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**Judicial Authority and Styles of Reasoning: Self-Presentation between Legalism and Deliberation**

Venzke, I.

*Published in:*

Establishing judicial authority in international economic law

*DOI:*

[10.1017/CBO9781316544860.010](https://doi.org/10.1017/CBO9781316544860.010)

[Link to publication](#)

*Citation for published version (APA):*

Venzke, I. (2016). Judicial Authority and Styles of Reasoning: Self-Presentation between Legalism and Deliberation. In J. Jemielniak, L. Nielsen, & H. Palmer Olsen (Eds.), *Establishing judicial authority in international economic law* (pp. 240-262). (Cambridge international trade and economic law). Cambridge: Cambridge University Press. DOI: 10.1017/CBO9781316544860.010

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UNIVERSITY OF AMSTERDAM

# JUDICIAL AUTHORITY AND STYLES OF REASONING: SELF-PRESENTATION BETWEEN LEGALISM AND DELIBERATION

Ingo Venzke

Amsterdam Law School Legal Studies Research Paper No. 2016–04

Amsterdam Center for International Law No. 2016-02

Postnational Rulemaking Working Paper No. 2016-01



Amsterdam Center for International Law  
University of Amsterdam

## RESEARCH PAPER SERIES

ACIL Research Paper 2016-02

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*Amsterdam Center for International Law*

Cite as: ACIL Research Paper 2016-02,  
available at [SSRN](#)

Forthcoming in: Jemielniak, J., Nielsen, L. & Palmer Olsen, H. (eds.)  
*Establishing Judicial Authority in International Economic Law*, CUP (2016)

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[Amsterdam Center for International Law](#), University of Amsterdam

## Judicial Authority and Styles of Reasoning: Self-Presentation Between Legalism and Deliberation

Ingo Venzke\*

Draft.

Forthcoming in: ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW (Joanna Jemielniak, Laura Nielsen & Henrik Palmer Olsen eds, Cambridge University Press 2016).

### Abstract

*The present contribution develops an understanding of international judicial reasoning as a technique of impression management: Judges' reasoning, it suggests, is geared towards leaving an impression with audiences. Anxiety, in turn, arises when judges find it important to convey a certain impression but are sceptical about their capacity to do so. Such a perspective on judicial reasoning refines and critiques two other well-received arguments. First, the notion of legalism suggests with a sociological leaning that judges turn to formalism when they face or anticipate critique. However, the appeal of formalism as a place of refuge actually depends on the predilection of audiences. Second, the more decidedly normative approach of a discourse-theoretical reconstruction of judicial reasoning suggests that audiences might play a critical and possibly legitimating role. However, if judges are to a significant extent motivated by appeasing an audience, no meaningful deliberation takes place. Deliberation is undercut by the dynamics of judges' social anxiety. The present contribution argues that a social-psychological perspective on judicial reasoning—as it emerges from self-presentation theory—adds important considerations for an understanding of judicial reasoning. This work thus seeks to contribute to the groundwork of emerging literature that zooms in on international judicial reasoning. As part of a general body of research that focuses on judicial behaviour, judicial reasoning has so far been placed between structural constraints and policy objectives. That view is too limited. I submit that future work will gain from looking at audiences and from exploring further which audiences are the most influential.*

### I. Introduction

Judicial reasoning is puzzling. International judges are often faced with cases where the law runs out or at least becomes murky. Such situations present themselves as problems because it is the image of correctly applying the given law that nurtures judges' social legitimacy. The notion of legalism suggests that judges do their utmost to present their activity as impeccable rule-following, especially when they face or anticipate critique. Legalism refers to a self-perpetuating force of narrow

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\* Associate Professor, University of Amsterdam. I wish to thank Kista Nadakavukaren Shefer, the editors, and an anonymous reviewer for their helpful suggestions and comments.

formalism. At the same time, it might be suggested that judges should use reasons that exceed the more narrow confines of strict formalism, particularly in those situations where the law does not readily give an answer. Such a view is supported from the perspective of discourse theory and its normative reconstruction of the separation of powers. Judicial reasoning should open up to modes of deliberation. Both claims (i.e., that legalism explains a narrow closure of the legal discourse on the one hand and that normative demands require judges to open up the legal discourse on the other hand) cannot coexist, at least not for a long period of time. In the long run, neither claim is plausible if the other holds some sway.<sup>1</sup>

The present contribution argues that legalism offers an appealing but ultimately inaccurate view of what drives (international) judges. Legalism's core propositions do not hold across different institutions and for different individual judges. It is not the case that the safe fall-back position of judges is necessarily a narrow formalism. The present contribution argues that a more powerful and more nuanced answer can be developed with a closer view of judges' audiences.<sup>2</sup> More specifically, such a competing answer could build on the concept of self-presentation to better understand why judges reason the way that they do. Theories of self-presentation refine our understanding of what drives judges by drawing attention to social anxiety. Such anxiety arises 'when individuals are motivated to convey a particular impression — usually one that will facilitate interpersonal acceptance (or perhaps more accurately, to avoid interpersonal rejection) but doubt their ability to do so.'<sup>3</sup> Self-presentation manages impressions. In short, the present contribution suggests an understanding of styles of reasoning as a strategy of impression management.

The target of this discussion is not only legalism as a common explanation of judicial reasoning. This contribution also investigates the implications of viewing international judicial behaviour through the lens of judges' audiences for normative arguments. In that regard, this work focuses on the argument from a discourse-theoretical reconstruction of the separation of powers. At its core, such a normative reconstruction demands that juridical discourses be broadened 'to the

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<sup>1</sup> This issue becomes especially clear in Jürgen Habermas' critique of Max Weber and his argument in favour of a conception of legitimacy, which combines descriptive and normative elements. Jürgen Habermas, *Legitimation Problems in the Modern State*, in *Communication and the Evolution of Society* (Beacon Press 1979) 178, 205.

<sup>2</sup> This move is inspired by and draws on Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006).

<sup>3</sup> Lahna I. Catalino, R. Michael Furr, and Freida a. Bellis, 'A multilevel analysis of the self-presentation theory of social anxiety: Contextualized, dispositional, and interactive perspectives' (2012) 46 *Journal of Research in Personality* 361, 361.

extent that legal programs are in need of further specification by the courts.<sup>4</sup> This contribution continues to argue that the additional legitimacy burden that arises with such a broadening of judicial discourses ‘could be partly satisfied by additional obligations before an enlarged critical forum specific to the judiciary.’<sup>5</sup> Understanding judicial reasoning as a strategy of impression management credits the role of critical fora by suggesting that judges indeed anticipate critique. However, this approach ultimately casts doubt on the critical and potentially legitimating role that such a forum might play. Reasons are not expressed to convince or to be backed up in argument but to please an audience whose favour judges seek.

