Antinomies and change in international dispute settlement: an exercise in comparative procedural law

Venzke, I.

DOI
10.1007/978-3-642-34967-6_5

Publication date
2013

Document Version
Final published version

Published in
International dispute settlement: room for innovations?

Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law

*Paper submitted by Ingo Venzke**

I. Introduction
II. Multiple Antinomies and the Making of Procedural Law
III. Manifestations of Change
  1. Publicness and Transparency
    a. Oral Proceedings and Public Hearings
    b. Judicial Deliberations and Individual Opinions
  2. Standing and Participation
    a. Third Party Intervention
    b. *Amici Curiae*
  3. Avenues of Review
IV. Promises, Perils and Future Dynamics

I. Introduction

Institutions for the settlement of international disputes are products of competing interests and aspirations. They testify to rivalling and changing ideas about international order and bear witness to incremental shifts in the antinomies that underlie their concrete shape. International judicial institutions, specifically their procedural law, respond to conceptions of what international dispute settlement is about, what it is for

* Lecturer and Research Fellow at the University of Amsterdam, formerly Hauser Research Scholar at New York University School of Law. The author's work was supported by the Postdoc-Program of the German Academic Exchange Service.

and what it actually does. While international adjudication could for long plausibly be understood as a sporadic affair concerned exclusively with the successful resolution of disputes between immediate parties, the quantitative increase in international adjudicators and in international decisions over the past two decades has gone hand in hand with a shift in quality. Even if the demand for the pacific settlement of disputes has not lost its force or salience, it has become more and more evident that international courts and tribunals do much more than this. Notably, they have developed international norms in their practice, shaped legal regimes and conditioned the legal situation of all those who are subject to the law. The more such systemic effects of international judicial decisions are recognized, the more traditionally prevailing requirements for judicial procedures are supplemented by new demands. The successful settlement of disputes as the overarching goal and respect for the will of the immediate parties then no longer dictates what the procedures look like. Instead, procedural law starts to respond to legitimatory concerns that spring from the jurisgenerative dimension of international adjudication.[1]

At their early modern stages, mechanisms for the settlement of international disputes by judicial means were very flexible and bent so as to accommodate the interests and concerns of the parties. Arbitration was for a long time the only modus of settling disputes, very much prone to the vernacular and ethos of diplomacy rather than to ideas connected with the somehow distinctly judicial resolution of conflicts. The First Hague Peace Conference of 1899 for example produced very rudimentary procedural rules for the Permanent Court of Arbitration, subjecting crucial decisions about the form of the proceedings and selection of arbitrators to the agreement of the parties.[2] Léon Bourgeois, a French

---

[1] In this article I build on A. von Bogdandy and I. Venzke 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (2012) 23 EJIL 7 (forthcoming). On the tensions between understanding adjudication as a matter between the parties alone and its actual effects on third parties, see M. Jacob 'Precedents: Lawmaking Through International Adjudication' (2011) 13 GLJ 1005; R. Wolfrum 'Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea' in V. Götz, P. Selmer and R. Wolfrum (eds) *Liber amicorum Günther Jaenicke* (Springer Heidelberg 1998) 427. Also see A. von Bogdany and I. Venzke 'International Courts as Lawmakers' p. 161 et seq. above.

[2] D.D. Caron 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94 AJIL 4; R.P. Anand *International Courts and Con-*

lawyer and member of the court since 1903, argued at the Second Peace Conference in 1907 that it was absolutely indispensable to pay utmost respect to the will of the parties in order to ensure that they submit their disputes to adjudication in the first place. Next to political expedience there have also been elements of justice and prudence embedded in this idea: the will of State parties constitutes the almost exclusive building block for legitimate international order and all international action needs to be based on their will, so the argument goes.

Such a conception remains vital but institutional developments over time give evidence to alternative views just as well. Already at the time of the Second Peace Conference in The Hague, US Secretary of State Elihu Root argued that only independent permanent judges could gain the confidence of the parties. The only promising avenue for the resolution of international disputes, he maintained, was to resort to standing impartial judicial mechanisms. Root argued at the 1907 national peace congress in New York: 'What we need for the future development of arbitration is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility'.[3] The establishment of the Permanent International Court of Justice (PCIJ) in 1920 was a large step into that direction, hailed by many at the time as a grand achievement and the beginning of a new era.[4] Some viewed it as the central organ of the international

---

temporary Conflicts (Asia Pub. House New York 1974) 28. According to James Brown Scott, the Court was not worthy of its name. In his view, it was not a court because it was made up of diplomats, not judges, and neither was it permanent but constituted anew with every case. See the statement by J. Brown Scott reproduced in Anand (Ibid.) 33. The Permanent Court of Arbitration, to be clear, has not lost its appeal and continues to offer important avenues for dispute resolution.

[3] Quoted in H. Wehberg *Das Problem eines internationalen Staatengerichtshofes* (Duncker & Humblot München 1912) 55.

[4] J.B. Scott 'A Permanent Court of International Justice (Editorial Comment)' (1921) 15 AJIL 53 (stating that 'we should […] fall upon our knees and thank God that the hope of ages is in process of realization'); N. Politis *La justice internationale* (Hachette Paris 1924) 182 (understanding the court as 'l'avènement d'une ère nouvelle dans la civilisation mondiale'). Cf. M. Koskenniemi 'The Ideology of International Adjudication and the 1907 Hague Conference' in Y. Daudet (ed.) *Topicality of the 1907 Hague Conference, the Second Peace Conference* (Nijhoff Leiden 2008) 127.

community and projected their hopes for international peace and human betterment onto this new institution.[5]

The debates at these informative times centred on the balance between the will of the parties, on the one hand, and the autonomy of the judicial proceedings as well as the powers of the adjudicators, on the other. Many commentators advanced the argument that beyond the settlement of the concrete disputes, international courts should rise to the occasion of developing international law in their practice. Even if the PCIJ could certainly not live up to all expectations, it did contribute to international legal developments and helped form the legal order. It not only did so as a matter of fact, but shifts in its argumentative practice indicate that it increasingly embraced the ethos of an actor who partakes in dynamic development of international law.[6] Be it with or without such a self-understanding or intention, international judicial institutions have by now become significant actors in the making of international law. They shape legal regimes and develop international law in a way that escapes the doctrine of sources in international law and that largely exceeds the reach of States.[7]

This contribution aims at elucidating the antinomies and changes in international dispute settlement by examining trends in the procedural law of a number of prominent international judicial institutions. It highlights how the increasing recognition of the jurisgenerative dimension of international judicial practice is reflected in demands for transparency, publicness and participation in international proceedings. It investigates by way of comparison, how the procedural law of international courts and tribunals copes with similar problems, in particular with legitimatory concerns that are triggered by the phenomenon of judicial lawmaking. At the same time, trends in procedural law give evidence to shifting ideas about international dispute settlement that inform yet broader debates about the nature of the international legal order and its deep social structure.

---

[5] See with further references O. Spiermann *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (CUP Cambridge 2005) 14.

[6] Spiermann (note 5). Also see the early contribution by H. Lauterpacht *The Development of International Law by the Permanent Court of International Justice* (Longmans Green London 1934).

[7] See in detail A. von Bogdandy and I. Venzke 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 13 GLJ 979.

With this focus, the article does not touch on the jurisdictional relations between courts and tribunals.[8] It further limits itself to a more detailed discussion of a number of procedural aspects that may best respond to legitimatory problems of judicial lawmaking.[9] Lastly, the article focuses on those institutions in which at least one party is a State and it marginalizes the fields of international human rights protection and international criminal law. While those fields might be connected to a thicker notion of dispute settlement and to rich accounts of international peace, they ultimately show elements of a different paradigm and therefore recede into the background for the present purposes.[10] Within these confines, the article first exposes multiple antinomies underlying procedural law, drawing attention to how they are embedded in larger frameworks. It also briefly discusses the making of procedural law and highlights the considerable discretion of many international courts and tribunals over their own procedures (II). The main task will then be the comparative study of recent trends in the procedural law of international judicial institutions in light of legitimatory problems stemming from the systemic effects of international adjudication. Issues of transparency and publicness, third party intervention and *amicus curiae* submissions, as well as avenues of judicial review are most significant in this regard (III). These trends harbour valuable potentials for improvement but also considerable perils. The article concludes with a sketch of possible future dynamics (IV).

---

[8] For a discussion of issues of *lis pendens* and judicial comity under the rubric of international procedural law, see B. Simma 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265. In further detail see Y. Shany *The Competing Jurisdictions of International Courts and Tribunals* (OUP Oxford 2003).

[9] It largely excludes, for example, the very rich and no less intriguing law pertaining to issues of evidence and standards of proof, recognizing however that developments in these fields also respond to shifting ideas about the nature and function of international adjudication. See in detail M. Benzing *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer Heidelberg 2010).

