are, according to the arbitration clause under which they were made, 'final and without appeal', and since the Court has received no mandate from the Parties in regard to them, it can neither confirm nor annul them either wholly or in part. ...

Apart from any other consideration, it is certain that the Court is not entitled to oblige the Belgian Government – and still less the Company which is not before it – to enter into negotiations with the Greek Government with a view to a friendly arrangement regarding the execution of the arbitral awards which that Government recognized to be binding: negotiations of this kind depend entirely upon the will of the parties concerned.<sup>57</sup>

It is interesting, however, that the PCIJ nevertheless saw an opportunity for the resolution of the dispute and, instead, urged the parties in this direction:

Nevertheless, though the Court cannot admit the claims of the Greek Government, it can place on record a declaration which Counsel for the Belgian Government ... made at the end of the oral proceedings. This declaration was as follows: 'If, after the legal situation had been determined, the Belgian Government should have to deal with the question of payments, it would have regard to the legitimate interests of the Company, to the ability of Greece to pay and to the traditional friendship between the two countries'.

This declaration ... enables the Court to declare that the two Governments are, in principle, agreed in contemplating the possibility of negotiations with a view to a friendly settlement, in which regard would be had, amongst other things, to Greece's capacity to pay. Such a settlement is highly desirable.<sup>58</sup>

In 1953, the ICJ in the *Ambatielos* case recognized that the parties to that dispute had concluded an arbitration agreement according to which they were under an obligation to resort to arbitration. The ICJ noted in that case:

The Court must refrain from pronouncing final judgment upon any question of fact or law falling within 'the merits of the difference' or 'the final validity of the claim'. If the Court were to undertake to decide such questions, it would encroach upon the jurisdiction of the Commission of Arbitration.<sup>59</sup>

Further, in the *Interhandel* case of 1959, the ICJ held that '[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law'.<sup>60</sup> The Court considered that the interest underlying both proceedings before the US domestic courts and before the ICJ were the same and that the former rule should apply 'whether in the case of an international court, arbitral tribunal, or conciliation commission'.<sup>61</sup> The ICJ concluded that 'any distinction so far as the rule of the exhaustion of local remedies is concerned between

<sup>57</sup> *Société Commerciale de Belgique*, *supra* note 56, at 174, 177.

<sup>58</sup> *Ibid.*, at 178.

<sup>59</sup> *Ambatielos*, *supra* note 56, at 16.

<sup>60</sup> *Interhandel*, *supra* note 56, at 25.

<sup>61</sup> *Ibid.*, at 27

the various claims or between the various tribunals is unfounded'.<sup>62</sup> This serves to demonstrate that, from the outset of the ICJ's existence, it considered itself to be part of a diverse world of courts and tribunals.

In *Legality of the Use of Force (Yugoslavia v. Belgium)*<sup>63</sup> and *Aerial Incident of 10 August 1999 (Pakistan v. India)*,<sup>64</sup> the ICJ did not find jurisdiction to settle the dispute itself but emphasized that the parties were under an obligation to settle their disputes peacefully.<sup>65</sup> Although the parties to these cases could not seek a remedy at the ICJ, the latter were aware that they had other means by which they could have their disputes settled. This said, with the ongoing creation of other judicial bodies over the course of the second half of the 20th century, plurality indirectly allowed for awards from one judicial mechanism to be the object of a dispute before another judicial forum. This was so in the *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*<sup>66</sup> and in the *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*,<sup>67</sup> for example. In the *Honduras v. Nicaragua*, the ICJ considered whether the arbitral award of 1906 settling a territorial dispute between Nicaragua and Honduras was valid. While emphasizing that it was not a court of appeal and, therefore, was unable to pronounce on the substance of the decision, the ICJ rejected Nicaragua's challenges in respect of the appointment and jurisdiction of the King of Spain as an arbitrator in that former dispute.

In *Guinea-Bissau v. Senegal*, Guinea-Bissau requested a declaration from the ICJ that a prior arbitral award concerning a maritime boundary delimitation between Guinea-Bissau and Senegal had not met the requirements of the arbitration agreement between the parties and was therefore invalid. It also asked the Court to indicate provisional measures regarding the interference of vessels in the disputed area and to delimit the maritime boundaries between the two states. The Court held that the award was valid, although it admitted that it did not make a full maritime delimitation between the two states. The Court noted that it could not interfere with the substance of the award and encouraged the parties to find a solution to the outstanding issues. This opened the door for one international judicial body to engage with the decision or award of another international judicial body such as the ICJ and was evidence of the inevitability that international courts and tribunals would interact in different ways.

Courts and tribunals have explicitly recognized the plurality of mechanisms in the fabric of international dispute settlement. For example, the ICTY has stated:

International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one

<sup>62</sup> *Ibid.*

<sup>63</sup> *Legality of the Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, 15 December 2004, ICJ Reports (1999) 124.

<sup>64</sup> *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction, 21 June 2000, ICJ Reports (2000) 12.

<sup>65</sup> Oellers-Frahm, *supra* note 26, at 1973.

<sup>66</sup> *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, 18 November 1960, ICJ Reports (1960) 192.

<sup>67</sup> *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, 12 November 1991, ICJ Reports (1991) 53.

of them but not the others. In international law, every tribunal is a self-contained system ... Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers ... Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.<sup>68</sup>

Today, we can see plurality both across regimes and within specialized areas of international law. Certain regimes have been especially good at creating provision for a plural system of courts and tribunals. Two specialized regimes provide particularly well-developed examples of this: the system of dispute settlement under the WTO and that in the area of the law of the sea.

To take the first example, the WTO has a variety of options for states when it comes to settling their trade disputes.<sup>69</sup> Indeed, the Dispute Settlement Understanding (DSU) outlines the system of dispute settlement under the WTO.<sup>70</sup> Articles 4–20 of the DSU set out in great detail the procedures that have been predominantly resorted to in practice, including consultations, the possibility of establishing a panel and recourse to the Appellate Body. However, the parties to a dispute can agree to resort to other means of dispute settlement, of a more diplomatic nature, such as negotiations,<sup>71</sup> good offices, conciliation and mediation.<sup>72</sup> Among the alternative means to the WTO mainstream dispute settlement procedures, there is also arbitration.<sup>73</sup> In the context of the DSU, arbitration appears as a stand-alone procedure through Article 25. It can also be seen as a procedure complementing WTO mainstream dispute settlement procedures with respect to specific issues (Articles 21.3 and 22.6 of the DSU). There are safeguards within this plural regime of dispute settlement. For example, Article 3.5 of the DSU provides that an arbitration award must be consistent with the covered agreements:

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

And so the menu of options is contained within a framework of constraints that seeks to ensure coherence.<sup>74</sup>

To take the second example, under the system of dispute settlement for the regime of the law of the sea, there is also provision made for a menu of options of dispute

<sup>68</sup> Jurisdiction, *Prosecutor v. Tadić* (IT-94-1) ICTY, 15 July 1999.

<sup>69</sup> See, e.g., Boisson de Chazournes, 'Arbitration at the WTO: A Terra Incognita to Be Further Explored', in S. Charnovitz, D.P. Stegala and P. van den Bossche (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (2005) 181.

<sup>70</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994, 1869 UNTS 401.

<sup>71</sup> *Ibid.*, Art. 3.7.

<sup>72</sup> *Ibid.*, Art. 5.6.

<sup>73</sup> *Ibid.*, Art. 25.1.

<sup>74</sup> This framework of constraints was more acutely evident, e.g., in WTO, *US – Final Anti-Dumping Measures on Stainless Steel from Mexico – Report of the Appellate Body*, 30 April 2008, WT/DS344/AB/R, in which the Appellate Body considered the distinct roles for the Appellate Body and panels in the dispute settlement system of the World Trade Organization (WTO) and emphasized the value in panels following Appellate Body jurisprudence to ensure consistency in the interpretation of rights and obligations (at para. 161).

settlement under UNCLOS. Part XV of UNCLOS, for example, governs the settlement of disputes arising from this treaty. Under this regime, parties are given a choice of means to settle their disputes by peaceful means. The wide discretion given to the parties under section 1, which sets out the general provisions, is illustrated particularly by Articles 280 and 282 of UNCLOS. Article 280 provides: ‘Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.’ And Article 282 sets out that:

[i]f the States Parties which are parties to a dispute concerning the interpretation or application of this Convention 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 this Part, unless the parties to the dispute otherwise agree.

As for compulsory procedures entailing binding decisions, provided for in Section 2 of Part XV under UNCLOS, states again have much discretion on the mechanism for settling their disputes. In this respect, Article 287(1) of UNCLOS provides for the various means to which states may have recourse, and these include the International Tribunal for the Law of the Sea, the ICJ or an arbitral tribunal. Moreover, under Article 287 of UNCLOS, where no choice of means is expressed or agreed upon, the default position is recourse to arbitration. However, in opening up UNCLOS dispute settlement to other tribunals, as provided for in Article 282 referred to above, some authors have pointed out that this has the potential to cause inconsistency and disorder.<sup>75</sup> This risk has however been mitigated by the inclusion of safeguards.<sup>76</sup>

A further example of a regime providing for a menu of dispute settlement options, albeit only binding on two states and with a mechanism scarcely used in practice compared with the previous two examples, is that of the Indus Waters Treaty between India and Pakistan.<sup>77</sup> The World Bank is also a signatory to the Treaty for certain specific purposes, including for the role it plays in the dispute settlement mechanisms under the Indus Waters Treaty. The settlement of questions, differences and disputes between the parties is set out under Article IX of the Treaty, and the settlement of each of the foregoing is provided for in a different way using a variety of mechanisms. This provision sets up a sequential set of steps. First, if a question should arise in regard to the interpretation, application or potential breach of the Treaty, this is dealt with by the Permanent Indus Commission, an entity established under the treaty composed of representatives from both parties. Second, where an agreement is not reached by the Commission, a difference is said to have arisen. A difference, where it meets the requirements set out under Article IX, is to be dealt with by a neutral expert, who must be a highly qualified engineer and is appointed either on the agreement of the

<sup>75</sup> Treves, ‘Dispute Settlement in the Law of the Sea: Disorder or System?’, in M. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch* (2007) 927.

<sup>76</sup> *Ibid.*, at 930ff.

<sup>77</sup> Indus Waters Treaty 1962, 419 UNTS 126.



two parties or by a designated appointing authority, such as the World Bank. Third, if the Commission deems a dispute to have arisen, it must report this to the two governments. The Treaty then encourages the governments to enter into a negotiation. They may in this context agree to engage mediators to help in this endeavour.

Paragraph (5) of Article IX makes provision for the resolution of disputes by a Court of Arbitration. A Court of Arbitration may be established where the parties mutually agree to do so, where either party requests it and is of the opinion that the commenced negotiation or mediation will fail, or where either party believes the other party is unduly delaying the negotiations. Unless the parties agree otherwise, the Court of Arbitration is to consist of seven members. Among these seven, at least one must be a highly qualified engineer and another must be a person well versed in international law. The chairman of the Court of Arbitration must be 'qualified by status and reputation to be Chairman of the Court of Arbitration, but need not, be engineers or lawyers'.<sup>78</sup> In addition to these mutually agreed appointments, each party should appoint a further arbitrator chosen by them.

The process of dispute settlement under the Indus Waters Treaty is not hierarchical.<sup>79</sup> So, for example, a decision of the neutral expert cannot be appealed to the Court of Arbitration. The non-hierarchical nature of this dispute settlement system has recently come into sharp focus since the World Bank has, at the time of writing, had to pause two separate processes – the appointment of a neutral expert requested by India and the establishment of a Court of Arbitration requested by Pakistan, which were initiated in an attempt to resolve disagreements over two hydroelectric power plants being built by India.<sup>80</sup> The World Bank Group President explained that the international organization has announced this pause to 'protect the Indus Waters Treaty' and in an effort to prompt 'the two countries to begin to resolve the issue in an amicable manner and in line with the spirit of the treaty rather than pursuing concurrent processes that could make the treaty unworkable over time'.<sup>81</sup> While these dispute settlement processes have seldom been used,<sup>82</sup> the World Bank Group perceives that allowing each to proceed simultaneously has the potential to lead to conflicting outcomes, which could in turn undermine the Indus Waters Treaty itself. This intervention is a most recent example of the managerial trend to international dispute settlement and serves to demonstrate that there are a variety of actors engaged in this approach.

In concluding this section, it should be emphasized that plurality has always been present in the fabric of international dispute settlement. This plurality has nevertheless

<sup>78</sup> *Ibid.*, Annexure G(4).

<sup>79</sup> See Salman, 'The Baglihar Difference and Its Resolution Process: A Triumph for the Indus Waters Treaty?', 10 *Water Policy* (2008) 105, at 107.

<sup>80</sup> World Bank, World Bank Declares Pause to Protect Indus Waters Treaty, Press Release, 12 December 2016, available at [www.worldbank.org/en/news/press-release/2016/12/12/world-bank-declares-pause-protect-indus-water-treaty](http://www.worldbank.org/en/news/press-release/2016/12/12/world-bank-declares-pause-protect-indus-water-treaty) (last visited 10 January 2017).

<sup>81</sup> *Ibid.*

<sup>82</sup> See Salman, *supra* note 79, at 116; Uprety and Salman, 'Legal Aspects of Sharing and Management of Transboundary Waters in South Asia: Preventing Conflicts and Promoting Cooperation', 56(4) *Hydrological Sciences Journal* (2011) 641, at 648.

become augmented insofar as there is now more diversity in dispute settlement and international courts and tribunals have become more numerous. This recent multiplication has provoked a response from both judicial and state actors. The form of the response has not served to restrict plurality but, rather, to organize it. In this sense, the response has been of a managerial nature. States are now, and always have been, in favour of plurality. It would appear to be in their interests for a number of reasons, particularly in regard to the choice of fora available to settle their disputes. Let us now turn our attention to the way in which judicial actors have responded to the multiplication of courts and tribunals through communication tools.

### 3 Plurality and the Steady Multiplication of Courts and Tribunals: The Rise of Communication Tools

An indicator of the growing awareness that judicial actors have of each other's presence in the fabric of international dispute settlement is the increasing communication between them. In fact, communication is a fundamental part of any system, as will be explored in this section. In the context of the international legal system, communication can serve both to prompt and coordinate the development of the law in different areas. This communication can take different forms, but we will focus primarily on cross-references in court decisions or arbitral awards.

#### A *The Need for Communication in a Context of Multiplied Fora*

The exponential increase in the number of international courts and tribunals over recent years – frequently termed a ‘proliferation’ or ‘multiplication’ – has been a notable and well-documented phenomenon.<sup>83</sup> There are many reasons for this proliferation, but it is broadly a consequence of the need for a variety of international courts and tribunals, the multiplication of actors involved in dispute settlement as well as the increasing scope of international law.

In this context, the trends of regionalization and specialization have contributed to the multiplication. As to the former – regionalization – courts and tribunals have served as constitutive pillars of these new loci of governance.<sup>84</sup> Regional organizations have often involved the creation of judicial mechanisms and dispute settlement through which the pursuit of common objectives and values is strengthened.<sup>85</sup> It has

<sup>83</sup> See, e.g., L. Boisson de Chazournes (ed.), *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution* (1995); Kingsbury, ‘Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?’, 31 *International Law and Politics* (1999) 679; Charney, *supra* note 52; Brown, ‘The Proliferation of International Courts and Tribunals: Finding Your Way through the Maze’, 3 *Melbourne Journal of International Law* (2002) 453; Karsten, ‘The Future of Arbitration: Prophecy Using the Prism of the Past’, in L. Lévy and Y. Derains (eds), *Liber Amicorum en l’honneur de Serge Lazareff* (2011) 349.

<sup>84</sup> Burgorgue-Larsen, ‘Le fait régional dans la juridictionnalisation du droit international’, in *Société française pour le droit international, La juridictionnalisation du droit international: Colloque de Lille* (2003) 203.

<sup>85</sup> See L. Boisson de Chazournes, *Interactions between Regional and Universal Organizations: A Legal Perspective* (2017), at 255ff.

been observed that the ‘submission of disputes to an international body vested with the power to make binding decisions, even if by no means an “abandonment of sovereignty”, ... is often a serious political decision, which is easier to be made in favour of a regional forum than of a World Court’.<sup>86</sup> The increasing institutionalization over time of judicial mechanisms and a preference for formal structures is often the result of regional integration in the areas of human rights<sup>87</sup> as well as economic integration. This can be achieved through a phased approach, as is the case in MERCOSUR.<sup>88</sup> This increasing judicialization may be said to be leading to a greater ‘predictability in the legal process’ so as to ascertain the promotion and protection of common values and objectives.<sup>89</sup>

As for the specialization trend, this has resulted in specialized disciplines having dispute settlement fora to deal with specific issues that arise in connection with this discipline.<sup>90</sup> This is not a particularly unusual trend in legal systems that are developing. In fact, as any system is developing into a more complex system, there is a need for specialization. This need for specialization is born out of the increasing complexity of international society, increasing interconnectedness and the transnational nature of many human or environmental challenges.

