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On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority

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Abstract
This contribution presents international judicial institutions as multifunctional actors against the background of a traditional understanding, which sees just one function: settling disputes. The traditional, one-dimensional understanding eclipses other important functions that many international courts do actually perform in contexts of global governance and it underrates problems in their legitimation. In order to appreciate international adjudications' manifold contributions to social interaction, the paper first identifies three more functions beyond dispute settlement: the stabilization of normative expectations, law-making, and the control as well as legitimation of authority exercised by others. It then places these functions within broader basic understandings of international courts, which respectively picture them as instruments of the parties in a state-centred world order, as organs of a value-based international community, and as institutions of specific legal regimes. The distinct problems that each of these basic understanding faces lead to the contours of a new paradigm for the study of international courts as actors exercising public authority. The present functional analysis ultimately helps to refine both the phenomenon and normative questions.

Key words
international adjudication; international public authority; legitimacy; multifunctionality

1. The traditional one-dimensional view and its problems

This contribution presents international judicial institutions as multifunctional actors against the background of a traditional understanding, which sees just one function: settling disputes. The traditional, one-dimensional understanding is deficient as it eclipses other important functions that many international courts do actually perform today. As we will show, it also underrates legitimacy problems. These shortcomings not only are a theoretical problem, but also stand in the way of realizing international adjudication's full potential. Since the traditional view can neither capture the relevant dimensions of contemporary judicial practice nor keep pace with the thrust of its growth, it has an unduly narrow view on legal

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interpretation, might mislead when it comes to policy and design choices, and obstructs a clear outlook on international courts as institutions of public authority. Recognizing law-making as a function of international courts, for example, would probably weigh in favour of interpreting the rules on third-party intervention more permissively when compared to an understanding that is exclusively focused on settling the dispute between the parties. Similarly, different demands for judicial interpretation and argumentation arise if the understanding of international courts embraces the systemic contributions they provide when they reassert law's validity and stabilize normative expectations.

The view of the functions of international courts needs to be reformulated in times of global governance and in light of the remarkable trajectory of international adjudication over the past two decades. New significant institutions have emerged and established ones have come to breathe new life.[1] This change in quantity has gone hand in hand with a change in quality precisely because of the multifunctionality of international adjudication. In order to appreciate international adjudications' many contributions to social interaction, we identify three more functions beyond dispute settlement. International courts stabilize normative expectations, which includes the reassertion of international law's validity and its enforcement; they develop normative expectations and thus make law; and they control and legitimate the authority exercised by others. Against the background of international courts' multifunctionality, other legitimatory resources need to be explored to complement state consent as a basis of international judiciary practice. Certainly, not all decisions serve all functions equally at all times and functions can even stand in tension to one another. But as institutions in the context of global governance in times of increased globalization, all the functions we mentioned are relevant for assessing the practice of international courts. A multi-dimensional view of international adjudication shows that international courts have overall become institutions that exercise public authority and demand a modus of justification that lives up to basic premises of democratic legitimacy.[2] International courts, broadly understood so as to include institutions such as World Trade Organization (WTO) panels and treaty-based arbitral tribunals,[3] should be placed within the broader field of international

1 Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', (2009) 20 EJIL 73; K. Alter, 'The Evolving International Judiciary', (2011) 7 *Annual Review of Law and Social Science* 387; B. Kingsbury, 'International Courts: Uneven Judicialization in Global Order', in J. Crawford and M. Koskenniemi (eds.), *Cambridge Companion to International Law* (2012), 203.

2 For the concept of public authority in further detail see A. von Bogdandy and I. Venzke, 'In Whose Name? International Courts' Public Authority and Its Democratic Justification', (2012) 23 EJIL 7; A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', (2008) 9 *German Law Journal* 1375.

3 We use the notion of international courts broadly for institutions whose characteristic practice it is to decide cases by way of binding decisions rendered by independent and impartial persons in conformity with an ordered judicial procedure. This notably includes WTO panels and the Appellate Body even if they do not formally decide cases in a binding fashion. Their institutional and political set-up all the same brings them within the purview of our definition. See text at notes 134–5, *infra*. Employing a similarly broad understanding: C. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', (1999) 31 JILP 709; L. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Journal* 273, at 338. Cf. C. Tomuschat, 'International Courts and Tribunals', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), para. 1 (using a more narrow conception). We

institutional law and not be treated under a separate and detached title of dispute settlement.[4]

In contrast, many scholarly treatises seem to take it as obvious that international courts are exclusively, or at least predominantly, instruments for settling disputes and treat them under such a heading in the same breath as good offices and mediation.[5] In textbooks as well as in great works of the discipline, they usually enter the scene in a late chapter as one means for settling dispute among others.[6] Such an understanding is inspired by, and corresponds with, positive law where Article 33 United Nations Charter (UNC) illustratively places arbitration and adjudication in a queue with mechanisms for the 'pacific settlement of disputes' (Chapter IV UNC). But this approach to international adjudication is out of sync with the recent developments and does clearly not hold across the breadth of international judicial institutions. That is clear to see if one only considers the field of international criminal law where truly little would be understood from the perspective of dispute settlement.[7]

The functional myopia comes with myopia in terms of international courts' legitimacy. The traditional view tends to focus on the consent of disputing states alone.[8] Such a focus certainly holds a lot of purchase and resonates with the image international adjudicators themselves draw of their practice.[9] The Appellate Body of the WTO, for instance, maintained in this vein that '[t]he WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain.'[10] It would be wrong, to be sure, to deny that the consent of states continues to be a key source of legitimacy. But in face of other functions and in light of international courts' burgeoning public authority, it is necessary to try and tab further resources of legitimacy. When we set out to

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do not, however, consider the ECJ as an international court because it is part of a constitutional order and of an institutionally developed polity. The research also seems to be more advanced with regard to the ECJ; see G. de Búrca and J. H. H. Weiler (eds.), *The European Court of Justice* (2001).

4 J. Alvarez, *International Organizations as Law-Makers* (2006) (fittingly discussing international courts within the framework of institutional law).

5 See, e.g., M. N. Shaw, *International Law* (2008), 1010; I. Brownlie, *Principles of Public International Law* (2008), 701–25; P. M. Dupuy and Y. Kerbrat, *Droit international public* (2010), 613–56; P. Daillier, M. Forteau, and A. Pellet, *Droit international public* (2009), 923; K. Doehring, *Völkerrecht* (2004), 470–502.

6 Cf. L. Caflisch, 'Cent ans de règlement pacifique des différends interétatiques', (2001) 288 *Recueil des cours* 245, at 442–460; C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', (1999) 281 *Recueil des cours* 9, at 390–433. Research in international relations has an advantage in this regard, see K. J. Alter, 'Delegating to International Courts: Self-Binding vs Other-Binding Delegation', (2008) 71 *Law and Contemporary Problems* 37; A. Stone Sweet, 'Judicialization and the Construction of Governance', (1999) 32 *Comparative Political Studies* 147.

7 This has, of course, been recognized and analyses in this field have proceeded accordingly. See, e.g., J. Alvarez, 'Rush to Closure: Lessons of the Tadić Judgment', (1998) 96 *Michigan Law Review* 2061; W. Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia–Herzegovina', (2008) 46 *Columbia Journal of Transnational Law* 279.

8 See, e.g., J. Merrills, *International Dispute Settlement*, (2011), 116–19.

9 See M. Shapiro, *Courts: A Comparative and Political Analysis* (1981), 2 (suggesting that most judicial behaviour should be analysed in terms of attempts that seek to prevent that triadic constellations breaking down into two, the court and the favoured party, against one, the disfavoured party).

10 Appellate Report Japan – Taxes on Alcoholic Beverages, adopted 1 November 1996, DSR 1996:2, WT/DS8/AB/R, WT/DS8/AB/R, WT/DS11/AB/R at 14.

clarify international court's distinct functions beyond the settlement of disputes, we do so not least to sharpen normative questions. We wish to stress that a functional analysis does itself say little about whether practices are well justified or not. But it helps to refine criticism.

In sum, this contribution pursues three main objectives. The first is analytical, aims at a better grasp of reality, and specifically aspires to better understand nuances and differences between judicial interpretations and institutional practices. Second, it wants to sharpen normative questions and, third, it wishes to contribute to a more solid basis for interpretative choices, especially as they pertain to international courts' procedural law. With these objectives the contribution starts out by presenting four key functions that international adjudication can perform (section 2). It then turns to basic understandings of international courts that further clarify the view on their functions and help to explain different emphases. It presents international courts respectively as instruments of the parties in a state-centred world order, as organs of a value-based international community, and as institutions of specific legal regimes (section 3). While significant, each understanding faces distinct problems against the background of which we sketch the contours of a new paradigm for the study of international courts as actors exercising public authority (section 4).