With this line of argument, the contribution wishes to lay further groundwork for an emerging strand of scholarship that studies the styles of reasoning of specific international courts and tribunals across different judicial institutions.<sup>6</sup> In contrast to some of this work—and more generally, in contrast to the largest strand of thought about (international) judicial behaviour—I suggest that the relevant factors that come into consideration should not be limited to the legal and structural constraints of international courts and tribunals. The present contribution argues that a more social-psychological perspective must be added. This approach thrives above all on one simple proposition: ‘judges, like other people, get satisfaction from perceiving that other people view them positively.’<sup>7</sup> Judges care about the way they are seen in the eyes of their audiences. This consideration adds to the mix of explanatory factors for judicial reasoning that cannot be reduced to the pursuit of judges’ policy objectives or to the working of discursive constraints.

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<sup>4</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996) 439-440 (italics added); see also p. 193.

<sup>5</sup> Habermas, *supra* note 4, at 439-440 (italics added); see also *ibid.* at 193.

<sup>6</sup> For comparative studies, see Joost Pauwelyn and Manfred Elsig, ‘The politics of treaty interpretation: variations and explanations across international tribunals’ in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 450–2; Armin von Bogdandy and Ingo Venzke, ‘On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority’ (2013) 26 *Leiden Journal of International of International Law* 49–72; Benedict Kingsbury, ‘International Courts: Uneven Judicialization in Global Order’ in James Crawford and Martti Koskeniemi (eds), *Cambridge Companion to International Law* (Cambridge University Press 2012) 202–228. For an example of an audience-centered analysis of a specific decision, see André Nollkaemper, ‘The Court and its Multiple Constituencies: Three Perspectives on the Kosovo Advisory Opinion’ ACIL Research Paper 2014-18, available at [www.acil.uva.nl](http://www.acil.uva.nl).

<sup>7</sup> Baum, *supra* note 3, at 4.

The argument proceeds as follows: Against the background of a brief overview of established views on judicial behaviour, I will present the dissonant perspectives on judicial reasoning as they flow from sociological accounts of legalism on the one hand and from normative accounts of deliberation on the other hand (III). I then introduce judges' audiences and self-presentation theory as a further angle from which to understand judicial reasoning. There are certainly a host of other factors that bear on the way in which judges act and argue. The aim here is to complement those accounts and to correct or refine the views of legalism and deliberation. The main thesis is that self-presentation theory makes a useful and at times plainly necessary addition to the framework for studying judicial reasoning (IV). The concluding outlook sets out a tentative programme for future research on judicial authority and styles of reasoning that is informed by core social-psychological considerations (V). However, first, the whole argument gains traction from a brief example of establishing judicial authority in international economic law (II).

## II. Judicial Authority and Styles of Reasoning: An Example

In a controversial and pivotal decision, a recent investment arbitral tribunal concluded that it had jurisdiction to hear the collective claim of Italian holders of Argentine bonds against the Argentine Republic.<sup>8</sup> The many interesting legal issues that the award touched upon included the interpretation of a so-called cooling-off period. The applicable investment treaty provided that a dispute shall only be subject to international arbitration if it continues to exist 18 months after the commencement of domestic proceedings.<sup>9</sup> All three arbitrators are among the most accomplished and experienced in their field. Two of those arbitrators, Albert Jan van den Berg and Pierre Tercier, have primarily commercial law backgrounds. Among many other past and present functions, the former arbitrator is president of the International Council for Commercial Arbitration (ICCA) and the latter arbitrator was president of the International Chamber of Commerce (ICC). Those arbitrators are law professors at Rotterdam and Fribourg, respectively.<sup>10</sup> In the example at hand, van den Berg and Tercier wrote the majority opinion of the final award. They argued, among other things, that 'it would be unfair to deprive the investor of its right to resort to arbitration based on the mere

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<sup>8</sup> ICSID, *Abaclat and others v. The Argentine Republic*, Decision on Jurisdiction and Admissibility, 4 August 2011 [*"Abaclat"*].

<sup>9</sup> Art. 8(3) Argentine-Italian Bilateral Investment Treaty, quoted in claimants' unofficial English translation in *Abaclat* at para. 100.

<sup>10</sup> See <http://www.arbitration-icca.org/members.html>.

disregard of the 18 months litigation requirement'.<sup>11</sup> They thus make an appeal to fairness that hardly squares with formalist legal reasoning. Put strongly, fairness overrides the cooling-off provision of the treaty. It is more than a platitude to say that fairness, like justice, lies in the eye of the beholder. Whether their appeal to fairness supports their delicate decision depends on the beliefs of relevant audiences. The overall context, including Argentina's persistent refusal to compensate foreign investors for violations of their rights during the upheaval that occurred in the wake of Argentina's economic crises of 1998, the truly dim prospects of domestic litigation, and possible empathy for ordinary Italian bondholders, underpins a belief that declining to exercise jurisdiction would be unfair.

The dissenting arbitrator, Georges Abi-Saab, wrote an elaborate critique of the majority's reasoning in which he also took issue with the invocation of fairness. Just like the appointments and achievements of his co-arbitrators in the present case, those of Abi-Saab are impressive and manifold. Next to a steep academic career, he was a judge of the Appeals Chamber of the international criminal tribunals for the former Yugoslavia and for Rwanda, as well as Chairman of the Appellate Body of the WTO. Abi-Saab has a primarily public international law background. In his view, the majority in the exemplary case at hand 'strike[s] out a clear conventional requirement, on the basis of its purely subjective judgment.'<sup>12</sup> It is easy to see that Abi-Saab would have struck the balance differently.<sup>13</sup> But that is not his point. There should be no balancing at all in light of a treaty provision. A balance was struck 'at the appropriate legislative level, by the parties themselves,' he argues. The balance is reflected in the treaty text that opens an avenue towards international arbitration but subjects that avenue to an 18-month domestic litigation requirement. Arguments of fairness or expediency were on the table when drafting the treaty text, and those arguments led to a certain outcome. The tribunal must not unravel the legislative agreement. For Abi-Saab, formalism has an appeal that it lacks for the majority. He rejects unmediated and outright references to the 'spirit' or the 'aim' of the law by referring to the Vienna Convention of the Law of Treaties (VCLT), which provides the fundamental grammar of treaty interpretation, at least for public international lawyers.

### III. Judicial reasoning between legalism and deliberation

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<sup>11</sup> *Abaclat*, at para 583.

<sup>12</sup> *Abaclat*, Dissenting Opinion, at para 30.

