

THE SHIFT FROM THE CONSENSUAL TO THE
COMPULSORY PARADIGM IN INTERNATIONAL
ADJUDICATION: ELEMENTS FOR
A THEORY OF CONSENT

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I. INTRODUCTION

As the Permanent Court of International Justice (PCIJ) held in the advisory opinion on the *Status of Eastern Carelia*, the fundamental legal principle underpinning the settlement of disputes involving sovereign states (hereinafter “international disputes”) is that “no state can, without its consent, be compelled to submit its disputes . . . to arbitration, or any other kind of pacific settlement.”¹ This is the so-called “principle of consent,” a rule so “well established in international law” that the Court felt no need to provide evidence of its existence, nor to elaborate on its precise content.²

While jurisdiction of domestic courts is compulsory, meaning that the plaintiff (“applicant,” in international terminology) need not obtain the defendant’s (“respondent’s”) consent to bring the dispute before the court, jurisdiction of international adjudicative bodies has historically depended on such consent. This is one of the most notable differences between international and domestic legal orders.

1. Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 19 (Jul. 23). The scope of this article encompasses not only disputes between sovereign states, but also disputes in which only one of the parties is a state or an international organization. Reference, whenever appropriate, is also made to international criminal tribunals. While states as such are not parties in international criminal cases, the question of their consent to the exercise of international criminal jurisdiction is nonetheless relevant.

2. The Court reaffirmed the *Eastern Carelia* dictum in *Mavrommatis Palestine Concessions*, but did not elaborate upon it. (Gr. Brit. v. Greece), 1924 P.C.I.J. (ser. A) No. 2, at 10 (Aug. 30). Dissenting opinions reinforced this conclusion. *Id.* at 34-35 (Finlay, J., dissenting); *Id.* at 54 (Moore, J., dissenting). See also *Mavrommatis Jerusalem Concessions* (Gr. Brit. v. Greece), 1925 P.C.I.J. (ser. A) No. 5, at 21-22 (March 26).

As a matter of fact, the principle of consent is a corollary of the principles of sovereignty and equality of states, which in turn constitute the “basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having uniform legal personality.”³ Thus, consenting to international adjudication⁴ is a simultaneous expression and cession of sovereignty.

The meaning and scope of the principle of consent has changed little over the course of the twentieth century,⁵ and the *Eastern Carelia* dictum has become a canon of international law. This principle has rarely, if ever, been challenged or questioned in either legal theory or practice. However, over the past two decades, theory and practice in relation to the compulsory exercise of international jurisdiction have increasingly grown apart. While some scholars have taken notice, a systematic analysis of the phenomenon has not yet been attempted, nor has it been considered whether traditional as-

3. IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287 (6th ed. 2003). The principle of consent applies to states and international organizations, but not to other non-public entities such as individuals or corporations, which now frequently have *jus standi* (standing) in several international jurisdictions (e.g., human rights courts, international criminal tribunals, and courts of regional economic integration agreements).

4. In this Article, the term “adjudication” is used merely to signify a judicial decision. It indicates both judicial settlement by standing international courts and tribunals and settlement by arbitration. JOHN BASSETT MOORE, *Notes on the Historical and Legal Phases of the Adjudication of International Disputes*, in 1 *INTERNATIONAL ADJUDICATIONS* xv-xvii (1929); see also J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 88 (3rd ed. 1998) (referring to arbitration and judicial settlement as two different means of judicial settlement) [hereinafter MERRILLS, *INTERNATIONAL*]. *Contra* Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 *RECUEIL DES COURS* (1996).