2. The functions of international courts

It is common and good practice in legal research to study a phenomenon by way of functional analysis, i.e. researching how it contributes to orderly and peaceful social interaction. The study of domestic courts in this light has produced many valuable insights on which we can build.[11] When a court 'decides a case' and 'applies the law', this usually has a series of different social consequences, which can be understood as functions. But according to a prominent strand in functional analysis, there can only be one single function of any system or institution.[12] One could then say on an abstract and vague level that international courts' function is adjudication. But that hardly satisfies anyone who wishes to grasp the phenomenon more precisely, and it immediately leads to spelling out further dimensions of such a function. Like us, many authors thus allow the plural 'functions' in order to capture the distinct social consequences of adjudication.[13] Furthermore, functions need not and should not be confined to what institutions are legally mandated to do. Functions can also stand in

11 Shapiro, *supra* note 9; N. Luhmann, *Das Recht der Gesellschaft* (1993); R. Bender, 'Funktionswandel der Gerichte', (1974) 7 *Zeitschrift für Rechtspolitik* 235; R. Cotterrell, *The Sociology of Law* (1984), 216–58; L. M. Friedman, 'Trial Courts and Their Work in the Modern World', in L. M. Friedman and M. Rehbinder (eds.), *Zur Soziologie des Gerichtsverfahrens* (1976), 39–82; H. Jacob, *Courts, Law, and Politics in Comparative Perspective* (1996); K.F. Röhl, *Rechtssoziologie* (1987), 520–21.

12 M. Esfeld, 'Funktion', in P. Kolmer and A. G. Wildfeuer (eds.), *Neues Handbuch philosophischer Grundbegriffe* (2011), at 842–54.

13 Röhl, *supra* note 11, at 520–1. Cf. D. Shelton, 'Form, Function, and the Powers of International Courts', (2009) 9 *Chicago Journal of International Law* 537, at 542; V. Lowe, 'The Function of Litigation in International Society', (2012) 41 ICLQ 209 (in spite of the titles, both contributions speak of *functions*). Also see A. Pellet, 'Art. 38', in A. Zimmermann, K. Oellers-Frahm, and C. Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary* (2006), mn. 55 (speaking of 'implied or derivative functions').

tension to one another and are usually weighed differently by different institutions, and balances may shift over time.[14] Besides, we reiterate that a functional analysis is distinct from a normative assessment.

It is certainly a grand question how the framework of social interaction should be understood. The horizon of domestic courts is usually set with the confines of the specific polity and the individuals that it harbours. Formulas such as 'in the name of the people' or 'in the name of the king', which many domestic courts around the world recite at the beginning of their judgments, convey precisely this reference point as the relevant whole.[15] The vantage point for a functional analysis of international courts is in comparison still harder to gauge. Conspicuously, international courts do not know any formula equivalent to that used by many domestic courts. This void reflects a foundational uncertainty: should international courts decide in the name of the states that created them, in the name of the international community, in the name of a specific legal regime, or maybe even in the name of transnational or cosmopolitan citizens? In spite of this foundational uncertainty, which we pick up in section 3, it is all the same possible to identify and distinguish four main functions.

2.1. Settling disputes

A first main function is and remains that of settling disputes in individual cases. It leans on the hope that the authority of judicial decisions leads to an end of a dispute that might otherwise even unleash a looming potential for violent confrontation.[16] While this one-dimensional view is insufficient, the function of settling disputes certainly remains most salient. International courts are mechanisms for the 'pacific settlement of disputes' (Chapter VI UNC) and provide 'an alternative to the direct and friendly settlement of such disputes between the parties'.[17] Also Article 38 ICJ Statute provides plainly that the court's 'function is to decide . . . disputes as are submitted to it'.[18] Significantly, the ICJ stated that 'the function of this Court is to resolve international legal disputes between States . . . and not to act as a court of criminal appeal'.[19] While there is no doubt with regard to the court's statement about what it is not, the singular function of dispute settlement is misleading. If one analyses the practice of an institution or a concrete decision in

14 Lowe, *supra* note 13 at 219. See in a similar perspective focused on goals rather than functions Y. Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach', (2012) 106 AJIL 225.

15 But note that the domestic boundaries of their horizons are increasingly challenged, with good reasons. A. Nollkaemper, *National Courts and the International Rule of Law* (2011), 9–10; E. Benvenisti and G. W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', (2009) 20 EJIL 59.

16 See *supra* notes 5–6. See also Shelton, *supra* note 13, at 540, n. 15 (on the even sacral status of international courts).

17 *North Sea Continental Shelf (Federal Republic of Germany v. Denmark and Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 3, para. 87, with reference to the *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, PCIJ Rep. Series A No. 22, at 3, para. 13. Cf. G. Abi-Saab, 'Cours général de droit international public', (1987) 207 *Recueil des cours* 9, at 229.

18 See Pellet, *supra* note 13, mn. 54.

19 *LaGrand (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of 3 March 1999, [1999] ICJ Rep. 9, at 9, para. 25.

light of one function alone, then its full meaning and relevance may well be lost. A famous case clarifies this handily by way example.

2.2. Stabilizing normative expectations

It is doubtful whether the ICJ's *Nicaragua* judgment contributed to settling the dispute between Nicaragua and the United States.[20] The decision in this case maybe even had a negative effect because it prompted the United States to withdraw its unilateral recognition of the court's jurisdiction.[21] But if the decision is considered in light of the contribution it has made by stabilizing normative expectations – a second main function of international courts – then a different picture starts to emerge. The judgment reasserted the validity of one of international law's cardinal norms – the prohibition of the use of force – in face of the contrary practice of the two superpowers at the time. Feeding into the general legal discourse, the decision affirmed international law as an order that promotes peace and does not bow to the powerful, even if it might not have settled the concrete dispute at hand.

The *Nicaragua* judgment supported law's normativity and stabilized *normative* expectations when it came to the use of force. The decision discouraged the opposite *cognitive* modus advocated by the Greek historian Thucydides, according to whom 'the strong do what they can and the weak suffer what they must'.[22] It is a widely shared position of otherwise conflicting strands of legal theory that this is one of law's cardinal functions. It supports normative expectations, particularly in case of their violation, and thereby makes a crucial contribution to orderly social interactions.[23] It would be odd to place this contribution beyond the court's functions, as this is precisely what the *Nicaragua* judgment is most famous for. The shortcomings of an unbalanced focus on dispute settlement and the importance of stabilizing normative expectations are both plain to see when it comes to international criminal courts and tribunals. There was simply no dispute between the accused Mr Tadić and the prosecutor Carla del Ponte that the International Criminal Tribunal for the Former Yugoslavia (ICTY) settled.[24]

International criminal justice rather points to the stabilization of normative expectations not only through restating the law, but also through mechanisms of enforcement and even punishment. True enough, when compared to the domestic level, there are indeed few coercive mechanisms in place in the international order that could practically be used to enforce compliance with international decisions. According to Article 94(2) UNC the Security Council could take coercive measures

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20 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 14.

21 United States: The Secretary of State, Washington, 'Department of State Letter and Confirmation Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction', (1985) 24 *International Legal Materials* 1742.

22 Thucydides, *The History of the Peloponnesian War* (1910), Book 5, Chapter 89.

23 J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (2008), 427; Luhmann *supra* note 11, at 150–3.

24 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-AR72, Appeals Chamber, 2 October 1995.

if disregard for decisions of the ICJ threatens international peace and security.[25] In practice, however, non-compliance with judgments of the ICJ or most other courts rarely draws measures of coercion in response.

But it would be much too narrow to confine enforcement and coercion to compulsory power. International courts are frequently embedded in contexts that may offer considerable mechanisms in support of judicial decisions. The Ministerial Committee of the Council of Europe oversees the implementation of decisions of the ECtHR;[26] in the framework of the WTO, members may resort to countermeasures once their claims have succeeded in adjudication;[27] and arbitration awards of ICSID panels are enforceable in domestic courts as if they were rendered by the highest level of jurisdiction in the domestic system.[28] Other forms of enforcement that work via the authority of courts and their standing in international legal discourse may be no less decisive and incisive.[29] Not least, contravening an international judgment frequently translates into a loss of reputation of practical significance.[30]

2.3. Making law

The *Nicaragua* judgment did not only contribute to stabilizing normative expectations, but also to what often is called the 'development' of international law.[31] The judgment has continuously supported legal arguments which endorse a wide interpretation of the prohibition of the use of force and a narrow reading of the right to self-defence. It 'thickened' international law by adding to its normative substance.[32] Some institutions are specifically mandated along the lines of Article 3(2) of the Dispute Settlement Understanding (DSU) of the WTO to 'provid[e] security and predictability' in international law. The Appellate Body leaned on this provision to argue that its earlier decisions need to be taken into account, where relevant, because they 'create legitimate expectations' among members and market participants.[33] The development of normative expectations is thus a core function

25 H. Mosler and K. Oellers-Frahm, 'Article 94', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), 1174, 1176; C. Schulte, *Compliance with Decisions of the International Court of Justice* (2005), 38–63.