[10] This is less of a loss in view of the study undertaken by F. Mégret '"Beyond Fairness": Understanding the Determinants of International Criminal Procedure' (2009) 14 UCLA Journal of International Law and Foreign Affairs 37. Also see M. Kuhli and K. Günther 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals' (2011) 13 GLJ 1261.

II. Multiple Antinomies and the Making of Procedural Law

The procedural law of international judicial institutions is largely a product of their own making.[11] As Jean-Marc Sorel put it, 'self-regulation is the prevailing system, which implies mutability of the rules of procedure within the framework of the statute. This is an important source of independence and one of the ways in which such a creature may escape its makers'.[12] International procedural law mirrors the historiography of international adjudication more generally – it is a sound expression of competing conceptions of the functions of international courts and of the expectations raised with regard to their work.

The interplay of three antinomies has left its mark. First, and of little concern from the present perspective, the procedural law of international judicial institutions oftentimes strikes a compromise between different national legal traditions – in particular between adversarial legal systems of the common law and the inquisitorial process of civil law systems.[13] Second, the traditional conception of international arbitration battles with ideas closer connected with permanent courts. While the former ties the judicial process to the will of the disputing parties, the latter tend to uphold a stronger autonomy on part of the court.[14] The juxtaposition of ideas endorsed by Léon Bourgeois and Elihu Root are illustrative of a deep conflict about the potentials and functions of international dispute settlement and, yet more fundamentally, of diverg-

---

[11] The notion of procedural law describes the body of requirements that govern how a judicial process has to be conducted. No uniform procedural law for all courts is thereby postulated. R. Kolb 'General Principles of Procedural Law' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (OUP Oxford 2006) 793 (795); C. Brown *A Common Law of International Adjudication* (OUP Oxford 2007) 6.

[12] J.–M. Sorel 'International Courts and Tribunals, Procedure' (2007) in R. Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* <www.mpepil.com> (12 February 2011) para. 1.

[13] See in particular the prominent debates in international criminal law, above all in the ICC. A. Cassese *International Criminal Law* (2nd edn. OUP Oxford 2008) 353; C. Kress 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 Journal of International Criminal Justice 603.

[14] S. Rosenne *The Law and Practice of the International Court 1920–2005* (4th edn. Nijhoff Leiden 2006) vol. I 9.

ing views on the relationship between law and politics.[15] Closely intertwined is a third main antinomy, which is of elevated interest. Understandings of the international legal order that stand in close analogy to private law thinking compete with views in which international courts act as parts and organs of an international public order.[16] In the former understanding, the judicial process builds on maxims of negotiation between the disputing parties; in the latter, adjudicating bodies are predisposed to act in pursuit of public interests. They may then act on their own motion and with different, broader powers. Not the negotiations of the parties characterize the proceedings, but maxims of investigation by the court or tribunal.[17]

The procedural law of the PCIJ, setting the precedent for the International Court of Justice (ICJ) and influencing younger courts and tribunals, offers an illustrative example of the interplay between these antinomies. It also serves as a fitting case in point with regard to the large discretion that the PCIJ had in forming its own procedures. Art. 30 of the PCIJ Statue enabled the court to adopt its own rules of procedures, within the bounds of its Statute, to be sure, but those bounds were so loose that they hardly amounted to significant constraints. It was thus also a crucial and enormously influential decision by the judges themselves not to categorically subject the judicial process to the will of the disputing parties but to retain a firm grip and ultimate authority over the proceedings. Should the parties come to unanimous agreement and push for changes in the procedures, and should such changes be justified by the particularities of the case, it would still be up to the Court to

---

[15] Consider the strong and eloquent positions taken by the Russian delegate Friedrich von Martens and the German delegate Philipp Zorn, both arguing for a preservation of political elements in arbitration. H. Wehberg 'Friedrich von Martens und die Haager Friedenskonferenzen' (1910) 20 Zeitschrift für internationales Recht 343; P. Zorn *Die beiden Haager Friedenskonferenzen von 1899 und 1907* (Kohlhammer Stuttgart 1914). A bit later Manley O. Hudson and Hans Kelsen offered excellent arguments to the contrary, building on the qualities of a distinct judicial process. M.O. Hudson 'The Permanent Court of International Justice – An Indispensable First Step' (1923) 108 American Academy of Political and Social Science, Annals 188; H. Kelsen *Law and Peace in International Relations* (Hein Buffalo New York 1942).

[16] Compare C.H. Brower II 'The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law' (2008) 18 DukeJComp&IL 259.

[17] Kolb (note 11) 809–10 paras 27–30.

accept and implement these changes.[18] The parties are left with rather minimal possibilities of influencing the procedural law. It is precisely not subject to their will, but in the hands of the Court as an autonomous actor.[19] Also Art. 30 of the ICJ Statute vests the Court with the power to 'frame rules for carrying out its functions. In particular, it shall lay down rules of procedure'.

The procedural law of international courts and tribunals is first and most straightforwardly the product of formal legislation on part of the judges. Beyond this formal act of lawmaking, procedural law is shaped in the practice of adjudication. Its making can also show how international courts and tribunals influence each other in their practice.[20] The international judicial institutions created ever since the first feeble steps of the PCIJ usually enjoy the competence to decide about the concrete form of the judicial process.[21] They certainly need to comply with the provisions of their foundational treaties, but these provisions are, with some due qualifications and nuances, rather vague. The framework set up by the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) offers more detail and amendments are only loosely tied to the agreement of Members.[22] Changes in the procedural

---

[18] Rule 32 of the Rules of the Court. Cf. J. Kolasa 'Origins and Sources of Procedural Law of International Courts: ubi jus, ibi remedium' in V. Epping, H. Fischer and W. Heintschel von Heinegg (eds) *Brücken bauen und begehen: Festschrift für Knut Ipsen zum 65. Geburtstag* (Beck München 2000) 185 (190).

[19] This stands in contrast to the law of the Permanent Court of Arbitration whose default procedures yield to any agreement between the parties. See Art. 41 of the Convention for the Pacific Settlement of International Disputes ([adopted 18 October 1907, entered into force 26 January 1910] [1907] 205 CTS 233).

[20] Consider, for instance, the history of provisional measures that tells the intriguing story of a vivid dynamic between international courts and tribunals, K. Oellers-Frahm 'Expanding Competence to Issue Provisional Measures – Strengthening the International Judicial Function' (2011) 13 GLJ 1279.

[21] Art. 16 of the ITLOS Statute; Art. 17 (9) of the DSU; Art. 26 (d) of the ECHR; Art. 15 of the ICTY Statute; Art. 14 of the ICTR Statute.

[22] Annex 3 to the DSU contains the panels' working procedures. Noteworthy is also Art. 12 (2) of the DSU stipulating that the 'Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'. The Appellate Body formulates its working procedures in consultation with the Chairman of the DSB and with the Director-General. According to Art. 17 (9) of the DSU it suffices, however, that it only informs the Members about the procedures it adopts.

law of the International Centre for Settlement of Investment Disputes (ICSID), in contrast, may only be introduced by a two-thirds majority in the Administrative Council, composed of one member from each contracting party. In addition, parties bringing their case before the ICSID can agree to adapt the procedural law for their concrete case.[23] This is not particularly surprising in view of the tradition of arbitration. Also changes in the rules of procedure and evidence of the International Criminal Court (ICC) require the affirmative vote of two-thirds of the Assembly of State Parties.[24]

In spite of notable differences, it generally holds true that the procedural law significantly develops in the practice of adjudication and under the tutelage of the respective courts and tribunals. Not only can most international judicial institutions decide autonomously about the rules of procedures, but beyond this avenue they can adopt directions to guide their work whenever the statutory basis does not regulate an issue in sufficient detail or when it is simple mute on certain aspects of the judicial process.[25] Such practice directions, sometimes also termed guidelines,[26] are not binding but they do have a remarkable influence on the proceedings.[27] Even with regard to the rather specific and meticulously detailed provisions of the DSU has the practice of adjudication set procedures in place, which arguably deviate from the treaty provisions.[28] It remains questionable and rather doubtful, however, whether international judicial practice has generated general principles, which

---

[23] Rule 20 (2) of the ICSID Arbitration Rules.

[24] Art. 51 of the Rome Statute of the International Criminal Court.

[25] Neither the ICJ Statute nor the Rules of the Court make any mention of directives. This has not kept the Court from using directives in the shaping of its work and procedures. Cf. S. Rosenne 'The International Court of Justice – New Practice Directions' (2009) 8 LPICT 171.

[26] Art. 50 of the ITLOS Rules.

[27] For example, international courts and tribunals have adopted directives on the issue of judicial independence or pronounced on this issue in their decisions. See R. Mackenzie and P. Sands 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 HarvardILJ 271; Y. Shany and S. Horovitz 'Judicial Independence in The Hague and Freetown: A Tale of Two Cities' (2008) 21 LJIL 113.