5. The most significant change to the scope of the principle is that, before World War II, states had no obligation whatsoever to settle their disputes. However, since the UN Charter outlawed the use of force in international relations, states now have the duty to seek settlement of disputes by any peaceful means if the dispute is one likely to endanger international peace and security. U.N. Charter art. 33; see also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the UN Charter, G.A. Res. 2625 (XXV), annex, U.N. Doc. A/8082 (Oct. 24, 1970). Article 33 of the Charter also codifies the principle of free choice of means according to which states are not bound to settle disputes using any particular means unless they have agreed to do so. U.N. Charter art. 33.

sumptions surrounding international dispute resolution need to be reconsidered.⁶

While in the past decade the proliferation of international courts and tribunals and the general increase in international adjudication have been hailed as some of the most significant changes in international law (and, correspondingly, international relations) of our time,⁷ this Article argues in Part II that the real revolution is actually that the overwhelming majority of these fora exercise compulsory jurisdiction and that litigation is triggered often and in certain contexts solely unilaterally.

Through the end of the twentieth century and the first few years of the twenty-first century, there has been a fundamental shift in the concept and practice of international adjudication from a traditional *consensual paradigm*, in which express and specific consent is a prerequisite to jurisdiction and adjudication largely takes place with the assent and cooperation of both parties, to a *compulsory paradigm*, in which consent is largely formulaic either because it is implicit in the ratification of treaties creating certain international organizations en-

6. At the end of the 1980s, Elihu Lauterpacht gave a very prescient lecture on the transformation of the principle of consent. He noted that “[t]he requirement is normally rigorously applied and is reflected in practice by, for example, the presumption in favour of the state against which jurisdiction is being invoked.” Yet, he also cautiously suggested that “. . . some cracks in the edifice are developing.” “[E]xact consent, closely linked in time and substance to the exercise of jurisdiction, may have become so worn away as to require profound reconsideration of the fundamentals of the subject . . .” ELIHU LAUTERPACHT, *ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE* 23-25 (1991). However, Lauterpacht’s analysis develops in a fundamentally different direction than the one taken by this Article, suggesting that states should reconsider their position vis-à-vis compulsory jurisdiction and in particular the jurisdiction of the International Court of Justice (ICJ). For an analysis of the issues discussed in this Article in the context of the Law of the Sea regime, see Bernard Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT’L. L. 277 (2001). In the context of investment disputes, see Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT’L. L. 835 (2005).

7. Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709 (1999) [hereinafter Romano, *Proliferation*]. Cf. José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT’L L.J. 405 (2003); Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L. ORG. 385 (2000).

dowed with adjudicative bodies or because it is jurisprudentially bypassed and litigation is often undertaken unilaterally.⁸

It must be stressed that the “shift of paradigm” from consensual to compulsory does not mean that the principle of consent has been extinguished.⁹ The principle remains valid, but its significance has been gradually reduced, transforming it into a pale simulacrum of its old self. The expression of consent has become so removed in time and substance from the exercise of jurisdiction that one may question whether consent continues to serve a significant function in the international order.¹⁰

There are currently about two dozen active international adjudicative fora in which international disputes can be decided with binding effect.¹¹ Most rely on the compulsory para-

8. This Article does not intend to explain why there has been a move toward the compulsory paradigm. Rather, it analyzes the consequences of a patchy and inhomogeneous shift that has occurred across the globe and discusses possible antidotes. The philosophical, political, and cultural forces driving the shift toward the compulsory paradigm deserve full consideration and, for the sake of conciseness, will not be addressed here.

9. This Article relies on Thomas Kuhn’s notion of “paradigm shift.” See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). However, I deliberately avoid using the expression “paradigm shift” and resort rather to the paraphrase “shift of paradigm,” as “paradigm shift” has become a meaningless buzzword used in all kinds of inappropriate contexts. See ROBERT L. TRASK, *MIND THE GAFFE* (2001).

10. See LAUTERPACHT, *supra* note 6, at 25. This shift is also visible in quasi-judicial and implementation control procedures as well in political processes such as determinations of legality by the UN Security Council. See *id.* at 37-48; PHILIPPE SANDS ET AL., *MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS*, at xxviii (1999). However, again for reasons of conciseness, this Article focuses solely on adjudicative processes.