26 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 2889, Art. 46(2).

27 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, Art. 22 (DSU).

28 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 8359, Art. 54 (ICSID Convention).

29 Cf. M. N. Barnett and R. Duvall, 'Power in Global Governance', in M. N. Barnett and R. Duvall (eds.), *Power in Global Governance* (2005), 1.

30 On the concept of reputation, see A.T. Guzman, *How International Law Works: A Rational Choice Theory* (2008), 71; S. Dothan, 'Judicial Tactics in the European Court of Human Rights', (2011) 12 *Chicago Journal of International Law* 115.

31 I. Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation', (2012) 34 *Loyola of Los Angeles International and Comparative Law Review* 99.

32 Cf. Lowe, *supra* note 13, at 213–14 (distinguishing a retrospective function of litigation that pertains to settling concrete disputes and a prospective function of law-making); C. Tams and A. Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development', (2010) 23 LJIL 781.

33 Appellate Report Japan – Taxes on Alcoholic Beverages, adopted 1 November 1996, DSR 1996:2, WT/DS8/AB/R, WT/DS8/AB/R, WT/DS11/AB/R, at 14–15; similarly *Prosecutor v. Aleksovski*, Judgment, IT-95-14, 1-A, 24 March 2000, paras. 107–111.

of international courts.[34] This dimension of judicial practice can best be understood as generating new legal normativity or simply as *law-making*. Strictly speaking, it is inevitable that statements about what international law requires also, to varying degrees, contribute to its making, something that judicial decisions' classification as 'subsidiary means for the determination of rules of law' (Article 38(1)(d) ICJ Statute) of course overshadows.[35]

The law-making effect of judicial decisions has two closely intertwined sides to it that should be distinguished. One concerns the making of law in the particular case between the parties and stems from applying pertinent norms in view of the concrete case.[36] The other dimension of judicial law-making, the one at stake here, reaches beyond the case at hand.[37] Courts are adding to the law with the very decision, the justification that carries the decision (*ratio decidendi*), as well as with everything said on the side (*obiter dictum*). As a matter of fact, it seems that a number decisions today candidly aim at influencing the general legal discourse by establishing abstract and categorical statements as authoritative reference points for later legal practice.[38] Judicial law-making is an inevitable part of adjudication as justifying a decision is a legal requirement.[39] But for many reasons, including more institutions with compulsory jurisdiction and generally more use of international adjudication, this dimension of international judicial practice has gained in importance in the last decades. Many courts now develop *case law.*[40]

Judicial law-making is different to legislation through formal sources, to be sure.[41] Judicial decisions impact the legal order differently than new legal texts that enjoy the blessing of sources doctrine. Judicial decisions work as arguments and influence the law through their impact in the legal discourse. Their law-making effect, in

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34 C. G. Weeramantry, 'The Function of the International Court of Justice in the Development of International Law', (1997) 10 LJIL 309.

35 Among others, already Hans Kelsen has observed that any law-*application* also amounts to a law-*making: Reine Rechtslehre* (1934), at 82–3, 91. See in further detail Venzke, *supra* note 31. A. E. Boyle and C. M. Chinkin, *The Making of International Law* (2007), 268 (observing that 'international courts . . . play a major law-making role').

36 F. Müller, 'Richterrecht – rechtstheoretisch formuliert', in G. Reinart (ed.), *Richterliche Rechtsfortbildung, Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Ruprecht-Karls-Universität Heidelberg* (1986), 65 and 78.

37 A. von Bogdandy and I. Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', (2011) 12 *German Law Journal* 979, at 987; M. Jacob, 'Precedents: Lawmaking through International Adjudication', (2011) 12 *German Law Journal* 1005, at 1029; T. Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', (2005) 45 *Virginia Journal of International Law* 63; M. Shahabuddeen, *Precedent in the World Court* (1996), at 76 and 209; A. Höland, 'Wie wirkt Rechtsprechung?', (2009) 30 *Zeitschrift für Rechtssoziologie* 23, at 35–9.

38 Y. Shany, *supra* note 1.

39 See, e.g., 1946 Statute of the International Court of Justice, Charter of the United Nations, Annex, Art. 56(1) (ICJ Statute); 1962 Rules of Procedure of the European Nuclear Energy Tribunal, 11 December 1962, Art. 41. See A. Ross, *Theorie der Rechtsquellen. Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* (1929), 283; M. Kriele, *Theorie der Rechtsgewinnung* (1976), 167–71; J. P. Trachtman, 'The Domain of WTO Dispute Resolution', (1999) 40 *Harvard International Law Journal* 333.

40 In more detail, see Jacob, *supra* note 37, at 1005–32; S. W. Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking', (2011) 12 *German Law Journal* 1083.

41 This distinction is held up in the use of different terms in German-speaking legal science, whereas in the world of common law the innovative judge frequently simply figures as *law-maker. South Pacific Co. v. Jensen*, 244 US 205 (Sup. Ct. 1917) at 221, Dissenting Judgment of Justice Oliver W. Holmes; Lord Reid, 'The Judge as Law Maker', (1972) 12 *Journal of the Society of Public Teachers of Law* 22. Cf. D. Kennedy, *A Critique of Adjudication* (1997), 23–38.

particular in its general and abstract dimension that goes beyond the individual case, does not only depend on *voluntas* but also on its *ratio* and judicial decisions' reception in legal discourse. But international courts' decisions by and large enjoy an exceptional standing in semantic disputes about what the law means and thus contribute to its making.[42] Notwithstanding the mantra that international law knows no doctrine of *stare decisis*, courts regularly use precedents in their legal argumentation and at times engage in detailed reasoning on how earlier decisions are relevant or not.[43] Judicial precedents redistribute argumentative burdens in legal discourse and generate legal normativity. Overlooking or even negating this law-making function means missing out on an important aspect of the dynamics of the international legal order. Accordingly, the procedural law of international courts should be interpreted and developed in a way that also takes into account their law-making function.[44]

2.4. Controlling and legitimating public authority

A further function comes into view if one considers international courts with respect to other institutions of public authority that call for control and legitimation, i.e. in a separation-of-powers or checks-and-balances perspective. In fact, signalling credible commitments and thus overcoming problems of collective action is one of the main reasons for member states to delegate authority to international courts in the first place, subjecting themselves and others to judicial control.[45] In a *vertical* dimension, international courts control domestic authority against yardsticks of international law.[46] International human rights courts provide the classic example,[47] but other courts have joined them. International trade law, strongly shaped by judicial practice, for example, contains detailed prescriptions for domestic regulators. Notably, domestic provisions that are deemed to contradict international trade law can be challenged by a member of the WTO before they have been applied and without a burden on the claimant to show an individual legal interest in the case.[48] The function of controlling domestic public authority also applies to awards rendered by ICSID tribunals. Investment tribunals often assume the role of domestic

42 I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012). On the concept of semantic fights, see R. Christensen and M. Sokolowski, 'Recht als Einsatz im semantischen Kampf', in E. Felder (ed.), *Semantische Kämpfe. Macht und Sprache in den Wissenschaften* (2006), 353. For a yet more drastic understanding, see R. M. Cover, 'Violence and the Word', (1986) 95 *Yale Law Journal* 1601.

43 Jacob, *supra* note 37; F. Schauer, 'Precedent', (1987) 39 *Stanford Law Review* 571.

44 For examples see von Bogdandy and Venzke, *supra* note 2, 25–36.

45 C. J. Carrubba, 'Courts and Compliance in International Regulatory Regimes', (2005) 67 *Journal of Politics* 669; Alter, *supra* note 6.

46 J. Martinez, 'Towards an International Judicial System', (2003) 56 *Stanford Law Review* 429, at 461, suggesting that this is the main function of international jurisdiction.

47 L. Wildhaber, 'Eine verfassungsrechtliche Zukunft für den Europäischen Gerichtshof für Menschenrechte?', (2002) 29 *Europäische Grundrechtezeitschrift* 569; H. Keller and A. Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008). P. Carazo Ortiz, 'El Sistema Interamericano de Derechos Humanos: democracia y derechos humanos como factores integradores en Latinoamérica', in A. von Bogdandy, C. Landa Arroyo, and M. Morales Antoniazzi (eds.), *¿Integración suramericana a través del Derecho?* (2009), 231.