<sup>13</sup> *Ibid.*, especially at para 33.



How should we make sense of such judicial reasoning? A whole host of factors with varying explanatory power suggest themselves. Overall—and especially in its dominant rationalist stream—scholarship sees judicial behaviour as a function of individual or institutional policy goals combined with contextual constraints. It looks at the limits of what courts and judges can possibly do in light of balances of power, institutional clout, pervasive ideas or discursive constraints.<sup>14</sup> Above all, the concern is with judicial outcomes rather than reasoning, although this view is slowly changing.<sup>15</sup> The reasoning certainly matters, too. Actors in the field know that it does. For instance, they appeal in cases in which they had won in every practical way with the ‘mere’ incentive of challenging what might otherwise become a bad precedent. Adjudicators know just as well that their reasoning in the present matters for the future, and they use precedents in the gradual development of the law.<sup>16</sup>

The present contribution aspires to add to the groundwork of the increasing literature on judicial reasoning by arguing that studies must pay more regard to insights from social-psychological perspectives. This work will offer a view in this vein by drawing on self-presentation theory and by presenting judicial reasoning as a technique for impression management. There are a number of nascent arguments that meet this aspiration half-way. With a view to judicial reasoning, especially in the field of international investment law, an arbitrators’ judicial ethos, which leans more on private or public law, has been added to the array of explanatory factors. Such an approach is already well suited to grasp some of the differences that exist, such as those between van den Berg and Tercier on one side and Abi-Saab on the other.<sup>17</sup> Such a move is inspired by similar work in the field of trade

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<sup>14</sup> Laurence R Helfer and Anne-Marie Slaughter, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’ (2005) 93 *California Law Review* 899–956. For a critical overview, also see Mark A Pollack, ‘Political Science and International Courts’ in Cesare Romano, Karen Alter and Yuval Shany (eds.) *Oxford Handbook of International Adjudication* (OUP 2013) 357-387. The perspective of political science can further gain from a broader sociological inquiry, see Mikael Rask Madsen, ‘Sociological Approaches to International Courts’ in Mark A Pollack, ‘Political Science and International Courts’ in Cesare Romano, Karen Alter and Yuval Shany (eds.) *Oxford Handbook of International Adjudication* (OUP 2013) 388-412.

<sup>15</sup> Recent contributions that pay more regard to judicial reasoning include Marc L Busch and Krzysztof J Pelc, ‘The Politics of Judicial Economy at the World Trade Organization’ (2010) 64 *International Organization* 257–79. See also *supra* note 6.

<sup>16</sup> Krzysztof Pelc, *The Politics of Precedent in International Law: A Social Network Application* (2013). APSA 2013 Annual Meeting Paper. Available at SSRN: <http://ssrn.com/abstract=2299638>.

<sup>17</sup> Stephan W. Schill, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator’ (2010) 23 *Leiden Journal of International Law* 401.

law, where a change in ethos from diplomats to lawyers was spotted previously.<sup>18</sup> Above all, these observations stem from lawyers who have a close understanding of the legal field. So far, the insights of those lawyers hardly feed into the studies of political science. I will resume such trends and suggestions for further research in the programmatic outlook on the study of international judges and their audiences. This section continues by presenting the well received but mutually irritating views of legalism and deliberation.

### A. *Legalism*

The notion of legalism captures one of the very influential views on judicial reasoning. Typically a part of grander sociological outlooks, legalism teases out the ‘belief by virtue of which persons exercising authority are lent prestige,’ which is ‘the basis of every system of authority, and correspondingly of every kind of willingness to obey.’<sup>19</sup> When it comes to judicial authority, such basic belief is generally informed by a whole range of factors, including those that pertain to the person of the judge, to the scenery of the courtroom, and to the language of the law.<sup>20</sup> Legalism zooms in on the ethical attitude, which informs a willingness to obey, and which links up closely with the practice of the law. In Judith Shklar’s seminal contribution, legalism refers to ‘the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.’<sup>21</sup>

With regard to judicial authority and styles of legal reasoning, legalism suggests with a lasting legacy that especially when their authority threatens to be disputed, judges would do their best to portray their practice as impeccable rule-following. If waters get rough, the law and the rules of legal reasoning appear to offer the best refuge. Judges tie themselves to the law not so much to resist any temptation of submitting to reasons of politics, morality or economics but to say compellingly that their hands are tied. They speak the law, so help them God.

With additional nuances and variations, this basic ethos of legalism—and the way it turns into an appeal to formalism for judges—finds support and further explanations in many sociological

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<sup>18</sup> Joseph H H Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’ (2001) 35 *Journal of World Trade* 191–207; Robert Howse, ‘From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime’ (2002) 96 *American Journal of International Law* 94–117.

<sup>19</sup> Max Weber, *Economy and Society* (University of California Press 1978), 263.

<sup>20</sup> Niklas Luhmann, *Legitimität durch Verfahren* (Suhrkamp 1983).

<sup>21</sup> Judith N Shklar, *Legalism* (Harvard Univ. Press 1964), 1.

studies of judicial behaviour and reasoning. Niklas Luhmann argues in his masterful *Legitimität durch Verfahren* that the whole point of judicial procedure is to first reduce any kind of broader conflict into a specific and technical question about the law in a concrete case and to then blend out the role of the judge as actually taking a decision.<sup>22</sup> For Shklar, the ‘aloofness from politics’ is likewise a key ingredient of adjudicators’ social legitimacy.<sup>23</sup> The phenomenon of legalism finds recognition not only in works with primarily sociological ambitions but likewise resonates in legal philosophical arguments. Jeremy Waldron’s critique of judicial review takes off on the basis that normative disagreement is stifled in the courtroom. Meaningful differences get lost when they are reduced into differences of interpretation: ‘Instead of encouraging us to confront these disagreements directly, judicial review is likely to lead to their being framed as questions of interpretation of those bland formulations.’<sup>24</sup> Waldron thus acknowledges the pervasive appeal of legalism and articulates a normative critique. In sum, legalism highlights the appearance of impeccable rule following, overshadowing choices, and blending out the judge as an actor.

### B. *Deliberation*

From a more decidedly legal-philosophical perspective, the sociological phenomenon of legalism can gain quite some support. Explaining this support requires a walk through venerable political philosophy at a rather high speed. This analysis will quickly reconnect to judicial authority and styles of reasoning.

At least since Kant’s moral theory, it is firmly established that the practice of morality is closely, if not inextricably, intertwined with the practice of law. In all brevity: the first moral duty of man is to leave the state of nature, to enter into a civil condition, and to thereby allow that questions about what is right (what belongs to whom) are no longer based on individual judgment alone but

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<sup>22</sup> Luhmann, note 20, at 108. Also see Andreas Fischer-Lescano and Ralph Christensen, ‘Auctoritatis Interpositio. Die Dekonstruktion des Dezisionismus durch die Systemtheorie’ (2005) 44 *Der Staat* 213–242.