[28] Consider for instance the take on confidentiality by the Appellate Body, p. 247 et seq. below.

may amount to a source of procedural law.[29] But even if one does not wish to elevate practice to such prominence, this doubt does not take away from the discretion and authority that international courts and tribunals enjoy in making their procedural law.

Their relative autonomy opens up avenues for mutual influence, possibly for processes of learning between institutions, and it allows for adaptations that tend to assimilate procedural laws of specific international judicial institutions, while marked differences do remain. It would be inadequate to speak of one singular international procedural law that applied across the board but, nevertheless, it is possible to note converging trends in the explicit provisions and even more so in the practice of adjudication.[30] Also propositions for reforms are oftentimes formulated in a comparative perspective. The discussion about possibilities for appellate review on the international investment arbitration, for example, is characterized by jealous leers towards the WTO context.[31]

Change and flexibility of the procedural law of international courts and tribunals long for orientation. It is decisive that legal and political propositions are backed by convincing normative arguments that are embedded in ideas about international order. International courts and tribunals exercise authority over the proceedings. At the same time, procedural law is part of the justification of judicial authority. This article understands trends in the changing procedural law as expressions of the insight that it is increasingly insufficient to only view international dispute settlement as the successful resolution of concrete cases. Instead, the systemic repercussions of international adjudication and le-

---

[29] Robert Kolb therefore speaks of 'general principles' not as a source of law in the sense of Art. 38 (1) (c) of the ICJ Staute but aptly as 'general normative proposition considered to be expressive of the ration of a series of more detailed rules' or as 'hallmark of a legal idea that permeates different questions of law', Kolb (note 11) 793 (794) para. 2. He further leaves open the question whether his observations in the context of the ICJ may be generalized. Ibid. 797 para. 6. Less reluctant and in the end not convincing in this regard is Chester Brown who carves out general principles as sources of law from the practice of adjudication, Brown (note 11) 53. Cf. A. von Bogdandy 'General Principles of International Public Authority: Sketching a Research Field' (2008) 11 GLJ 1909 (on the different uses and functions of general principles in international law).

[30] See the rich material gathered in Brown (note 11). With nuances also compare Benzing (note 9).

[31] See *infra* notes 131–133.

gitimatory concerns with regard to international judicial authority have come to inform the procedures of international judicial institutions.

III. Manifestations of Change

There are a number of fields of procedural law that express antinomies and change in international dispute settlement. For example, international courts and tribunals may resort to their own mechanisms of fact-finding or they may call on their own experts rather than relying on the submissions of the parties alone.[32] It is also intriguing that provisional measures have commonly been understood as serving to avert an irredeemable loss of one of the parties, and that lately also community interests, such as the protection of the environment, appear as targets of such measures.[33] The present article focuses on the repercussions triggered by judicial lawmaking and international judicial authority.[34] Avenues for participation and increased publicness, introducing different interests and opening up possibilities for public scrutiny and deliberation, are taken to be of primary importance in this regard. When international judicial practice has systemic effects beyond the disputing parties and when it conditions others in the exercise of their freedom, it seems only plausible to give those others a meaningful say in the making of judicial decisions. Trends in the procedural law of international courts and tribunals give evidence to an increasing recognition of such systemic effects and partake in offering responses to problems of legitimation.

There remains a fundamental question. How may judicial procedures be understood as spaces in which the legitimacy of international judicial practice may be strengthened in a way that would also live up to fundamental democratic premises, while neither calling into doubt the

---

[32] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Joint Dissenting Opinion of Judges Al-Khasawneh and Simma) (20 April 2010)* <http://www.icj-cij.org> (12 February 2011) para. 8 (lamenting that the court excessively relied on expertise offered by the parties and arguing that the Court should have either appointed its own experts or had party-appointed experts subjected to cross-examination).

[33] M. Benzing 'Community Interests in the Procedure of International Courts and Tribunals' (2006) 5 LPICT 369.

[34] See in further detail von A. von Bogdandy and I. Venzke 'International Courts as Lawmakers' p. 161 et seq. above.

judge's monopoly over the judicial decision nor watering down a nuanced concept of democracy that demands effective participation in decision-making processes? Two features come to mind by way of which judicial procedures could strengthen the legitimacy of judicial decisions. The first concerns the justification of decisions with regard to the participants in the process. The parties to a dispute are involved in a debate about the case and the court is required to address their arguments in a reasonable manner. This co-operative treatment of the matter in dispute is not confined to questions of fact or evidence but – against the widespread understanding of the principle *jura novit curia* – also extends to questions of law. The second feature places the judicial decision within the general context of justifying public authority. The open discussion of interests and competing positions is part of the social basis that is necessary for democratic legitimation. Judgments of courts form part of this basis and may contribute to legitimacy if only they are embedded in normative discourses of a certain quality. Both features raise very similar demand for judicial institutions' procedural law.

1. Publicness and Transparency

a. Oral Proceedings and Public Hearings

A crucial link for publicness and transparency are the oral proceedings. Some court statutes such as Art. of the 46 ICJ Statute explicitly provide that '[t]he hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted'.[35] The detail of the Rules of Court (Arts 54–72) on this issue shows the reluctance on the part of State parties to submit to the force of arguments in public oral proceedings.[36] In the practice of the Court, it is almost always the case that the oral proceedings are public and the Rules of Court allow to exclude the public only from parts of the proceedings. Such is the exception that is in need of justification.[37] In addi-

[35] See Art. 46 of the ICJ Statute; Rule 59 of the ICJ Rules of Court; Art. 26 (2) of the ITLOS Statute; Rule 74 of the ITLOS Rules of the Tribunal; Art. 40 of the ECHR; Rule 63 (2) of the ECtHR Rules of Court; Arts 67 and 68 (2) of the ICC Statute.

[36] Sorel (note 12) para. 18.

[37] von Schorlemer 'Article 46' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1063 (1065) para. 5.

tion to the fact that the proceedings are in principle public, the ICJ introduced in 2004 live transmissions on the internet, of oral hearings and of the announcement of its judgments. With this move, the Court says, it responds to the considerable interest of the general public.[38] As anybody interested in its Advisory Opinion on Kosovo's Declaration of Independence knows, demand for this service was so high that the Court's website collapsed – indication of the demand for publicness and room for improvement.

Art. 26 of the ITLOS Statute is modelled in close analogy to the example of the ICJ. The procedural law of both institutions is in significant parts plainly identical. Also Art. 40 of the ECHR provides that '[h]earings shall be in public unless the Court in exceptional circumstances decides otherwise'.[39] Until now, the court has never decided that hearings should not be public.[40] In addition, the documents in the possession of the Registrar of the Court are accessible by the public, as long as the President of the Court does not decide otherwise.[41] The same qualifications apply here as in the case of the hearings.[42]

In other contexts like the WTO, confidentiality is the rule. But even here procedures have opened up in practice to meet some demands for publicness and transparency.[43] The Sutherland Report of 2004 reinforced this trend by stating that 'the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution' and by suggesting that oral proceedings better be public.[44] Of course it remains critically important to pay due respect

---

38 UNGA 'Report of the International Court of Justice' (2 September 2004) UN Doc. A/59/4 para. 266.

39 The specific circumstances are further specified in Art. 63 (2) of the ECtHR Rules of Court.

40 J. Frowein and W. Peukert *Europäische Menschenrechtskonvention: EMRK-Kommentar* (3rd edn. Engel Kehl am Rhein 2009) 534.

41 Art. 40 (2) of the ECHR.

42 Art. 33 of the ECtHR Rules. See Frowein and Peukert (note 40) 535.

43 Arts 14 (1), 18 (2) and 17 (10) of the DSU provide that procedures and written submissions are confidential. Cf. L. Ehring 'Public Access to Dispute Settlement Hearings in the World Trade Organization' (2008) 11 JIEL 1021.

44 P. Sutherland et al. 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium ('Sutherland Report', 2004)' <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf> (18 June 2011) paras 261 et seq.

to the interests of the parties. Also sensitive trade secrets must be kept. Proceedings do often remain behind closed doors, in particular proceedings at the stage of panels, which are, in comparison to the Appellate Body, both as an institution as well as in their personal membership closer to the ethos of arbitration.[45]

And yet there is room for manoeuvre. For instance, the parties and the panel in *EC – Bananas III (Article 21.5 – US)* agreed to open the doors to the public.[46] In *Brazil – Retreaded Tyres*, the Centre for International Environmental Law advanced with the initiative to transmit the first session of the panel live on the Internet but was met with rejection on the part of the panel, deciding in consultation with the parties that the session should be confidential in accordance with the Working Procedures.[47] But this is not generally the case. The position taken by the panel in *Canada – Continued Suspension* is most remarkable. It held public hearings and backed this decision with the witty argument that the rules providing for confidentiality only pertained to the internal deliberations of the panels, but not to the exchange of arguments between the parties – a truly innovative interpretation of the rules of procedure.[48] Lately, the parties and the panel in *Measures Affecting the Im-*

---

[45] J.H.H. Weiler 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 JWT 191; P. van den Bossche 'From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System' in G. Sacerdoti, A. Yanovich and J. Bohanes (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP Cambridge 2006) 289; C. Ehlermann 'Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as Member of the Appellate Body of the World Trade Organization' (2002) 36 JWT 605.