48 1994 Marrakesh Agreement Establishing the World Trade Organization, 1869 UNTS 401, Art. 16(4); Appellate Report European Communities – Regime for the Importation, Sale and Distribution of Bananas, adopted 9 September 1997, AB-1997–3, WT/DS27/AB/R, paras. 132–135.

administrative or even constitutional courts, which are possibly deficient or biased in the host country.[49]

In order to refine, but also to deepen, their control function, many international courts have shaped doctrines such as proportionality analysis, which stems precisely from administrative and constitutional justice.[50] With such doctrines international courts can closely control domestic regulatory activity. They move into the space of political decision-making that has, at least traditionally, been reserved for administrations or legislatures.

Controlling domestic authority contributes in many constellations to its legitimation. The review of public acts against general standards by an independent institution is one of the most powerful legitimating mechanisms. It is for this very reason that many domestic constitutions attribute a specific domestic role to international treaties and their courts, in particular in the field of human rights protection.[51] Moreover, some courts develop procedural standards for fairer domestic administrative and regulatory processes and thus contribute to the legitimation of domestic public authority that impacts outsiders.[52]

The *horizontal* control and legitimation of authority exercised at the international level is weaker. As of now, international courts hardly have a role within the institutional order of international law in terms of a system of checks and balances.[53] While a possible check on the Security Council by judicial review of the ICJ has been subject to much debate, the Court has so far refrained from embracing such a role.[54] But there are some other instances that go in this direction. The ICTY at least reviewed the legality of the resolution to which it owes its existence,[55] and the Inspection Panel of the World Bank, as well as other internal administrative tribunals, shows potential for control and legitimation.[56] Notably, the ICJ's advisory jurisdiction was meant precisely 'to serve as a method of dealing with constitutional questions arising in

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49 See B. Kingsbury and S. W. Schill, 'Investor State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law', (2009), *NYU Public Law and Legal Theory Research Working Paper*, Paper 146, at 7.

50 J. Saurer, 'Die Globalisierung des Verhältnismäßigkeitsgrundsatzes', (2012) 51 *Der Staat* 3; S. Issacharoff, 'Democracy and Collective Decision Making', (2008) 6 *International Journal of Constitutional Law* 231.

51 C. Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', (2012) 12 *German Law Journal* 1203.

52 See M. Ioannidis, 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law', (2011) 12 *German Law Journal* 1175; S. Cassese, 'Global Standards for National Administrative Procedure', (2005) 68 *Law and Contemporary Problems* 109.

53 For other possible mechanisms, see E. Benvenisti and G. W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', (2007) 60 *Stanford Law Review* 595.

54 D. W. Bowett, 'The Court's Role in Relation to International Organizations', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996), 181; E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 69–129; M. I. Papa, *I rapporti tra la corte internazionale di giustizia e il consiglio di sicurezza* (2006), 287–358; A. Tzanakopoulos, *Disobeying the Security Council* (2011), 94–110.

55 *Prosecutor v. Tadić*, *supra* note 24, paras. 13–48.

56 On the development of administrative review in domestic contexts, see S. Cassese, 'Die Entfaltung des Verwaltungsstaates in Europa', and M. Fromont, 'Typen staatlichen Verwaltungsrechts in Europa', both in A. von Bogdandy, S. Cassese, and P. M. Huber (eds.), *Ius Publicum Europaeum: Bd. III: Verwaltungsrecht in Europa: Grundlagen: Verwaltungsrecht in Europa: Grundlagen und Wissenschaft* (2010), at mnn. 50–1 and mn. 20 respectively.

a future general international organziation'.[57] More fundamentally, international courts can contribute to the legitimacy of the legal order of which they form part. In this vein, finally, it is possible to see that the *Nicaragua* judgment contributed to vesting the international legal order in general with legitimacy, especially in the eyes of newer states and within a broader international community.[58]

3. Functions and basic understandings of international courts

If there is so much evidence for the multifunctionality of international courts, the question arises why the traditional one-dimensional view is still so prominent. Various elements contribute to a tentative explanation. One reason is that the discourse on the functions forms part of the general doctrine of international law, and general doctrines usually evolve at glacial speed. Another element is that prevailing doctrine is largely built on the example of the International Court of Justice (the 'World Court'), whose paradigmatic role for today is questionable. Ultimately and critically, we argue that the view on international courts' functions is fundamentally informed by broader normative understandings of the international judiciary, and, in fact, of the international order generally. The traditional emphasis on the dispute settlement function has gone hand in hand with a basic understanding of international courts that pictures them as instruments in the hands of the parties in a state-centred world order (subsection 3.1). A reappraisal of the functions leads us to identify and revisit broader basic understandings. Two more such understandings are well established and of particular importance today. Both allow for a multifunctional analysis. With early roots, a second basic understanding sees international courts as organs of a value-based international community (subsection 3.2). A third understanding has grown in the wake of globalization and views international courts as institutions of specific legal regimes (subsection 3.3). The contours and problems of each understanding lead us in section 4 to sketch a new paradigm for the study of international courts that appreciates them as actors exercising public authority.

3.1. International courts as instruments of the parties

The monofunctional view of the international judiciary is a corollary of an understanding that sees international courts as instruments in the hands of the parties for the settlement of concrete disputes in a state-centred world order. In this understanding, courts decide disputes in the name of the states that created them and courts' proper role is to stick to this function. This understanding connects to the origins of adjudication, which lie in the move of two parties to involve a third actor in the resolution of their dispute.[59] Oftentimes judicial processes were the first

57 R. Y. Jennings, 'General Introduction', in Zimmermann, Oellers-Frahm, and Tomuschat, *supra* note 13, at 3–37, para. 5 (with reference to the negotiation records).

58 E. McWhinney, 'Judicial Settlement of Disputes: Jurisdiction and Judiciabilty', (1990) 221 *Recueil des cours* 9, at 36–45; Abi-Saab, *supra* note 17, at 255–8.

59 Shapiro, *supra* note 9.

institutions of a society tasked with deciding disputes on the basis of generally shared normative standards.[60] The decisive step lies in transforming a bilateral, or dyadic, dispute between the parties into a triadic process in which the decision of a third actor is supposed to undercut the dynamics of action and retaliation and to settle their squabble.[61]

Sticking to this function, and keeping a low profile, might be seen as crucial for courts' institutional success in the rough environment of international relations. Such an understanding has a long pedigree. In a treaty of 445 BC Athens and Sparta agreed not to go to war as long as one of the parties wished to bring the controversy before an arbitral tribunal. When a dispute erupted, Athens suggested bringing the case to arbitration in accordance with the treaty. But Sparta instead attacked Athens and suffered a bitter defeat. The widespread opinion held that Sparta lost because by disregarding its obligation to resort to arbitration it had provoked the wrath of the gods. In another instance, the roles were reversed, Sparta stood on the side of the law and defeated Athens, which was again seen as the just punishment of the gods.[62] Against this background, the already mentioned Thucydides came to the conclusion that it is impossible to attack a party which has offered to submit the dispute to judicial settlement.[63] Settling the dispute and nothing else was the task of the tribunal.

Modern international judicial institutions developed from a somewhat similar context,[64] when the two Peace Conferences 1899 and 1907 established the Permanent Court of Arbitration (PCA).[65] Most delegates had a state-centred conception of international order, which is rather hostile to an autonomous international institution with functions other than settling disputes. The same held true after the First World War when state representatives established the Permanent International Court of Justice (PCIJ) in 1920.[66] The prevailing state-centred understanding, epitomized in the PCIJ's *Lotus* decision, only allowed a rather weak institution without compulsory jurisdiction and no real role beyond the settlement of a dispute.[67] Max Huber, president of the PCIJ from 1925 to 1927, expressed the first basic understanding in an ideal fashion when he found as sole arbitrator in the *Islas of Palmas* case that

> [s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. . . . [T]his principle of the exclusive competence

60 Ibid. H. Kelsen, *Peace through Law* (1944).

61 L. F. Damrosch, 'Retaliation or Arbitration – Or Both? The 1978 United States–France Aviation Dispute', (1980) 74 AJIL 785; W. Sandholtz and A. Stone Sweet, 'Law, Politics, and International Governance', in C. Reus-Smit (ed.), *The Politics of International Law* (2004) 238.

62 L. B. Sohn, 'International Arbitration in Historical Perspective: Past and Present', in A. H. Soons (ed.), *International Arbitration* (1990) 9, at 10–11; J. H. Ralston, *International Arbitration from Athens to Locarno* (1929), 153–5 .