<sup>23</sup> Shklar, *supra* note 21 at 11; see also p. 41. See also Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” (1987) 38 *Hastings Law Journal* 814–853, 828 ([t]he ritual that is designed to intensify the authority of the act of interpretation ... adds to the collective work of sublimation designed to attest that the decision expresses not the will or the world-view of the judges but the will of the law or the legislature (*voluntas legis* or *legislatoris*)).

<sup>24</sup> Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346, at 1369. Nik de Boer brought this specific part of Waldron’s work to my attention.

determined by law.<sup>25</sup> As long as everyone follows his own inclinations, the most powerful will get their way. In Kant's famed words: 'Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.'<sup>26</sup> Both morality and freedom need law, and that law must be enforced.<sup>27</sup>

One problem, which has indeed received ample attention, is the difficult benchmark of a universal law.<sup>28</sup> Both John Rawls and Jürgen Habermas have updated Kant's truly core proposition in a way that avoids this reference. Instead, they place the notion of equal rights and liberties at the centre of their arguments. Laws must guarantee equal rights and liberties and ensure the respect of those rights and liberties.<sup>29</sup> Here too, those laws must be enforced to ensure that no one's freedom is unduly constrained by that of someone else. Laws and freedom require public authority.

However, even without a reference to universal law, the question remains of how a group of people can decide what they owe to one another and when public authority is justified on the basis that it actually 'just' ensures the equal protection of rights and liberties. On the one hand, there is the private autonomy of each individual, which by default, suggests that any authority is justified only if its subjects consent to it. On the other hand, there is the collective, or civic, autonomy that bears on the room to manoeuvre of each subject so as to allow equal rights and liberties. This tension has sharpened and has been refined over the years in the eternal divide between liberalism and republicanism. To frame the tension coming from the opposite direction once more in slightly different terms: public authority must act on behalf of the collective to ensure that the exercise of freedom by one does not unduly constrain the other. However, where should one draw the line? From a liberal perspective, such authority is only justified if it can connect to the consent of each

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<sup>25</sup> Articulated as an argument about rights, this view is most clearly expressed in Immanuel Kant, *Metaphysical First Principles of the Doctrine of Right*, in *The Metaphysics of Morals*, [1797] (Mary Gregor trans., Cambridge University Press 1996), 33, § 44, 90.

<sup>26</sup> *The Metaphysics of Morals*, 6:237. From the wealth of scholarly treatment of this core idea, see especially Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, 2009 240–241.

<sup>27</sup> Notably and in contrast to a sociological study of legitimacy, the issue is not whether subjects are *willing* to obey (referring to internal motivation) but whether they can justifiably be forced to obey.

<sup>28</sup> See Ripstein, *supra* note 27.

<sup>29</sup> John Rawls, *Political Liberalism* (Columbia University Press 1993) 261; Habermas, *supra* note 4 at 31-2.

party. Because of this tension, Habermas argues persuasively that both private and civic autonomy are co-original.<sup>30</sup> Neither one can do without the other.

How does that reasoning link up with (international) judicial authority and styles of reasoning? From the perspective of Habermas' deliberative theory — and in line with general ideas about the core functions of public law — the law turns into a medium that legitimises and constrains the exercise of public authority. Writing from the context of a democratic constitutional state, Habermas argues that the public sphere generates communicative power that is then absorbed by the law to legitimise the administrative power of the state. A parallel track of legitimacy leads via elections and mechanisms of representation. Both meet in parliament, where debates can use the whole spectrum of moral, ethical and pragmatic reasons to debate the law that should be adopted. The features of parliament, which connects both to the public sphere and to ideas of representation, make it the focal point for legally programming the administrative power of the state.<sup>31</sup>

Other institutions, administrations and courts draw on the legitimacy thus fed into the law. With reference to Jerry Mashaw, Habermas speaks of the 'transmission belt model,' in which the law transports legitimacy from the public sphere and elections through the parliament into the practice of the state.<sup>32</sup> Habermas' discourse theoretical reconstruction of the law in democratic constitutional states certainly does not believe that the law is determinate to the extent that courts or administrations — from now on I leave aside the latter — are programmed like robotic puppets. Parties typically find themselves before the court because the law has run out. According to Habermas, what the procedure before court and ultimately, the judicial decision need to do is complete the legislative programme. Following Ronald Dworkin, they do so in a creative and constructive fashion. However, unlike Dworkin, they are engaged in a *cooperative* enterprise in which the process of arguing, which is structured by judicial procedures, bears the burden of completing the legislative programme, rather than any ideal judge with supernatural powers.<sup>33</sup>

However, before court, the discourse is in principle limited to a more narrow set of possible reasons. The limits are loosely confined by the rules of interpretation.<sup>34</sup> What I take from the

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<sup>30</sup> Habermas, *supra* note 4 at 127.

<sup>31</sup> Habermas, *supra* note 4 at 170.

<sup>32</sup> Habermas, *supra* note 4 at 190 with reference to Jerry L. Mashaw, *Due Process in the Administrative State* (Yale University Press 1985) 22.

<sup>33</sup> That is the gist of the 'theory of legal discourse' Habermas, *supra* note 4 at 222-237.

<sup>34</sup> See Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (2012) 23 *European Journal of International Law* 7, 16.

discourse-theoretical reconstruction of the law in the democratic constitutional state is its reading of the separation of powers as a separation of types of discourses. That approach links the overall characteristics (especially procedural) of institutions with governmental functions and types of discourses. The features and setup of the parliament place it centre-stage and support it to make law through *norm-justificatory* discourses. Parliament can justify the law that it makes with a whole range of moral, ethical and pragmatic reasons. Courts, conversely, are engaged in more narrow discourses of *norm-application*. Following the idea of a transmission belt: ‘the judiciary must be separated from the legislature and prevented from programming itself. This explains the *principle of binding the judiciary to existing law*.’<sup>35</sup> At the same time, it is clear that discourses of norm-application are creative in completing the existing law or, better put, in making and changing that law.