[46] WTO 2007 News Items 'WTO Hearings on Banana Dispute Opened to the Public' (29 October 2007) <http://www.wto.org/english/news_e/news07_e/dispu_banana_7nov07_e.htm> (12 February 2011); P. van den Bossche *The Law and Policy of the World Trade Organization* (2nd edn. CUP Cambridge 2008) 212.

[47] WTO *Brazil – Measures Affecting Imports of Retreaded Tyres* (12 June 2007) WT/DS332/R para. 1.9. See further L. Johnson and E. Tuerk 'CIEL's Experience in WTO Dispute Settlement: Challenges and Complexities from a Practical Point of View' in T. Treves et al. (eds) *Civil Society, International Courts and Compliance Bodies* (Asser Press The Hague 2005) 243.

[48] WTO *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (31 March 2008) WT/DS321/R para. 7.47.

portation of Apples from New Zealand[49] agreed to open the meeting of experts and the further proceedings up to the public.[50]

When it comes to the Appellate Body, whose members tend to understand themselves more as judges of an ordinary court, maybe even of the 'World Trade Court', public proceedings are rather common.[51] In 2009 the Appellate Body asserted self-confidently that '[i]n practice, the confidentiality requirement in Article 17.10 has its limits. Notices of Appeal and Appellate Body reports are disclosed to the public. Appellate Body reports contain summaries of the participants' and third participants' written and oral submissions and frequently quote directly from them. Public disclosure of Appellate Body reports is an inherent and necessary feature of our rulesbased system of adjudication. Consequently, under the DSU, confidentiality is relative and timebound'.[52] It is also noteworthy that it is due to the initiative of the Appellate Body that there are oral proceedings at all, something not provided for in the DSU.[53]

Procedures in the ICSID framework fall short of those in the WTO on the point of publicness and transparency. But first cracks start to show that may soon widen so as to accommodate growing demands for better possibilities of participation and public scrutiny.[54] The understanding

---

[49] WTO *Australia – Measures Affecting the Importation of Apples from New Zealand* (9 August 2010) WT/DS367/R paras 1.18–1.19.

[50] WTO 2007 News Items 'WTO Hearings on Apple Dispute Opened to the Public' (16 June 2009) <http://www.wto.org/english/news_e/news09_e/hear_ds367_16jun09_e.htm> (12 February 2011).

[51] Ehlermann (note 45); G. Abi-Saab 'The Appellate Body and Treaty Interpretation' in Sacerdoti, Yanovich and Bohanes (note 45) 453.

[52] WTO *United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body* (4 February 2009) WT/DS350/AB/R, Annex III, Procedural Ruling para. 4; WTO *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute – Report of the Appellate Body* (16 October 2008) WT/DS321/AB/R, Annex IV *Procedural Ruling of 10 July to Allow Public Observation of the Oral Hearing* paras 3–6.

[53] WTO *United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body* (4 February 2009) WT/DS350/AB/R, Annex III Procedural Ruling para. 6.

[54] A.J. Menaker 'Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Invester-State Arbitration' in K. Yannaca-Small (ed.) *Arbitration under International Investment Agreements* (OUP Oxford 2010) 129; C.N. Brower, C.H. Brower II and J.K.

that tribunals have come to increasingly touch on issues of public interest has pushed such demands to increasing relevance when compared to imperatives stemming from the confidentiality of the proceedings.[55] In June 2005, the OECD Investment Committee threw its authority into the discussion when it maintained that '[t]here is a general understanding among the Members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence'.[56] Apart from the fact that the Committee clearly connects questions of transparency with questions of legitimacy and effectiveness, it should be highlighted that it explicitly describes building up a visible body of jurisprudence as a valuable goal to be pursued.[57]

Many decisions with regard to the procedural law in ICSID remain subject to the agreement of disputing parties. Rule 32 (2) of the new Rules of Procedure for Arbitration now provides that a tribunal may, in consultation with the Secretary-General, allow interested individuals to

---

Sharpe 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arbitration International 415; C. Zoellner 'Third-Party Participation (NGOs and Private Persons) and Transparency in ICSID Proceedings' in R. Hofmann and C.J. Tams (eds) *The International Convention for the Settlement of Investment Disputes (ICSID) – Taking Stock After 40 Years* (Nomos Baden-Baden 2007) 179; C. McLachlan, L. Shore and M. Weiniger *International Investment Arbitration: Substantive Principles* (OUP Oxford 2007) 57 para. 3.40.

[55] See S. Schill 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 13 GLJ 1083.

[56] OECD 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee (2005) <http://www.oecd.org/dataoecd/25/3/34786913.pdf> (12 February 2011).

[57] Rule 32 (2) of the ICSID Arbitration Rules (10 April 2006). For an example from legal practice see for instance *Aguas Argentinas SA Suez v. The Argentine Republic (Order in Response to a Petition for Transparency and Participation as Amicus Curiae)* ICSID Case No. ARB/03/19 para. 6 ('While the *Methanex and UPS* cases […] cited by Petitioners did indeed involve public hearings, both claimants and respondents in those cases specifically consented to allowing the public to attend the hearings. The crucial element of consent by both parties to the dispute is absent in this case').

attend and observe the oral proceedings, if neither party objects. This has turned out to be a sensible compromise in practice.[58] It also merits emphasis that Rule 48 (4) provides that '[t]he Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal'. This appears to indicate that the publication of excerpts is not subject to the agreement of the parties.[59]

The procedural law of international criminal courts and tribunals deviates from the general rule of publicness of proceedings for quite distinct reasons. Criminal proceedings need to respond to different demands and imperatives. Art. 79 of the ICTY Rules on Procedure and Evidence stipulate for example that sessions may be closed in order to effectively protect witnesses. Should a chamber decide to hold confidential sessions, it needs to make the reasons for this decision public, which again underscores the exceptional character of such a decision.[60]

b. Judicial Deliberations and Individual Opinions

Next to oral proceedings, the deliberations of the judges may themselves be tested against demands for publicness and transparency. On first sight this thought evidently runs counter to the explicit provisions of almost all international courts and tribunals and also counter to the common view upheld in legal doctrine. Art. 54 (3) of the ICJ Statue states clearly in an exemplary fashion: 'The deliberations of the Court shall take place in private and remain secret'. At no time has this been subject to discussion in practice.[61] Shortly before the decision on preliminary measures in the *Nucelar Test Case* between Australia and France in June 1973 some pieces of information were leaked to the Australian press. The Court strongly condemned this fact and in a biting

---

[58] J. Delaney and D. Barstow Magraw 'Procedural Transparency' in P. Muchlinski, F. Ortino and C. Schreuer (eds) *The Oxford Handbook of International Investment Law* (OUP Oxford 2009) 721 (774).

[59] Rule 48 (4) of the ICSID Arbitration Rules.

[60] Von Schorlemer (note 37) 1070–71 para. 28. Also compare for example the clear provisions of Arts 67 and 68 (2) of the ICC Statute.

[61] Art. 54 was reproduced from the PCIJ Statute and is equal to Arts 77 and 78 of the Convention for the Pacific Settlement of International Disputes (1907). See B. Fassbender 'Article 54' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1171 para. 1.

resolution it reiterated its view that 'the making, circulation or publication of such statements is incompatible with the fundamental principles governing the good administration of justice'.[62] For the case of the ICJ, the conclusive summary by Bardo Fassbender is largely unchallenged: 'the secrecy of proceedings', he maintains, 'is essential for the continued trust that the Court enjoys among States and international organizations'.[63]

This view has a lot in its favour. But it is not categorically without alternative. When it comes to very important issues, the Swiss *Bundesgericht* for example deliberates in public.[64] It might merit second thoughts to explore which consequences such a working mode would have for certain international courts and tribunals. At this point, it appears adequate to discuss a general concern pertaining to the implementation of demands for transparency: it might very well be suggested that, once certain areas and parts of judicial proceedings become more transparent, it is likely that new processes of (informal) decision-making emerge that again lead behind closed doors. While this may indeed be correct, it is too short sighted. New procedural requirements could still influence behaviour and could still create new requirements of justification. In addition, public and confidential proceedings are not two different kinds, but publicness and transparency are qualifications that may be pursued in degrees and in parts.