63 See J. B. Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), 198.

64 J. Goebel, *The Equality of States* (1925).

65 See D. D. Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference', (2000) 94 AJIL 4.

66 O. Spiermann, *International Legal Argument in the Permanent Court of International Justice* (2005).

67 *The Case of the S.S. Lotus (France v. Turkey)*, Judgment, 7 July 1927, PCIJ Rep Series A No. 10, at 18; similarly *Island of Palmas Case (Netherlands v. United States of America)* (1928) 2 RIAA 829.

> of the State ... [is] the point of departure in settling most questions that concern international relations.[68]

This understanding has shaped ideas about international adjudication up to the present day and the International Court of Justice (ICJ) continues to breathe its air. The *Kosovo* Advisory Opinion of 2010, for example, testifies, also according to Judge Simma, to a still-prevailing contractualist and anachronistic, in his view, conception of international law that does not seem to have changed since the days of the *Lotus* judgment.[69] While members of the United Nations are obliged to settle their disputes peacefully and the Charter calls the ICJ the 'principal judicial organ of the United Nations' (Article 92 UNC), the ICJ's role in the pacific settlement of disputes is mentioned only marginally in Article 33 UNC, where judicial settlement is just one mechanism of dispute resolution among others. The main responsibility for ensuring international peace rests with the Security Council.[70] This constellation nourishes an understanding of the ICJ that places it squarely within the first paradigm.

The understanding of the Court as a mere instrument of dispute settlement in a state-centred world order has informed many of its decisions. We offer but a few prominent examples and pointedly show how other courts diverge. In the *Corfu Channel* case between the United Kingdom and Albania the ICJ clarified, for instance, that only the individual consent of the parties could establish its jurisdiction and did not follow the submissions of the UK to rely on a Security Council Resolution as a basis for jurisdiction.[71] Such an avenue is now recognized in the Rome Statute for the International Criminal Court,[72] but it is not an option for the ICJ.

How the bedrock principle of consensual rather than compulsory jurisdiction plays out is also illustrated by the Court's doctrine of a necessary third party, which demands that it declares a case inadmissible when it is required to pass judgment on the actions of a third state that has not accepted its jurisdiction.[73] The Court thus decided that the *East Timor* case between Portugal and Australia was inadmissible because it was inevitably, according to the Court, to also touch on the legality of Indonesia's invasion of East Timor while Indonesia had not recognized its jurisdiction. It did not come to bear on the Court's decision that Portugal accused Australia of breaching an *erga omnes* obligation springing from the right to self-determination of the East Timorese people.[74] A deeply rooted contractual understanding of international

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68 *Island of Palmas Case (United States of America v. Netherlands)* (1928) 11 RIAA 831, at 8.

69 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010 (not yet published) (Judge Simma), paras. 2–3 and 8. Cf. R. Howse and R. Teitel, 'Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling on Kosovo?', (2010) 11 *German Law Journal* 841.

70 Charter of the United Nations, Art. 24(1). Cf. H. Steinberger, *The International Court of Justice* (1974), 194–5.

71 *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Assessment of the amount of compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland, Judgment of 15 December 1949, [1949] ICJ Rep. 244.

72 1988 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 13(b).

73 *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)*, Preliminary Question, Judgment of 15 June 1954, [1954] ICJ Rep. 19, at 32.

74 *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, at para. 29. Cf. (Judge Weeramantry, Dissenting Opinion) at 139.

law even informed its opinion on the Genocide Convention when it held that a party having made impermissible reservations is not bound by the Convention – no will, no obligation.[75] As we shall show in a moment, the ECtHR later decided the exact opposite with regard to the effect of territorial restrictions that Turkey had made in relation to its submission to the European Convention of Human Rights.

The issue of *amici curiae* submissions provides another example of how international courts are understood as instruments in the hands of the parties for settling disputes in concrete cases.[76] In one of the ICJ's first cases, its registrar rejected completely the motion by an NGO seeking to submit its opinion in writing and to present its view orally in contentious proceedings.[77] The same NGO later 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*.[78] Ever since the *Gabcikovo-Nagymaros* case it is also clear that *amicus curiae* briefs may be introduced as part of the submissions of the disputing parties.[79] Beyond this minimal common denominator there remains considerable disagreement within the ICJ on how to deal with *amicus curiae* briefs. Opposing opinions have so far impeded developments as they have taken place in other judicial institutions.[80] Former President Gilbert Guillaume stated that states and inter-governmental institutions should be protected against 'powerful pressure groups which besiege them today with the support of the mass media'. For that reason, he argued, the ICJ should ward off unwanted *amicus curiae* submissions.[81] This is not necessarily so. The WTO has warmed up to the idea that maybe *amici curiae* should have a role to play.[82] In the path-breaking *US Shrimp* case, 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

75 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15, at 27.

76 See 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* (1998), 427.

77 The answer was an easy one because the NGO had tried to base its claim on Art. 34 of the ICJ Statute, whose relevant para. 3 is shaped to fit *public* international organizations. Therefore, the simple conclusion that the NGO is not a public international organization sufficed. See P. Dupuy, 'Article 34', in Zimmermann, Oellers-Frahm, and Tomuschat, *supra* note 13, at 545–63, mn. 3; A. K. Lindblom, *Non-Governmental Organisations in International Law* (2005), 303–4; E. Valencia-Ospina, 'Non-Governmental Organizations and the International Court of Justice', in T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 227.

78 Lindblom, ibid., at 305.

79 *Gabcíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, [1997] ICJ Rep. 7.

80 See ICJ Practice Direction XII (as amended on 20 January 2009), available at www.icj-cij.org.

81 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, at 287 (Judge Guillaume, Separate Opinion).

82 R. Howse, 'Membership and Its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy', (2003) 9 *European Law Journal* 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* (2002), 317–30; D. M. McRae, 'What Is the Future of WTO Dispute Settlement?', (2004) 7 *Journal of International Economic Law* 2.

> both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.[83]

The state-centred understanding not only informs the ICJ. It is also well visible in other institutions, for example in decisions by arbitral tribunals in the framework of the Permanent Court of Arbitration (PCA).[84] A common understanding is sketched in *Romak* v. *Uzbekistan*, an investment treaty arbitration, in which the tribunal found that

> [u]ltimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of arbitral jurisprudence. [Its] mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that [its] analysis might have on future disputes in general.[85]

The tribunal did not at all see itself as contributing in any other fashion to social interactions. Other tribunals in its framework have recognized at least a contribution to the maintenance of peace.[86]

But by and large, even institutions that are above all geared towards settling specific disputes in an arbitral fashion do frequently contribute to general legal developments. If only they publish their reasoned decisions, this is hardly avoidable. The Iran–United States Claims Tribunal – initially accused of not living up to the task of stabilizing normative expectations[87] – actually ended up clarifying international law pertaining to issues of nationality and expropriation. It pronounced on general issues of interpretation and inevitably fed into the broader legal discourse.[88] As typical cases of dispute settlement in concrete cases, arbitral and claims tribunals already indicate how the one-dimensional view eclipses part of the social consequences of international adjudication.

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83 Appellate Report United States – Import Prohibition of Certain Shrimp and Shrimp Products, adopted 21 November 2001, AB-2001-4, WT/DS58/AB/R, at para. 106. The European Communities – Measures Affecting Asbestos and Products Containing Asbestos case (DS135) was also of great importance; see especially WTO Appellate Body Communication, 8 November 2000, WTO Doc. WT/DS135/9; and Minutes of the Meeting of the General Council Held on 22 November 2000, 23 January 2001, WTO Doc. WT/GC/M/60.

84 Lately it has seen a remarkable increase in business, which is not least due to its flexibility and significant changes in the rules that can be applied under its auspices. At present, 29 cases are pending, more than ever before, accessible at www.pca-cpa.org.

85 *Romak (Romak SA (Switzerland) v. Uzbekistan)*, PCA Case No. AA 280, UNCITRAL Award of 26 November 2009, at para. 171.

86 *Abyei Arbitration* (Government of Sudan/The Sudan People's Liberation Movement/Army), Award of 22 July 2009, at para. 767.

87 T. L. Stein, 'Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran–U.S. Claims Tribunal', (1984) 78 AJIL 1, at 48 ('a tribunal that opts out of the task of normative elaboration makes it more difficult for later tribunals to rely on law as a source of legitimation. The law remains embryonic, untextured, calcified').

88 See the jurisprudence analysed in detail in G. H. Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal* (1996); also C. Pinto, 'Iran–United States Claims Tribunal', in Wolfrum, *supra* note 3. See *Iran v. United States* (Case No. B1), 38 Iran-USCTR (2000–1), paras. 84–88 and 113–115.

