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Image by Permanent Court of Arbitration

The Overlooked Role of Arbitration in International Adjudication Theory

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International adjudication is increasingly seen as the center of the international legal system. Legality and illegality in international law no longer manifest themselves principally in the sources of international law and the argumentative practices of states,[1] but in the final and binding decisions of international courts and tribunals.[2] What is more, international adjudicators not only apply pre-existing law to specific facts; they also actively shape international law and become law-makers. This, in turn, raises legitimacy concerns. Considering the panoply of issues involved, it comes as no surprise that international legal research, including large-scale projects, such as the *Project on International Courts and Tribunals*,[3] *PluriCourts*,[4] *iCourts*,[5] or the Max Planck Institute's project on *International Judicial Institutions as Law Makers*,[6] zoom in on the functioning, authority, and legitimacy of international adjudication.

These projects contribute from different angles to developing a general theory of international adjudication. In doing so, they focus primarily on permanent international courts, and generally share a motivation to strengthen them. Arbitration, by contrast, is largely neglected, or at best dealt with tangentially. This reflects the underlying and rarely explicit assumption that arbitration is an archaic form of settling international

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1 On this view Martti Koskenniemi, *From Apology to Utopia* (2nd edn CUP 2006).

2 This follows the legal theory of Niklas Luhmann, *Law as a Social System* (OUP 2004) 297-337.

3 See http://www.pict-pcti.org (9 April 2015).

4 See http://www.jus.uio.no/pluricourts/english (9 April 2015).

5 See http://jura.ku.dk/icourts (9 April 2015).

6 Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (Springer 2012).

disputes, which is but a stop on the way towards permanent courts.[7] Yet, as I argue in this Reflection, the focus on permanent courts obscures the growing importance of arbitration in practice and neglects its potential to contribute to the theory of international adjudication. Above all, arbitration is more flexible in meeting the demand for bespoke dispute settlement solutions in a pluralist world order and alleviates some of the concerns raised by the increasing authority of permanent international courts.

International Courts in Crisis – Growth in International Arbitration

A need to reconsider the assumption that permanent international courts constitute the perfection of the idea of international adjudication, and therefore justifiedly constitute the main focus of international adjudication theory, is prompted by the backlash some of these courts have experienced in the last years. Several of the 'younger' permanent courts are significantly 'underused'. The International Tribunal for the Law of the Sea, for example, does not possess general compulsory jurisdiction in the law of the sea;[8] important states ignore the International Criminal Court (ICC) and even actively boycott it through bilateral non-extradition treaties.[9] Even more radical is the neutralization of the Tribunal of the Southern African Development Community after it had passed 'overly progressive' judgments.[10] 'Older' institutions, such as the International Court of Justice (ICJ), face difficult times too. Only 70 states made declarations under Article 36(2) of the ICJ Statute (the Optional Clause), with major players, such as the United States, China, and Russia, missing.[11] Colombia even withdrew from the Pact of Bogotá, a general inter-state dispute settlement treaty, after the Court's 2012 ruling in the maritime dispute with Nicaragua.[12] These are some examples that illustrate how the great enthusiasm of the 1990s and early 2000s to enhance the effectiveness of international law through the establishment of new or the jurisdictional expansion of existing international courts[13] has given way to a certain disillusionment.

At the same time, arbitration is growing considerably as a mechanism to enforce international law. This trend is evident on the level of state-to-state and in private-public disputes. The Permanent Court of Arbitration, after decades of dormancy, now lists 94 proceedings on its docket, out of which six are inter-state and 89 are investor-state cases;[14] likewise, the number of ICSID proceedings has grown to almost 600 disputes

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[7] See James Brown Scott, 'The Evolution of a Permanent International Judiciary' (1912) 6 Am J Int'l L 316; Hans Kelsen, *Law and Peace in International Relations* (Harvard UP 1942) 145, 148-151; for a more recent view see Karen J Alter, 'The Evolving International Judiciary' (2011) 7 Ann Rev L & Soc Sci 387.

[8] See Article 287 of the United Nations Convention on the Law of the Seas.

[9] Markus Benzing, 'U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties' (2004) 8 Max Planck UNYB 181.

[10] Erica de Wet, 'The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa' (2013) 28 ICSID Review-FILJ 45.

[11] See http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3 (9 April 2015).