The example of international dispute settlement in the context of the WTO provides for the notable practice of interim review in which panels present to the disputing parties excerpts of their draft, containing both findings of fact and descriptive conclusions. In a second step, the panel then gives to the disputing parties an interim report, which extends beyond questions of fact to findings of law and to the overall conclusions of the panel. The disputing parties may suggest that certain parts be revisited before the report is distributed to all members of the WTO. If need be, the panel holds a further meeting with the disputing parties to present its revisions.[65] This remarkable procedure contributes

---

62 (1973–1974) 28 ICJ Yearbook 126.

63 Fassbender (note 61) 1175 para. 16.

64 Art. 59 of the Bundesgesetz über das Bundesgericht.

65 Art. 17 (2) of the DSU. On this issue see M. Hilf '§ 27. Das Streitbeilegungssystem der WTO' in M. Hilf and S. Oeter (eds) *WTO-Recht: Rechtsordnung des Welthandels* (Nomos Baden-Baden 2005) 505–35 (518) para. 31; P. Stoll and K. Arend 'Article 15 DSU' in R. Wolfrum, P. Stoll and K. Kaiser (eds)

to a higher quality of the decisions and it partakes in ensuring its legitimacy. At the appellate stage, such a process is not provided for, but the Appellate Body can of course build on the findings that the panel has already made. At least formally it is in any event confined to reviewing questions of law, not of fact.[66] At this stage of the proceedings, another practice is quite remarkable; namely, a high degree of collegiality. The rules of procedure provide that according to mechanism of rotation, three of the total seven members of the Appellate Body deal with any case.[67] In drafting their reports, the members in charge of a certain dispute still exchange their views with all other members who receive all the relevant documents as a basis for deliberations.[68] This is hardly compatible with strong notions of confidentiality, but it helps avoid contradictory judgments, which would otherwise give rise to serious concerns of legitimacy.[69]

Apart from the deliberations of the courts and tribunals, the possibility of dissenting or separate opinions remains to be discussed. The positive procedural law of international judicial institutions diverges on this issue. Art. 57 of the ICJ Statute provides that 'if the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion'.[70] This is regularly practiced and well known. Most other international courts and tribunals have a similar provision on this issue.[71] In the context of the WTO, in contrast, every effort shall be made to achieve consensus; should this not be possible, the majority decides.[72] Art. 17 (11) of the DSU stipulates that 'opinions expressed in the Appellate Body report by individu-

---

Max Planck Commentaries on World Trade Law (Nijhoff Leiden 2006) *Vol. 2* 435.

66 Art. 17 (6) of the DSU.

67 Art. 17 (1) of the DSU.

68 WTO *Working Procedure for Appellate Review – Report of the Appellate Body* (4 January 2005) WT/AB/WP/5, Rule 4.3 of the Working Procedures.

69 This alternative has occurred in investment treaty arbitration.

70 Further specified in Rule 95 (2) of the Rules of Court.

71 Art. 30 (3) of the ITLOS Statute; Rule 125 (3) of the ITLOS Rules; Art. 48 (4) of the ICSID Convention; Art. 45 (2) of the ECHR; Rule 74 (2) of the ECtHR Rules.

72 WTO (note 68) Rule 3.2 of the Working Procedures.

als serving on the Appellate Body shall be anonymous'.[73] The Appellate Body has interpreted this to mean that it is possible to formulate separate opinions.[74] In practice this remains the rare exception. Among the more important courts and tribunals discussed in this contribution, none requires unanimity absolutely. It is interesting to see that the ILC Draft for the Statute of the ICC first explicitly prohibited the formulation of separate or dissenting opinions, but was modified on this point in the treaty negotiations.[75] One of the factors conducive to this change was the opinion of judges who had experience serving on the ICTY and ICTR.[76]

Judges frequently make use of the possibility to formulate separate or dissenting opinions. As a matter of fact, it is truly rare that the ICJ takes a decision without dissent.[77] Some have argued that this practice undermines the authority of the Court.[78] But such voices are few and praise of this practice prevails for good reasons.[79] It may be helpful to support this praise by way of juxtaposing the practice of the ECJ, whose procedural rules explicitly prohibit individual opinions.[80] In this

---

[73] Art. 17 (11) of the DSU ('Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous').

[74] WTO *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products– Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R paras 149–54.

[75] Art. 45 of the Draft Statute for an International Criminal Court, in UNGA 'Report of the ILC on the Work of its Forty-Sixth Session' (1 September 1994) UN Doc. A/49/355, 22.

[76] Compare the statements by Judge Gabrielle Kirk McDonald, President of the ICTY, in front of the preparation committee for the establishment of the ICC, ICTY Press Release No. CC/PTO/234-E (14 August 1997) (maintaining *inter alia* that individual opinions may be very helpful in developing the case law). Cf. L. Fisler Damrosch 'Article 56' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1183 (1196–97) paras 42–44.

[77] The 90 judgments, 25 advisory opinions and 128 decisions that the court has rendered until 15 November 2005 have been accompanied by a total of 1017 personal opinions (262 declarations, 206 separate opinions and 349 dissenting opinions). See R. Hofmann and T. Laubner 'Article 57' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1199 (1208–09) para. 35.

[78] Ibid.

[79] Ibid. 1215 para. 57.

[80] Art. 36 of the ECJ Statute. Cf. V. Perju 'Reason and Authority in the European Court of Justice' (2009) 49 VJIL 307. The debate about effects and normative assessments of separate opinions is far developed with a view on do-

comparison it becomes evident that authority does not primarily depend on unanimity.

First of all, it speaks in favour of individual opinions that the decisions of the court gain in lucidity. There would be no necessity to compromise on rather vague formulations. The majority must meet the expectation of clear judgments and the contrast of diverging views offers additional clarity.[81] Furthermore, the psychological effect is important. The losing party to the dispute may see a certain satisfaction in the fact that it could at least convince part of the bench with its reasoning. It might gain the support of others in its view that some individual opinion did indeed provide the better resolution of the case. This is of particular importance in the context of the international legal order where the enforcement of judgments oftentimes leans on discoursive processes.[82] The practice of individual opinions highlights the plurality of opinions and feeds into the general legal discourse in which the judgment, including its dissenting or separate opinions, is negotiated, praised and critiqued. This is a very important element of the legitimation of international judicial authority. Lastly, in the development of international law there are a number of examples in which a position that was once in the minority advanced in the discoursive reception and informed later judicial practice or legislative projects.[83]

---

mestic courts, with regard to the international legal order the contributions are few and invite to further comparative research on this issue. See D. Terris, C.P.R. Romano and L. Swigart *The International Judge: An Introduction into the Men and Women Who Decide the World's Cases* (OUP Oxford 2007) 123; A. Oraison 'Quelques réflexions générales sur les opinions séparées individuelles et dissidentes des Juges de la Cour Internationale de Justice' (2000) 78 Revue de Droit International, de Sciences Diplomatiques et Politiques 167; R.P. Anand 'The Role of Individual and Dissenting Opinions in International Adjudication' (1965) 14 ICLQ 788; I. Hussain *Dissenting and Separate Opinions at the World Court* (Nijhoff Dordrecht 1984); E. Hambro 'Dissenting and Individual Opinions in the International Court of Justice' (1956) 17 ZaöRV 229 (offering intriguing insights into the debates at the time of the making of the PCIJ Statute).

[81] See the position by Max Humber reproduced in Hambro (note 80) 238. See further Hofmann and Laubner (note 77) 1212 para. 48 (arguing that this is one of separate opinions' most important functions).

[82] Compare von Bogdandy and Venzke (note 7) (on the authority of judicial interpretations and how it is embedded in legal discourse).

[83] Hofmann and Laubner (note 77) 1213–15 paras 55–56.

2. Standing and Participation

a. Third Party Intervention

Further manifestations of changes in the conception of international dispute settlement and responses to problems of legitimation may be found in an expansion of possibilities for intervention and participation. In spite of its vagueness in this matter, the ICJ Statue is again archetypical and influential with regard to the procedural law of other institutions.[84] According to Art. 62 of the ICJ Statute, States may seek permission from the Court to intervene in pending cases. The Court alone decides about such requests.[85] Principally, State parties can intervene when they can show an interest of a legal nature that would be affected by a decision in the case at issue.[86] Only such actors may intervene who also have standing as parties. The possibility of third party intervention is generally understood as a mechanism for combining similar cases.[87] When it comes to the interpretation of multilateral agreements, a legal interest is not expressly necessary when a third treaty party wants to intervene, but it is simply presumed. In such cases every party to the treaty at issue is notified by the Court according to Art. 63 of its Statute and may intervene. Since 2005, also international organizations are notified and submissions by its secretariats are allowed to the extent that their respective statute is at issue in the proceedings before the Court.[88]

---

[84] C.M. Chinkin 'Article 62' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1331 (1365–66) para. 94.

[85] Cf. S. Torres Bernárdez 'L'intervention dans la procédure de la Cour internationale de Justice' (1995) 256 RdC 197; C.M. Chinkin *Third Parties in International Law* (Clarendon Press Oxford 1993); K. Oellers-Frahm 'Die Intervention nach Art. 62 des Statuts des Internationalen Gerichtshofs' (1985) 41 ZaöRV 579.