All of this argument continues to support legalism’s core propositions from a more decidedly political-philosophical angle. Norm application is the business of courts. Courts are bound by the law and should stay within the confines of formalism. For the legitimating potential of authorising the judiciary through the medium of the law to be realised at all, judges must not be allowed to simply replace the moral and ethical reasons of the legislator with their own. That issue was arguably a main concern that underpinned Georges Abi-Saab’s dissent in the *Abaclat* case. Arbitrators should not unravel the agreement that was struck by negotiating parties (even if those negotiations have truly little in common with anything like parliamentary legislation). To reconsider the separation of powers as one between types of discourses already takes into account that a mechanical separation of law-making and law application is not tenable. Beyond that, Habermas keenly recognises that a number of general socio-legal trends contribute to types of law that shift ever greater chunks of law-making from the legislature to the executive and judicial branches of the state.<sup>36</sup> In light of this development, Habermas writes:

to the extent that legal programs are in need of further specification by the courts . . . juristic discourses of application must be *visibly supplemented by elements taken from discourses of justification*. Naturally, these elements of a quasi-legislative opinion- and will-formation require *another kind of legitimation* than does adjudication proper. The additional burden of legitimation could be *partly satisfied by additional obligations before an enlarged critical forum specific to the judiciary*.<sup>37</sup>

While developing his discourse-theoretical approach to the separation of powers and to adjudication, Habermas clearly has in view the democratic constitutional context of national legal

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<sup>35</sup> Habermas, *supra* note 4 at 172.

<sup>36</sup> His emphasis actually falls on bureaucracies and agencies rather than courts.

<sup>37</sup> Habermas, *supra* note 4 at 439-440 (italics added); see also p. 193.

orders.<sup>38</sup> Together with Armin von Bogdandy, I have argued elsewhere what emerges in the context of *international* adjudication.<sup>39</sup> Among other things, it seems to be yet more frequently the case in the context of the international legal order that legal programmes are vague. Especially where treaties set up international institutions or where they more generally delegate interpretative authority to international courts and tribunals, one might expect the terms of delegation to be precise. However, the prevailing modus of consensual rather than majority law making points in the opposite direction. Where compromises that suit everyone must be struck, precision may well be the first victim. What is more, whatever programme upon which state representatives might agree may well soon be out of touch with changing realities. The consensual modus of decision-making in political-legislative procedures largely prevents any updates. Not once have the WTO Members agreed to issue an authoritative interpretation (Art. IX:2 WTO Agreement), let alone change any of the WTO covered agreements (Art. X WTO Agreement).<sup>40</sup>

In the present paper, I suggest focusing on the qualified demand that the ‘juristic discourse of application must be visibly supplemented by elements taken from discourses of justification.’ For one, there is a question on that same political-philosophical terrain: Would that approach actually be well justified and advisable? Would it be conducive to the legitimacy of adjudication? An answer hinges, not the least, on the additional means of legitimation, which might include lower thresholds of participation in judicial proceedings, as well as greater transparency and publicness, for instance.<sup>41</sup> The answer also depends, as Habermas highlights, on the role of ‘an enlarged critical forum specific to the judiciary,’ which is supposed to contribute additional legitimacy through its critique of judicial reasoning. Is that at all possible, and is it advisable? There is a clear tension between this proposition and the core idea of legalism. Legalism would suggest that when the law runs out and the legal programme requires further specification, the adjudicators find themselves in a moment of crisis. The ground opens up under their feet, and they try their best to hold on to any and every branch of the law that is just within reach. They seek refuge in formalism. However, precisely in those moments, formalism is weakest. As Judith Shklar summarises: ‘as denunciations of “lawmaking”

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<sup>38</sup> More specifically, he focuses on the German constitutional order, with some detours via the US-American context.

<sup>39</sup> Von Bogdandy & Venzke, *supra* note 36.

<sup>40</sup> Pieter Jan Kuijper, ‘WTO Institutional Aspects’ in Daniel L Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 79.

<sup>41</sup> Armin von Bogdandy & Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014) 171-184.

multiply, the legalistic ethos is reinforced and the likelihood of judges satisfying it becomes increasingly rare.<sup>42</sup>

#### IV. Beyond legalism and deliberation: Judge's audiences

To refine the discussion of both legalism and deliberation, this section introduces in further detail a third perspective from which to approach judicial reasoning, namely that of self-presentation theory and its emphasis on impression management (A). I submit that such an approach is already subtly present in Shklar's legalism. This approach must be amplified and then used to reconsider arguments about judicial reasoning from the view of social legitimacy (B). Drawing attention to judges' audiences also has implications for the possibly critical and legitimating role of an enlarged forum specific to the judiciary (C).

##### *A. Audiences*

Audiences matter to judges for a variety of reasons, including because 'judges, like other people, get satisfaction from perceiving that other people view them positively.'<sup>43</sup> Being seen favourably can serve strategic ends, for example, if people who form part of the audience are in a position in which they might bear on the future career of a judge or on the judges' preferred policy outcome. In short, audiences can be instrumental. However, suggesting that being seen favourably gives satisfaction also endows audiences with a self-sufficient role that is not linked to further objectives. Laurence Baum, who pioneered thinking about judges and their audiences in domestic settings, maintains that 'judges care about the regard of salient audiences because they like that regard in itself, not just as a means to other ends'.<sup>44</sup>

The argument is one of social-psychology, which can be further refined through the lens of self-presentation theory. This strand of thinking sees behaviour as an extension of the impressions that actors are trying to create in the eyes of their audiences.<sup>45</sup> Erving Goffman, whose work set self-

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<sup>42</sup> Shklar, *supra* note 21 at 13.

<sup>43</sup> Baum at 3

<sup>44</sup> Baum at 4

<sup>45</sup> Much of the work follows on the heels of Erving Goffman, *The Presentation of Self in Everyday Life*, 1956. For an overview see Timothy J. Owens and Sarah Samblanet, 'Self and Self-Concept', in John DeLamater and Amanda Ward, *Handbook of Social Psychology* (John DeLamater (ed), 2nd edn, Springer 2013), Handbooks of Sociology and Social Research 225-249, especially 234-6; Roy F. Baumeister and Debra G. Hutton, 'Self-Presentation Theory: Self-Construction and Audience Pleasing' in Brian Mullen and George R. Goethals (eds), *Theories of Group Behavior* (Springer 1987).



perception theory on its track, draws attention to the ‘arts of impression management’.<sup>46</sup> He sees the focus of his *The Presentation of Self in Everyday Life* to lie precisely in the ‘study of impression management, of the contingencies which arise in fostering an impressions, and of the techniques for meeting these contingencies.’<sup>47</sup> More recently, Nezlek and Leary have argued that self-presentation is shaped by five factors: ‘[individuals’] self-concepts, constraints imposed by salient social roles, their desired and undesired identity images, the values of the people to whom they are impression-managing, and the current and potential nature of their public images.’<sup>48</sup>

The degree of self-awareness with which actors present themselves certainly differs, not the least depending on how deep-seated certain routines are. Like anyone else, judges may act in a thoroughly calculating manner based on their interests. Their interests may be shaped by previously established social relations, and their socialisation may turn their actions into unconscious knee-jerk reactions. This spectrum reflects the now generally acknowledged co-constitution of actors and social structures. With a view to the authority of international adjudicators and their choice of one rather than another style of legal reasoning, self-presentation theory and its emphasis on impression management suggests two complementary angles from which to look at judicial reasoning: anxiety and performance.