11. For a comprehensive listing of international adjudicative bodies, see Romano, *Proliferation*, *supra* note 7, at 715-19. An updated version of this listing is reprinted in JOSÉ ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 404-07 (2005), available at http://www.pict-pecti.org/publications/synoptic_chart/Synop_C4.pdf. This Article considers only international adjudicative fora that are significantly active. These include fora in which disputes between states and/or international organizations are heard (e.g., the International Court of Justice, the dispute settlement systems of the United Nations Convention for the Law of the Sea and of the World Trade Organization, and NAFTA Chapter 19 tribunals), international criminal bodies (e.g., the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court), international human rights courts (e.g., the European Court of Human Rights and the Inter-American Court of Human Rights), judicial

digm. Within that paradigm, consent to compulsory jurisdiction is a requirement of state membership in an international organization or legal regime and the adjudicative process is typically started by unilateral submission.¹² There are a few exceptions to this prevailing paradigm, and interestingly, these were conceived before 1990 and thus before the post-Cold War “Big Bang” that gave rise to an expanded constellation of international adjudicative fora.¹³ The International Court of Justice (ICJ) and the Inter-American Court of Human Rights (IACHR) still rely on the classic consensual paradigm. For both of these courts, consent to jurisdiction must be expressly accorded either before or after any given dispute arises.¹⁴ Dispute settlement under the United Nations Convention on the Law of the Sea (“LOS Convention”) relies partly on the consensual paradigm and partly on the compulsory paradigm.¹⁵ Finally, arbitration, which for centuries has been a quintessentially consensual exercise, has been increasingly pursued unilaterally since the end of the Cold War.¹⁶ As Part III of this Article sets out to demonstrate, the stumbling block of consent, which has been decried by generations of legal scholars as the great limitation of international adjudication,¹⁷ has

bodies and dispute settlement systems of regional economic and/or political integration agreements (e.g., the Court of Justice of the European Communities, the European Free Trade Agreement Court, the Court of Justice of the Common Market for Eastern and Southern Africa, the Court of Justice of the Andean Community, and NAFTA Chapter 11 tribunals), and permanent arbitral facilities open to disputes involving states (e.g., the Permanent Court of Arbitration and the International Center for the Settlement of Investment Disputes). *See id.*

12. *See infra* Part II.B.

13. The legal structure of the ICJ is essentially that of its predecessor, the PCIJ, which was created in the aftermath of World War I. *Compare* ICJ Statute, *infra* note 87, with PCIJ statute, *infra* note 48. The American Convention on Human Rights, which provided for the establishment of the IACHR, was adopted on November 22, 1969. *See* American Convention, *infra* note 87. The dispute settlement system under the LOS Convention was negotiated during the Third UN Conference on the Law of the Sea between 1973 and 1982. *See infra* note 15.

14. *See infra* Part III.A.

15. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention]. *See infra* Part III.B.

16. *See infra* Part II.B.

17. *See, e.g.*, NICOLAS POLITIS, *THE NEW ASPECTS OF INTERNATIONAL LAW* 49-68 (1928); GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW: TWO ALTERNATIVE PLANS* (3rd ed. 1966); NAGENDRA SINGH, *THE*

been largely circumvented even in the case of these fora that, to varying degrees, still rely on the consensual paradigm.

The move toward the compulsory paradigm would be rather unproblematic if it had taken place homogeneously throughout the globe and across legal regimes. However, “judicialization”¹⁸ has had an inevitably¹⁹ disproportionate effect on certain areas of international law and relations.²⁰ The various dispute settlement procedures and institutions are disharmonic, unrelated, and unsynchronized, with some relying on express consent to be activated and others relying on the compulsory paradigm. More importantly, the proclivity toward international courts and tribunals and the willingness to confer compulsory jurisdiction on them seems to vary greatly among the various regions of the globe and from state to state. This contrasts with domestic legal systems, which are typically based on the compulsory paradigm because power and legiti-

ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 26-35 (1989); Frank Przetacznik, *The Compulsory Jurisdiction of the International Court of Justice as a Prerequisite for Peace*, 68 REV. DE DROIT INT’L, DE SCIENCES DIPL. ET POLIT. 39, 39-74 (1990); Heinhart Steiger, *Plaidoyer pour une Juridiction Internationale Obligatoire*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 817, 817-832 (Jerzy Makarczyk ed., 1996).