[86] Chinkin (note 84) 1346–51 paras 41–49 (offering an overview of the use of this qualification in the practice of international adjudication). According to Art. 81 (2) (b) of the ICJ Rules, the party applying to intervene 'precise object of the intervention', even if the procedural law does not limit intervention to particular objects, neither has the object of intervention ever been tested in practice.

[87] Chinkin (note 84) 1334–39 paras 7–19.

[88] Rule 43 of the ICJ Rules. Cf. A. Koroma 'International Court of Justice, Rules and Practice Directions' (2006) in R. Wolfrum (ed.) Max Planck Encyclopedia of Public International Law <www.mpepil.com> (12 February 2011) para. 2.

The ICJ Statute makes no determination on the issue whether an intervening party needs to show a jurisdictional link to the disputing parties. The Court clarified the issue in the seminal *Pulau Ligitan* case in which it allowed an intervention even if such a link to any of the disputing parties was not established.[89] This take on the issue has also been adopted in the ITLOS Statute, whose Art. 31, in combination with Rule 99 (3) of the Rules of the Tribunal, explicitly allows for the intervention of parties who have not submitted themselves to its jurisdiction – yet another manifestation of a trend towards wider participation in judicial proceedings, testifying to an increasing recognition of the effects that judgments create beyond those who are immediately involved in the particular dispute. A trend towards lowering the threshold for third party intervention further indicates that it is largely inadequate to understand judicial decisions as acts of simply finding the law and as acts that are binding only *inter partes*. The tension between systemic repercussions of international adjudicatory practice, on the one hand, and ideas of *res judicata* that is binding only between the parties, on the other, has not yet been treated in a wholly satisfactory manner and discussions on this issue still seem to be in their rather embryonic stages. In the *Pulau Ligitan Case*, Judge Christopher Weeramantry wrote a separate opinion with the intention to rekindle debates on this issue of procedural law. Until now, such debates have in his view only been 'cramped and ineffectual'.[90]

In the procedures of the WTO, members who are not parties to the dispute have always been able to participate in all steps of the dispute (consultations, panel proceedings, appellate proceedings, and surveillance of implementation).[91] According to Art. 10 (2) of the DSU, every party having a substantial interest in the matter dealt with in front of the panel should enjoy the opportunity to be heard by the panel. It may also file written submissions that are made available to the disputing parties and that should be addressed in the panel report. The Working Procedures detail further that the first meeting of the panel should be

---

[89] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Application to Intervene)* [2001] ICJ Rep. 575 para. 35.

[90] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Application to Intervene) (Separate Opinion by Judge Weeramantry)* [2001] ICJ Rep. 630 para. 13. Cf. P. Palchetti 'Opening the International Court of Justice to Third States Intervention and Beyond' (2002) 6 Max Planck UNYB 139.

[91] Arts 4 (11), 10, 17 (4) and 21 of the DSU. See further Hilf (note 65) 521; D. McRae 'What is the Future of WTO Dispute Settlement?' (2004) 7 JIEL 2.

used in order to hear the views of third parties.[92] In contrast to the ICJ and also to ITLOS, the black letter procedural law of the WTO does not grant intervening parties the right to attend the hearings. Whether and how often hearings are opened up to third parties, largely lies within the discretion of the panels.[93] In *EC – Bananas III*, a large number of developing countries requested to attend the hearings and the panel observed that decisions to open up the hearings have so far always been taken with the consent of the disputing parties – a crucial element that it saw lacking in the case at hand. In the same breath, the panel nevertheless allowed that the respective States attend the hearings and justified this decision with the special economic implications that the EC legal regime on bananas had.[94] Judicial practice has since supported the claim that special circumstances may justify extended possibilities for participation in judicial proceedings.

Practice in investment arbitration still shows that the traditional logic of arbitration leaves little room for third parties to participate. There are good reasons for this which are akin to those that already militated against transparency and publicness of the proceedings: the effective dispute resolution in the concrete case, sensitive concessions and compromises that may only be reached in confidential settings, and keeping business secrets.[95] Accordingly, until 2006 no provision of the ICSID Rules of Procedure in Arbitration spoke on the possibility of third party intervention. And yet, even in this field of adjudication there are trends to expand the proceedings. They may be better discussed with regard to the role of *amici curiae*.

b. Amici Curiae

Usually, *amici curiae* are those actors who do not themselves have a legally protected interest in the particular case and yet want to intervene.[96] Above all, NGO participation may open up legitimatory poten-

---

92 Appendix 3 (Working Procedures) DSU para. 6.

93 Art. 10 and Appendix 3 para. 6 of the DSU. Cf. K. Arend 'Article 10 DSU' in Wolfrum, Stoll and Kaiser (note 65) 373.

94 See van den Bossche (note 46) 279.

95 Delaney and Barstow Magraw (note 58) 721 (775).

96 P. Sands and R. Mackenzie 'International Courts and Tribunals, Amicus Curiae' in Wolfrum (note 12) para. 2; A. Zimmermann 'International Courts and Tribunals, Intervention in Proceedings' in Wolfrum (note 12) para. 1. Ter-

tials. They may bridge the gap between the legal procedures and the global or national public. They can also introduce additional perspectives and might be able to trigger processes of scandalization that contribute to discussions and mobilize the general public. Civil society at the periphery of international processes tends to show a greater sensibility for social and ecological questions when compared with actors at the centre of international political decision-making.[97] In contrast to intervening third parties who themselves would usually have standing in front of the respective international court or tribunal, it is not necessary that *amici curiae* have standing or a protected legal interest. They commonly offer their views as experts.[98]

The procedural law of the ICJ and ITLOS does not provide for submissions by an *amicus curiae*.[99] In one of the ICJ's first cases ever, its registrar rejected the motion on part of an NGO to submit its opinion in writing and to present its view orally.[100] This decision holds for conten-

---

minology is by no means consistent. See L. Vierucci 'NGOs Before International Courts and Tribunals' in P.-M. Dupuy and L. Vierucci (eds) *NGOs In International Law: Efficiency in Flexibility?* (Elgar Cheltenham 2008) 155 (156); H. Ascensio 'L' amicus curiae devant les juridictions internationales' (2001) 105 RGDIP 897.

97 J. Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press Cambridge 2008) 303, 382; P. Nanz and J. Steffek 'Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens' in P. Niesen and B. Herborth (eds) *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (Suhrkamp Frankfurt am Main 2007) 87; J. von Bernstorff 'Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Expertenherrschaft?' in H. Brunkhorst (ed.) *Demokratie in der Weltgesellschaft* (Nomos Baden-Baden 2009) 277.

98 It is worth noting that in some courts, like the ECtHR, NGOs and private individuals themselves have a right to initiate proceedings; conversely, also States, who usually act as parties may also function as *amici curiae* in such contexts as international investment arbitration. The meaning of each notions is thus evidently not all that clear-cut.

99 In detail see Wolfrum (note 1) 427.

100 The answer was an easy one because the NGO had tried to base its claim on Art. 34 of the ICJ Statute, whose relevant paragraph 3 is shaped to fit public international organizations. Therefore, the simple conclusion that the NGO is not a public international organization sufficed.

tious cases but not when the ICJ acts in an advisory capacity.[101] Only a little later the same NGO received a positive response from the registrar and was allowed to appear as *amicus curiae* in the advisory proceedings concerning the *Status of South-West Africa*.[102] Ever since the *Gabčíkovo-Nagymaros* case it is also clear that *amicus curiae* briefs may be introduced as part of the submissions of the disputing parties.[103] Beyond this minimal common denominator there prevails considerable disagreement within the ICJ on how to deal with *amicus curiae* briefs. Opposite opinions have so far impeded developments as they have taken place in other judicial institutions. The lowest common denominator is expressed in Practice Direction XII of 2004, stating that '[w]here an international non-governmental organization submits a written statement […], such statement and/or document is not to be considered as part of the case file. [It] may […] be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain [and it] will be placed in a designated location in the Peace Palace'.[104] Former President Gilbert Guillaume expressed candidly that nowadays States and intergovernmental institutions should be protected against 'powerful pressure groups which besiege them today with the support of the mass media'. For that reason, he argued that the ICJ should better ward off unwanted *amicus curiae* submissions.[105]

Also treaty law within the WTO context does not contain any provision on how to deal with *amicus curiae* briefs. In contrast to the ICJ, here legal practice has warmed up to the idea that maybe *amici curiae* should have a word to say. Practice has been paralleled by a significant discussion among practitioners and scholars on the issue.[106] Already in

---

[101] Art. 66 of the ICJ Statute.

[102] Cf. A.K. Lindblom *Non-Governmental Organisations in International Law* (CUP Cambridge 2005) 303.

[103] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep. 7.