1. *Anxiety*. To think of judicial reasoning from the perspective of social anxiety ties in well with legalism’s idea about the self-reinforcing appeal of formalism, that is, legalism’s proposition that judges attempt to present their practice as impeccable rule-following, leaving no room for discretion or choice.<sup>49</sup> According to self-presentation theory, social anxiety arises ‘when individuals are motivated to convey a particular impression – usually one that will facilitate interpersonal acceptance (or perhaps more accurately, to avoid interpersonal rejection) but doubt their ability to do so.’<sup>50</sup> Social anxiety is thus a product of two components: the wish to convey a particular impression and

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<sup>46</sup> Goffman, *supra* note 47 at 132.

<sup>47</sup> Goffman, *supra* note 47 at 49. This is further worked out in B. R. Schlenker, *Impression management: The self-concept, social identity, and interpersonal relations* (Brooks/Cole 1980); M. R. Leary, *Self-presentation: Impression management and interpersonal behavior* (Westview Press 1996).

<sup>48</sup> J. B. Nezlek and M. R. Leary, ‘Individual differences in self-presentational motives in daily social interaction’ (2002) 28 *Personality and Social Psychology Bulletin* 211–223 at 212; quoted in Owens & Samblanet, *supra* note 47 at 23.

<sup>49</sup> See *supra* note 23.

<sup>50</sup> Catalino, Furr, and Bellis, ‘A multilevel analysis of the self-presentation theory of social anxiety: Contextualized, dispositional, and interactive perspectives’ at 361

the perceived probability of success. Social anxiety increases the more it matters to an actor to convey a particular impression and the less likely she perceives her success to be.<sup>51</sup>

From this angle, judicial reasoning is part of the repertoire with which judges attempt to manage their impressions.<sup>52</sup> Judges tackle anxieties with the art of impression management. Whether they succeed—given that they place a constant level of importance on imposing a particular impression—depends on the degree to which they master the art of impression management *and also* on the audience they are trying to impress.

2. *Performance.* Whereas dealing with social anxiety focuses on judges as actors, a complementary perspective looks at judges' judicial reasoning as routine performances. It is not that judges choose one style over another but rather that they get 'locked in.' Judges' anxiety is dependent on the audience they are facing. The audience is part of the cause of anxiety because it might be more or less likely to be impressed. What is more, drawing attention to routine performances highlights how the anticipation of others' reactions becomes part of the self. Baum develops this line of thinking with reference to psychologist Kristen Monroe, among others, who argues that human behaviour is driven principally by 'the actor's perceptions of self *in relations to others.*'<sup>53</sup> In fact, Goffman concludes that 'the very obligation and profitability of appearing always in a steady moral light, of being a socialised character, forces us to be the sort of person who is practiced in the ways of the stage.'<sup>54</sup> With repeat performance, actors are no longer free to choose. They are subject to constraints, and their self is constituted by those constraints. At this point, the actor no longer perceives constraints as such. In other words, individuals internalise the images that the audience draws of them.<sup>55</sup>

This is an important point to stress: arguing about the perceptions of others does not in and of itself suggest that judges are insincere or cynical about what they are doing. These are good reasons that all three arbitrators in the initial example were convinced that they were doing 'the right thing.' What self-presentation theory suggests is that judges also want to be seen to do the right thing, at least by those whose opinion they value. In addition, this theory suggests that the interaction with audiences influences what actors believe to be appropriate. Thus, this theory opens up a

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<sup>51</sup> *Ibid.* at 361-2.

<sup>52</sup> Goffman, *supra* note 47 at 160 ('the role of expression is conveying impressions of self').

<sup>53</sup> Kristen Renwick Monroe, 'A Paradigm for Political Psychology' in Kristen Renwick Monroe (ed), *Political Psychology* (Lawrence Erlbaum Associates 2002) 399–415 at 414; quoted in Baum at 26.

<sup>54</sup> Goffman, *supra* note 47 at 162.

<sup>55</sup> Baum at \_\_\_, with reference to Schlenker 1980, 194–96; Leary 1996, 167–68.

nanced perspective for a critical understanding of the judicial reasoning of the majority by Jan van den Berg and Pierre Tercier and of George Abi-Saab's dissent.

The argument concerning how audiences matter when attempting to explain and understand judicial reasoning benefits from revisiting the main propositions of legalism, as well as the potential of deliberation. With regard to the former, self-presentation theory and its emphasis on impression management highlight the contingency of formalism: whether formalism is a valuable strategy depends on the audiences that judges are trying to impress. In fact, Judith Shklar's *Legalism* is rather amenable to such a reading. The question that concerns deliberation is whether and to what extent the dynamics of judging as self-presentation might take away from a controlling and legitimating role of a critical public.

### B. *Reconsidering legalism's ties with formalism*

The role of audiences can, in fact, already be traced in Shklar's account of legalism. She stresses societal expectations that form the core of judges' social legitimacy. Judges *generally* meet social anxiety with formalism. However, this refuge is indeed contingent: 'Professional ideology and public expectations, in fact, do mold the conduct of the judiciary and its perception of its role.'<sup>56</sup> Formalism works as a social practice, and Shklar recognises in passing that its appeal varies. When judges face critique, '[t]he easiest resort ... is for judges to escape into formalism *when they can*. For American judges this is frequently not possible. In England it is.'<sup>57</sup> Shklar's account of the appeal of formalism comes with an implicit assessment of the leaning of English judges' audiences.

What is more, her account is open to recognise the internalisation of images that audiences draw of actors. It is not so much that judges advance their policy interests in the guise of formalism, Shklar suggests. Their ideas and, by extension, their styles of legal reasoning rather correspond 'to the professional experiences and necessity of bench and bar.'<sup>58</sup> In much the same way, Habermas offers the sociological observation in his normative reconstruction of the rule of law in domestic democracies that standards and practices of the legal profession shape judicial reasoning and continue to strengthen the ties that bind judges to the law.<sup>59</sup>

Formalism is a contingent refuge. As the example already shows, it is not a destination that every judge chooses. Its appeal depends on the beliefs of a judge's audience. The practice of

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<sup>56</sup> Shklar, *supra* note 21 at 12.

<sup>57</sup> Shklar, *supra* note 21 at 13 (italics added).