18. “[L]egalization [is] a particular form of institutionalization characterized by three components: obligation, precision and delegation.” Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT. ORG. 401, 401 (2000). In this Article, I use the term “judicialization” to refer to a particular form of “legalization” characterized by a high degree of delegation to adjudicative institutions.

19. The uneven judicialization of international relations is likely inevitable given the fact that the international community is made of sovereign entities that do not recognize *ipso facto* superior authorities. One might assume that this is only a phase in the history of humankind, heralding a future in which power is ultimately transferred to a sort of supranational and universal federation endowed with one international judiciary exercising compulsory jurisdiction over all states. However, this vision is neither plausible nor normatively desirable from a libertarian point of view. International law will always maintain a remarkable degree of unity at the normative level, lest it negate itself, but it will also always be fractured when it comes to its governing institutions, because power and legitimacy at the international level are fragmented and distributed throughout a large number of sovereign states and, more recently, some supranational entities. If there is therefore no escape from pluralism and fragmentation, then the question arises whether such a judicial “non-system” can remain on the cusp between the lure of the “universal state” pipedream and self-destruction under the weight of its own inherent contradictions.

20. See Goldstein, *supra* note 7.

macy are concentrated in one single source: the sovereign (be that the people, the monarch, the party, or whomever). Again, in domestic legal systems, courts are organized in a hierarchical structure. Procedural rules regulate interactions at all levels and delimit ambits of jurisdiction.²¹ Courts exercise compulsory jurisdiction, and the plaintiff need not obtain the respondent's consent to seize the court.

The shift away from the consensual and toward the compulsory paradigm has created an uncertain international environment in which international adjudicative bodies are activated not only frequently and unilaterally but often simultaneously or serially to litigate essentially the same disputes. Which procedures and bodies should have precedence when two or more fora can exercise compulsory jurisdiction over the same parties for the same (or different aspects of the same) dispute? Additionally, what happens if one forum hinges on the consensual paradigm and the other on the compulsory? Does the compulsory forum always prevail over the consensual, or is it the reverse? In this Article, I provide several recent examples of actual disputes.

Part IV of this Article argues that "cluster litigation," or parallel or serial litigation of essentially the same dispute before multiple international jurisdictions, is problematic for at least three fundamental reasons. First, it increases the chances that two or more international courts might interpret the same norm of international law differently.²² This is particularly problematic because the international legal system lacks a central authority capable of authoritatively and defini-

21. Granted, this might be a gross oversimplification, as even in domestic systems there could be conflicts between various jurisdictions regardless of whether states have adopted legislation to address these problems. Nonetheless, international courts and tribunals are much less coordinated than the various courts within most nation states.

22. It is still unclear whether the increase of multiple proceedings necessarily threatens the unity of international law or, less dramatically, creates a concrete risk of diverging or contrasting judgments on the same points of law between different fora. In the second half of the 1990s, Jonathan Charney researched international jurisprudence and found little evidence that such threats had come to pass. *See generally* Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 *RECUEIL DES COURS* 101 (1998). However, that study was conducted in the early days of the "compulsory" revolution, and since then no new equally authoritative and comprehensive study has been carried out.

tively determining the correct interpretation. Second, if the same dispute can be litigated over and over before as many fora as possible, no international court can really be a jurisdiction of last instance and one of the essential functions of international courts, that is to say providing a definite resolution to otherwise intractable disputes, is frustrated. Third, if the principle of state sovereignty is to retain practical meaning, any attempt to resolve issues raised by the concurrent jurisdiction of multiple international courts must begin with an examination of what the state(s) that accepted the jurisdiction of multiple international courts intended in so doing. As the world is just starting to think through and seek antidotes to the legal problems caused by the multiplication of international judicial bodies, the answer might not be straightforward: Did the state(s) intend to create redundancy, thus making sure at least one forum would be available in the event of disputes, or did the state(s) accept the jurisdiction of one court in order to exclude that of the other court?