[104] See ICJ Practice Direction XII (2004).

[105] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (Dissenting Opinion of Judge Guillaume)* [1996] ICJ Rep. 287.

[106] R. Howse 'Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy' (2003) 9 ELJ 496; P.C. Mavroidis 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing' in A. von Bogdandy, Y. Mény and P.C. Mavroidis (eds) *European Integration and International Co-Ordination: Studies In Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer The Hague 2002) 317.

the *US – Gasoline* case NGOs pushed to present their views but were simply ignored by the panel. In the path-breaking *US – Shrimp* case the panel then explicitly rejected *amicus curiae* submissions but was corrected by the Appellate Body. The Appellate Body argued that '[t]he thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts'.[107] It is also worthy to point out that the Appellate Body successfully claimed the authority to decide whether to accept *amicus curiae* briefs or not.[108]

The practice on this issue varies and in particular in *EC – Asbestos* the unusually high number of briefs raised critiques on part of the members. In this case the Appellate Body even set up additional procedures for the submission of *amicus curiae* briefs according to Rule 16 (1) of its Working Procedures, a move that triggered notable protest in the Dispute Settlement Body.[109] Many State delegates argued that the Appellate Body had surpassed its competences by adopting such guiding principles, going beyond its adjudicatory function and unduly acting as a quasi-legislator.[110] The delegate of the United States was one of the very

---

[107] WTO *United States – Import Prohibition of Certain Shrimp and Shrimp Products –Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R para. 106. The *EC – Asbestos* case was also of great importance; see especially WTO *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Communication from the Appellate Body* (8 November 2000) WT/DS135/9 and WTO *Minutes of the Meeting of the General Council held on 22 November 2000* (23 January 2001) WT/GC/M/60.

[108] WTO *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom – Report of the Appellate Body* (10 May 2000) WT/DS138/AB/R paras 38–39, with reference to Art. 17 (9) of the DSU.

[109] WTO *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Communication from the Appellate Body* (8 November 2000) WT/DS135/9 (the Appellate Body informs the Chairman of the DSB about additional rules of procedure according to Rule 16 (1) of the Working Procedures). See WTO *European Communities – Measures Affecting Asbestos and Products Containing Asbestos – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R para. 51.

[110] See WTO *Minutes of the Meeting of the General Council held on 22 November 2000* (23 January 2001) WT/GC/M/60.

few who backed the actions of the Appellate Body on this issue and supported the new principles.[111] The Appellate Body eventually rejected all submissions with the reason that they did not meet the rules for their submission – in the eyes of many this was a response to the overwhelming criticism in the DSB with negative implications for the independence of the adjudicating bodies.[112] Ever since the Appellate Body has accepted *amicus curiae* briefs in some sporadic cases, hope rests on a formal revision of the procedural law to clarify this issue. While it still remains unlikely that such a reform is soon to come, the practice of adjudication will continue to shape the rules on the submission of *amicus curiae* briefs.

ICSID proceedings have for long been sealed off from any possibility of participation. But also here legal practice has changed and opened up avenues for *amici curiae*.[113] The NAFTA Free Trade Commission passed a recommendation in which it maintained that the rules of procedure do not in principle contradict allowing third parties to state their views. It went on to argue that in their decisions on this issue panels should be guided by the consideration of whether the case concerned a public interest.[114] Similarly, the OECD Investment Committee elaborated in the report mentioned above states that 'Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific regulations'.[115] The new ICSID Rules of Procedure for Arbitra-

---

111 Ibid.; Cf. R. Mackenzie and P. Sands 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 HarvardILJ 271 (284).

112 S. Charnovitz 'Judicial Independence in the World Trade Organization' in L. Boisson de Chazournes, C.P.R. Romano and R. Mackenzie (eds) *International Organization and International Dispute Settlement: Trends and Prospects* (Transnational Publishers New York 2002) 219. On the critical issue of judicial independence generally see E. Benvenisti and G. Downs 'Prospects for the Increased Independence of International Tribunals' (2011) 13 GLJ 1057.

113 See Delaney and Barstow Magraw (note 58) 721.

114 NAFTA 'Statement of the Free Trade Commission on Non-disputing Party Participation' (7 October 2004) <http://www.sice.oas.org/tpd/nafta/Commission/Nondispute_e.pdf> (14 February 2011).

115 OECD 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee' (2005) <http://www.oecd.org/dataoecd/25/3/34786913.pdf> (12 February 2011).

tion of 2006 responded to such observations and introduced a new Art. 37, which speaks on the possibility of submissions by third parties and *amici curiae*.[116] This development in the positive procedural rules was again foreshadowed in the practice of adjudication. In *Vivendi Universal v. Argentine Republic* the tribunal acknowledged that *amici curiae* had a public interest in the case – namely the maintenance of a functioning water and sewage system in Buenos Aires and its surroundings – and thus allowed for *amicus curiae* briefs.[117] On the basis of the new rules of procedure for arbitration, for example, the ICSID tribunal in *Biwater Gauff* accepted *amicus curiae* submissions from a number of interested actors.[118] Such a shift in the conception of what such kind of dispute settlement is about further expresses itself in the practice of treaty making. Increasingly, bilateral investment treaties improve the possibilities for non-parties to participate in the proceedings.

In the case of the ECtHR, Art. 44 of the Rules of the Court provides a solid basis for NGOs and other interested persons to intervene in the proceedings. The court habitually takes up the arguments of *amici curiae* or intervening third parties and discusses them directly. The role of NGOs in human rights litigation also exceeds their functions as third participants in the proceedings and extends to the active support of individual applicants.[119] With regard to the ICC Rules of Procedure and Evidence, the chambers of the court enjoy the explicit competence to deal with third party submissions autonomously.[120] In this context, *amici curiae* are understood as offering impartial support in dealing with rather technical questions. Likewise, the Statutes of the ICTY and the ICTR leave it to the chambers to decide about submissions.[121] It is

---

[116] Rule 37 (2) of the ICSID Arbitration Rules. See also ICSID Discussion Paper 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14> (12 February 2011).

[117] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal v. Argentine Republic (Order of 19 May 2005)* ICSID Case No. ARB/03/19.

[118] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (Order of 2 February 2007)* ICSID Case No. ARB/05/22.

[119] Compare E. Valencia-Ospina 'Non-Governmental Organizations and the International Court of Justice' in Treves et al. (note 47) 227.

[120] Rules 103 and 149 ICC Rules of Procedure and Evidence.

[121] Rule 74 of the respective Rules of Procedure and Evidence.

interesting to note that the ICTY stretched its competence to adopt rules of procedure and evidence under Art. 15 of its Statute and further adopted a number of internal rules that would *inter alia* specify how to deal with *amicus curiae* briefs. On this basis, the court has occasionally allowed statements by NGOs and by private persons such as experts in international (criminal) law.

3. Avenues of Review

Expectations with regard to the legitimation of international judicial authority are particularly strong when it comes to mechanisms of review by another, higher judicial body. The provisions across international courts and tribunals and views *lege ferenda* differ widely on this issue. Avenues of review harbour numerous potentials, some of which are not immediately related to antinomies and change in international dispute settlement. They seem to stand separate from these issues as categorical demands. First of all, review may simply correct mistakes, aiming at justice in the individual case and building on the greater professional competence of the members of appellate bodies. Second, avenues of review contribute to consistency in judicial practice, significant for the development of the legal order generally. If one understands justice in contrast to arbitrariness, then this second aspect is also important for pursuing justice in individual cases.[122] Both aspects are important, but are not of prime interest for present purposes. There is a third aspect to appellate review, which merits further attention: it improves the conditions and possibilities for linkages with a general public. Avenues of review are valuable because they combine important cases and stoke attention. In this way, they increase the possibilities of a meaningful discourse about the quality of reasons offered for and against a decision.

On a preliminary note, it may help to bear in mind that the relationships between international courts and tribunals are hardly ordered.[123] The discussion of avenues of review thus pertains to particular legal regimes and to proceedings within separate institutional settings, nothing

---

[122] See R. Forst *Das Recht auf Rechtfertigung: Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Suhrkamp Frankfurt am Main 2007) 9.

[123] Shany (note 8). On a theoretical note prone to systems theory see A. Fischer-Lescano and G. Teubner 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 MichiganJIL 999.

more.[124] In the case of the ICJ, the issue is abundantly clear. Art. 60 of the ICJ Statue stipulates that its judgments are 'final and without appeal'. A State could at a later stage request an interpretation of a judgment, but this does certainly not open up avenues of review.[125] ITLOS again follows the example of the ICJ on this issue.[126] Some newer judicial institutions have, in contrast, opted for different kinds of appeal and review. Above all international criminal courts and tribunals offer fully-fledged appellate proceedings very much akin to those in domestic legal orders. They respond to Art. 14 (5) of the ICCPR, providing that '[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'. Also the procedures of the ECtHR allow that a case is referred to the Grand Chamber 'if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance'.