<sup>58</sup> Shklar, *supra* note 21 at 12.

<sup>59</sup> Facts and Norms 224-5

adjudication knows many other decisions for which formalism was not the preferred style of impression management. Adjudication in international criminal law offers many examples, but so does the law of the sea.<sup>60</sup> In its first case, then split into two, the majority of the International Tribunal for the Law of the Sea (ITLOS) upheld its jurisdiction by arguing *inter alia* that ‘it would not be consistent with justice if the Tribunal were to decline to deal with the merits of the dispute.’<sup>61</sup> The boundaries of what is permissible in legal argument and which styles of legal reasoning in fact support judicial authority or detract from it is contingent on the predilection of relevant audiences.

### C. *Reconsidering Deliberation*

What do self-presentation theory and its emphasis on the role of audiences say in relation to a normative account of the style of reasoning? The proposition here was that the additional need for legitimacy in judicial proceedings, which arises when discourses are opened up to include discourses of norm justification (such as fairness, for instance), ‘could be partly satisfied by additional obligations before an enlarged critical forum specific to the judiciary.’<sup>62</sup> Whether that approach works depends on the features and general quality of the respective forum.

On a first account, understanding judicial reasoning as a technique for impression management could be twisted to support the controlling and legitimating role of a critical public. Judges anticipate the reaction to their decisions and reasoning when attempting to deal with their social anxiety. This take on their practice recognises the power and influence of their onlookers. However, an overall pessimistic view prevails; the implied attitude is one of anticipation and appeasement, rather than one of good arguments that should convince.

The crucial normative question is whether the audiences, which are relevant for specific judges or for specific judicial institutions, constitute a public that has the capacity to generate supplementary legitimacy in cases in which judicial discourses are opened. Follow-up questions include: What are judges’ actual audiences? Which audiences matter the most? If it at all makes sense to split up a larger and general public into more narrowly confined audiences, can those audiences exercise a controlling and possibly legitimating function?

As Nancy Fraser highlights, Habermas developed a concept of the public sphere that is ambitious in that it refers not merely to simple flows of communication but to a normatively

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<sup>60</sup> ICTY,  *Anto Furundzija* (Judgment) IT-95-17/1-T (10 December 1998) paras 143–57.

<sup>61</sup> ITLOS, *The M/V “Saiga”* (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, 1 July 1999, para 73.

<sup>62</sup> Habermas, *supra* note 4 at 439-440 (italics added); see also p. 193.

legitimizing and politically efficacious public.<sup>63</sup> Who participates in debates on what terms matters, as does whether public officials are at all accountable to such a public. According to Fraser, public sphere theory has overwhelmingly bought into implicit assumptions of rather hermetic nation states that align the scope of authority with a public that ties together equal members of a political community.<sup>64</sup> Within territorial borders, national language and media outlets nourish life in the public sphere. Finally, as citizenry, the public can be politically efficacious. There is public authority that reacts to the public. All of this of course changes in the post-national constellation, where authority, territory and rights fall apart.<sup>65</sup> Fraser suggests that regardless of political citizenship, those individuals must be included on an equal footing and be granted channels of influence that are ‘subject[ed] to a structure of governance that set the ground rules for their interaction. For any given problem, accordingly, the relevant public should match the reach of the governance structure that regulates the relevant swath of social interaction.’<sup>66</sup> Of course, that is a high threshold. Not the least, massive inequality and mechanisms of exclusion stand in the way. Euphoric references to the internet as a medium that gives rise to new transnational public spaces are contrasted with the fact that the internet still only reaches less than a third of the world population (2 of roughly 7 billion people).<sup>67</sup> Whether such spaces at all qualify is also contested with good arguments.<sup>68</sup>

There are several problems in the potentially legitimating function of a ‘forum specific to the judiciary.’ Following Fraser and others, a persistent problem is how the relevant public should shift

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<sup>63</sup> Nancy Fraser, *Scales of Justice. Reimagining Political Space in a Globalizing World* (Columbia University Press 2009) 76-77.

<sup>64</sup> Fraser at 79-83. Fraser includes Habermas’ pivotal work in this regard. She focuses on his *Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity 1989). Though translated and published in English only in 1989, it is an early book that was published in German in 1962 (it is Habermas’ *Habilitationschrift*, in fact). Habermas has since done much that actually chimes in well with Fraser’s criticism, especially arguing that political communication needs to open up to experiences in different nation states. See only Jürgen Habermas, ‘Why Europe Needs a Constitution’ (2001) 11 *New Left Review* 5–26, 16-19; Jürgen Habermas, ‘The Crisis of the European Union in the Light of a Constitutionalization of International Law’ (2012) 23 *European Journal of International Law* 335–348, 346.

<sup>65</sup> On the shifting constellations of this trilogy see Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006).

<sup>66</sup> Fraser at 96.

<sup>67</sup> This is the flipside of the upbeat 2013 Human Development Report, available at <http://hdr.undp.org/en/>.

<sup>68</sup> Zizi Papacharissi ‘The Virtual Sphere 2.0: The Internet, the Public Sphere, and Beyond.’ in *Routledge Handbook of Internet Politics* (2009), 230-245.

with the authority that it is subjected to while at the same time forming a community of sufficient quality to realise inclusive participation on par and a discourse of some density. The related and most important problem appears more clearly if considered from the perspective of judges and their audiences; there is an idea of openness embedded in the public sphere that together with inclusiveness as to who participates, suggests that themes may not in principle be excluded or perspectives be *ab initio* weighted. The idea is that of generality, which is typically linked to the process of law creation in parliament. This idea demands that procedures be thematically unsettled and open to all kinds of competing perspectives.<sup>69</sup> The problem is that adjudication at the international level is clearly thematically fragmented. Discourses are equally fragmented so that any forum that is specific to a judiciary brings specific perspectives that favour one point of view over another.<sup>70</sup> Such fragmentation impacts how judges deal with their social anxiety and manage their impressions. Arguments tend to be geared more towards groups that share a specific perspective. They should resonate with the interests that particular regimes of international law pursue.<sup>71</sup> It is in this light that the majority reasoning in the *Abaclat* can make sense. It is one instance of the more general pattern in which the objectives of investment protection or trade liberalisation support judicial decisions in international economic law.<sup>72</sup>

## V. Outlook: A programme for studying judicial authority and audiences

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<sup>69</sup> Bast 'Das Demokratiedefizit fragmentierter Internationalisierung', in H. Brunkhorst (ed.), *Demokratie in der Weltgesellschaft*, 18 Soziale Welt Sonderband (2009) 177. Cf. Christoph Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (Mohr Siebeck 2005), 31 and 223; Paulus, 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?', in T. Broude and Y. Shany (eds), *The Shifting Allocation of Authority in International Law* (2008) 193, 210.