[12] *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment [2012] ICJ Reports 624.

[13] For an overview see http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf (9 April 2015).

[14] See http://www.pca-cpa.org/showpage.asp?pag_id=1029 (9 April 2015).

in recent years.[15] This increase in international arbitration suggests the emergence of a "new generation of international adjudication".[16] Far from being an historic remnant and precursor of permanent courts, arbitration fulfills a role that is no less important than that of permanent courts in settling international disputes and enforcing international law. Although international arbitration, above all under investment treaties, also attracts poignant criticism,[17] it is still a growing phenomenon. The same does not hold true for permanent international courts. For this reason alone, international adjudication theory should have deeper regard to international arbitration.

Saving International Adjudication Through Cosmopolitan Reconstruction?

Mainstream international law research, however, largely ignores international arbitration in developing a general theory of international adjudication. While responding to the challenges permanent international courts face, the resulting theories reflect little on the growth of international arbitration and risk ignoring core differences between arbitral tribunals and courts in making prescriptions to how international adjudicatory bodies in general, including arbitration, should react to current challenges. An example is the book by Armin von Bogdandy and Ingo Venzke, entitled "*In Whose Name? A Public Law Theory of International Adjudication*".[18] In it, the authors analyze international courts as multifunctional actors that are not only institutions of dispute resolution, but also exercise international public authority by further developing and making international law. Framing the activity of international courts as an exercise of international public authority provides a forceful explanation for the crisis international courts face. It is the effect of the decisions of international courts that go beyond the realm of the disputing parties – such as further developing international law with multilateral effect, or the restriction of regulatory powers of governments that affect a state's population – that create legitimacy concerns and cause backlash.

The international public authority exercised by international courts can be framed as a concern for state sovereignty generally. For democratic states, however, the exercise of international public authority by international courts becomes an issue of democratic control and democratic legitimacy. To respond to the democratic challenge, von Bogdandy and Venzke argue that international courts must be embedded in a democratic framework that legitimizes them not only through the consent of the disputing parties, but as institutions that administer justice in a cosmopolitan orientation and render their decisions "in the name of the peoples and the citizens."[19] This cosmopolitan reconstruction would strengthen the legitimacy of international courts.

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[15] See UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)', *IIA Issue Note No 1*, 1 (April 2014) http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf (9 April 2015).

[16] Gary Born, 'A New Generation of International Adjudication' (2012) 61 Duke Law Journal 775.

[17] See Stephan W Schill, 'International Investment Law and Comparative Public Law: An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 3, 4-7.

[18] Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014).

[19] ibid at 214.

The analysis of the exercise of public authority by international courts through a democratic lens is a watershed in moving the theory of international adjudication and the debate about criteria for legitimacy forward. While not addressing international arbitration directly, the conceptual framework developed is also helpful for better understanding the challenges this form of international adjudication faces. After all, arbitration as a mechanism, in particular investor-state arbitration, attracts considerable criticism, including from a democratic perspective, because of the restrictions it may impose on governments' policy space.[20] Similarly, arbitral tribunals in inter-state and investor-state cases also have an active role in further developing international law. Yet, it is questionable whether the solutions prescribed for addressing challenges in international adjudication generally are suitable for international arbitration as well. Is it adequate, for example, to consider that arbitral tribunals should adjudicate, like permanent international courts, "in the name of the peoples and the citizens"? Are there not fundamental differences between arbitral tribunals and permanent courts that require making distinctions between both mechanisms in a theory of international adjudication, including one that takes the perspective of democratic theory?

International Arbitration as a Vision for a Pluralistic Global Society

The reasons why arbitration increases and why parties choose it are manifold. When compared to permanent international courts, core advantages are closely related to the extent to which arbitral tribunals exercise international public authority and to the ability of states to control arbitration. Both aspects distinguish an arbitral tribunal from a permanent international court and should affect the assessment of arbitral tribunals in terms of their legitimacy. They can be viewed as democratic advantages of international arbitration.