Both of these impulses – regionalism and specialization – also reflect the increasing density and complexity of the normative content of international law as it has developed over time.<sup>91</sup> Georges Abi-Saab has characterized the relationship between institutional development and normative development as a law of legal physics in that as the normative density increases, there is a corresponding increase in institutional density, which is necessary to sustain the norms.<sup>92</sup> Moreover, as Wilfred Jenks has noted:

it is not uncommon for legal systems to evolve from a limited range of procedures and remedies characteristic of their early stages of development towards a wider range of procedures and remedies characteristic of their maturity, and for there to be a close relationship between a growing diversification of and flexibility in the procedures and remedies available and the growth towards maturity of the substance of the law.<sup>93</sup>

Indeed, there has been a multiplication of courts and tribunals at the universal level and at the regional level, and variety in the nature of their jurisdiction is also apparent at all levels. Many of the forces that have propelled the recent multiplication of international fora are still in play. For example, the increasing complexity and diversification

<sup>86</sup> Pellet, *supra* note 2, at 541. On the political complexities associated with disputes brought to international courts, even if they are regional, see Alter, Gathii and Helfer, ‘Backlash against International Courts in West, East and Southern Africa: Causes and Consequences’, 27(2) *EJIL* (2016) 293.

<sup>87</sup> See, e.g., D. Shelton and P. Carozza, *Regional Protection of Human Rights* (2nd edn, 2013).

<sup>88</sup> N. Susini, *Le règlement des différends dans le Mercosur* (2008).

<sup>89</sup> Bowett, ‘Contemporary Developments in Legal Techniques in the Settlement of Disputes’, 180 *RCADIH* (1983) 181.

<sup>90</sup> Callisch, *supra* note 33, at 445.

<sup>91</sup> Abi-Saab, *supra* note 27, at 925.

<sup>92</sup> Abi-Saab, ‘Cours général de droit international public’, 207 *RCADIH* (1987) 9.

<sup>93</sup> W. Jenks, *The Prospects of International Adjudication* (1964), at 119.

of the international legal order, to which many recently created courts and tribunals owe their existence, continues unabated. In this context, it is likely that international courts and tribunals will continue to grow in number and type. It is therefore pertinent to consider the consequences of this ongoing multiplication.

Given the relatively recent vintage of this accelerated multiplication and the emergence of profound concerns about the consequences of proliferation, consideration of the risks such as conflicting judgments or overlapping jurisdiction had, until recently, been rare. However, there is now a plurality of competent courts and tribunals for similar issues. In a similar way, very few techniques had, until recently, been envisaged for organizing the relationships between international dispute settlement mechanisms.<sup>94</sup> As a result, international courts and tribunals have had little need to resort to procedural tools for coordinating jurisdiction, and, in contrast to domestic legal systems, there has been a paucity of practice among international judicial actors having recourse to such tools. This new situation was an impetus for the recent trend towards a managerial approach in the fabric of international dispute settlement.

Much has been said about the discrepancies between the rulings of courts and tribunals on international issues. It is of course part of the wider debate on the threats of fragmentation in international law. There are a relatively limited number of apparently conflicting cases that are invariably referenced as examples of a fragmented and uncoordinated system. The issue of the different control tests applied by the ICTY in the *Tadić* case<sup>95</sup> and the ICJ in the *Nicaragua*<sup>96</sup> and *Genocide* cases<sup>97</sup> are often quoted as instances of such discrepancy and disorder. Other discrepancies between interpretations accorded by the ICJ and those of other international courts and tribunals are also referred to. The application of Article 36 (1) of the Vienna Convention on Consular Relations in the *La Grand*<sup>98</sup> and *Avena*<sup>99</sup> cases of the ICJ are such examples.<sup>100</sup>

<sup>94</sup> A few examples are Art. 35(2)(b) of the European Convention on Human Rights, which provides that ‘The Court shall not deal with any application submitted under Article 34 that ... (b) is substantially the same as a matter that has already been submitted to another procedure of international investigation or settlement and contains no relevant new information’. Art. 5(2)(a) of the Optional Protocol to the Convention on Civil and Political Rights (GA Res 44/128, UN Doc. A/44/49 [1989]) provides that ‘[t]he Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement’ and Art. 46(1)(c) of the American Convention on Human Rights (1978, 1144 UNTS 123), which provides that ‘[a]dmission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: ... (c) that the subject of the petition or communication is not pending in another international proceeding for settlement’.

<sup>95</sup> *Prosecutor v. Tadić*, *supra* note 68.

<sup>96</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 109.

<sup>97</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, at paras 401–402, 210–211, para. 407.

<sup>98</sup> *La Grand (Germany v. United States)*, Judgment, 27 June 2001, ICJ Reports (2001) 466.

<sup>99</sup> *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, Judgment, 31 March 2004, ICJ Reports (2004) 12.

<sup>100</sup> See Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’, 55(4) *International and Comparative Law Quarterly* (2006) 791, at 796. Vienna Convention on Consular Relations 1963, 596 UNTS 261.

In the field of investment arbitration, other examples of tribunals applying the same norm differently are regularly highlighted. An often-mentioned example of discrepancy is the interpretation of necessity as a circumstance precluding wrongfulness in investment arbitration. In this context, various arbitral tribunals have assessed differently whether there existed a state of necessity in Argentina during its economic crisis in the early 2000s. Article 25 of the ILC's Draft Articles on State Responsibility provides the common standard.<sup>101</sup> However, in *CMS v. Argentina*,<sup>102</sup> a tribunal under the International Centre for the Settlement of Investment Disputes (ICSID) concluded that the situation was not severe enough to amount to necessity under the Draft Articles, whereas, in *LG&E v. Argentina*,<sup>103</sup> another ICSID tribunal reasoned afterwards that there was a state of necessity for a certain period of time. Similarly, *Maffezini v. Spain* has often split the practice of arbitral tribunals on the capacity of a MFN clause to extend bilateral investment treaty (BIT) procedural provisions.<sup>104</sup>

So far, these few examples have not been significant enough to challenge either the coherence or legitimacy of international dispute settlement.<sup>105</sup> In fact, divergent decisions do not *per se* threaten systemic coherence. As the above – and other examples – demonstrate, these differences can occur between general and specialized tribunals such as human rights tribunals, as well as between universal and regional mechanisms, and can be explained away by reference to differing contexts.<sup>106</sup> In the case of investment arbitration, it is also important to underline that parties (including states) have freely opted into a system that arguably allows divergences where necessary,

<sup>101</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement no. 10, Doc. A/56/10, November 2001, ch. IV.E.1.

<sup>102</sup> ICSID, *CMS v. Argentina*, Award, 12 May 2005, ICSID Case no. ARB/01/8.

<sup>103</sup> ICSID, *LG&E v. Argentina*, Decision on Liability, 3 October 2006, ICSID Case no. ARB/02/1.

<sup>104</sup> ICSID, *Emilio Agustín Maffezini v. The Kingdom of Spain*, Award, 13 November 2000, ICSID Case no. ARB/97/7. Contrast, e.g., the approaches of ICSID, *Hochtief v. Argentina*, Decision on Jurisdiction, 24 October 2011, ICSID Case no. ARB/07/31; ICSID, *Siemens AG v. Argentina*, Award, 17 January 2007, ICSID Case no. ARB/02/8; ICSID, *Wintershall Aktiengesellschaft v. Argentina*, Award, 8 December 2008, ICSID Case no. ARB/04/14; ICSID, *Daimler Financial Services v. Argentina*, Award, 22 August 2012, ICSID Case no. ARB/05/01.

<sup>105</sup> Other examples of more nuanced discrepancies may include the manner in which the IACtHR in *Velasquez Rodriguez* adopted a more rigorous standard of state responsibility for Honduras' failure to act than the PCIJ had done in the *Chorzów Factory* case (see IACtHR, *Velasquez Rodriguez*, Judgment, 29 July 1988; *Case Concerning The Factory at Chorzów*, 1927 PCIJ Series A, No. 9, or the 'effective overall control' test employed by the European Court of Human Rights in ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 23 March 1995, at 24–30. See also the similar point made by Rosalyn Higgins in respect of the International Criminal Tribunal for the former Yugoslavia's (ICTY) divergence from the ICJ's 'effective control' test in the *Tadić* case: '[M]uch has been made of the virtually sole example of a relatively recent court deliberately deciding an issue of general international law differently from how the same point had been decided by the International Court of Justice. What is little commented on, but it is in my view of significantly more importance, is the tremendous efforts that courts and tribunals make, both to be consistent inter se and to follow the International Court of Justice.' Higgins, *supra* note 100, at 797. Several authors have concluded that there is, in general, coherence among courts and tribunals. See, e.g., Charney, *supra* note 52; Simma, 'Universality of International Law from the Perspective of a Practitioner', 20(2) *EJIL* (2000) 265.

<sup>106</sup> See Charney, *supra* note 52; Kingsbury, *supra* note 83.

which is inherent to the very nature of *ad hoc* arbitration. Rather than establishing systemic incoherence, these examples show that judicial actors and institutions are reflexive and aware of their judicial surroundings. They engage with, and may challenge, established judicial practice throughout the system in which they operate.

In a similar fashion, courts and tribunals have managed to make a distinction between the need to ensure that treaties beyond their specialized regime do not become a basis for their jurisdiction and the equally important need to ensure such treaties nevertheless inform their interpretation of the applicable law where appropriate. The former is necessary to prevent conflicting applications of law across different regimes, and the latter is necessary to ensure development of the law in specialized regimes. This has been executed well so far by the judicial actors who have attempted to draw the distinction, and, as has been commented, ‘jurisdiction *ratione materiae*, provided that it is thoughtfully regulated, is an excellent tool to achieve unity within diversity’.<sup>107</sup>

It is submitted that the risks of fragmentation in international dispute settlement are more perceived than they are real.<sup>108</sup> The practice of international courts and tribunals reveals that proliferation has not caused many problems, contrary to popular assumptions. Where there has been divergence, there is more often legitimate justifications for such divergence, or this divergence can simply remain unproblematic so long as the instances from which it stems remain isolated and do not develop into trends. They may also be seen as inconsistent practice in the determination of customary international law.<sup>109</sup> In any event, it is likely that ‘[t]he best judgments, because of their technical qualities and because of their correspondence to the needs of time, will prevail, the others will be overcome or forgotten’.<sup>110</sup> Further still, judicial actors regularly seek coherence with other judicial actors,<sup>111</sup> and we must remember that the number of apparently conflicting decisions are very few indeed.

In the alternative, proliferation may well present opportunities.<sup>112</sup> While proliferation and plurality in international adjudication can often be perceived as synonymous with negative outcomes, such as conflicts or contradictions in the interpretation and application of international legal rules, it is also possible to point to the positive consequences of an approach that seeks systemic coordination over hierarchical ordering. A system of this nature can help to facilitate third party dispute settlement and, over time, courts and tribunals can cooperate together to build consistent and coherent rules as well as encourage respect for the rule of international law.<sup>113</sup> Indeed, it is

<sup>107</sup> Forteau, ‘The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’, 15(2) *Law and Practice of International Courts and Tribunals (LP ICT)* (2016) 190, at 206.

<sup>108</sup> In fact, the thesis of fragmentation more generally has been challenged. See, e.g., Greenwood, ‘Unity and Diversity in International Law’, in M. Andenas and E. Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (2015) 38.

<sup>109</sup> Treves, ‘Fragmentation of International Law: The Judicial Perspective’, 23 *Comunicazioni E Studi* (2008) 12.

<sup>110</sup> *Ibid.*

<sup>111</sup> Higgins, *supra* note 100, at 797.

<sup>112</sup> *Ibid.*, at 791.

<sup>113</sup> O’Connell and VanderZee, ‘The History of International Adjudication’, in Romano, Alter, and Shany, *supra* note 5, 60.

possible to promote the rule of law by facilitating a more objective interpretation of the material rules through judicial, rather than state, activity.<sup>114</sup> Where there are various courts and tribunals deciding upon similar substantive issues, this can prompt more ‘inter-mingling’ of these institutions, the building of relationships as well as information sharing.<sup>115</sup> Moreover, particularly in areas like international criminal law, one may wonder whether it is not preferable to have overlapping jurisdiction rather than no jurisdiction at all.

This perspective also resonates with Lauterpacht’s conception of the secondary role of the judicial function to promulgate the international rule of law<sup>116</sup> as well as Yuval Shany’s objective goals of norm and/or regime support in enhancing the effectiveness of international courts and tribunals.<sup>117</sup> In this respect, Georges Abi-Saab has noted that proliferation should in fact be viewed as a ‘heathy phenomenon’ as it ‘makes it possible to manage and apply’ the (growing) normative content of the international legal system.<sup>118</sup> Norms are generally strengthened through their encounters with judicial actors, and their content is made more determinate, not indeterminate. This, in turn, affects the legitimacy of international norms. Indeed, increased international judicial activity is likely to lead to the elaboration, clarification and strengthening of the rule of international law. Similarly, Tullio Treves has observed that there is a ‘healthy effect’ from the proliferation of international courts and tribunals insofar as this phenomenon cultivates a constructive judicial dialogue.<sup>119</sup> This ‘results in positive responses by one judicial body to positions taken by another in reaction to perceived drawbacks of its decisions or rules’.<sup>120</sup>

Specialized legal systems often derive their legitimacy from the fact that their rules are rooted in a wider legal order.<sup>121</sup> The ILC has observed that ‘a regime can receive (or fail to receive) legally binding force (‘validity’) only by reference to (valid or binding) rules or principles *outside* it’.<sup>122</sup> Some concepts are applied differently in different legal orders, and this can lead to different results. However, it is important to note that the concepts that are applied are common. To be an order, certain ‘cohesive forces’ must hold it together.<sup>123</sup> While the courts and tribunals may be diverse in nature, they belong to the same legal order, and they derive their legitimacy from being a part of that order. It is this relationship that also provides an impulse for coordination between judicial actors.

<sup>114</sup> See Higgins, ‘International Courts and Tribunals: The Challenges Ahead: Opening Speech’, 7 *LPICT* (2008) 261; Bedjaoui, ‘L’humanité en quête de paix et de développement’, 324 *RCADIH* (2006).

<sup>115</sup> Higgins, *supra* note 114, at 262.

<sup>116</sup> Lauterpacht, *Function of Law*, *supra* note 7.

<sup>117</sup> Y. Shany, *Assessing the Effectiveness of International Courts* (2014).

<sup>118</sup> Abi-Saab, *supra* note 27, at 925.

<sup>119</sup> Treves, *supra* note 109, at 11.

<sup>120</sup> *Ibid.*

<sup>121</sup> Abi-Saab, *supra* note 27, at 920.

<sup>122</sup> International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Chapter X)’, in *Report of the Fifty-Sixth Session of the International Law Commission*, GA Official Records, Supplement no. 10, Doc. A/59/10 (2004), para. 318.

<sup>123</sup> Abi-Saab, *supra* note 27, at 921.

In this context, judicial actors play an important role in keeping the system together, in weaving common normative threads through the system and, in fact, in preventing it from fragmenting into different discrete systems or regimes.<sup>124</sup> Where judicial actors are aware of their role in keeping the system together, they must also be aware of their role in seeking coherence. In concluding this section, it should be noted that those who have surveyed judicial practice over the 20th century recognize that international courts and tribunals have developed a common understanding of international law despite the proliferation and risks of incoherence.<sup>125</sup> While there are differences, of course, it would seem that all actors in international dispute settlement are involved in the same dialectic activity and share an appreciation for the core features of general international law.<sup>126</sup> The development of a common understanding is explored in the following section.

## **B Judicial Interactions**

International courts and tribunals have indeed developed an increased awareness of their potential contribution to strengthening the world of dispute settlement that they inhabit. They have also, in some ways, become actors in the promotion of a coordinated approach, which tends to ensure greater coherence within the international legal order. Judicial actors have pursued coherence through various tools of communication, such as cross-referencing or other forms of judicial dialogue. Interaction among judicial actors of different legal regimes is well known and has been affirmed and even encouraged by academics and practitioners for many years now. Judicial dialogue can be the result of a cross-cutting concern for coherence and judicial economy and is evidenced by the development of specific tools, such as cross-references, which help to harmonize legal norms and are intended to coordinate decision making. Beyond these objectives, there is perhaps a natural tendency towards coherence. Indeed, coherence is a foundational element in a legal system for many legal theorists and resonates with a basic human desire for intelligibility.<sup>127</sup> Coherence is achieved where similar issues, both in terms of fact and law, are treated similarly. Where there is difference, this should be explained.<sup>128</sup> This all contributes to the internal coherence of the system. Let us look a little more closely at the mechanics of communication in a system.