The WTO Appellate Body contributes significantly to meeting expectations of 'security and predictability' (Art. 3 (2) of the DSU) within the multilateral trading system. In the negotiations leading to the 1995 Marrakesh Agreement, many State parties linked their agreement to a quasi-automatic adoption of panel reports (reports are adopted unless there is a consensus against their adoption, something which, unsurprisingly, has never happened) to the possibilities of appellate review.[127] The ex-

---

[124] It might be debated whether the ICJ should eventually play a coordinating role. As a matter of fact this is not likely to happen. For an affirmative argument in this regard see K. Oellers-Frahm 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions' (2001) 5 Max Planck UNYB 67; S. Oeter 'Vielfalt der Gerichte – Einheit des Prozessrechts?' in R. Hofmann et al. (eds) *Die Rechtskontrolle von Organen der Staatengemeinschaft: Vielfalt der Gerichte – Einheit des Prozessrechts? Berichte der Deutschen Gesellschaft für Völkerrecht* vol. 42 (Müller Heidelberg 2007), 149 (offering a well-balanced discussion of the advantages and disadvantages of such a move).

[125] See A. Zimmermann and T. Thienel 'Article 60' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1275 (1282–84) paras 25–28.

[126] Art. 33 of the ITLOS Statute.

[127] P. van den Bossche 'From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System' in Sacerdoti, Yanovich and Bohanes (note 45) 289 (294–300). The Appellate Body is confined to revisit questions of law according to Art. 17 (6) of the DSU. Cf. Hilf (note 65) 519 para. 34. Compare I. Venzke 'Making General Exceptions:

pectations of the future members of the WTO was that the Appellate Body would come to act on rare occasion in order to correct straightforward mistakes of law on the part of the panels.[128] As a matter of fact, the large majority of all cases (about 70%) has been appealed since 1995. And at issue were not only the findings in the concrete case but also the systemic effects of international judicial practice.[129] It is illustrative in this regard that in *Japan – Alcoholic Beverages* the US agreed with the results reached by the panel, it had practically won the case, but still appealed because it thought the panel's reasoning to be flawed. In clear recognition of the effects that the report creates as a matter of fact beyond the immediate parties, the US did not want to leave a bad precedent unchallenged.[130]

ICSID knows no avenues of review, but debates about institutional reform have given prime attention to such a mechanism.[131] In part, they have been triggered by investment tribunals reaching contradicting conclusions on the same or very similar matters.[132] More recent contradictions between cases stemming from the Argentinean economic crisis have further fuelled such demands. One of the central issues in these cases has been whether Argentina could rely on the justification of necessity as part of the customary law on State responsibility. Argentina

---

The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' (2011) 13 GLJ 1111.

[128] Van den Bossche (note 127) 294–300.

[129] See Venzke (note 127).

[130] WTO *Japan – Taxes on Alcoholic Beverages – Report of the Panel* (11 July 1996) WT/DS8/R, WT/DS10/R and WT/DS11/R; WTO *Japan – Taxes on Alcoholic Beverages – Report of the Appellate Body* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R.

[131] Cf. G. Sacerdoti 'Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review' in E. Petersmann (ed.) *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer London 1997) 245; J.E. Alvarez 'Implications for the Future of International Investment Law' in K.P. Sauvant (ed.) *Appeals Mechanism in International Investment Disputes* (OUP New York 2008) 29 (stating that 'the WTO still inspires the envy of investment lawyers').

[132] Cf. *Lauder v. Czech Republic (UNCITRAL, Award of 3 September 2001)* (2006) 9 ICSID Rep. 66 para. 313; *CME v. Czech Republic (UNCITRAL, Partial Award of 13 September 2001)* (2006) 9 ICSID Rep. 121 para. 575; *CME v. Czech Republic (UNCITRAL, Final Award of 14 March 2003)* (2006) 9 ICSID Rep. 264 paras 446–47.

filed a request for annulment against the first award on the issue, which had found in the negative (*CMS Gas Transmission Co. v Argentine Republic*). According to Art. 52 ICSID, an annulment committee is strongly confined in what it can actually do. It may annul an award only for a number of very limited reasons, for example, when the panel 'manifestly exceeded its powers' or if it 'failed to state the reasons' on which the award is based. The annulment committee in *CMS Gas Transmission Co. v Argentine Republic* thus strongly critiqued the legal reasoning of the tribunal, but, with an unmistakable sense of discomfort and dismay, it found itself incapable of annulling the award. This stark decision has gained immense prominence, not least for the authority of its authors Gilbert Guillaume, Nabil Elaraby and James R. Crawford. It pushed the topic of new avenues of review in international investment arbitration to the top of the reform agenda.[133]

IV. Promises, Perils and Future Dynamics

Recent trends in the procedural law of a number of significant international courts and tribunals illustrate antinomies in what international dispute settlement is for and what it is about. The comparative study of procedural law helps to see and to understand changes in the conception of international adjudication. In growing recognition of the systemic effects of international judicial practice – its jurisgenerative dimension that comes to influence the law in general and that conditions other actors – procedural law responds to demands for increasing possibilities of participation and public scrutiny.

---

[133] *CMS v. Argentina (Decision on Annulment of 25 September 2007)* ICSID Case No. ARB/01/8. Also consider the recent decisions in *Sempra Energy International v. Argentine Republic (Decision on the Application for Annulment of 29 June 2010)* ICSID Case No. ARB/02/16 and *Enron Corp. v. Argentine Republic (Decision on the Application for Annulment of 30 July 2010)* ICSID Case No. ARB/01/3. In some cases, annulment committees have significantly stretched the confines of their limited mandate, see for instances the cases pertaining to what amounts to an investment in the sense of Art. 25 (1) of the ICSID Convention, e.g. *Mitchell v. Democratic Republic of the Congo (Decision on Annulment of 1 November 2006)* ICSID Case No. ARB/99/7; in detail see J.D. Mortenson 'The Meaning of "Investment": ICSID's Traveaux and the Domain of International Investment Law' (2010) 51 HarvardILJ 257.

These developments are indicative of a deeper change in the thinking about international adjudication. The traditional function of successfully resolving disputes in concrete cases is supplemented, certainly not replaced, by the simple fact that international courts and tribunals develop international law through the practice of interpretation. International courts and tribunals are weighty actors in disputes about what certain provisions mean and their judgments frequently amount to authoritative reference points in legal argument. In this way, they exercise public authority and contribute to the creation of legal normativity.[134] Improved mechanisms for transparency and participation, minimal preconditions for meaningful deliberations and public scrutiny, may help curb concerns about the legitimacy of such exercises of power. These trends in the procedural law of international judicial institutions harbour a legitimating potential that is slowly set free. In their concrete effects, however, they need to be tested on an empirical basis and in view of a number of possible downsides and alternatives.

One of the principal disadvantages of the recent trends discussed in the preceding sections might be the overrepresentation of particular interests at the expense of others, which are not backed by the clout of equally powerful actors or which cannot raise similar economic resources in their support. This is a well-recognized and very real danger. It is noteworthy in this regard that in the context of the WTO above all representatives of developing countries have opposed the possibility of *amicus curiae* submissions.[135] Another concern relates to the distinctive characteristics and comparative advantages of the judicial process of adjudication over the political-legislative process. It seems that judicial processes can only accommodate specific forms and degrees of participation without losing advantages that rest on judicial modes of dealing with dispute. An alternative might open up with improved mechanisms of politicization of the regimes in which international courts and tribunals are embedded. International institutional law then comes into focus next to the procedural law of international courts and tribunals.

In conclusion, the future dynamics of institutional developments might be shaped in the interplay between mechanisms of international dispute settlement, on the one hand, and domestic courts, on the other. It is interesting in this regard to observe how domestic courts treat international decisions. In particular there are relatively frequent points of

---

[134] Von Bogdandy and Venzke (note 7); Jacob (note 1).

[135] See WTO *Minutes of the Meeting of the General Council held on 22 November 2000* (23 January 2001) WT/GC/M/60.

contact in the field of investment arbitration. In view of concerns about legitimacy, domestic courts may come to act as instances of review; not only enforcing awards as they are supposed to, but questioning their quality and sometimes even formulating procedural demands for the international judicial process.[136] The authority of mechanisms for the settlement of disputes will be negotiated at this juncture and actors will continue to shape their self-understanding in this practice. In reflexive awareness of their authority over the respective other, they will need to come to terms with the repercussions of their actions in the grand normative pluriverse.

[136] E. Baldwin, M. Kantor and M. Nolan 'Limits to Enforcement of ICSID Awards' (2006) 23 JIntlArb 1. It is true, however, that so far domestic courts have shown a high degree of deference to international awards. See K. Hobér and N. Eliasson 'Review of Investment Treaty Awards by Municipal Courts' in Yannaca-Small (note 54) 635.