How can the disruptive forces unleashed by the non-uniform judicialization of international relations and the shift to the compulsory paradigm be reined in? In Part V, a careful survey of the most recent scholarly literature and international practice points to three possible attitudes. I have labeled these possibilities the *technocratic/legalistic approach*, which relies on legal rules and procedural solutions; the *sociologic/jurisprudential approach*, which mostly relies on the voluntary action of epistemic communities made up of international judges and arbitrators; and the *non-engagement/disengagement approach*, which stresses the capacity and ultimately the right of states not to accept the jurisdiction of international courts. While each of these three approaches represents a potential solution, I argue that each also has inherent problems that limit its efficacy.

Reliance on general principles of law and more careful treaty wording (*technocratic/legalistic approach*) has limited impact. On the one hand, given the abstract and general nature of these principles and rules, their application to concrete cases might be far from self-evident. On the other hand, more elaborate and careful dispute settlement provisions might address future problems but do nothing to untangle the existing confusion of overlapping and conflicting dispute settlement provisions.

The sociologic/jurisprudential approach calls for judges of international (and also national) courts and tribunals to reach across divides and, in the absence of clear-cut norms and principles that can frame their relations, spontaneously build a sort of informal judicial system. However, no state or organization has given any explicit mandate to international judges to address issues of conflicting jurisdictions, and the legitimacy of judges operating at the limit of or beyond their statutory mandates is questionable, all the more so given the flawed and opaque procedures through which judges are frequently selected and nominated.

Finally, the principle of consent to adjudication implies that, as much as states are free to accept third-party binding adjudication, they are also free either not to do so (non-engagement) or to remove themselves from jurisdiction once they have done so (disengagement). In theory, non-engagement and disengagement provide states with useful mechanisms to affirm or reappropriate their sovereign rights whenever they have well-founded reasons to doubt the interpretation of jurisdictional clauses by international courts. In practice, however, this approach comes with significant opportunity costs that make it at best a last-resort measure.

Because each of the three approaches considered is flawed in some essential way, this Article concludes with a series of normative claims and suggestions for specific actions.

First, there is an urgent need for more and better thinking about the design of dispute settlement clauses. This calls for an attitudinal change in international legal scholars and states' negotiators, who have so far approached such clauses as mere afterthoughts.

Second, reliance on spontaneous action by international judges working through epistemic networks is questionable, for these networks and their participants lack transparency and legitimacy. Thus, it is imperative to improve the mechanisms by which international judges are selected and elected. There is a general need for a more finely grained understanding of who international judges are, who they represent, what their mission is, and from what exact source their legitimacy arises. Moreover, natural parochialism cannot be simply wished away. More could be done to reduce competition between multiple fora with jurisdiction over the same kinds of

dispute. For example, making financing less dependent on quantitative criteria and caseload could help in this regard.

Third, I argue that governments are better off engaging and steering the process of judicialization of international politics rather than remaining at the margins. At the same time, I also make a case for international courts and tribunals to be more deferential toward the will of those states wishing to remain at the margins. To that end, this Article calls for courts still relying on the consensual paradigm to practice greater judicial restraint, arguing that international courts should tend to err on the side of declining jurisdiction whenever jurisdiction is contested rather than on the side of exercising jurisdiction, as they currently do.

In addition, I suggest that since there are obvious limits to the degree to which the fundamental flaws of the three highlighted approaches can be addressed, it is necessary to either make advances in each of the three areas simultaneously or to develop a strategy through which the three approaches' respective weaknesses could cancel each other out.

While issues of litispence and forum shopping are attracting increasing attention from international legal scholars and decisionmakers, the qualitative transformation of the international legal system brought about by the expansion of compulsory jurisdiction is an underappreciated and even largely unnoticed phenomenon. Highlighting the shift from a consensual to a compulsory paradigm in international litigation creates a different theoretical and empirical framework for understanding contemporary international adjudication and the phenomenon of the judicialization of world politics. By presenting new hypotheses and normative findings, this Article lays the groundwork for future research and discussion.