Niklas Luhmann explored the operation of communications in a system, and, in a legal context, his theory can help us to understand how law responds to specific challenges.<sup>129</sup> Luhmann argued that law was an autopoietic system, capable of

<sup>124</sup> *Ibid.*

<sup>125</sup> Charney, *supra* note 52.

<sup>126</sup> *Ibid.*, at 101. See also Andenas and Bjorge, 'Introduction: From Fragmentation to Convergence in International Law', in Andenas and Bjorge, *A Farewell to Fragmentation*, *supra* note 108, 1; Crawford, 'Chance, Order, Change: The Course of International Law', 365 *RCADIH* (2013) 9.

<sup>127</sup> L. Fuller, *The Morality of Law* (1964); J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994); R. Dworkin, *Taking Rights Seriously* (1977).

<sup>128</sup> P. Webb, *International Judicial Integration and Fragmentation* (2013), at 5.

<sup>129</sup> N. Luhmann, *Law as a Social System* (2004).



distinguishing its own structures and boundaries, and that it did so through communication. He asserted that '[l]egal communications, like all other communications, have a circular relationship between their structures and operations. Structures can only be established and varied by operations that, in turn, are specified by structures'.<sup>130</sup> A legal system may receive information from external sources, and it will process that information in a way that enables the creation of legal meaning. If a legal system is internally congruent, it will create shared understandings or meanings that are conducive to self-reproduction. In other words, a legal system will use communication to translate social phenomena into legal meanings.<sup>131</sup> It is capable of determining its own processes and substance and, in particular, its own 'substantive validity based on empirical, teleological and axiological criteria (notions of effectiveness or legitimacy, finalities, essential values), incorporated as underlying or implicit rules of the system'.<sup>132</sup>

'Internal communication' – that is, communication among the actors who shape the system – is concerned with how judicial actors communicate with each other as well as with the structures that both judicial and state actors are engineering to deal with the phenomenon of the multiplicity of courts and tribunals. It is also important to note the implications that coherence in 'internal communication' has for 'external communication'. 'External communication' is concerned with the way in which a system interacts with those subject to it. In particular, there are consequences for the way a system is perceived, its legitimacy and its compliance pull by those it serves.<sup>133</sup> Stability and consistency of the rule of international law are at stake here in the way the legal system presents itself *via* 'external communication'.

Judges have a central role in the communication function of the law and can help to determine the structures and boundaries of the legal system in response to external social experiences. Various scholars and practitioners, including judges, have made reference to judicial interactions between courts and tribunals.<sup>134</sup> Some have referred to a 'powerful new international judiciary',<sup>135</sup> a '[global] community of courts ... constituted above all by the self-awareness of the national and international judges who play a part',<sup>136</sup> 'judicial globalization'<sup>137</sup> or 'judicial dialogue' to describe the

<sup>130</sup> *Ibid.*, at 6.

<sup>131</sup> N. Luhmann, *Social Systems* (1995), at 92–96.

<sup>132</sup> Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', 11(2) *EJIL* (2000) 361, at 381. See also Ost, 'Between Order and Disorder: The Game of Law', in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (1988) 70.

<sup>133</sup> Franck, 'Legitimacy in the International System', 82 *AJIL* (1998) 705.

<sup>134</sup> See, e.g., Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) 273; Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', 31 *NYUJILP* (1999) 709; Slaughter, 'Judicial Globalization', 40 *Virginia Journal of International Law* (2000) 1103; Slaughter, 'A Global Community of Courts', 44 *Harvard International Law Journal* (2003) 201; Baudenbacher, 'Judicial Globalization: New Development or Old Wine in New Bottles?', 39 *Texas International Law Journal: Special Symposium on Globalization and the Judiciary* (2003) 547.

<sup>135</sup> Sands, 'Turtles and Torturers: The Transformation of International Law', 33 *NYUJILP* (2001) 527, at 553.

<sup>136</sup> Slaughter, 'A Global Community of Courts', *supra* note 134, at 192.

<sup>137</sup> Slaughter, 'Judicial Globalization', *supra* note 134; L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court', 34 *Tulsa Law Journal* (1998) 15.

phenomenon of interaction between international (or national) courts and tribunals. In this way, the proliferation of courts and tribunals at the international level brings further diversity to international dispute settlement, and, in particular, it can play an important role in the way it informs the development of different substantive areas of law. In other words, various areas of law can be nourished by other areas of law, and judicial dialogue can greatly assist in the cross-fertilization of legal regimes. Indeed, interactions among judges can be a valuable resource in offering solutions to new legal problems as well as in preventing the occurrence of problems in the first place.<sup>138</sup>

As has been pointed out by Abi-Saab, '[i]n sum, it all depends on the epistemic community of those who act as judges, in affirming what the judicial function is, what its limits are, and what are its incompressible minimum requirements'.<sup>139</sup> Indeed, judges appear to recognize that they are part of this legal system and should strive to seek the internal coherence of that system, which includes promoting a better conception of the rule of law.<sup>140</sup> Part of their responsibility is to propagate 'common values', which include 'guaranteeing litigant rights and safeguarding an efficient and effective system'.<sup>141</sup> In this context, there are many examples of judges recognizing their role as being part of a wider system, but there is one extract of *dicta* that clearly reflects the pursuit of unity in a world of diversity through engaging with other judgments, awards and opinions. As Judge Greenwood said in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, '[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, ... it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other courts and tribunals'.<sup>142</sup>

<sup>138</sup> See Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice', 39 *Texas International Law Journal: Special Symposium on Globalisation and the Judiciary* (2003) 547.

<sup>139</sup> Abi-Saab, 'Whither the Judicial Function? Concluding Remarks', in L. Boisson de Chazournes, C. Romano and R. Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (2002) 241, at 247.

<sup>140</sup> Legal scholars have called for different, but related, manifestations of this idea. See, e.g., Anne-Marie Slaughter, 'A Global Community of Courts', *supra* note 134; C. McLachlan, *Lis Pendens in International Litigation* (2009). On the importance of coherence, Yuval Shany noted in 2003 that 'the lack of binding precedent under international law ... combined with the poor level of jurisdictional co-ordination ... threatens the coherence of international law'. Shany went on to say that '[i]t is submitted that the combined effect of more organized jurisdictional inter-fora relations and a higher degree of jurisprudential consistency could transform international courts and tribunals into a judicial system, enjoying meaningful levels of inner-coherence, and thus result in the strengthening of the unity of international law'. Shany, *supra* note 46, at 111, 127.

<sup>141</sup> Slaughter, 'A Global Community of Courts', *supra* note 134, at 217.

<sup>142</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, 19 June 2012, ICJ Reports (2012) 324, at para. 8. Declaration of Judge Greenwood. Further, Judge Erik Mose has said of the European Court of Human Rights (ECHR): '[T]he Court has had an open attitude to these legal sources. This should come as no surprise. The Court has always taken into account other legal instruments and practice, such as the UN human rights conventions, EU law and The Hague conventions. An approach aimed at reconciling different international sources avoids fragmentation and makes it easier for national courts to apply international law.' Judge Erik Mose, 'Comments on Judicial Dialogue between Courts Confronting International Crimes', in *Opening of the Judicial Year – Seminar – Friday 29 January 2016*, available at [www.echr.coe.int/Documents/Speech\\_20160129\\_Mose\\_JY\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20160129_Mose_JY_ENG.pdf) (last visited 12 December 2016).

This need to consider or even adhere to the jurisprudence of other courts and tribunals has in fact been codified in certain statutes of international judicial fora. For example, Article 20 of the Statute of the Special Court for Sierra Leone provides that '[t]he Judges of the Appeal Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda'.<sup>143</sup> With respect to the Court of Justice of the European Free Trade Area, it is obliged to interpret law in accordance with the jurisprudence of the Court of Justice of the European Union (CJEU). Article 3 of the Agreement between the European Free Trade Association (EFTA) States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement)<sup>144</sup> sets out that provisions of the latter (including its protocols and annexes):

[I]n so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall in their implementation and application be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement.

More generally, in its interpretation and application of the Agreement on the European Economic Area (EEA)<sup>145</sup> and the Surveillance and Court Agreement, the EFTA Surveillance Authority and the EFTA Court must:

pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.

Moreover, some regional free trade agreements (FTAs) such as the EU–South Korea FTA have similar features worthy of note.<sup>146</sup> As an example, Article 14.16 of the EU–South Korea FTA directs arbitral panels to adopt WTO DSU interpretations where the concerned FTA obligation is identical to that of a WTO provision. Additionally, Article 14.19(1) provides that the dispute settlement under the arbitral procedure of the FTA is 'without prejudice to any action in the WTO framework'. Judicial dialogue can take many forms. Among the means to seek coherence through 'internal communication' is the use of cross-referencing in awards and decisions.

### C *Cross-References in the Decisions of Courts and Tribunals*

As mentioned above, the ICJ retains a special status in the international legal order. It commands something of a gravitational pull when it comes to courts and tribunals

<sup>143</sup> Statute of the Special Court for Sierra Leone 2002, 2178 UNTS 138.

<sup>144</sup> Agreement between the European Free Trade Association (EFTA) States on the Establishment of a Surveillance Authority and a Court of Justice, OJ 1994 L 344, at 1.

<sup>145</sup> Agreement on the European Economic Area, 1994 OJ L 1, at 3-522.

<sup>146</sup> European Union–South Korea Free Trade Agreement (EU–South Korea FTA), OJ 2011 L 127.

following its lead on the interpretation of rules of international law.<sup>147</sup> For example, regional courts tend to follow the rules of treaty interpretation as laid down by the ICJ or to locate rights found under their respective treaty regimes within general international law as well.<sup>148</sup> Further examples of following the interpretative lead of the ICJ can be seen by the importance accorded to the need for the interpretation of legal rules to be evolutionary as opposed to relying on the original or intended meaning behind particular treaty provisions in the environmental law area. The *Iron Rhine* and *Kishanganga* arbitrations are examples in this context.<sup>149</sup> Similarly, there appears to be a common understanding across courts and tribunals that human rights should be interpreted so as to extend effective protection and that reservations and limitations on the application of rights are to be interpreted narrowly.<sup>150</sup>

A good illustration of references being made to each other's decisions is provided by the attitude of the International Tribunal for the Law of the Sea (ITLOS) towards decisions handed down by the ICJ. In the *M/V Saiga* case,<sup>151</sup> ITLOS referred with apparent approval to the ICJ's pronouncement in the *Gabčíkovo-Nagymaros* case on the customary law status of the state of necessity as then codified in the aforementioned ILC Articles on State Responsibility.<sup>152</sup> Also of note is the recent attitude of the ICJ, which, when dealing with the customary international law applicable in the field of state immunity, referred to several judgments of the European Court of Human Rights (ECtHR).<sup>153</sup>

<sup>147</sup> Andenas and Bjorge, 'Introduction', *supra* note 126, at 6; Crawford, *supra* note 126, at 216.

<sup>148</sup> *Al-Adsani v. United Kingdom*, [2002] 34 EHRR 273.

<sup>149</sup> *In the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award of the Tribunal, [2005] ICGJ 373 (24 May 2005), para. 59: 'The Tribunal would recall the observation of the International Court of Justice in the *Gabčíkovo-Nagymaros* case that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development'. *Gabčíkovo-Nagymaros (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7, at 78, para. 140). And, in that context, the Tribunal further clarified that 'new norms have to be taken into consideration, and ... new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past' (*ibid.*). In the view of the Tribunal, this *dictum* applies equally to the Iron Rhine railway. PCA, *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award, 18 February 2013, PCA Case no. 2011-01, para. 452 (footnotes omitted): 'It is established that principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law. The *Iron Rhine* Tribunal applied concepts of customary international environmental law to treaties dating back to the mid-nineteenth century, when principles of environmental protection were rarely if ever considered in international agreements and did not form any part of customary international law. Similarly, the International Court of Justice in *Gabikovo-Nagymaros* ruled that, whenever necessary for the application of a treaty, "new norms have to be taken into consideration, and ... new standards given proper weight." It is therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today.'

<sup>150</sup> Higgins, *supra* note 96, at 798; see also IACtHR, *Case of Caesar v. Trinidad and Tobago*, Judgment, 11 March 2005, para. 7, Separate Opinion of Judge Cançado Trindade.

<sup>151</sup> *M/V 'Saiga' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, ICGJ 336.

<sup>152</sup> Charney, *supra* note 50. *Gabčíkovo-Nagymaros*, *supra* note 143.

<sup>153</sup> *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 78.

The protection and management of fresh water offers other interesting examples of these trends. Access to varied dispute settlement procedures in the area of fresh water has made courts and tribunals more sensitive to each other's existence. As there are more numerous sources of persuasive case law, decisions have tended to include more diverse cross-references to other courts and tribunals, and this has helped to strengthen the interpretation and application of law in water disputes.<sup>154</sup> In this context, it is interesting to note the cross-references that concern the human rights aspects of water management.<sup>155</sup> One such example is the *Saramaka People v. Suriname*<sup>156</sup> case brought before the Inter-American Court of Human Rights. The Court stated that it 'takes notice' of the views of the African Commission on Human and People's Rights to support its interpretation that natural resources such as fresh water resources found on indigenous territories are subject to property rights under the American Convention.<sup>157</sup> In the *Tătar v. Romania* case, the ECtHR referred to the case law of the CJEU<sup>158</sup> as well as the decision of the ICJ in the *Gabčíkovo Nagymaros* case.<sup>159</sup> The ECtHR's decision relied on these references to assert the customary nature of environmental law principles and their applicability to the water pollution case before it.

The dialogical nature of the discourse between courts and tribunals, namely that this can be a two-way non-hierarchical conversation, may also be evidenced. The ICJ is increasingly referring to other courts and tribunals, both at the international and domestic levels.<sup>160</sup> In this context, mention should be made of what the ICJ said in its 2010 judgment with respect to an opinion expressed by the Human Rights Committee:

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.<sup>161</sup>

This statement of the Court is significant as it links consistency with the authority and legitimacy of the body to which it is referring. As such, it highlights a further contextual feature to the notion of consistency in recognizing the authority of the specialized institutions. Moreover, the Court in this case situates its own voice in the broader institutional conversation on human rights and the rule of law. It recognizes it is part of a wider communicative system.

<sup>154</sup> See L. Boisson de Chazournes, *Fresh Water in International Law* (2013), at 243–247.

<sup>155</sup> Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental Law Review* (2007) 475.

<sup>156</sup> IACtHR, *Case of Saramaka People v. Suriname*, Judgment, 28 November 2007.

<sup>157</sup> American Convention on Human Rights 1969, 1144 UNTS 123.

<sup>158</sup> ECtHR, *Tătar v. Romania*, Appl. no. 67021/01, Judgment of 27 January 2009, para. 69(B)(h).

<sup>159</sup> *Ibid.*, para. 69(B)(d).

<sup>160</sup> Andenas and Bjorge, 'Introduction', *supra* note 126, at 6.

<sup>161</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 30 November 2010, ICJ Reports (2010) 639, at 663, para. 66.

Legitimacy is also at play in the way in which the Court saw value in grounding its decision on interpretations developed by courts and tribunals who are familiar with this type of assessment as well as other institutions. Referencing in this way employs communication to render decisions more robust and authoritative, thereby improving legitimacy. This is particularly important in a legal system like that of international law, which is decentralized and has weak enforcement mechanisms. Indeed, the system relies on self-compliance by state subjects. The more consistency there is in interpretation, the stronger the legitimacy of the system and confidence of states in the system.<sup>162</sup>

In the law of the sea context, the ICJ has been willing to refer to the case law of a range of international tribunals. An early example of this practice is its reference in *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*<sup>163</sup> to the 1977 Award in the *Anglo-French Continental Shelf* arbitration,<sup>164</sup> wherein the Court drew upon that earlier case for the premise that ‘it is in accord with precedents to begin with the median line and then to ask whether ‘special circumstances’ require any adjustment or shifting of the line’.<sup>165</sup> In *Territorial and Maritime Dispute (Nicaragua v. Columbia)*, the Court made reference to the case law of ITLOS as well as other international courts and tribunals:

The Parties agree that, since Colombia is not a party to UNCLOS, only customary international law may apply in respect to the maritime delimitation requested by Nicaragua. The Parties further agree that the applicable law in the present case is customary international law reflected in the case law of this Court, the International Tribunal for the Law of the Sea (ITLOS) and international arbitral courts and tribunals.<sup>166</sup>

In *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the ICJ was tasked with determining the amount of compensation to be paid to Guinea by the Democratic Republic of the Congo, an exercise that it had only done once before.<sup>167</sup> The Court therefore refers to decisions and awards from a variety of other tribunals, including the ECtHR, the Inter-American Court of Human Rights, the UN Human Rights Committee, the African Commission on Human and Peoples’ Rights, the UN Compensation Commission, the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission and ITLOS, for example.<sup>168</sup>

<sup>162</sup> Kassoti, ‘Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface’, 8(2) *European Journal of Legal Studies* (2015) 21, at 35.