3.2. International courts as organs of a value-based international community

The second basic understanding pictures courts as organs of the international community, tasked mainly with protecting the community's core values and interests.[89] They decide in the name of the international community rather than in the name of states. This second view is already amenable to a multifunctional analysis opening up to dimensions of judicial practice beyond the settlement of disputes. Of course, international courts continue to settle disputes, but states are now seen as members of the international community and international adjudication needs not only to consider the bilateral relationships between them, but also to pay regard to the interests of the community. It is easy to depict the stabilization of normative expectations, law-making, and the control and legitimation of public authority as activities in the interest of the community.

The understanding's roots lead to conceptions of the *jus gentium* that lie close to natural-law theories and to Christian doctrine based on the idea of a society which spreads globally and does not halt at the borders of particular polities.[90] In this tradition, activists of various peace movements shared a belief in the possibilities of universal order and provided important impulses for the development of modern international judicial institutions towards the end of the nineteenth century.[91] With similar fervour, a group of eminent international lawyers founded the Institut de droit international in 1873, committed to advancing international arbitration as a means for ensuring international peace.[92] The institute's Statute formulates its aim as 'favouring the progress of international law by becoming the organ of the conscience of the civilized world'.[93] The international community – the civilized world in the vernacular of the nineteenth century – was placed in a position of legitimating international law and international judicial practice.[94]

While the outcomes of the peace conferences in The Hague testify to the preponderance of the first basic understanding, the second paradigm was certainly present.[95] James Brown Scott, admirer of the international legal scholarship of late scholasticism, argued compellingly that the PCA was neither permanent, because tribunals had to be established for every case anew, nor a court at all, in his view, because its members were diplomats rather than judges.[96] In the aftermath of the Peace

89 M. Payandeh, *Internationales Gemeinschaftsrecht* (2010), 131 and 446; A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001); B. Simma, 'From Bilateralism to Community Interest in International Law', (1994) 250 *Recueil des cours* 221.

90 A. von Bogdandy and S. Dellavalle, 'Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms', (2009) 10 *German Law Journal* 5; J. von Bernstorff and I. Venzke, 'Ethos, Ethics and Morality in International Relations', in Wolfrum, *supra* note 3.

91 H. Lammasch, 'Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange', in F. Stier-Somlo (ed.), *Handbuch des Völkerrechts Bd. V* (1914), 36. A. Fried, *Handbuch der Friedensbewegung* (1905), 262–5.

92 'Projet de règlement pour la procédure arbitrale internationale', (1875) Justicia et Pace Institut de Droit International, Session de la Haye, available at www.idi-iil.org/idiF/resolutionsF/1875_haye_01_fr.pdf; cf. M. Koskenniemi, *The Gentle Civilizer of Nations* (2001), 39–41.

93 Koskenniemi, *supra* note 92, at 41.

94 Sure enough, the new international law of the civilized world was also shaped by colonial exploitation and European imperialism.

95 Cf. M. Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference', in Y. Daudet (ed.), *Topicality of the 1907 Hague Conference* (2008), 127.

96 Scott, *supra* note 63; R. Prakash Anand, *International Courts and Contemporary Conflicts* (1974), 33.

Conferences, others advocated stronger courts as organs of the international community and they frequently stressed the importance of the judicial development of international law. Only if international law were enriched by judicial practice could it properly contribute to the maintenance of international peace. Sporadic arbitration was critiqued as unsuited for that purpose. For Hans Wehberg, a German scholar linked with peace movements, the formula for peace was clear: 'More development of international law through international decisions!'[97] In his argument, as in others, the function of generating and stabilizing normative expectations was clearly articulated for international courts and justified by the aim of ensuring peace.[98] For commentators in this strand of thinking, the creation of the PCIJ marked no less than 'the advent of a new era in world civilization'.[99] And complementary to a prevailing state-centred ethos, the PCIJ did indeed sometimes act as a community institution to contribute to the dynamic development of international law.[100]

Such a complementary and competing perspective also finds support in the practice of the ICJ and explains its designation as the 'world court'.[101] Like the PCIJ, the ICJ presents itself not only as an instrument for the settlement of disputes in the hands of states but also, if not as an organ of the international community, then at least as an organ of international law. Already in *Corfu Channel*, the court also saw itself in the role 'to ensure respect for international law, of which it is an organ'.[102] It is also this community-oriented perspective that best explains its stance in the *Oil Platforms* case, where it ultimately lacked jurisdiction but did not let go of the opportunity to recall and foster the reasoning of its *Nicaragua* judgment.[103] Here, as in other cases, separate and dissenting opinions show how the two different understandings tug and pull on the Court. When it comes to its advisory jurisdiction, the *Wall* opinion contrasts with its stance in *Kosovo* and illustrates how the Court contributes to the development of international law, above all in its aspiration to ensure international peace and human rights.[104] In short, while the state-centred understanding does by and large prevail in the ICJ, there are all the same elements that speak in support of the second basic understanding.[105] Antônio Augusto Cançado Trindade looked back at the practice of the Court as an organ of an international

97 H. Wehberg, *Das Problem eines internationalen Staatengerichtshofes* (1912), 11.
98 Ibid., at 11–12; M. O. Hudson, *Progress in International Organization* (1981), 80; H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), 45–68.
99 N. Politis, *La justice internationale* (1924), 182. Cf. Koskenniemi, *supra* note 95.
100 Spiermann, *supra* note 66, at 394.
101 T. D. Gill, *Rosenne's The World Court* (2003); Jennings, *supra* note 57, paras. 6 and 30; G. Abi-Saab, 'The International Court as a World Court', in V. Lowe and M. Fitzmaurice, *Fifty Years of the ICJ* (1996), 3–16. Cf. www.icj-cij.org/jurisdiction.
102 *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment of 25 March 1948, [1948] ICJ Rep. 4, at 35; Compare *Certain German Interests in Polish Upper Silesia*, Merits, Judgment of 25 May 1925, Series A, No. 7, p. 19. Cf. H. Mosler, 'The International Society as a Legal Community', (1974) 140 *Recueil des cours* 1, at 28–32 and 189–91.
103 *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161.
104 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136.
105 McWhinney, *supra* note 58, at 191; A. A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2010).

community under the heading of 'International Law for Humankind: Towards a New *Jus Gentium*'.[106] Now a member of the Court, his separate opinions steadily formulate in practice a view that is inspired by a value-based international community. The tradition of universalism as it developed from late scholasticism is well alive.

The traditional one-dimensional view of international judicial practice clearly breaks down if cast onto younger international institutions in the field of human rights or international criminal law. From the outset, the European Court of Human Rights (ECtHR) was supposed to act as a strong institution to ensure respect for human rights on the Continent.[107] In early cases, state representatives sought to limit the reach of the Convention and of judicial control, arguing inter alia that as an international treaty placing limitations on state sovereignty, the Convention should be interpreted restrictively.[108] But the ECtHR developed a strong line of jurisprudence that rejects such arguments and instead emphasizes the goal of effective rights protection. It presents the Convention as a 'living instrument' which needs to be interpreted in light of new developments[109] – a euphemism for the law-making function. In direct contrast to the ICJ's advisory opinion in *Reservations to the Genocide Convention*, the ECtHR held in 1995 that, if substantive or territorial restrictions on the applicability of the Convention mechanism were allowed, this 'would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order'.[110] As a consequence, the defending state, having made such reservations, was bound without the benefit of the reservations rather than not bound at all, as was the position of the ICJ. Over the course of its activity, the ECtHR has significantly developed the European Convention and coated its text with thick layers of meaning. The Court itself clearly sees its function 'to elucidate, safeguard and develop the rules instituted by the Convention'.[111] Decisions of the Inter-American Court of Human Rights (IACtHR) paint a similar picture while the Court dives even deeper into the constitutional orders of member states by obliging domestic courts to engage in judicial review of national law against standards of the American Convention on Human Rights.[112] The IACtHR has decisively asserted all the functions we have identified, for example, with its consequential decisions on the impossibility of amnesties in cases of human rights violations.[113]

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106 Cançado Trindade, *supra* note 105.

107 E. Bates, *The Evolution of the European Convention on Human Rights* (2010).

108 *Golder v. United Kingdom*, Report of the European Commission of Human Rights, adopted 1 June 1973, No. 4451/70, at 16, para. 15.

109 *Tyrer v. United Kingdom*, Judgment (Merits) of 25 April 1978, ECHR, Ser. A No. 26, at para. 31. Cf. R. Bernhardt, 'Evolutive Treaty Interpretation: Especially of the European Convention on Human Rights', (1999) 42 *German Yearbook of International Law* 11.