<sup>70</sup> On fragmentation as a problem for the democratic legitimacy of international adjudication, see Von Bogdandy & Venzke, *supra* note 36 at 23.

<sup>71</sup> For such an understanding of fragmented regimes in international law, see Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999–1045.

<sup>72</sup> Of course, such references may find support in the standard rule of interpretation that demands that treaties be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*' (Art. 31 Vienna Convention on the Law of Treaties). The point is, however, that assessments of what the object and purpose is and how it should be pursued are likely to differ depending on who you ask.

The present contribution has attempted to show how thinking about judges' quest for authority and about styles of judicial reasoning gains from a closer consideration of judges' audiences. This work has challenged explanations and justifications of judicial reasoning in the forms of legalism and deliberation by drawing attention to judges' self-presentation and impression management. It has tried to give a first account of how judges' audiences matter. Granted, a number of questions remain. I hope that curiosity to explore these questions further also remains. In this concluding outlook, I wish to contrast the study of audiences with closely competing alternatives, especially those of epistemic or interpretative communities. Further, there is of course the key question of what audiences are relevant. Moreover, differences between domestic and international contexts must be considered further.

*A. Audiences rather than epistemic or interpretative communities*

The view of the practice of adjudication that arises from considering judges' self-presentation between legalism and deliberation might also be understood from the perspectives of the closely competing ideas of epistemic or interpretative communities. I submit that for a number of reasons, thinking about judges' audiences fares better.

The first notion—that of epistemic communities—refers to 'a network of professionals with recognised expertise and competence in a particular domain.'<sup>73</sup> Members of an epistemic community have 'a shared set of causal and principled (analytic and normative) beliefs, a consensual knowledge base, and a common policy enterprise (common interests) that distinguishes epistemic communities from various other groups.'<sup>74</sup> The notion is highly ambitious and demanding, as it includes members that share all of these things. To argue that audiences matter, it is not necessary to buy into all or even any of these elements. Self-presentation theory is both less demanding and more nuanced. It allows for a whole range of sincere and also cynical motivations.<sup>75</sup>

The notion of interpretative communities is also less demanding. This notion comes close to thinking about judicial reasoning in light of audiences, in that it takes communicative practices to lie

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<sup>73</sup> Peter M Haas, 'Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1–35, 3.

<sup>74</sup> *Ibid.* at 18.

<sup>75</sup> On cynical self-performance, Goffman 1956, at 10-13; see more generally, Alexis T. Franzese, 'Motivation, Motives, and Individual Agency', in J. DeLamater and A. Ward (eds), *Handbook of Social Psychology* (2013), 281, at 286.

at the heart of a community.<sup>76</sup> In their practice, interpretative communities uphold beliefs about what is a correct interpretation and above all, uphold standards concerning how to argue about what is a correct interpretation.<sup>77</sup> In Stanley Fish's strong view, it is precisely how one should look at a text that makes the text.<sup>78</sup> This way of looking at interpretative practice is complementary to that of considering audiences. However, the latter approach has the additional advantage of zooming in on the perspective of the actor. It is thus able to contribute to explaining the stabilising dynamics of an interpretative community by highlighting the varying motives of the interpreter. The interpreter wants to be seen as being a good member of a community—she wants to please her audience.

### B. *The power of audiences at the international level*

The key question is of course: Which are the relevant audiences for international judges? Writing for the domestic setting, Baum sets up a whole range of possibilities, each with varying plausibility for different specific contexts but all with some sway. Ranging from the microcosmic personal context via the immediate workplace to broader political audiences, Baum zooms in on colleagues at the court, other branches of government, and social and professional groups, such as Bar Associations, as well as policy groups and the news media. With regard to the latter, he revisits arguments as to how the reception of Supreme Court judges' reasoning in the *New York Times*, especially the reception of reporter Linda Greenhouse, has arguably given rise to a 'Greenhouse effect' on judicial behaviour.<sup>79</sup> The audiences differ for judges at different courts. For instance, Baum draws attention to how two rivalling conservative judges at the federal appeals court with aspirations to be appointed for the Supreme Court went to great lengths in their judgments to win the favour of the future president's closer circle in the lead-up to presidential elections.

Some observations may be made as to what audiences are relevant for international judges. I have already highlighted that at least in some contrast to the domestic setting, adjudication is much more fragmented along thematic lines. Second, it only happens rarely—though increasingly—that international adjudication is taken up in the public media. Relevant audiences are likely to be rather limited to professionals, more specifically, legal professionals in a specific field of law. All of this

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<sup>76</sup> Stanley Fish, *Doing What Comes Naturally. Change, Rhetoric, and the Practice of Theory in Literature and Legal Studies* (Duke University Press 1989) 141–60.

<sup>77</sup> The notion of communities of practice is set up along similar lines, see P Eckert, *Communities of Practice*. In *Encyclopedia of Language and Linguistics* (2006) \_\_\_\_ [1-4].

<sup>78</sup> Stanley Fish, 'What Makes an Interpretation Acceptable' in *Is There a Text in This Class? The Authority of Interpretative Communities* (Harvard University Press 1980).

<sup>79</sup> Baum, at 138-44.



questions the possibly legitimating role that audiences could play. To the contrary, drawing attention to the role of judges' audiences in the construction of their authority and styles of reasoning may even highlight and explain how international law is pushed in directions that follow the interests and inclinations of specific regimes. The question then is whether inclusive publics emerge that contest those moves. Evidence suggests that they do.<sup>80</sup>

For instance, in trade law, jurisprudence and styles of reasoning have shifted visibly and significantly in reaction to widespread criticism to decisions that seemingly categorically rule out the possibility that unilateral trade-restrictive measures could be justified by the environmental objectives they pursued.<sup>81</sup> Public contestation played its role in changing that view. This factor points to shifts in adjudicators' strategic space. A change in adjudicators—with the new Appellate Body and its general public international lawyers—also came with a shift in the audiences that mattered. The pivotal and programmatic decisions clearly speak a different language that is geared towards different interlocutors.<sup>82</sup> While much is currently in flux in the field of investment arbitration, it is safe to say that public contestation has drawn the field out into the open, where the argumentative space has already shifted.

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<sup>80</sup> Michael Zürn, 'The politicization of world politics and its effects: Eight propositions' (2014) 6 *European Political Science Review* 47–71.

<sup>81</sup> GATT Panel Report, *United States - Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155, see especially para 5.27.

<sup>82</sup> Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, especially at p. 16; Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WB/DS58/AB/R, 12 October 1998, especially at paras 152-4.