<sup>163</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, 14 June 1993, ICJ Reports (1993) 38.

<sup>164</sup> *Anglo-French Continental Shelf Arbitration (UK, France)*, Decision of 30 June 1977, reprinted in UNRIIAA, vol. 28, 45, para. 70.

<sup>165</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, 14 June 1993, ICJ Reports (1993) 38, para. 51.

<sup>166</sup> *Territorial and Maritime Dispute (Nicaragua v. Columbia)*, Judgment, 19 November 2012, ICJ Reports (2012) 624, para. 114.

<sup>167</sup> *Corfu Channel Case (United Kingdom v. Albania)*, Judgment, 9 April 1949, ICJ Reports (1949) 244. *Ahmadou Sadio Diallo*, *supra* note 161.

<sup>168</sup> *Ahmadou Sadio Diallo*, *supra* note 161, para. 13. See also Greenwood, *supra* note 104, at 48.

As previously alluded to, this cross-fertilization has of course flowed in the opposite direction as well, with specialist bodies such as ITLOS drawing upon relevant ICJ pronouncements; it did with *Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*.<sup>169</sup> In *South China Sea (Philippines v. China)*,<sup>170</sup> the Tribunal utilized cross-referencing to determine customary rules.<sup>171</sup> In fact, a helpful byproduct of communication between courts and tribunals is that it can facilitate judicial economy. This is because when judicial actors communicate they can draw on analyses already conducted by other courts and tribunals and, therefore, do not have to engage in, for example, a time-consuming analysis of state practice in the ascertainment of customary international law, although they should make sure that the assessments they refer to reflect state practice. So, for example, in *South China Sea*, cross-referencing was used to ascertain the customary nature of the duty of due diligence in the protection of the marine environment. It did so also with state claims regarding rights in the exclusive economic zone (EEZ) of another state. In determining rights in the EEZ, the Tribunal noted that:

[t]he present dispute is not the first instance in which a State has claimed rights in or to the exclusive economic zone of a neighbouring State. The Tribunal considers it useful, for the purpose of confirming its own reasoning, to briefly canvas the other decisions to have addressed claims involving rights in the exclusive economic zone of another State.<sup>172</sup>

Similarly, it is noteworthy that judicial economy may also be served by reliance on fact-finding carried out by other courts and tribunals. We have seen this, for example, in cases with similar fact patterns heard by the ICJ, the ICTY and the International Criminal Court (ICC).<sup>173</sup> As with the analysis of state practice in custom ascertainment, fact-finding is likewise a time consuming exercise that courts and tribunals can relieve themselves of in the event that other tribunals have carried out this exercise for similar factual matrices.

In the field of investment arbitration, communication is often used as a vehicle for consistency. It is usually understood as the need to take into account earlier decisions and to contribute to predictability. Often, arbitral tribunals refer expressly to the value of consistent interpretations, although this express recognition is invariably

<sup>169</sup> ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 March 2012, ITLOS Case no. 16, paras 90, 95, 117, 185, 229–230, 233, 264, 294–295, 330, 383.

<sup>170</sup> PCA, *South China Sea Arbitration (Philippines v. China)*, 12 July 2016, PCA Case no. 2013–19.

<sup>171</sup> A. Angelini, 'Cross-references to External Judicial Sources: A Safety Net to Keep Afloat in the South China Sea Arbitration' (on file with the author).

<sup>172</sup> *South China Sea*, *supra* note 170, para. 255.

<sup>173</sup> See *Case Concerning the Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43; Judgment, *Prosecutor v. Kistić (IT-98-33)*, Trial Chamber, 2 August 2001; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168; Judgment, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga (ICC-01/04-01/07)*, Appeals Chamber, 27 March 2013.

prefaced with the caveat that the tribunal is not bound by any rule of *stare decisis*.<sup>174</sup> Nevertheless, it would seem that tribunals are, for the most part, aware of their role in promoting consistency for the benefit of investors and states alike. This awareness and understanding was apparent in *ADC v. Hungary*, an ICSID investment case, wherein the Tribunal reasoned that:

[t]he Parties to the present case have also debated the relevance of international case law relating to expropriation. It is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the present BIT in certain respects. However, cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.<sup>175</sup>

Another tribunal spoke of a ‘duty to adopt solutions established in a series of consistent cases’.<sup>176</sup> Although it is important that investment tribunals take into account earlier decisions, it seems that the *ad hoc* nature of investment arbitration should be taken into account. Moreover, the reference to ‘solutions established in a series of consistent cases’ raises questions of interpretation in practice.<sup>177</sup>

Consistency is related to an awareness of each other’s decisions as well as implying caution in deviating from earlier decisions. It should not, however, prevent divergences from taking place if tribunals feel that they are necessary, especially in a field such as investment arbitration, which is uncoordinated and of an *ad hoc* nature. This being said, one cannot but agree with the importance that tribunals acknowledge the wider implications of their decisions and that there is an emerging awareness among these actors in this respect. Some even speak in terms of a responsibility for the development of the system.<sup>178</sup> In conclusion, communication between courts and tribunals has become a critical thread in the plural fabric of dispute settlement. While it can take various forms, the most predominant is cross-referencing. It helps to ensure coherence in the interpretation of international law, not to mention an integrated vision of international law.<sup>179</sup>

<sup>174</sup> On this rule, see generally Aloupi and Kleiner, ‘Le précédent en droit international’, in N. Aloupi and C. Kleiner (eds), *Société française pour la droit international*, Colloque de Strasbourg (2016).

<sup>175</sup> ICSID, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, Award, 2 October 2006, ICSID Case no. ARB/03/16, para. 293.

<sup>176</sup> ICSID, *Saipem S.p.A. v. The People’s Republic of Bangladesh*, Decision on Jurisdiction, 21 March 2007, ICSID Case no. ARB/05/07, para. 90.

<sup>177</sup> *Ibid.* The Tribunal stressed that: ‘The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law’ (para. 67).

<sup>178</sup> See Dupuy, ‘L’Unité de l’ordre juridique international’, 297 *RCADIH* (2000) 9, at 466.

<sup>179</sup> In this sense, see Sicilianos, ‘Le precedent et le dialogue des juges: L’exemple de la Cour européenne des droits de l’homme’, in Aloupi and Kleiner, *supra* note 175, 225.



## 4 Procedural Law as a Tool Used by Judicial and State Actors for Organizing Plurality

The contribution of courts and tribunals, as well as states, to the development of procedural rules to coordinate jurisdiction across different dispute settlement mechanisms is another emerging trend that merits consideration. This trend is very clear evidence of an emerging managerial approach in response to the proliferation of courts and tribunals. It is premised on the assumption that, as the rules of the game are harmonized, predictability, stability and coherence are promoted.<sup>180</sup> Procedural tools to deal with jurisdictional overlaps, particularly through a means that has not been anticipated in treaties or other regulatory instruments, have been devised. This tendency towards a managerial approach is also a response to the risk of undesirable consequences arising from uncoordinated dispute settlement in a world of numerous courts and tribunals, including, but not limited to, abusive forum shopping, wasted resources, uncertainty and conflicting judgments.<sup>181</sup>

To mitigate the risks of uncoordinated jurisdiction, conflicting judgments and more generally undermining the rule of law, coordination among international courts and tribunals has come to be seen as essential, and procedural rules play an increasingly important role in this context.<sup>182</sup> Some are borrowed from domestic legal systems.<sup>183</sup> That said, it is important to emphasize that they are being adapted and not imported wholesale into international law. The adaptation of such mechanisms is made by both international courts and tribunals themselves and, occasionally, by states acting as legislators.

### A *International Economic Law as a Laboratory*

The most recent conventional practice would appear to show that state actors who are drafting treaties in the area of international economic relations are following the lead of judicial actors in their pursuit for the coordination of international dispute settlement. It is important to note that while some of those conventions mentioned below are not yet in force, and may never come into force, they nevertheless indicate the broader intention and direction of travel. This section will focus its attention on the field of international

<sup>180</sup> Indeed, Hersch Lauterpacht said of procedural rules: 'Formal and procedural rules represent the element of convenience and certainty in law, and in the prosecution of rights. Thus conceived, they are often regarded as embodying an element of substantive justice.' H. Lauterpacht, *The Development of International Law by the International Court* (1982), at 209.

<sup>181</sup> See, e.g., Waibel, 'Coordinating Adjudication Processes', in Z. Douglas, J. Pauwelyn and J.E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 530; Gaja, *supra* note 44; Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions', 5 *Max Planck Yearbook of UN Law* (2001) 67. The cases of ICSID, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001; ICSID, *CME v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 are examples of conflicting decisions in the area of investment arbitration.

<sup>182</sup> On international courts and tribunals and procedural law, see Ruiz Fabri, 'Les juridictions internationales', in S. Guinchard *et al.*, *Droit processuel: Droits fondamentaux du procès* (8th edn, 2015) 1156.

<sup>183</sup> As in other areas, H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), at viii.

economic law in this respect, which offers an interesting laboratory for the use and development of these tools. Analogously, however, we should note that international law has also developed over time certain tools for dealing with norm collision in other areas of international law, such as *jus cogens*, *lex specialis* and systemic integration, as provided for in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.<sup>184</sup> In this context, while there is currently no political will to establish a hierarchy of international tribunals, there would seem to be a collective desire to inject order into the universe of international dispute settlement, and these tools are being used for this purpose.

The traditional toolkit for dealing with conflicting judgments includes such procedural mechanisms as *lis pendens*, fork-in-the-road provisions, *connexité* and estoppel. While these all essentially lead to the same result in theory (one tribunal declining jurisdiction or staying proceedings in favour of another), they each offer quite different means of getting to that result. Judges and states have become aware of the importance of these tools for resolving the problems of parallel or overlapping proceedings. This section will consider how these tools are being adapted for use at the international level and chart some of the new trends that reveal a more coordinated approach in this respect.<sup>185</sup>

### 1 *Lis Pendens*

The concept of *lis pendens* has increasingly found application in the jurisprudence of international courts and tribunals for managing problems arising from overlapping proceedings. This is a tool that has been borrowed from domestic regimes and has long been applied by domestic courts faced with a conflict of jurisdiction. It is also now a cornerstone of the private international law regime of the European Union.<sup>186</sup>

In the past, instances of the application of the *lis pendens* principle at the international level have been sporadic, showing a reluctance of courts and tribunals to accept its applicability and injecting a measure of unpredictability in its operation. For example, in *Certain German Interests in Polish Upper Silesia*, the PCIJ took into consideration the principle of *lis pendens* but ultimately concluded that its requirements had not been met in that case.<sup>187</sup> Similarly, in *Benvenuti and Bonfant v. Congo*, an investment

<sup>184</sup> Kassoti, *supra* note 162. Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

<sup>185</sup> For suggestions in the field of arbitration, see G. Kaufmann-Kohler, 'Multiple Proceedings in International Arbitration: Blessing or Plague?', Herbert Smith Freehills and Singapore Management University School of Law Asian Arbitration Lecture, 24 November 2015 (on file with the author).

<sup>186</sup> *Lis pendens* is laid down in Art. 29 of the Brussels I Regulation (Recast 2012) (formerly Art. 27), which courts of European Union (EU) member states must apply when faced with multi-jurisdictional cases involving other EU member states. Article 29 provides: 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seized must of its motion stay its proceedings until such time as the jurisdiction of the first seized court is established. Once this occurs, it must decline jurisdiction in favour of that court.' Council Regulation 1215/2012, OJ 2012 L 351/1 (Brussels I Regulation).

<sup>187</sup> *Certain German Interests in Polish Upper Silesia, Germany v. Poland, Merits*, Judgment, 1926 PCIJ Series A, No. 7. The discussion of *lis pendens* in this case would suggest that the PCIJ was concerned with the issue of potentially conflicting procedures and decisions. Giorgio Gaja has observed that one of the Court's reasons for rejecting the application of *lis pendens* was the difference in character between the PCIJ and the Mixed Arbitral Tribunal concerned, which could suggest that *lis pendens* could apply where the nature of tribunals was considered to be more similar. See Gaja, *supra* note 44, at 580.

tribunal considered that *lis pendens* might be applicable but concluded that certain requirements of the principle were not met.<sup>188</sup> In *SGS v. Pakistan*, the Tribunal also considered and dismissed the applicability of *lis pendens*.<sup>189</sup> Within the international legal order, this is explained by the fact that state consent to adjudication cannot be presumed. Moreover, with respect to international arbitration, the existence of an agreement providing for exclusive jurisdiction should normally preclude the exercise of jurisdiction by any other judicial body (either international or domestic).<sup>190</sup>

However, recently, some courts and tribunals have shown a willingness to engage with this principle, crafting a broader conception of *lis pendens*. While the triple identity test (that is, that the cause of action, the parties and the object of the dispute are the same) for *lis pendens* may be difficult to meet,<sup>191</sup> more liberal interpretations have been offered by international tribunals. For example, concepts such as the substantial identity of the parties, the same fundamental basis, piercing the corporate veil and single economic entity are all ways that could be used to overcome the traditionally strict hurdles.<sup>192</sup> In an example of such a liberal approach, the UNCLOS Annex VII Tribunal in the *Southern Bluefin Tuna* case examined the essential basis of the dispute and concluded that the case before it was substantially the same as that before the Commission for the Conservation of Southern Bluefin Tuna.<sup>193</sup> This was in spite of the fact that there were differing legal bases in the two disputes. That said, the Tribunal decided the case on the basis of another provision of UNCLOS. In fact, the Tribunal's approach in this case has been characterized as *laissez-faire* in the way it treated each obligation implicated in the case as distinct.<sup>194</sup> Commentators have warned that such an approach could actually lead to more parallel proceedings of a complex nature with different tribunals deciding upon different obligations pertaining to the same dispute.<sup>195</sup>

Another example is provided by *SPP v. Egypt*, in which an ICSID tribunal suspended litigation while there was a parallel proceeding between the same parties at the *Cour de*

<sup>188</sup> ICSID, *S.A.R.L. Benvenuti and Bonfant v. People's Republic of the Congo*, Award, 8 August 1980, ICSID Case no. ARB/77.

<sup>189</sup> ICSID, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision on Objections to Jurisdiction, 6 August 2003, ICSID Case no. ARB/01, para. 182.

<sup>190</sup> Kaufmann-Kohler *et al.*, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently? Final Report on the Geneva Colloquium Held on 22 April 2006', 21(1) *ICSID Review: Foreign Investment Law Journal* (2006) 59.

<sup>191</sup> See, e.g., *CME v. Czech Republic*, *supra* note 171; ICSID, *Pantechniki v. Albania*, Award, 30 July 2009, ICSID Case no. ARB/07/21; ICSID, *H & H Enterprises Investment Inc. v. Arab Republic of Egypt*, Decision on Objections to Jurisdiction, 5 June 2012, ICSID Case no. ARB/09/15. See also Reinisch, 'The Issues Raised by Parallel Proceedings and Possible Solutions', in M. Waibel (ed.), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) 122 (arguing that the triple-identity test ought to be relaxed in certain circumstances).

<sup>192</sup> *Ibid.*, at 123.

<sup>193</sup> UNCLOS Annex VII Tribunal, *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan*, Award on Jurisdiction and Admissibility, Decision of 4 August 2000, paras 52, 59.

<sup>194</sup> C. McLachlan, 'Lis Pendens in International Litigation' 336 *RCADIH* (2009), at 454.

<sup>195</sup> *Ibid.*

*Cassation* in France on whether the parties had agreed to submit the dispute to arbitration.<sup>196</sup> While the issue before the *Cour de Cassation* was not strictly the same as that before the arbitral tribunal, the latter tribunal nevertheless viewed that it was ‘in the interest of international judicial order’ to stay the proceedings before it ‘pending a decision by the other tribunal’.<sup>197</sup>

In addition to this more flexible and liberal application of *lis pendens* by the international judiciary, we may also observe the way in which new treaties are developing, adapting and expanding manifestations of the principle. Under the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA),<sup>198</sup> for example, a choice-of-forum clause and a restriction on litigating an obligation that is equivalent in substance in two fora is present in Article 29.3.1-2. These sub-paragraphs provide:

1. Recourse to the dispute settlement provisions of this Chapter is without prejudice to recourse to dispute settlement under the WTO Agreement or under any other agreement to which the Parties are party.
2. Notwithstanding paragraph 1, if an obligation is equivalent in substance under this Agreement and under the WTO Agreement, or under any other agreement to which the Parties are party, a Party may not seek redress for the breach of such an obligation in the two fora. In such case, once a dispute settlement proceeding has been initiated under one agreement, the Party shall not bring a claim seeking redress for the breach of the substantially equivalent obligation under the other agreement, unless the forum selected fails, for procedural or jurisdictional reasons, other than termination under paragraph 20 of Annex 29-A, to make findings on that claim.