First, in arbitration the disputing parties have more immediate influence on the composition of the decision-making body. Their voice in the composition of tribunals is regularly greater. Judges in permanent courts are appointed for a term of several years, are empowered to hear an indeterminate number of cases, and are subject to complex inter-governmental bargains about positions in international organizations. This removes individual adjudicators quite far from a state's consent and from domestic democratic processes that may imbue international adjudication with democratic legitimacy. Moreover, the ratio of party-appointed ad hoc judges to permanent members is small (1 to 15 in the ICJ); in a three-member tribunal, by contrast, one out of three members is party-appointed. In addition, parties may appoint the tribunal's president by mutual agreement. The more direct influence of parties on the composition of decision-makers should bring arbitral tribunals closer to domestic democratic processes than permanent international courts.

Second, the decision of an individual arbitral tribunal is much less powerful than that of a permanent international court and has less impact on non-disputing parties. While arbitral tribunals contribute to the further development of international law –the reliance

[20] See supra n 17.

on arbitral precedent in international investment law attests to that–[21] there is no institutional rationale to follow precedent comparable to that of a permanent international court. Whereas permanent courts have an institutional interest in creating a coherent jurisprudence and in adopting their own precedent in subsequent decisions, arbitral decisions can only convince future arbitrators and appointing parties because of their reasons. Unlike permanent courts, arbitral tribunals cannot invoke institutional authority. The international public authority tribunals exercise individually is therefore more limited than that of permanent courts. This reduces the impact decisions by arbitral tribunals have beyond the disputing parties and beyond an individual case and, consequently, the need to legitimize the law-making functions of arbitral tribunals in the same way as for permanent courts.

Finally, the difference between permanent international courts and arbitral tribunals also shows when asking in whose name they rule. Permanent courts may need to root their decision-making powers in a cosmopolitan framework and speak the law in the name of "the peoples and the citizens" in order to be legitimate as potentially multilateral law-makers. Arbitral tribunals, by contrast, rule in the name of the parties and can legitimately rule in a more limited perspective. They do not need to look for an overarching legitimating framework and understand themselves as mouthpieces of the international community. Arbitration can limit itself to serving as an adjudicatory bridge between disputing parties. Unlike permanent courts, which reflect top-down, hierarchical ordering structures that are typical for large-scale multilateralism, arbitration reflects a bottom-up approach to international adjudication that puts the parties and their desire for tailormade dispute settlement center stage. Arbitration thus reflects the paradigm of a pluralistic, heterarchical ordering of the international community, in which flexibility according to domestic and bilateral preferences is more important than multilateral harmonisation.

Addressing Problems of International Arbitration

Arbitration, however, is not the panacea to all challenges in international adjudication. On the contrary, international arbitration creates its own problems. What the one-off nature of arbitration proceedings recoups, in terms of its comparatively reduced public authority and increased possibilities for state control, is forfeited by the greater risk of inconsistencies in decision-making. This poses challenges for legal certainty and the rule of law, and for the democratic principle of equality. This is inherent in the one off-nature of arbitration. Yet, arbitral tribunals themselves can help to reduce the risk of inconsistencies and the charge of overstepping their mandate. In this context, the mechanisms they can use are similar to those suggested for, and partly already practiced by, permanent international courts. They include reasoning of decisions that avoid unnecessary *obiter* or statements that are not reasonably related to the case at hand. Similarly, well-adapted standards of review are important, as well as contextualizing the decision at hand in relation to general principles of international law and dispute settlement. A theory of international adjudication that takes account of the specificities of international arbitration could help to address these problems.

[21] Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 321-357.

All in all, integrating international arbitration into a theory of international adjudication on equal footing with permanent international courts would enrich our understanding of both permanent courts and international arbitration, and thereby allow us to get a more complete picture of international adjudication. Not doing so, by contrast, may result in a theory of international adjudication that misses out on important developments. In fact, international arbitration in certain areas is among the avant-garde in international law, both on substance and procedure. Investment treaty arbitration, to name but one example, is starting to become a source of precedent that other international and domestic courts, albeit still cautiously, consider for guidance on questions of general international law.[22] Conversely, theories of international adjudication that are limited to permanent courts are less helpful in addressing challenges for international arbitration; such theories miss the opportunity to tie international arbitration firmly into general international law and dispute settlement. Integrated theories of international adjudication would benefit both permanent courts and international arbitration and become the framework for a fruitful cross-fertilisation between both forms of international adjudication.

[22] See Stephan W Schill and Katrine R Tvede, 'Mainstreaming Investment Treaty Jurisprudence: The Contribution of Investment Treaty Tribunals to the Consolidation and Development of General International Law' (2015) 14 LPICT 94.