110 *Loizidou v. Turkey*, Judgment (Preliminary Objections) of 23 March 1995, ECHR, Ser. A No. 310, at para. 75.

111 *Ireland v. United Kingdom*, Judgment (Plenary) of 18 January 1978, ECHR, Ser. A No. 25, at para. 154.

112 L. Burgorgue-Larsen, 'El Sistema Interamericano de Protección de los Derechos Humanos entre Clasicismo y Creatividad', in von Bogdandy, Landa Arroyo, and Morales Antoniazzi, *supra* note 47, at 287, 311; Binder, *supra* note 51.

113 *Barrios Altos v. Peru*, Judgment (Merits) of 14 March 2001, I/A Court HR, Ser. C No. 75; *La Cantuta v. Peru*, Judgment (Merits, Reparations and Costs) of 29 November 2006, I/A Court HR Ser. C No. 162; *Almonacid*

Judicial institutions in the field of international criminal law are also supposed to safeguard the fundamental values of the international community and little, if anything, would be understood from the traditional one-dimensional point of view.[114] The International Criminal Tribunal for the Former Yugoslavia (ICTY) is charged with prosecuting perpetrators of international crimes, thereby contributing to restoring peace, and preventing such crimes in the future.[115] It has crafted a rich body of case law that has considerably developed both procedural and material criminal law.[116] Of central importance in the development of the law has been the Appeals Chamber, which has effectively vested earlier decisions with precedential force. '[T]he need for coherence is particularly acute', it held, 'where the norms of international humanitarian law and international criminal law are developing.'[117] There is now hardly an aspect of international criminal law in which it is possible to argue without the ICTY's jurisprudence. Beyond that, the tribunal has influenced the structure of international law more generally, for example when it characterized the prohibition of torture as *jus cogens* and held that '[t]he general principle of respect for human dignity is the basic underpinning and indeed the very raison d'être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.'[118] This is a far cry from the view that the PCIJ formulated in *Lotus*.

The ad hoc criminal tribunals fuelled endeavours for a permanent institution that were finally met in 1998 when state representatives passed the Statute of the International Criminal Court (ICC). For many commentators the ICC is the epitome of a new area in international law in which the international community's fundamental values are now better protected.[119] Antonio Cassese argues that international crimes are grave violations of universal values, a matter for the whole international community, and as such best brought before an international court.[120] The court's preamble references the 'conscience of humanity', addresses jurisdiction over 'most serious crimes of concern to the international community as a whole', and expresses the determination to 'guarantee lasting respect for and the enforcement of international justice'.

Arellano y otros v. Chile, Judgment (Preliminary Objections, Merits, Reparations and Costs) of 26 September 2006, I/A Court HR (Ser. C No. 154).

114 C. Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice', in A. Cassese (ed.), *Oxford Companion to International Criminal Justice* (2009), 143.

115 UNSC Res. 827 (25 May 1993), UN Doc. S/RES/827.

116 M. Kuhli and K. Günther, 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals', (2011) 12 *German Law Journal* 1261; M. Swart, 'Judicial Lawmaking at the Ad Hoc Tribunals: The Creative Use of the Sources of International Law and 'Adventurous Interpretation', (2010) 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 459; A. Marston Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War', (2006) 59 *Vanderbilt Law Review* 1.

117 *Prosecutor v. Aleksovski*, *supra* note 33, para. 113.

118 *Prosecutor v. Anto Furundzija*, Judgment, Case No. IT-95–17/1-T, T.Ch, 10 December 1998, at para. 183.

119 L. Condorelli, 'La cour pénale internationale: Un pas de géant (pourvu qu'il soit accompli. . .)', (1999) 103 *Revue générale de droit international public* 7; T. Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law', (2012) 81 *Nordic Journal of International Law* 79, at 84.

120 A. Cassese, 'The Rationale for International Criminal Justice', in Cassese, *supra* note 114, 123, at 127.

Also decisions of the International Tribunal for the Law of the Sea (ITLOS) fit the second understanding. Its prime responsibility rests with inter-state dispute settlement concerning the application of UNCLOS.[121] From the perspective of the community paradigm, it is noteworthy that UNCLOS constructs the area beyond national jurisdiction and its resources as 'common heritage of mankind' whose 'exploration and exploitation shall be carried out for the benefit of mankind as a whole'.[122] Most cases in front of ITLOS have so far dealt with the prompt release of vessels and their crew where the tribunal enforces the right of prompt release of vessels against the posting of a bond when vessels have been arrested by coastal states in those states' exclusive economic zone on the suspicion of illegal economic activity.[123] ITLOS here controls domestic public authority and can wield power itself by determining what amounts to a reasonable bond, for example.[124] While the practice of ITLOS testifies to the second basic understanding, prompt-release cases as well as the regulation of economic activity can only be linked to the fundamental values of the international community at a stretch. They are rather part of increased international regulation and governance in a globalized world and thus point towards the third basic understanding.

3.3. International courts as institutions of legal regimes

A number of increasingly important international courts can, third, basically be understood as institutions of specific legal regimes in whose name they then act. This paradigm looks far more than the other two at transformations in the wake of economic globalization. Many international courts and especially younger institutions nowadays reach further than the co-ordination between states or the protection of fundamental values of the international community. They form part of legal regimes that have grown with increasing interdependence and processes of globalization.[125]

While interdependence and interaction are in principle nothing new,[126] economic globalization since the 1960s, improvements in transportation and information technology, the spread of production chains around the globe, the mobility of capital, and the unsteady but gradual liberalization of market access have all contributed to a constellation in which states and market participants are thirsty for international regulation.[127] In the third basic understanding, the iconic *Lotus* judgment and its grasp on international judicial practice is inadequate not because the will of states has maybe been complemented by values of the international community, but because states can simply no longer, if they ever could, be plausibly conceived as 'co-existing independent communities'.[128] National communities exist

121 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3, Art. 293(1) (UNCLOS).
122 UNCLOS, *supra* note 121, Preamble and Arts. 136–49
123 UNCLOS, *supra* note 121, Arts. 73 and 292.
124 See, e.g., *The 'Juno Trader' Case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, Prompt Release Judgment of 18 December 2004, ITLOS Reports 2004, at 17, paras. 76–77.
125 See R. Keohane and J. Nye, *International Relations Theory: Power and Interdependence* (2000).
126 R. Findle and K. H. O'Rourke, *Power and Plenty* (2007).
127 J. H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547.
128 *The Case of the S.S. Lotus*, *supra* note 67.

to a large extent in symbiosis and in mutual dependence. Alas, that does not mean that international conflicts are now impossible. But it means that states are not self-contained entities. Increasing interaction between sectors of society across porous state borders has undermined the premises of a state-centred world order and such interaction exceeds the rather narrow focus on fundamental communal values. The globalized world is much more complex and like any complex system it requires institutions that do much more than sporadic dispute settlement, fundamental rights protection, or prosecution of most serious crimes. Institutions of global governance now meet those needs without reproducing domestic structures of government.[129] It is sometimes for loose regulatory networks, for international bureaucracies, or for international judicial institutions to engage in law-making, in stabilizing normative expectations, and in controlling and legitimating public authority. In the absence of an overarching polity international institutions tend to entrench processes of societal differentiation and are part of processes of fragmentation. Legal regimes diverge and develop their own perspectives on the world.[130]

International trade law provides a fine example. The General Agreement on Tariffs and Trade (GATT) of 1947 obliged contracting parties to concentrate trade measures on tariffs and to gradually negotiate tariff reductions in order to facilitate market access and to boost international trade flows. Notably, neither the GATT nor the Agreement establishing the WTO of 1994 mentions the grand themes of peace or human rights protection, which formed the core of the international legal project of the UNC after the Second World War. The focus rather rests on trade liberalization and on economic goals. In this vein, panels established under the GATT to deal with trade disputes largely argued along the functional perspective entrenched in this legal regime. In a series of critical cases in the 1990s they tried to fend off any interference from outside perspectives and severely limited the possibilities of contracting parties to justify trade restrictions, for example in the form of conditions for market access that are connected to public policy goals such as environmental protection.[131] Only the new Appellate Body established with the WTO redirected the line of argument when it held that the GATT must not be read 'in clinical isolation from public international law'.[132] The Appellate Body in principle opened up to competing perspectives,[133] but biases along the functional lines of the legal regime arguably remain.

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129 J. N. Rosenau and E. O. Czempiel (eds.), *Governance without Government* (1992); A. M. Slaughter, *A New World Order* (2004).

130 A. Fischer-Lescano and G. Teubner, 'Regime–Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 *Michigan Journal of International Law* 999; M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 LIJL 553.