Referring in Article 29.3.2 to a ‘substantially equivalent obligation’, the parties to this treaty have thereby used a broad formula in order to incorporate a comprehensive form of safeguard against *lis pendens* rather than a classical interpretation based on the identical nature of claims and obligations; as such, an attempt has been made to prevent parallel procedures as much as possible. A similar provision is contained in Article 24 of the EU–Vietnam Free Trade Agreement.<sup>199</sup> The inclusion of these

<sup>196</sup> ICSID, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Decision on Jurisdiction I, 14 April 1988, ICSID Case no. ARB/84/3.

<sup>197</sup> *Ibid.*, at 129.

<sup>198</sup> EU–Canada Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, not yet in force at time of writing), available at [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) (last visited 12 December 2016).

<sup>199</sup> Art. 24(1)–(2) of the EU–Vietnam Free Trade Agreement (EU–Vietnam FTA), 2 December 2015, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (last visited 18 January 2017), provides as follows:

1. Recourse to the dispute settlement provisions of this Chapter shall be without prejudice to any action in the WTO framework, including dispute settlement action, or in any other international agreement to which both Parties are parties.
2. By way of derogation from paragraph 1, a Party shall not, for a particular measure, seek redress for the breach of a substantially equivalent obligation under this Agreement and under the WTO Agreement or in any other international agreement to which both Parties are parties in the relevant fora. Once a dispute settlement proceeding has been initiated, the Party shall not bring a claim

*lis pendens*-type devices is an interesting contribution to avoiding conflicts of jurisdiction in modern FTAs,<sup>200</sup> while allowing states to resort to the judicial mechanisms they prefer, albeit that they remain subject to the existence of certain restrictions.

The potential of the *lis alibi pendens* principle as a competition-regulating principle should be carefully assessed at a time when numerous FTAs containing trade and investment chapters are being adopted. Issues related to parallel litigation mechanisms can arise between FTAs and the WTO as well as between two FTAs. In this context, the competent dispute settlement bodies might have to give consideration to a legal impediments-type argument, as referred to by the Appellate Body in the *Mexico – Soft Drinks* case, that would entail that one court would consider staying or terminating proceedings due to the other proceedings taking place before another court or tribunal.<sup>201</sup> A more progressive understanding of this principle would help to prevent diverging interpretations and decisions.

## 2 Connexité, Related Actions and Consolidation in a Contemporary Context

*Connexité* and variations of this concept, such as ‘related actions’,<sup>202</sup> are emerging as a further way in which to coordinate jurisdiction and avoid parallel and overlapping proceedings in international litigation. *Connexité* is a concept of French law that regulates a conflict of jurisdiction where two cases are pending that are not identical (so *lis pendens* does not apply) but are similar enough that they should be consolidated into one case.<sup>203</sup> This doctrine is discretionary in nature, and so it would appear to be a close cousin of *forum non conveniens*. It is also less strict insofar as it does not require identical elements in the cases in question. There is, for example, no requirement that the parties be the same in connected disputes. The discretion to connect proceedings may be exercised where it is expedient to do so and where there is a risk that two judgments may be irreconcilable.<sup>204</sup> With the proliferation of trade and investment agreements, it is increasingly likely that connected claims will arise around related issues, and the potential therefore exists for these claims to be connected or heard together.

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seeking redress for the breach of the substantially equivalent obligation under the other agreement to the other forum, unless the forum selected first fails for procedural or jurisdictional reasons to make findings on the claim seeking redress of that obligation.

<sup>200</sup> See Kuijper, ‘Preface – EU (TDM CETA Special)’, in *TDM Special Issue on the Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA)* (2016), available at [www.transnational-dispute-management.com/article.asp?key=2309](http://www.transnational-dispute-management.com/article.asp?key=2309) (last visited 12 December 2016).

<sup>201</sup> *Mexico – Tax Measures on Soft Drinks and Other Beverages – Report of the Appellate Body*, 6 March 2006, WT/DS308/AB/R, para. 54. See discussion in this article from n. 204ff on the development of this tool in the trade field.

<sup>202</sup> Related actions are also provided for under the Brussels I Regulation (Recast), *supra* note 186, which was referred to earlier. Art. 30 (formerly Art. 28) states that ‘where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings’. Moreover, Art. 30(2) provides that the subsequent court may even decline jurisdiction rather than simply stay proceedings.

<sup>203</sup> H. Campbell Black, *A Dictionary of Law* (1991), at 253.

<sup>204</sup> Kaufmann-Kohler *et al.*, *supra* note 190.

Given the recent trends concerning other procedural tools designed to coordinate jurisdiction, it is foreseeable that tribunals pursue such an approach whereby similar claims and issues are connected.

It is helpful to illustrate the potential for connecting claims with several possible scenarios. One situation could be an umbrella clause combined with a broad compromissory clause ('any dispute relating to an investment') that is connected to trade-related claims. Another could involve a MFN clause in a BIT that may apply both to benefits granted in other BITs as well as in other investment-related treaties such as the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) or FTAs.<sup>205</sup> In accordance with the MFN obligation included in the GATS, the parties are committed to treating services and service providers in a no less favourable way than like services and service providers from any other country. We might ask whether a MFN clause in a BIT extends to benefits granted to other countries in the WTO or an FTA? Conversely, does the MFN provision in GATS or an FTA automatically incorporate substantive or dispute settlement advantages given to another country in a BIT?

More generally, the approach of connecting related issues has begun to feature in certain international instruments. This has been characterized as 'consolidation' and is envisaged as joining two or more pending arbitrations into one proceeding. One of the best examples is Article 1126 of the North American Free Trade Agreement (NAFTA), which also provides for the establishment of a special consolidation tribunal to decide on the consolidation of relevant arbitrations under NAFTA's Chapter 11.<sup>206</sup> The consolidation tribunal has the discretion to decide whether it consolidates claims entirely or partially. Consolidation under NAFTA Article 1126 can be undertaken even without the explicit consent of the parties.

Article 10 of the International Chamber of Commerce (ICC) Rules provides for the consolidation of arbitrations under the aegis of the ICC, although it does not make provision for a consolidation tribunal, as is the case under NAFTA.<sup>207</sup> Article 10 stipulates:

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

- a) the parties have agreed to consolidation; or
- b) all of the claims in the arbitrations are made under the same arbitration agreement; or
- c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have

<sup>205</sup> General Agreement on Trade in Services 1994, 1869 UNTS 183; Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299.

<sup>206</sup> North American Free Trade Agreement (NAFTA) 1992, 32 ILM 289, 605 (1993).

<sup>207</sup> International Chamber of Commerce (ICC), Rules of Arbitration, ICC Doc 108 (2012).

been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed. When arbitrations are consolidated, they are to be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

A number of recent trade and investment agreements appear to have followed the approach in NAFTA and the ICC Rules insofar as they also make provision for the consolidation of proceedings. These are interesting in the way that, through the vehicle of consolidation, they adopt a broader notion of *connexité*. Article 8.43 (1) of CETA, for example, provides for consolidation thus:

1. When two or more claims that have been submitted separately pursuant to Article 8.23 have a question of law or fact in common and arise out of the same events or circumstances, a disputing party or the disputing parties, jointly, may seek the establishment of a separate division of the Tribunal pursuant to this Article and request that such division issue a consolidation order ('request for consolidation').

Article 9.28 of the Trans-Pacific Partnership (TPP)<sup>208</sup> and Article 27(1) of the Transatlantic Trade and Investment Partnership (TTIP)<sup>209</sup> also make provision for consolidation in similar language. However, while all of these provisions appear to follow NAFTA's lead in consolidating similar or related proceedings, there remains a difference. Under NAFTA, the tribunal may consolidate proceedings without the consent of the parties, whereas under the ICC Rules, the CETA, the TPP and the TTIP proposal, consolidation must be at the request of the disputing parties. That said, Article 27(3) of the TTIP goes on to set out the circumstances in which a formal consolidation mechanism, not dissimilar to that under NAFTA, may come into effect where the disputing parties disagree on the consolidation of proceedings:

In the event that the disputing parties referred to in paragraph 2 have not reached an agreement on consolidation within thirty days of the receipt of the request for consolidation referred to in paragraph 1 by the last claimant to receive it, the President of the Tribunal shall constitute a consolidating division of the Tribunal pursuant to Article 9. The consolidating division shall assume jurisdiction over all or part of the claims, if, after considering the views of the disputing parties, it decides that to do so would best serve the interest of fair and efficient resolution of the claims, including the interest of consistency of awards.

This represents an endorsement of the concept of *connexité* and entrusts to a tribunal the discretionary power of consolidation, to be exercised on the basis of fairness, efficiency and the consistency of decisions. It is the strongest evidence yet that *connexité* is gaining ground.

Another procedural option is available in Article 8.24 of CETA, which provides:

Where a claim is brought pursuant to this Section and another international agreement and:  
(a) there is a potential for overlapping compensation; or

<sup>208</sup> Not yet in force at time of writing. Text available at <https://ustr.gov/tpp/#text> (last visited 12 December 2016).

<sup>209</sup> Not yet in force at time of writing. Text of the European Commission's Proposal for Chapter II – Investment, available at [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf) (last visited 12 December 2016).

- (b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section, the Tribunal shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award.

This formulation offers something akin to *connexité* without consolidation insofar as the tribunal should take into account parallel proceedings in its own decision or a form of *lis pendens* where it may stay proceedings. It represents yet another way in which *connexité* is being conceived differently for dispute settlement at the international level.

As these examples demonstrate, the tools for coordinating jurisdiction are being crafted both by international tribunals and through negotiations in new trade and investment agreements. In these new tools, we see both traditional non-discretionary elements, such as the mechanical operation of *lis pendens*, as well as newly conceived discretionary elements, such as *connexité* and consolidation mechanisms. However, they are not the only tools that are being developed for coordinating jurisdiction in the field of international economic law. Other tools include fork-in-the-road provisions and election and waiver mechanisms.

### 3 Fork-in-the-Road, Election and Waiver Provisions

Fork-in-the-road clauses are another way in which one court or tribunal may be deprived of jurisdiction over another competent court or tribunal. These provisions leave it to the party to decide which forum is more appropriate, although this may also be dictated by the legal nature of a particular claim or the applicable law.<sup>210</sup> These types of clauses will be considered first in the investment law field and then in the trade law field.

#### (a) Tools in the field of international investment law

A fork-in-the-road clause is a provision in many BITs that provides for a choice between local remedies in domestic courts and international arbitration.<sup>211</sup> Once one means has been chosen for the resolution of a given dispute, the other means cannot be resorted to. However, this is subject to the proviso that the legal nature of the claim before a domestic court is indistinct from the legal nature of the claim before an international tribunal. As such, if one claim is essentially based on a contract and the other essentially based on a treaty, the two sets of proceedings would likely be allowed to proceed concurrently. This was the case in *Genin v. Estonia* where, despite the respondent state arguing otherwise, the arbitral tribunal held that the fact that the claimant had pursued proceedings in Estonian courts did not preclude him from

<sup>210</sup> McLachlan, *supra* note 194.

<sup>211</sup> E.g., Art. 10(2) of the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments (Albania–Greece BIT), 1991, 4 January 1995, available at <http://investmentpolicyhub.unctad.org/IIA/mapped-Content/treaty/18> (last visited 12 December 2016) provides that ‘the investor of the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal’.



having recourse to investment arbitration.<sup>212</sup> The Tribunal reasoned that the claims and causes of action before the Estonian courts and the arbitral tribunal were different. It would appear that in many cases involving fork-in-the-road provisions, arbitral tribunals have found similar differences between the proceedings at issue.<sup>213</sup> In other cases, fork-in-the-road clauses have been said to enhance certainty, as was spelled out in *Maffezini v. Spain*:

If the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the [MFN] clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy.<sup>214</sup>

Parties have inserted fork-in-the-road clauses in treaties as a means for coordinating national and international jurisdiction over disputes arising directly or indirectly from the treaty. There are many examples of such provisions in investment treaties, and Article 10(2) of the Albania–Greece BIT is typical of the underlying idea. It provides that if disputes cannot be settled amicably, ‘the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal’. Variations of the fork-in-the-road clause are also present in multilateral conventions too, as we will see. In the past, many investment treaties had simply required that domestic remedies be exhausted before international proceedings were commenced.<sup>215</sup>

Variations on the fork-in-the-road clause, while they are invariably less strict, also exist. For example, BITs may set a time limit for domestic courts to resolve an issue before they exercise jurisdiction,<sup>216</sup> and some BITs only allow international arbitration to proceed if there has not been a first instance decision by the courts of the host state.<sup>217</sup> In all events, the relatively simple criteria that triggers the operation of a fork-in-the-road clause is the identical nature of the dispute and parties in both juridical proceedings. Despite its apparent simplicity, these can nevertheless be difficult criteria to apply in practice given that both private and public parties may be involved in

<sup>212</sup> ICSID, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, Award, 25 June 2001, ICSID Case no. ARB/99/2.

<sup>213</sup> Schreuer, ‘Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road’, 5(2) *Journal of World Investment and Trade* (2004) 231; McLachlan, *supra* note 194.

<sup>214</sup> ICSID, *Emilio Augustin Maffezini v. The Kingdom of Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case no. ARB/97/7.

<sup>215</sup> Schreuer, *supra* note 212, giving the Agreement between the Government of Ghana and the Government of the Socialist Republic of Romania on the Mutual Promotion and Guarantee of Investments, 14 September 1989, Art. 4(3) as an example, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1459> (last visited 12 December 2016).

<sup>216</sup> Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, 3 October 1991, 1699 UNTS 188, Art. x(3)(a).

<sup>217</sup> Agreement between the Republic of Austria and the Republic of Macedonia on the Promotion and Protection of Investments, 28 March 2001, Art. 13(3), available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3313> (last visited 12 December 2016).

litigation at the domestic level in different capacities. Tribunals have often taken a relatively strict approach in their application of the criteria. In *Enron v. Argentina*, the respondent had objected to the arbitral tribunal's jurisdiction on the basis of the fork-in-the-road provision under the Argentina–USA BIT,<sup>218</sup> claiming that Enron had been embroiled in litigation before courts in Argentina seeking relief for tax measures that were the subject of the dispute before the arbitral tribunal. The Tribunal held:

This Tribunal is mindful of the various decisions of ICSID Tribunals also discussing this very issue, particularly *Compania de Agua del Aconquija, Genin*, and *Olguin*. In all these cases the difference between the violation of a contract and the violation of a treaty, as well as the different effects that such violations might entail, have been admitted, not ignoring of course that the violation of a legal rule will always have similar negative effects irrespective of its nature. It has accordingly been held that even if there was recourse to local courts for breach of contract this would not prevent resorting to ICSID arbitration for violation of treaty rights, or that in any event, as held in *Benvenuti & Bonfant*, any situation of *lis pendens* would require identity of the parties. Neither will these considerations be repeated here.

The Tribunal notes that in the present case the claimants have not made submissions before local courts, and those made by TGS are separate and distinct. Moreover, the actions by TGS itself have been mainly in the defensive so as to oppose the tax measures imposed, and the decision to do so has been ordered by ENARGAS, the agency entrusted with the regulation of the gas sector. The conditions for the operation of the principle *electa una via* or 'fork-in-the-road' are thus simply not present. The Tribunal accordingly dismisses the objection to jurisdiction on this other ground.<sup>219</sup>

More recently, several tribunals have applied fork-in-the-road clauses less narrowly, which in turn has meant that most or all of the claims in the respective disputes have been dismissed on jurisdictional grounds. For example, in *Pantechniki v. Albania*, the sole arbitrator, Jan Paulsson, preferred to adopt an approach that asked 'whether or not "the fundamental basis of a claim" sought to be brought before the international forum is autonomous of claims to be heard elsewhere'.<sup>220</sup> Latterly, the ICSID tribunal in *H & H Enterprises v. The Arab Republic of Egypt* applied a similar test based on the fundamental basis of the claim, instead of, for example, a more formalistic triple-identity test.<sup>221</sup> In this case, the claimant had argued that the MFN clause in the applicable BIT meant they could be entitled to better treatment afforded under an alternative BIT that did not contain a fork-in-the-road clause. The Tribunal, however, disagreed. Instead, it found that dispute

<sup>218</sup> Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (Argentina–US BIT) 1991, 20 October 1994, 31 ILM 124.

<sup>219</sup> ICSID, *Enron Corp. and Ponderosa Assets LP v. Argentina*, Decision on Jurisdiction, 14 January 2004, ICSID Case no. ARB/01/3, paras 97–98.

<sup>220</sup> ICSID, *Pantechniki v. Albania*, Award, 30 July 2009, ICSID Case no. ARB/07/21, para. 61.