It is easy to see how this particular perspective might aid several ongoing scholarly discussions, casting them in a different light and making them more meaningful and fruitful. For instance, consider the debate over whether the proliferation of international judicial bodies is a positive or negative development.²³ The proliferation of consensual jurisdiction is not at

23. See generally Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is it Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001); Rosalyn Higgins, *The ICJ, the ECJ and the Integrity of International Law*, 52 INT'L & COMP. L.Q. 1 (2003); see also LA JURIDICTIONNALISATION DU DROIT INTERNA-

issue, because the existence of a greater number of fora simply increases the possibility that disputes can be addressed via law-based and impartial procedures. This consensual proliferation reflects the growing complexity and diversity of international law.²⁴ But the proliferation of compulsory jurisdictions that are at best only informally coordinated is a problem, because it creates an opportunity for parallel or serial litigation of essentially the same dispute before multiple international judicial bodies.

Or think about the debate regarding the “effectiveness of international adjudication”; i.e., the capacity of international courts to settle disputes. Are “more independent” courts less effective than courts that are “less independent,” if independence is measured by the degree of institutional separation from the states party to the court more than by ethical or moral standards?²⁵ In a world in which adjudicative bodies operate on the consensual paradigm, relying on explicit consent and depending on the cooperation of *both* parties (as in the case of consensual arbitration), independence is not as big of a concern as some claim. In these situations, the judicial body is almost by definition dependent on both parties. However, independence does become an issue in a compulsory context

TIONAL: COLLOQUE DE LILLE (Société Française pour le Droit International ed., 2003) and the editorial comments on the proliferation of international courts by Guillaume, Pocar, and Cancado Trindade: Gilbert Guillaume, *Advantages and Risks of Proliferation: A Blueprint for Action*, 2 J. INT'L CRIM. JUST. 300 (2004); Fausto Pocar, *A Necessity in the Current International Community*, 2 J. INT'L CRIM. JUST. 304 (2004); Antonio Augusto Cancado Trindade, *The Merits of Coordination of International Courts on Human Rights*, 2 J. INT'L CRIM. JUST. 309 (2004).

24. Cf. Gerhard Hafner, *Should One Fear The Proliferation Of Mechanisms For The Peaceful Settlement Of Disputes?*, in RÈGLEMENT PACIFIQUE DES DIFFÉRENDIS ENTRE ÉTATS 25, 25-41 (Lucius Cafilisch ed., 1998); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law?: Postmodern Anxieties*, 15 LEIDEN J. OF INT. L. 553 (2002).

25. See, e.g., Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 7 (2005) (responding to Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) [hereinafter Helfer & Slaughter, *Toward a Theory*]). For the subsequent counter-reply, see Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005). On the effectiveness of the ICJ, see generally CONSTANZE SCHULTE, *COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE* (2004).

because of the asymmetries that compulsion necessarily introduces between the parties. Therefore, the effectiveness debate might result in more fruitful speculation if it were separated from the issue of independence and instead focused on whether adjudicative fora based on the compulsory paradigm are more or less effective than those based on the consensual one.

The ambivalent attitude of the United States toward international adjudication, especially since the end of the Cold War, has been subject to principled criticism as a signal of the country's larger repudiation of multilateralism.²⁶ Yet, as we will see, non-acceptance of the jurisdiction of international adjudicative bodies, conditional acceptance, and withdrawal of acceptance are all practical and legitimate remedies to the problems created by the uneven and spotty shift toward the compulsory paradigm.²⁷

II. THE SHIFT FROM THE CONSENSUAL TO THE COMPULSORY PARADIGM

The transition from the consensual to the compulsory paradigm has taken place gradually over more than two centuries, which may explain why it has gone largely unnoticed. Typical accounts of international adjudication tend to focus more on form (i.e., the institutionalization and, toward the end of the twentieth century, multiplication of international jurisdictions) than on substance. The qualitative transformation brought about by the increasingly compulsory nature of international adjudication has been generally overlooked.²⁸

26. See, e.g., JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* (2004); DAVID M. MALONE & YUEN FOONG KHONG, *UNILATERALISM AND U.S. FOREIGN POLICY* (2003); *THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* (Cesare P.R. Romano ed., forthcoming 2008).