131 R. Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime', (2002) 96 AJIL 94; J. H. H. Weiler, 'The Rule of Law and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', (2002) 13 *American Review of International Arbitration* 177; Cf. I. Venzke, 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy', (2011) 12 *German Law Journal* 1111.

132 Appellate Report United States – Standards for Reformulated and Conventional Gasoline, adopted 20 May 1996, AB-1996-1, WT/DS2/9, at 17.

133 H. Ruiz Fabri, 'About the Sense and Direction of Multilateralism in International Trade Law', in H. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), 281.

Technically, both panels and the Appellate Body issue 'reports' which have no binding force unless they are adopted by the plenary Dispute Settlement Body.[134] These institutions qualify as courts in this contribution's understanding all the same because their reports are adopted quasi-automatically – they are adopted unless they are rejected by consensus – and they show such continuity and discursive density that they can well be termed permanent.[135] The steady support of the WTO Secretariat, with its legal division, further nourishes the construction of a body of case law and so does the principle of collegiality according to which the members of the Appellate Body who are charged with a case confer with those who are not. In addition, jurisdiction is compulsory.

Institutional design and the spell of precedents in legal discourse backed by judicial practice have led to a rich body of case law. The Appellate Body has explicitly demanded that panels follow its decisions in order to allow for 'the proper functioning of the WTO dispute settlement system'.[136] The stabilization and development of normative expectations is thus clearly on the horizon of adjudicators. And so is the function of controlling domestic authority by way of judicial review when adjudicators test domestic legislation and administrative action against a detailed web of international regulation. Richard Stewart summarizes that the

> dispute settlement system [takes] on the principal burden of updating WTO trade disciplines and determining the addressing their relation to non-trade norms . . . . These circumstances . . . have also helped push the dispute settlement process from a purely bilateral and reciprocal system of episodic dispute settlement towards a multilateral system with a regulatory character. . . . [T]he dispute settlement system has assumed a regulatory and even an incipient administrative character.[137]

Many strands of the WTO's judicial practice easily bear out this observation.[138]

The International Centre for the Settlement of Investment Disputes (ICSID) provides another important example for regime-specific adjudication. It can well be viewed from the perspective of courts as institutions of specific legal regimes in a globalized world, similar to the field of international trade law. As part of the investment-law regime, ICSID primarily acts as a venue for investors to enforce protection standards against host states. Its creation speaks volumes. It goes back to the political advocacy of then general counsel of the World Bank, Aron Broches, who, faced with failed international negotiations about the applicable material law

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134 DSU, *supra* note 27, Arts. 16(4) and 17(14).

135 R. Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law', in J. H. H. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?* (2000), 35.

136 Appellate Report United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, adopted 20 May 2008, AB-2008-1, WT/DS344, at para. 162; Cf. Appellate Report United States – Continued Existence and Application of Zeroing Technology, adopted 19 February 2009, AB-2008-11, WT/DS350, paras 362–365.

137 R. B. Stewart and M. R. Sanchez-Badin, 'The World Trade Organization and Global Administrative Law', in C. Joerges and E. U. Petersmann, *Constitutionalism, Multilevel Trade Governance and International Economic Law* (2011), at 457, 467.

138 Consider specifically the case law on 1947 General Agreement on Tariffs and Trade, 55 UNTS 187, Art. X(3), on the 'uniform, impartial and reasonable' administration of trade regulations, the yet more elaborate obligations of 1994 General Agreement on Trade in Services, 1869 UNTS 183, Art. VI, in this regard, and finally the now growing case law centred on the Agreement on Technical Barriers to Trade. For the latter, see for instance Appellate Report United States – Measures Affecting the Production and Sale of Clove Cigarettes, adopted 24 April 2012, AB-2012-1, WT/DS406.

in the 1960s, advanced the programmatic formula 'procedure before substance'.[139] At the time, state representatives found no agreement on many substantive issues such as what amounts to expropriation or to fair and equitable treatment, or how compensation should be determined. In view of persistent disagreement, the process of adjudication was supposed to develop the law – procedure before substance. And so it did. Investment tribunals shaped the law deeply imbued with the functional logic pervading the investment protection regime.[140] Judicial practice in this field continues to be justified either with the consent of the parties or, where this becomes increasingly less plausible, by the functional goal of contributing to the economic development of the host state.[141]

In many ways investment arbitration is an unlikely case for adjudication to show contributions to a larger whole other than sporadic dispute settlement. Not only are tribunals composed ad hoc, but they also operate on the basis of roughly 3000 bilateral investment treaties, which do not always speak the same language. But judicial practice has all the same developed a system of investment law.[142] Tribunals have engaged in law-making and they review domestic action against international standards which they themselves helped to shape. While practice is not uniform, an ethos grows along the lines expressed by one tribunal when it found that 'it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law'.[143] More tribunals see the need to relate their practice to earlier decisions and conflicting decisions are generally perceived as a legitimatory problem. While the system lacks an appellate mechanism and only knows an annulment procedure which is very limited in its scope, the expansion of what annulment committees actually do, almost engaging in outright appellate review, can well be understood as a reaction to the legitimatory deficits of inconsistent and ill-reasoned arbitral awards.[144]

The WTO dispute settlement institutions, as well as ICSID tribunals, challenge general doctrine and, given the economic, social, and political importance of many of their decisions, it seems increasingly hard to sustain that the focus of general doctrine rests on decisions of the ICJ. Such doctrine risks missing its very purpose.

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139 See R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008), 18.

140 J. Alvarez and K. Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime', in K. P. Sauvant (ed.), *Yearbook of International Investment Law & Policy* (2009), 379.

141 Dolzer and Schreuer, *supra* note 139, at 149. For an example from practice which is controversial precisely for its functional reasoning, see *Abaclat and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility of 4 August 2011, ICSID Case No. ARB/07/5, especially at para. 583. Compare the strong dissenting opinion by George Abi-Saab in this case.

142 Schill, *supra* note 40.

143 *Saipem S.p.A. v. The People's Republic of Bangladesh*, Award of 30 June 2009, ICSID Case No. ARB/05/7, para. 80.

144 See, e.g., *CMS Gas Transmission Company v. Argentine Republic*, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic of 25 September 2007, ICSID Case No. ARB/01/8; *Sempra Energy International v. Argentine Republic*, Decision on the Argentine Republic's Request for Annulment of the Award, 29 June 2010, ICSID Case No. ARB/02/16. For a critique of the legal arguments underpinning this arguable trend, see C. Schreuer, 'From ICSID Annulment to Appeal: Half Way Down the Slippery Slope', (2011) 10 *Law and Practice of International Courts and Tribunals* 211, at 225.

4. Outlook: how functional analysis sharpens normative questions

The sequence of three basic understandings should not be seen as a progressive chronology or projection, not least because each understanding has serious difficulties when it comes to giving a satisfactory account of the legitimatory basis of contemporary international adjudication. Briefly pointing out the most salient difficulties leads us towards suggesting a new paradigm for the study of international courts.

The first paradigm sees courts as instruments in the hands of parties and justifies their practice on the basis of state consent. But the solidity and reach of this consensual basis may well be questioned in light of a multifunctional analysis of judicial practice which draws attention to the ways in which adjudication reaches beyond concrete disputes, above all by its law-making dimension. The second understanding is amenable to a multifunctional view and complements state consent as a legitimatory basis with the interests and values of the international community. But the reference to fundamental communal interests is also too narrow and too vague to fully justify the current practice of adjudication in a globalized world. The third paradigm sees international courts as institutions of specific legal regimes and tends to employ narratives of legitimacy that implore specific regime interests. The difficulty here is that courts may be prone to bias and that their legitimatory basis remains unsettled because the focus on pursuing specific interests can hardly inform inevitable normative choices and balances between competing interests.

Finally, then, none of these understandings sees international courts as actors. They rather reduce judicial practice to giving effect to the will of the parties, the values of the community, or the interest of legal regimes. International courts are understood as instruments, organs, and agents. Against the background of the difficulties of each understanding, we suggest developing a new paradigm for the study of international courts that sees them as multifunctional actors exercising public authority. Characterizing their activity as an exercise of public authority sets the parameters for their legitimation generally.[145] Employing a functional analysis and drawing attention to distinct functions helps to further refine the phenomenon as well as normative questions. As we mentioned earlier, not all courts serve all functions equally at all times. The ICJ, given its weak jurisdictional basis, its broad focus, and its global constituency, certainly differs from the ECtHR or the WTO Appellate Body, for example. In fact, the multifunctional approach helps to better understand the differences between international judicial institutions and thus hopes to contribute to a nuanced discussion relating to international courts' exercise of public authority and its legitimation.

145 Von Bogdandy and Venzke, *supra* note 2.