<sup>221</sup> ICSID, *H & H Enterprises Investment Inc. v. Arab Republic of Egypt*, Decision on Objections to Jurisdiction, 5 June 2012, ICSID Case no. ARB/09/15. See Dahlquist, 'In Newly-Surfaced Ruling, MFN Can't Be Used to Bypass Fork-in-the-Road, and Latter Clause Defeats Most of Investor's Claims against Egypt', *Investment Arbitration Reporter* (28 December 2016), available at [www.iareporter.com/articles/in-newly-surfaced-rulingmfn-cant-be-used-to-bypass-fork-in-the-road-and-latter-clause-defeats-most-of-investors-claims-against-egypt/](http://www.iareporter.com/articles/in-newly-surfaced-rulingmfn-cant-be-used-to-bypass-fork-in-the-road-and-latter-clause-defeats-most-of-investors-claims-against-egypt/) (last visited 10 January 2017).

settlement provisions were different to substantive provisions and the MFN clause did not cover the former category of provisions.<sup>222</sup> Since claims that were fundamentally the same as the present dispute had previously been litigated before another arbitral tribunal and an Egyptian court, the fork-in-the-road clause had been triggered.<sup>223</sup>

Waivers may also be considered as fork-in-the-road-type provisions as they aim to prevent the same proceedings being filed in different fora.<sup>224</sup> Waivers provide for the renunciation of a party's rights to a given tribunal. They may be executed voluntarily by parties to litigation or stipulated by a treaty as a precondition to the commencement of litigation. The advantage they offer for the claimant is that the latter may opt to have the case litigated in a local court but still leave open the possibility of investment treaty arbitration later if the investor considers that the treaty standards continue to be violated by the state. Any later investment tribunal would consider the conduct of the host state, including the treatment of the claimant in its domestic courts. The advantage for the host state and for the subsequent investment tribunal is that an investment tribunal does not have to deal with parallel proceedings in the courts of the host state.<sup>225</sup> An example of a waiver provision is Article 1121(1) of NAFTA, which states that:

- [a] disputing investor may submit a claim under Article 1116 to arbitration only if:
- (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
  - (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

Similarly, under NAFTA's Article 1120, the investor must choose between NAFTA and arbitration under the United Nations Commission on International Trade Law, and Article 1121(2)(b) of NAFTA then provides that the investor must:

waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

In *Waste Management I*, an ICSID tribunal concerned itself with this provision and held that the claimant was obliged, 'in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

<sup>224</sup> Kaufmann-Kohler *et al.*, *supra* note 190.

<sup>225</sup> McLachlan, *supra* note 140; McLachlan, *supra* note 194.

with respect to those measures pleaded as constituting a breach of the provisions of NAFTA' and that the purpose of Article 1121 was to prevent 'the imminent risk that the Claimant may obtain the double benefit in its claim for damages'.<sup>226</sup> As is becoming evident, through both fork-in-the-road clauses and waivers, we can see efforts being made by both legislative and judicial actors to answer concerns around the duplication of proceedings and double recovery in particular.

Interestingly, newly adopted treaties, such as CETA, have gone a step further. Article 8.22 on '[p]rocedural and other requirements for the submission of a claim to the Tribunal' reads as follows:

An investor may only submit a claim pursuant to Article 8.23 if the investor: ... (f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and (g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.

This approach differs from the classically conceived fork-in-the-road provision that leaves the choice of forum to the claimant. Instead, here, CETA specifically requires that the investor provides evidence that they have discontinued any other proceedings and that they waive their right for any further proceedings. By requiring the claimant to provide evidence that there is no overlapping or parallel proceedings, CETA adopts an even stronger approach to mitigate the risk of conflicting jurisdiction.

The approach pursued in the EU's proposal for the TTIP chapter on investment does not contain a fork-in-the-road provision as classically conceived either. Rather, the TTIP proposal makes explicit the duty of the tribunal to 'dismiss a claim by a claimant who has submitted a claim to the Tribunal or to any other domestic and international court or tribunal concerning the same treatment' (Article 14(2)). This is in fact a strong and sweeping articulation of the fork-in-the-road notion. The tribunal does not just have discretion to stay proceedings before another forum, but, rather, it has a duty to dismiss a claim that has been submitted to the concerned tribunal or, indeed, any other domestic or international court or tribunal. Further still, Article 14(3)(a) (ii) of the TTIP proposal requires that the claimant provide 'evidence that ... it has withdrawn any such claim or proceeding' and that 'evidence shall contain, as applicable, proof that a final award, judgment or decision has been made or proof of the withdrawal of any such claim or proceeding'.

The doctrine of election has also recently been applied in a creative way by an ICSID tribunal, with the latter indicating that provision for this doctrine can find application on the basis of Article 26 of the ICSID Convention in regard to two international proceedings.<sup>227</sup> Article 26 provides that '[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration

<sup>226</sup> ICSID, *Waste Management, Inc. v. United Mexican States*, Award and Dissenting Opinion, 2 June 2000, ICSID Case no. ARB(AF)/98.

<sup>227</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965, 575 UNTS 159.

to the exclusion of any other remedy'. In the recent decision on jurisdiction in *Ampal-American v. Egypt*, the Tribunal found that an abuse of process had crystallized by virtue of the claimant pursuing a claim before the ICSID Tribunal and the Permanent Court of Arbitration (PCA).<sup>228</sup> In paragraph 337 of the decision, the Tribunal quotes Article 26 of the ICSID Convention and goes on to reproduce a leading commentary on the ICSID Convention to indicate that consent to ICSID arbitration implies exclusive pursuit of a claim through ICSID (with respect to both international and national proceedings).<sup>229</sup> In the following paragraph, the Tribunal says: 'Such an election would secure to Ampal in the present arbitration the advantages of the ICSID Convention, upon which it places special reliance, whilst removing the abuse constituted by the double pursuit of the same claim.'<sup>230</sup> In this case, the Tribunal subsequently offered the claimant the option to 'elect to pursue [a] portion of the claim in the present proceedings alone by 11 March 2016, or make its choice known at that time'.<sup>231</sup> The Tribunal then went on to stipulate that it would reconsider whether there had been an abuse of process by double pursuit of the same claim after the claimant had indicated its choice to the tribunal.<sup>232</sup>

These treaty provisions and their interpretation by international tribunals demonstrate an evolution in conception and operation of the fork-in-the-road, waiver and election clauses. They illustrate a recent trend towards mitigating the risks arising from parallel and overlapping procedures by including provisions in treaties that are better suited to consolidating, staying or declining jurisdiction. These examples illustrate the emergence of a managerial approach towards the plurality of courts and tribunals, developed by both judges and states, albeit in the particular area of international investment law.

#### (b) Tools in the field of international trade law

Turning now to the trade field, issues related to parallel litigation mechanisms can arise between FTAs and the WTO as well as between two FTAs. That many FTAs are making provision for autonomous dispute settlement mechanisms leaves open the possibility for overlapping jurisdiction and conflicting judgments. However, the existence of parallel adjudication mechanisms is increasingly being dealt with through choice-of-forum clauses. Under NAFTA, for example, to deal with mitigating the risks of overlapping jurisdiction, its Article 2005 not only allows applicant parties to choose whether to bring their claims before NAFTA or GATT dispute settlement mechanisms but also provides:

6. Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.

<sup>228</sup> ICSID, *Ampal-American Israel Corp. v. Egypt*, Decision on Jurisdiction, 1 February 2016, ICSID Case no. ARB/12/11.

<sup>229</sup> C. Schreuer et al., *The ICSID Convention: A Commentary* (2009).

<sup>230</sup> *Ampal-American Israel Corp. v. Egypt*, *supra* note 228, para. 338.

<sup>231</sup> *Ibid.*, para. 339.

<sup>232</sup> *Ibid.*

The operation of Article 2005 is evident in the case law of the WTO Dispute Settlement Body (DSB). The Appellate Body's decision in the *Mexico – Soft Drinks* case reveals the difficulties linked to jurisdictional overlaps as well as possible solutions to these challenges.<sup>233</sup> *In casu*, the question was to determine whether a WTO panel could decline to exercise jurisdiction over a particular dispute in favour of a NAFTA Chapter 20 panel, without diminishing the rights of the complaining WTO member under the DSU and other covered agreements. The legitimacy of that question was heightened by the pronouncement of the Appellate Body in *Mexico – Corn Syrup*, where it had stated that 'panels are required to address issues that are put before them by the parties to a dispute'.<sup>234</sup> This cast doubt on the freedom of WTO panels to decline jurisdiction, despite their inherent power to determine whether a particular matter is within their jurisdiction.<sup>235</sup>

The panel in *Mexico – Soft Drinks* considered it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it.<sup>236</sup> Referring to Article 11 of the DSU and to the ruling of the Appellate Body in *Australia – Salmon*,<sup>237</sup> the panel observed that 'the aim of the WTO dispute settlement system is to resolve the matter at issue in particular cases and to secure a positive solution to disputes'<sup>238</sup> and that a panel is required 'to address the claims on which a finding is necessary to enable the DSB to make sufficiently precise recommendations or rulings to the parties'.<sup>239</sup> It concluded that a WTO panel does not have full discretion as to whether it may exercise its jurisdiction.<sup>240</sup>

On appeal, Mexico contended that the panel erred in rejecting Mexico's request that the panel decline to exercise jurisdiction.<sup>241</sup> According to Mexico, a panel had the power:

to refrain from exercising substantive jurisdiction in circumstances where the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions or when one of the disputing parties refuses to take the matter to the appropriate forum.<sup>242</sup>

The Appellate Body decided not to follow Mexico's assertions and rather declared that:

panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that it is a widely accepted rule that an international tribunal is entitled to consider the

<sup>233</sup> *Mexico – Soft Drinks*, *supra* note 201.

<sup>234</sup> WTO, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Report of the Appellate Body*, 22 October 2001, WT/DS132/AB/RW.

<sup>235</sup> For a general discussion of inherent powers at the WTO, see I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009).

<sup>236</sup> WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages – Panel Report*, 7 October 2005, WT/DS308/R, para 7.18.

<sup>237</sup> WTO, *Australia – Measures Affecting Importation of Salmon – Report of the Appellate Body*, 20 October 1998, WT/DS18/AB/R.

<sup>238</sup> *Mexico – Soft Drinks*, *supra* note 236, para. 7.8.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

<sup>241</sup> *Mexico – Soft Drinks*, *supra* note 201 (quoting Mexico's Appellant's Submission).

<sup>242</sup> *Ibid.* (internal quotations omitted).

issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it. ... [I]t does not necessarily follow, however, from the existence of these inherent adjudicative powers that, once jurisdiction has been validly established, WTO panels would have the authority to decline to rule on the entirety of the claims that are before them in a dispute.<sup>243</sup>

Although it upheld the finding of the panel, the Appellate Body was careful to make an interesting qualification. Noting that it had expressed:

no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. In the present case, Mexico argues that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute, and that only a NAFTA panel could resolve the dispute as a whole. Nevertheless, Mexico does not take issue with the Panel's finding that neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA ... and the dispute before us. Mexico also stated that it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA. It is furthermore undisputed that no NAFTA panel as yet has decided the broader dispute to which Mexico has alluded. Finally, we note that Mexico has expressly stated that the so-called exclusion clause of Article 2005.6 of the NAFTA had not been exercised. We do not express any view on whether a legal impediment to the exercise of a panel's jurisdiction would exist in the event that features such as those mentioned above were present. In any event, we see no legal impediments applicable in this case.<sup>244</sup>

The Appellate Body makes it clear here that, in some circumstances, a panel may decline to 'act at all' if another dispute settlement mechanism is more suitable to entertain jurisdiction. A panel may have to decline jurisdiction if there is a so-called 'legal impediment' to it hearing a case. Among these legal impediments, as framed by the Appellate Body in the above-mentioned paragraph of its decision, there is the possibility of invoking a fork-in-the-road provision.<sup>245</sup> It is interesting to note that, in practice, states parties to regional FTAs have not shown much appetite for activating them.<sup>246</sup> This hints at an attitude of favouring the plurality of courts and tribunals, with less than stringent rules for regulating parallel and overlapping proceedings.<sup>247</sup>

<sup>243</sup> *Ibid.*, paras 45–46 (internal citations and quotations omitted).

<sup>244</sup> *Ibid.*, para. 54 (emphasis added) (ellipsis in original) (internal citations mostly omitted).

<sup>245</sup> However, in the *Mexico – Soft Drinks* case, Mexico did not exercise the exclusion clause of Art. 2005.6 of NAFTA. See *Mexico – Soft Drinks* 2006, *supra* note 201, para. 54, n. 110.

<sup>246</sup> Mbengue, 'The Settlement of Trade Disputes: Is There a Monopoly for the WTO?', 15(2) *LPICT* (2016) 207.

<sup>247</sup> In this perspective, the arguments made by the USA at the time of the request for the establishment of a panel in the WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II)*, WT/DS381 as well as the attitude of the USA once a panel was established, are worthy of note. See Office of the United States Trade Representative, "United States Initiates NAFTA Dispute with Mexico over Mexico's Failure to Move Its Tuna-Dolphin Dispute from the WTO to the NAFTA" (November 2009), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/november/united-states-initiates-nafta-dispute-mexico-over> (last visited 19 January 2017). See also L. Boisson de Chazournes, *Interactions between Regional and Universal Organizations: A Legal Perspective* (2017), at 124.

That said, some recent FTAs appear to be more restrictive. Under the EU–South Korea FTA, there are several features that appear to aim at the prevention of conflicting jurisprudence and/or parallel proceedings through a more elaborate fork-in-the-road provision.<sup>248</sup> It should be noted that the agreement leaves the choice of forum to the parties, although Article 14.19(1) cautions that parties cannot litigate the same measure on the merits in two fora. Indeed, under Article 14.19(2), a party ‘may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has been concluded’. Further still, Article 14.19(2) provides that ‘a Party shall not seek redress of an obligation which is identical under this Agreement and under the WTO Agreement in the two forums’ and that ‘once a dispute settlement proceeding has been initiated, the Party shall not bring a claim seeking redress of the identical obligation under the other Agreement to the other forum, unless the forum selected fails for procedural or jurisdictional reasons to make findings on the claim seeking redress of that obligation’. These are indeed novel provisions that can be looked at as new types of fork-in-the-road provisions. They intend to set constraints in the choice and type of proceedings that can be instituted.

Another example is the EU–Vietnam FTA.<sup>249</sup> Its Article 24(2) provides for a mechanism akin to a fork-in-the-road clause, together with a *lis pendens* feature (similar to that in CETA<sup>250</sup>):

By way of derogation from paragraph 1, a Party shall not, for a particular measure, seek redress for the breach of a substantially equivalent obligation under this Agreement and under the WTO Agreement or in any other international agreement to which both Parties are parties in the relevant fora. Once a dispute settlement proceeding has been initiated, the Party shall not bring a claim seeking redress for the breach of the substantially equivalent obligation under the other agreement to the other forum, unless the forum selected first fails for procedural or jurisdictional reasons to make findings on the claim seeking redress of that obligation. ...

As is evident, the fork-in-the-road clause has found provision in both the treaty and judicial practice of international trade law. It has been given various facets, which aim to a greater or lesser extent at restraining the possibility of parallel proceedings in certain contexts. That said, it does not entail a relinquishment of the right to bring disputes covered by a FTA to the WTO.<sup>251</sup>

<sup>248</sup> EU–South Korea FTA, *supra* note 146.

<sup>249</sup> EU–Vietnam FTA, *supra* note 199.

<sup>250</sup> CETA, *supra* note 198, Art. 29.3.1–2.

<sup>251</sup> As in the WTO, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457. The Appellate Body considered whether Guatemala had waived its right to have recourse to the WTO DSU, *supra* note 70. The FTA with Peru not yet having entered into force, the panel concluded that ‘it [was] not necessary for this panel to express an opinion on whether the parties may, through the FTA, modify between themselves their rights and obligations under the covered agreements; or whether there is a conflict of rules between the FTA and the covered agreements and the consequences such conflict would have’ (para. 7.528), and the Appellate Body noted: ‘[T]hat the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41. This is particularly true in the case of FTAs considering that Article XX.IV of the GATT 1994 specifically permits departures from certain WTO rules in FTAs. However, Article XX.IV conditions such departures on the fulfilment of the rule that the level of duties and other regulations of commerce, applicable in each of the FTA members to the trade of non-FTA members, shall not be higher or more restrictive than those applicable prior to the formation of the FTA (para. 5.112).



#### 4 Other Attempts to Order Coexisting Jurisdiction in International Economic Law

Other attempts to order coexisting jurisdiction are apparent in recent treaties as well. In this context, certain trends are evident across a variety of international instruments and in the case law of international tribunals. As such, a series of alternative means for ordering jurisdiction can be detected, most of which import or derive from the tools of which we have been speaking. It is important to highlight that the lion's share of these developments can be seen in trade and investment agreements.

##### (a) Delimiting the scope of covered disputes

In a series of recent FTAs, states have introduced various tools to mitigate the risks of overlapping jurisdiction. For example, CETA demarcates the scope of disputes that fall under its dispute settlement mechanism. Article 8.18 of CETA requires a tribunal to dismiss claims that fall outside the jurisdiction set up by the CETA provisions:

Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under: Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or Section D: where the investor claims to have suffered loss or damage as a result of the alleged breach. Claims under subparagraph 1(a) with respect to the expansion of a covered investment may be submitted only to the extent the measure relates to the existing business operations of a covered investment and the investor has, as a result, incurred loss or damage with respect to the covered investment. ...

A Tribunal constituted under this Section shall not decide claims that fall outside of the scope of this Article.

The TPP also addresses the possibility of overlapping jurisdiction, albeit without providing for a clear indication of how to organize the foreseen coexistence. Article 1.2(1) envisages the TPP's coexistence with other agreements in the region that might be applicable:

Recognizing the Parties' intention for this Agreement to coexist with their existing international agreement, each Party affirms, ... (b) in relation to existing international agreements to which that party and at least one other Party are party, its existing rights and obligations with respect to such other Party or Parties, as the case may be.

Article 1.2(2) of the TPP goes on to explain that where there is an inconsistency between the provisions of the TPP and a pre-existing agreement, the concerned parties should consult with one another to find a mutually satisfactory solution. This is without prejudice to dispute settlement under the TPP.

The actual risks that may arise as a result of overlapping jurisdiction are to some extent mitigated through the use of time limits for bringing treaty claims. Of course, this is a different approach to that seen in CETA and other FTAs but nevertheless purports to achieve a similar aim and serves as a response to the realization that it exists in a multi-jurisdictional world. Article 9.21(1) of the TPP provides for the conditions and limitations on consent of each party:

1. No claim shall be submitted to arbitration under this Section if more than three years and six months have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 9.19.1 ...
2. No claim shall be submitted to arbitration under this Section unless:
  - (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and the notice of arbitration is accompanied:
    - (i) for claims submitted to arbitration under Article 9.19.1(a) (Submission of a Claim to Arbitration), by the claimant's written waiver; and
    - (ii) for claims submitted to arbitration under Article 9.19.1(b) (Submission of a Claim to Arbitration), by the claimant's and the enterprise's written waivers, of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 9.19 (Submission of a Claim to Arbitration).

### (b) A role for good faith

Under the most recent EU proposal for the TTIP, taking a different approach again, a tribunal is required to identify and decline jurisdiction in the circumstances of a frivolous claim.<sup>252</sup> This provision can be seen as a manifestation of the good faith principle. This possibility may be seen as a means for preventing parallel or overlapping proceedings that may be initiated. As such, Article 15 on anti-circumvention, which is concerned with situations where an investor acquires an investment in order to commence litigation, provides:

For greater certainty, the Tribunal shall decline jurisdiction where the dispute had arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject to the dispute and the Tribunal determines, on the basis of the facts of the case, that the claimant has acquired ownership or control of the investment for the main purpose of submitting the claim under this Section. The possibility to decline jurisdiction in such circumstances is without prejudice to other jurisdictional objections which could be entertained by the Tribunal.<sup>253</sup>

Recourse to the principle of good faith is also evident in the practice of investment dispute settlement. In several cases, it is possible to observe arbitration panels refer to this well-established principle of international law with a view to preventing abuse of process. As early as 1983, the tribunal in *Amco Asia Corporation et al. v. Indonesia* confirmed the centrality of good faith in interpreting conventions to arbitrate.<sup>254</sup> However,

<sup>252</sup> In a relatively similar sense, according to Art. 36(3) of the ICSID Convention, *supra* note 227, the Secretary General of ICSID may decline to register a request for arbitration if it is 'manifestly outside the jurisdiction of the Centre'.

<sup>253</sup> European Union Proposal for Investment Protection and Resolution of Investment Disputes in the Negotiations for the Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce, available at [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (last visited 12 December 2016).

<sup>254</sup> ICSID, *Amco Asia Corporation et al. v. Indonesia*, Decision on Jurisdiction, 25 September 1983, ICSID Case no. ARB/81/1. The tribunal stated: 'Moreover – and this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged' (para. 14) (emphasis in original).

more recently, tribunals have considered the application of the principle in the broader context of international public order. For example, in *Phoenix Action Ltd v. Czech Republic*, the tribunal was concerned ‘with the international principle of good faith as applied to the international arbitration mechanism of ICSID ... to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected’.<sup>255</sup> Echoing these sentiments on protecting the investment treaty system from abuses of process, the ICSID tribunal in *Transglobal Green Energy LLC and Transglobal Green Panama S.A. v. Republic of Panama* upheld Panama’s objection to jurisdiction in that case ‘on the ground of abuse by Claimants of the investment treaty system by attempting to create artificial international jurisdiction over a pre-existing domestic dispute’.<sup>256</sup>

Related to good faith is of course the possibility of estoppel. This has also been the subject of consideration by a WTO panel. In *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, a case that concerned a conflict of jurisdiction between the DSB and MERCOSUR, a WTO panel held that Brazil was entitled to bring the dispute to the WTO’s dispute settlement mechanism even though the same measures had previously been adjudicated upon under MERCOSUR.<sup>257</sup> In responding to Argentina’s argument that ‘Brazil (was) estopped from pursuing the present WTO dispute settlement proceedings’,<sup>258</sup> the Panel held:

We do not consider Argentina’s response sufficient to establish that the three conditions it identified for the application of the principle of estoppel are fulfilled in the present case. Regarding the first condition identified by Argentina, we do not consider that Brazil has made a clear and unambiguous statement to the effect that, having brought a case under the MERCOSUR dispute settlement framework, it would not subsequently resort to WTO dispute settlement proceedings. In this regard, we note that the panel in *EEC (Member States) – Bananas I* found that estoppel can only ‘result from the express, or in exceptional cases implied consent of the complaining parties’. We agree. There is no evidence on the record that Brazil made an express statement that it would not bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR. Nor does the record indicate exceptional circumstances requiring us to imply any such statement.<sup>259</sup>

Overall, these developments admit the contemporary reality of the coexistence of the WTO, FTAs and investment dispute settlement procedures. One can note the various attempts at an ‘organized coexistence’ in this respect. As has become evident from the emergent trends, different techniques have been embraced through treaties, and responsibility is placed on both courts and tribunals as well as on parties to disputes in managing this organized coexistence.

<sup>255</sup> ICSID, *Phoenix Action Ltd v. Czech Republic*, Award, 15 April 2009, ICSID Case no. ARB/06/5, para. 113 (emphasis in original).

<sup>256</sup> ICSID, *Transglobal Green Energy LLC and Transglobal Green Panama S.A. v. Republic of Panama*, 2 June 2016, Award, ICSID Case no. ARB/13/28, para. 118.

<sup>257</sup> WTO, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil – Report of the Panel*, 22 April 2003, WT/DS241/R, para. 7.38.

<sup>258</sup> *Ibid.*, para. 7.37.

<sup>259</sup> *Ibid.*, para. 7.38.

## B Other Tools: Courts and Tribunals as Actors

While international economic law is serving as something of a laboratory for the development of procedural rules to coordinate jurisdiction, courts and tribunals acting in other fields have also experimented with coordinating the exercise of jurisdiction, highlighting the possible resort to various means for coordinating jurisdiction and thereby managing plurality. This said, the tools of *lis pendens* and *commixité*, as considered earlier, can surely find application in areas other than international economic law.<sup>260</sup>

### 1 *Res judicata*

*Res judicata* is another tool developed primarily by domestic courts that has from time to time found application in international proceedings. It has been characterized as both a principle of law<sup>261</sup> and customary international law<sup>262</sup> and is traditionally understood as a matter that has already been judicially acted upon or decided and serves as an estoppel on matters being litigated again.<sup>263</sup> It is intended to ensure finality and certainty in the resolution of disputes.<sup>264</sup> While it has been used relatively infrequently, its first use in international proceedings came quite early on. Indeed, in 1902, it was invoked in an arbitral procedure conducted under the aegis of the PCA between the USA and Mexico because it was considered that the matter at issue between the parties had been decided by an umpire who had adjudicated the dispute in 1875.<sup>265</sup> The arbitral tribunal said of *res judicata*: ‘This rule applies not only to the judgments of tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the compromise.’<sup>266</sup>

<sup>260</sup> See, e.g., Art. 5(2) of the Optional Protocol to the International Covenant on Civil and Political Rights, which provides that ‘[t]he [Human Rights] Committee shall not consider any communication from an individual unless it has been ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement’. Optional Protocol to the International Covenant on Civil and Political Rights 1966, 999 UNTS 302; or European Convention on Human Rights, Art. 35(2) (b), as modified by Protocol no. 11 1994, ETS 155, which provides: ‘The [European] Court [of Human Rights] shall not deal with any application submitted under Article 34 that ... (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no new relevant information.’

<sup>261</sup> *Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow*, 1927 PCIJ Series A, No. 11, at 27, Dissenting Opinion of Judge Anzilotti; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Reports (1954) 47; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1994), at 336; Lauterpacht, *supra* note 180, at 19, 325–326.

<sup>262</sup> Dodge, ‘National Courts and International Arbitration: Exhaustion of Remedies and *Res Judicata* under Chapter Eleven of NAFTA’, 23 *Hastings International and Comparative Law Review* (2000) 357, at 365.

<sup>263</sup> H. Campbell Black, *Black’s Law Dictionary* (4th edn, 1968), at 650.

<sup>264</sup> See, e.g., *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, 17 March 2016, available at [www.icj-cij.org/docket/files/154/18956.pdf](http://www.icj-cij.org/docket/files/154/18956.pdf) (last visited 12 December 2016), at para. 58; *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections (*Nigeria v. Cameroon*), Judgment, 25 March 1999, ICJ Reports (1999) 31, at para. 12.

<sup>265</sup> PCA, *Pious Fund of the Californians (U.S. v. Mexico)*, 14 October 1902.

<sup>266</sup> *Ibid.*

More recently, it has also been invoked by the ICJ. For example, in the *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*,<sup>267</sup> the ICJ noted that the arbitral award made by the King of Spain in the border dispute between Honduras and Nicaragua in 1906 was *res judicata*. In the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* case, the ICJ stated that *res judicata* was a 'well established and generally recognized principle of law' and that 'a judgment rendered by a judicial body is *res judicata* and has binding force between the parties to the dispute'.<sup>268</sup> It has also been considered by the ICJ, although ultimately not applied given that the judicial body considered that its conditions were not met, in cases such as *Land and Maritime Boundary Case between Cameroon and Nigeria*<sup>269</sup> and the *Maritime Delimitation and Territorial Boundary Dispute between Qatar and Bahrain Case*.<sup>270</sup> Beyond the ICJ, it has found application in several other fora, including both permanent courts and *ad hoc* arbitration.<sup>271</sup>

In the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*,<sup>272</sup> one of Colombia's preliminary objections to the jurisdiction of the ICJ was that it had already decided Nicaragua's claim in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.<sup>273</sup> The Court noted that *res judicata* was a general principle of law that was reflected in Articles 59 and 60 of the ICJ Statute, which confirmed that a 'decision of the Court has no binding force except between the parties and in respect of that particular case' and that judgments are 'final and without appeal'. In ultimately rejecting the application of the *res judicata* principle in this case, the Court pointed out that '[i]t is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed'.<sup>274</sup>

However, it is important to point out that there are differing interpretations of the principle to that taken by the majority of the ICJ in this case. In fact, the Court was evenly split on the issue of *res judicata* in this case, as such relying on the casting vote of the president of the ICJ, and several judges dissented from the resulting decision of the Court. In a joint dissenting opinion, Vice-President Yusuf and Judges Cançado

<sup>267</sup> *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, 18 November 1960, ICJ Reports (1960) 192.

<sup>268</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 13 July 1954, ICJ Reports (1954) 47, at 53.

<sup>269</sup> *Request for Interpretation (Cameroon v. Nigeria)*, *supra* note 264.

<sup>270</sup> *Maritime Delimitation and Territorial Boundary Dispute between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, 16 March 2001, ICJ Reports (2001) 40, Dissenting Opinion of Judge Torres Bernárdez.

<sup>271</sup> See, e.g., several cases of the European Court of Justice: Case 14/64, *Mrs Emilia Gualco (née Barge) v. High Authority of the European Coal and Steel Community*, [1965] ECR 51; Cases 172, 226/83, *Hoogovens Groep v. Commission*, [1985] ECR 2831; Cases 358/85, 51/86, *France v. Parliament*, [1988] ECR 4846 and the *ad hoc* arbitration *Delimitation of the Continental Shelf – 'Channel Arbitration' (UK v. France)*, Decision of 14 March 1978, reprinted in UNRIAA, vol. 18, 271.

<sup>272</sup> *Question of the Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, *supra* note 264.

<sup>273</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 166.

<sup>274</sup> *Question of the Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, *supra* note 264, para. 59.

Trindade, Xue, Gaja, Bhandari, Robinson and Judge *Ad Hoc* Brower considered that ‘Colombia’s objection, which is based on the principle of *res judicata*, should have been upheld’.<sup>275</sup> In their criticism of the Court’s judgment, the dissenting judges noted that the decision of the majority of the Court ‘detracts from the values of legal stability and finality of judgments that the principle of *res judicata* operates to protect’.<sup>276</sup> This exemplifies the fact that the principle of *res judicata* can give rise to different interpretations, which in turn put into question legal security. That said, *res judicata* is among the tools that can be resorted to in a context of a plurality of courts and tribunals.

## 2 *Compétence de la compétence and Comity*

The principle of *compétence de la compétence* has the potential to be characterized as an ‘ordering principle’ in the context of the proliferation of international courts and tribunals. The consensual nature or basis of international adjudication has often overshadowed the autonomy of the international judicial function. However, if consent of the parties lays at the basis of the jurisdiction of international courts and tribunals, it is in fact consent ‘as found and determined by’ international courts and tribunals that really matters.<sup>277</sup> This implies a fundamental prerequisite to the autonomy of the international judicial function. In deciding upon their *compétence de la compétence*, tribunals may have recourse to considerations of comity,<sup>278</sup> which may be defined as follows:

A court or tribunal exercising discretionary jurisdiction ... might be justified in deciding to defer jurisdiction in favour of another judicial body, which is better situated to address the particular dispute at hand and to take into consideration the various rights and interests of the parties before it.<sup>279</sup>

Comity is not a norm regulating jurisdictional overlaps between international courts and tribunals. It is a ‘consideration’ that may be taken into account in the exercise by an international court or tribunal of its *compétence de la compétence* and not the determining factor by which a court or a tribunal will decide its competence to act at all.

This perception of comity is evident in the order of the arbitral tribunal constituted under Annex VII of UNCLOS in the *MOX Plant* case. Taking into account that ‘important and interrelated areas of European Community law ... appear to affect the dispute’ that it had before it,<sup>280</sup> and the fact that proceedings could be instituted by the Commission against Ireland before the CJEU, the Tribunal stated:

<sup>275</sup> *Ibid.*, para. 1, Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *Ad Hoc* Brower, available at [www.icj-cij.org/docket/files/154/18970.pdf](http://www.icj-cij.org/docket/files/154/18970.pdf) (last visited 12 December 2016).

<sup>276</sup> *Ibid.*

<sup>277</sup> I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction* (1965).

<sup>278</sup> See Shany, *supra* note 46, at 260.

<sup>279</sup> *Ibid.*, 261–262; Boisson de Chazournes, ‘The Principle of *Compétence de la Compétence* in International Adjudication and Its Role in an Era of Multiplication of Courts and Tribunals’, in M.H. Arsanjani *et al.* (eds), *Looking to the Future: Essays in Honor of W. Michael Reisman* (2010) 1027.

<sup>280</sup> PCA, *MOX Plant Case (Ireland v. United Kingdom)*, Order no. 3 Suspension, 24 June 2003, PCA Case no. 2002-01, para. 3.

In the circumstances, and 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 with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties.<sup>281</sup>

In a situation of potential parallel proceedings, the Tribunal chose to stay its proceedings, allowing for problems in the other proceedings (although not yet having started) to be resolved. It also clearly indicated that the resolution of the dispute would be hampered by two conflicting decisions. With this approach, the Tribunal in fact relied on the *connexité* that prevailed between the two proceedings.<sup>282</sup>

A similar conception of comity was argued before an investment tribunal in *Eurêko v. The Slovak Republic*.<sup>283</sup> There, it was contended that there was a risk of conflicting decisions between the arbitral tribunal, the EU Commission and CJEU due to the similarity of issues with a complaint filed by the investor regarding an alleged infringement of the EC Treaty.<sup>284</sup> While the Tribunal decided to find jurisdiction, it did not deny the possible application of the comity principle in cases of procedural unfairness or inefficiency:

The Tribunal has considered whether it would be appropriate to suspend these arbitration proceedings until the EU Commission and/or the ECJ have come to a decision on the EU law aspects of the infringement case. While the Tribunal wishes to organise its proceedings with full regard for considerations of mutual respect and comity as regards other courts and institutions, it does not consider that the questions in issue in the infringement case are so far coextensive with the claims in the present case that it is appropriate to suspend its proceedings now. Should it become evident at a later stage that the relationship between the two sets of proceedings is so close as to be a cause of procedural unfairness or serious inefficiency, the Tribunal will reconsider the question of suspension.<sup>285</sup>

Indeed, it seems that the *Eurêko* tribunal referred to considerations of the sound administration of justice, particularly regarding equality of arms, that could justify a stay of proceedings on the basis of comity. It stated that it wanted to organize the proceedings 'with full regard for considerations of mutual respect and comity'.<sup>286</sup> This case constitutes another interesting example of the potential for comity in allowing a court or a tribunal to order a stay of proceedings.

<sup>281</sup> *Ibid.*, para. 28.

<sup>282</sup> Kerbrat, 'Le différend relatif à l'usine MOX de Sellafield (Irlande/Royaume-Uni): Connexité des procédures et droit d'accès à l'information en matière environnementale', 50(1) *Annuaire français de droit international* (2004) 607, at 613.

<sup>283</sup> UNCITRAL, *Eurêko v. The Slovak Republic*, Award on Jurisdiction, Admissibility and Suspension, 26 October 2010, PCA Case no. 2008-13, paras 286–292.

<sup>284</sup> Treaty Establishing the European Economic Community 1957, 298 UNTS 3, as amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts and now known as the Treaty Establishing the European Community.

<sup>285</sup> *Eurêko v. The Slovak Republic*, *supra* note 283, para. 292.

<sup>286</sup> *Ibid.*

In respect of another UNCLOS case submitted in parallel under the WTO Agreements, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*,<sup>287</sup> Judge Wolfrum has stated that '[j]udicial comity among courts and tribunals should encourage them to cooperate and to act rigorously within their own jurisdictional powers' so as to reduce risks that may arise in parallel proceedings.<sup>288</sup> This case between Chile and the European Community illustrates how advantage can be taken of different dispute settlement fora to assert claims relating to a common set of facts. There, the EU had brought the case against Chile before the WTO DSB,<sup>289</sup> and Chile had brought the case to UNCLOS.<sup>290</sup>

Interestingly, in the *Timor Leste/Australia* conciliation initiated by Timor Leste, where Australia had raised preliminary objections regarding the ongoing arbitration proceedings between the parties, Australia argued:

that principles of comity compel the [Conciliation] Commission to at the very least stay the conciliation proceedings until the Tribunal constituted to hear [a related arbitration concerning the validity of the Treaty between Australia and the Democratic Republic of Timor-Lest on Certain Maritime Arrangements in the Timor Sea] has reached a decision.<sup>291</sup>

That said, the Conciliation Commission ultimately concluded that there were no issues of comity that would preclude the continuation of the conciliation proceedings.<sup>292</sup>

In another context, in the case between *Bangladesh v. Myanmar*,<sup>293</sup> ITLOS proceeded with the case in informal coordination with an UNCLOS Annex VII arbitration between Bangladesh and India (which was initiated on the same date but followed a lengthier timeline).<sup>294</sup> This could be perceived as a form of comity but with resort to other procedural devices to ensure its application. As such, comity is a concept that has the potential to be used to coordinate proceedings and may be particularly useful

<sup>287</sup> See ITLOS, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*, Order, 16 December 2009, ITLOS Case no. 7; see further WTO, *Chile – Measures Affecting the Transit and Importation of Swordfish*, 28 May 2010, WT/DS/193/4 (G/L/367/Add.1), Joint Communication from the European Union and Chile dated (informing the WTO Dispute Settlement Body of the ITLOS order).

<sup>288</sup> Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, at 9.

<sup>289</sup> WTO, *Chile – Measures Affecting the Transit and Importing of Swordfish*, 13 December 2007, WT/DS193 (withdrawn, mutually agreed solution).

<sup>290</sup> See *Case Concerning Swordfish Stocks (Chile/European Union)*, *supra* note 287.

<sup>291</sup> PCA, *In the Matter of a Conciliation before a Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Decision on Australia's Objections to Competence, 19 September 2016, PCA Case no. 2016-10, para. 20.

<sup>292</sup> *Ibid.*, para. 111.

<sup>293</sup> *Dispute concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, *supra* note 169.

<sup>294</sup> See reference to simultaneous filing in the ITLOS case (*ibid.*, Notification Submitted by Bangladesh, 13 December 2009, para. 2) and to the ITLOS judgment in the parties' final submissions to the arbitral tribunal (PCA, *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case no. 2010-16, paras 60, 62).



in a changing dispute settlement environment in which judicial actors are increasingly aware of other judicial fora and of proceedings instituted under their aegis.

### 3 *Legal Issues Sufficiently Distinct/Not Sufficiently Distinct*

Two recent disputes between East Timor (Timor-Leste) and Australia, one before a PCA arbitral tribunal and the other before the ICJ, are further examples of international courts and tribunals showing an awareness of the possible problems created by jurisdictional overlaps. In 2013, East Timor initiated an arbitration arguing that a 2006 Timor Sea Treaty<sup>295</sup> was null and void because Australia allegedly carried out espionage activities during the negotiations. Later that year, an application was made to the ICJ with regard to the seizure and subsequent detention by 'the agents of Australia of documents, data and other property which belongs to Timor-Leste and/or which Timor-Leste has the right to protect under international law'. In particular, East Timor contended that Australian intelligence officers entered the office or residence of a legal adviser to East Timor in Canberra and seized, *inter alia*, documents relating to the Timor Sea Treaty arbitration.

A first feature to be noted is that in an act of cooperation with the ICJ, the PCA arbitral tribunal partially waived confidentiality, permitting either party to submit to the ICJ copies of correspondence, pleadings and transcripts relating to the arbitration.<sup>296</sup> A second feature is that the ICJ dismissed Australia's request for a stay of the ICJ proceedings until the arbitral tribunal in the arbitration under the Timor Sea Treaty had handed down its decision, finding that the legal issues in the PCA arbitration and in the ICJ case were sufficiently distinct for the cases to proceed concurrently. According to an order of the ICJ, '[w]hereas the Court, acknowledging East Timor's concerns regarding the way in which the request for a stay of the proceedings was put before the Court, considers that the dispute before it is sufficiently distinct from the dispute being adjudicated upon by the Arbitral Tribunal'.<sup>297</sup> The Court took, *mutatis mutandis*, the same position in its order on provisional measures when Australia reiterated its request for a stay of proceedings at the end of its oral observations.<sup>298</sup>

What is particularly striking is that the ICJ admits that it might in some specific circumstances decide to order a stay of proceedings. This is an important statement for a judicial body that is only beginning to refer from time to time to decisions of other judicial bodies. Through this statement, it appears that the ICJ accepts that it is part of a wider community of courts and tribunals and that harmonious interactions have

<sup>295</sup> Treaty on Certain Maritime Arrangements in the Timor Sea 2007, 2483 UNTS 359.

<sup>296</sup> *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Memorial of the Democratic Republic of Timor-Leste, 28 April 2014, ICJ Reports (2014) 147, n. 47.

<sup>297</sup> *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order, 28 January 2014, ICJ Reports (2014) 136, at 137.

<sup>298</sup> *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order, 3 March 2014, ICJ Reports (2014) 147, para. 17: 'By an Order dated 28 January 2014, the Court decided not to accede to Australia's request for a stay of the proceedings, considering, *inter alia*, that the dispute before it between Timor-Leste and Australia is sufficiently distinct from the dispute being adjudicated upon by the Arbitral Tribunal in the Timor Sea Treaty Arbitration.'

to be devised. The ICJ is brief in its statement and, without doubt, has very carefully chosen its words. It will be necessary to better understand what ‘sufficiently distinct’ means. Is the Court following the same direction as the *Mox Plant* tribunal when the latter referred to appropriateness and the risk of conflicting decisions?<sup>299</sup> Or is the Court targeting a legal impediment as referred to by the WTO’s Appellate Body?<sup>300</sup> This legal impediment would be linked to the closeness of the dispute brought before it with another dispute or a broader dispute brought before another court or tribunal.

The ICJ case in this dispute has been terminated<sup>301</sup> and there has been an agreement between the two parties to end the PCA arbitration mentioned above and a subsequent arbitration that had been started by Timor-Leste.<sup>302</sup> In that subsequent arbitration, which commenced in 2013, East Timor had initiated another case against Australia – also under the Timor Sea Treaty and concerning petroleum rights – in which its government had expressly made a link to the earlier-mentioned dispute settlement procedures: ‘Timor-Leste has initiated this new arbitration to resolve a dispute ... which arose in early 2014 in the context of an inappropriate interference by Australia in a third-party international arbitration, without prior consultation with Timor-Leste’.<sup>303</sup> As part of the conciliation proceedings that East Timor has initiated pursuant to UNCLOS, the parties are endeavouring to seek a permanent resolution of their maritime boundaries in the same area covered by the resource-sharing provisions of the Timor Sea Treaty.<sup>304</sup> Such proceedings may have the potential to further contribute to interactions among the various judicial actors involved as well as with the conciliation proceedings.

## 5 Concluding Remarks

Plurality has been a constant feature in the fabric of courts and tribunals. More recently, there has been a growing awareness that this plurality must be managed. The plurality has been managed not by the design of hierarchical structures but, rather, by the institution of various means by both judicial and state actors. This offers

<sup>299</sup> *MOX Plant Case (Ireland v. United Kingdom)*, *supra* note 280.

<sup>300</sup> *Mexico – Soft Drinks* 2006, *supra* note 201, para. 54.

<sup>301</sup> *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order, 11 June 2015, ICJ Reports (2015) 147.

<sup>302</sup> PCA, *Arbitration under the East Timor Sea Treaty (Timor-Leste v. Australia)*, 23 April 2013, Case no. 2013-16. See also Trilateral Joint Statement - PCA Case No. 2016-10: Conciliation Proceedings between Government of the Democratic Republic of Timor-Leste and the Government of the Commonwealth of Australia Pursuant to Article 298 and Annex V of the UN Convention on the Law of the Sea, 24 January 2017, available at <https://pca-cpa.org/fr/news/trilateral-joint-statement-pca-case-no-2016-10-conciliation-proceedings-between-the-government-of-the-democratic-republic-of-timor-leste-and-the-government-of-the-commonwealth-of-australia-copy/> (last visited 21 February 2017).

<sup>303</sup> Minister of State and of the Presidency of the Council of Ministers and Official Spokesperson for the Government of Timor-Leste, ‘Timor-Leste Initiates Arbitration Proceedings under the Timor Sea Treaty’, press release, 24 September 2015, available at <http://timor-leste.gov.tl/?p=13421&lang=en> (last visited 12 December 2016).

<sup>304</sup> Minister of State and of the Presidency of the Council of Ministers and Official Spokesperson for the Government of Timor-Leste, ‘Timor-Leste Launches United Nations Compulsory Conciliation Proceedings on Maritime Boundaries with Australia’, press release, 11 April 2016, available at <http://timor-leste.gov.tl/?p=14978&lang=en> (last visited 12 December 2016).

variety to the litigants it serves insofar as the choice of dispute settlement fora is in their hands. In this context, judicial actors are increasingly cognizant of their position in a diverse world of dispute settlement. They are aware of their function, not only as arbiters in individual disputes but also as key players in shaping the international legal system. They discharge this function by communicating with each other in the pursuit of coherence. This internal coherence is relevant to the external legitimacy and, ultimately, the compliance pull of the overall system.<sup>305</sup>

In the light of a multiplication of international fora for the settlement of disputes, there is a widespread concern that the risks of parallel proceedings and conflicting decisions have become more acute. Ultimately, it is feared that this could threaten the legitimacy of the dispute settlement. In seeking ways in which these risks can be mitigated, international judges have looked beyond their immediate regime for inspiration. This contemporary reality in the international legal order is one that domestic and regional legal systems have faced for some time, and there exist well-developed procedural tools for coordinating jurisdiction in the private international law regimes of these particular systems. While the international judiciary and lawmakers have taken cognizance of these tools, they have also shied away from importing them 'lock, stock and barrel',<sup>306</sup> preferring instead to adapt them for their own purposes and taking into account the specificities of the international judicial scene.

Judicial awareness is also evident where disputes brought, or which may be brought, before various fora are connected, and this is evident in various cases. For example, in *Mexico – Soft Drinks*, the Appellate Body made reference to 'the broader dispute to which Mexico has alluded' when giving consideration to similar claims being pursued in the context of NAFTA.<sup>307</sup> Similarly, the arbitral tribunal constituted under Annex VII of UNCLOS noted the 'interrelated areas of European Community law' that were likely to 'affect the dispute' in the *Mox Plant* case.<sup>308</sup> A further example may be found in the *Timor Leste v. Australia* case before the ICJ, wherein the Court considered that 'the dispute before it [was] significantly distinct from the dispute being adjudicated upon by the [PCA]'.<sup>309</sup>

This would suggest that there is an overriding concern for securing the rule of law of the international legal system, rather than undermining it by introducing the risk of conflicting judgments, wasted resources and uncertainty. As such, the seeds have been sown for a more ordered coexistence in a world of multiple courts and tribunals. This also reveals several new dimensions in multilateral efforts among both judicial and state actors. There is an overarching managerial approach emerging.

These trends are scarcely grounded in principles of international law. Their development is mainly due to the attitude of international courts and tribunals. As a matter

<sup>305</sup> Franck, 'Legitimacy in the International System', 82 *AJIL* (1988) 705.

<sup>306</sup> To use the words of Lord McNair in his separate opinion to the advisory opinion of the ICJ in *International Status of South-West Africa*, 11 July 1950, ICJ Reports (1950) 128, at 148. As referred to by McLachlan, *supra* note 136, at 459.

<sup>307</sup> *Mexico – Soft Drinks* 2006, *supra* note 201, para. 54.

<sup>308</sup> *MOX Plant Case (Ireland v. United Kingdom)*, *supra* note 280, para. 3.

<sup>309</sup> *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order, 28 January 2014, ICJ Reports (2014) 136, at 137.

of fact, at their own initiative, courts and tribunals have taken it upon themselves to manage the inherent plurality of the fabric of international dispute settlement. Some courts and tribunals behave as actors of judicial change in favouring a systemic approach to dispute settlement. Their practice is shaping the emergence of new principles of international law, such as the *lis pendens* principle or an approach of *connexité* or comity. Moreover, at the same time as being actors of judicial change, they are contributing to the development of international procedural law. These various aspects are certainly recent developments worthy of attention, and they generally contribute to the promotion of the rule of international law in innovative ways.

In certain areas of international law, states have become aware of the need to manage the consequences of the multiplication of courts and tribunals. While they have made a choice for plurality, and, thus, the possibility to resort to various and different dispute settlement fora, they have also foreseen mechanisms and procedures for preventing the problems arising from conflicting interpretations or from overlapping jurisdiction. In this context, international economic law serves as a kind of laboratory for developing more refined managerial approaches.

Given the transversal nature of the risks associated with the multiplication of courts and tribunals, other areas of international law can learn from, and contribute to, these managerial approaches. As for the contribution from other areas of law, perhaps the concepts of subsidiarity or exclusivity, which find application especially in the law of the EU (among other applications),<sup>310</sup> or the principle of complementarity, which is a cornerstone of international criminal law,<sup>311</sup> could play a role in guarding against incoherence and ensuring legitimacy in the context of an increasingly complex international legal order. This is to say that, while certain threads of a managerial approach have already been, or are presently being, woven through the plural fabric of international courts and tribunals, there are still others that can strengthen this choice of fabric.

<sup>310</sup> See Art. 5 of the Treaty on the European Union, OJ 2010 C 83/13 (subsidiarity) or Art. 344 of the Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon, OJ 2010 C 83/49 (exclusivity). As for exclusivity, the CJEU has said in the *Mox Plant* case (Case C-459/03, *MOX Plant*, [2006] ECR I-4635) that '[E]xclusive jurisdiction of the Court is confirmed by Article 292 EC [now Article 344], by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for' (para. 123) and that '[t]he act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community Law' (para. 177). However, there are other (less stringent) ways of understanding exclusivity. See Schmalenbach, 'The Struggle for Exclusiveness: The ECJ and Competing International Tribunals', in I. Buffard *et al.* (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2008) 1045.

<sup>311</sup> See Article 17 of the Rome Statute of the International Criminal Court 1998, 2187 UNTS 90. Interestingly with the amendment to the Statute of the African Court of Justice and Human Rights (see Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Doc. AU Exp/Min/IV/Rev.7, 15 May 2012) or Decision on the Draft Legal Instruments 26–27 June 2014, AU Doc. Assembly/AU/Dec.529, 26–27 June 2014), complementarity could also play a role in the relationship between two international courts, i.e., a regional court and the International Criminal Court. See also, M. Eynard, 'La métamorphose de la justice pénale internationale: étude des fonctions judiciaires de la Cour pénale internationale' (PhD dissertation, University of Geneva and University of Nice, Sophia Antipolis, 2016), at 131–133.