27. See *infra* Part V.C.

28. See, e.g., MERRILLS, *INTERNATIONAL*, *supra* note 4; BOLESŁAW ADAM BOCKEZ, *HISTORICAL DICTIONARY OF INTERNATIONAL TRIBUNALS* 1-8 (1994); JEAN ALLAIN, *A CENTURY OF INTERNATIONAL ADJUDICATION* (2000). Sands, Mackenzie, and Shany concede that "[r]ecent developments suggest a trend toward the establishment *within particular treaty regimes* of dispute settlement arrangements having compulsory mandatory jurisdiction and binding-decision making powers." SANDS ET AL., *supra* note 10, at xxviii (emphasis added).

This section will focus on how the principle of consent to adjudication has been historically conceived and construed.

A. *From Arbitration to the Optional Clause*

Although arbitration of international disputes dates back to the earliest recorded times, the idea that disputes involving sovereign states can be settled peacefully, bindingly, and on the basis of international law is essentially a product of the Enlightenment. Toward the end of the seventeenth century and throughout the eighteenth century, a number of Western thinkers articulated instruments to settle international disputes as alternatives to war.²⁹ However, if a single intellectual forefather of modern international adjudication had to be designated, no one would deserve the title more than Immanuel Kant (1724-1804), who first described the need for a compulsory and permanent international jurisdiction.³⁰

During the nineteenth century, arbitration was the only form of binding international dispute settlement practiced.³¹ States could give their consent to arbitral proceedings essentially in two ways: ad hoc (by way of the so-called *compromis*); or ante hoc (by adopting treaties containing a compromissory clause whereby the parties agreed to submit to arbitration any future dispute that arose between them subject to the treaty). Regardless of how consent was expressed, no form of compulsory arbitration existed in the early years. Nineteenth century treaties either required the express consent of both parties (i.e., the so-called “agreement to agree”) or were silent on the point, which had virtually the same effect due to the international legal principle that consent could not be presumed.³²

Obviously, an “agreement to agree” does not necessarily ensure that the parties will actually agree on having a given dispute settled by arbitration. It is just a naked promise. Even-

29. See generally W. EVANS DARBY, INTERNATIONAL TRIBUNALS: A COLLECTION OF THE VARIOUS SCHEMES WHICH HAVE BEEN PROPOUNDED, AND OF INSTANCES IN THE NINETEENTH CENTURY (4th ed. 1904).

30. Steiger, *supra* note 17, at 818; see IMMANUEL KANT, *Perpetual Peace*, in KANT: POLITICAL WRITINGS 93, 102-05 (Hans S. Reiss ed., 1991) [hereinafter KANT, *Perpetual Peace*]; IMMANUEL KANT, *Metaphysics of Morals* §§ 43-61, in *id.* 131, 136-71 [hereinafter KANT, *Metaphysics of Morals*].

31. See JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 190-239 (1929).

32. LAUTERPACHT, *supra* note 6, at 23.

tually, to overcome the problem of the stonewalling party, some treaties started providing that *either* party could trigger arbitration unilaterally.³³ This was a significant departure from the strictly consensual paradigm. True, states still had to consent to the initial treaty obligation, but now a state could enter into an open-ended commitment to arbitrate that would not require it to consent to arbitral jurisdiction for each dispute. Further, consent could not be withdrawn without amending the treaty (requiring the consent of all parties) or denouncing the treaty altogether. The overarching grant of consent still needed to be clear and specific, and individual disputes had to be framed within the confines of that expression of consent in order to ensure jurisdiction, but the withholding of consent could no longer be used as a bargaining chip once a dispute had arisen. Any party to the treaty could initiate compulsory arbitration.

For some time, however, states that had the option of triggering arbitration unilaterally still overwhelmingly sought the consent and cooperation of the other party.³⁴ For over two centuries, unilaterally-triggered arbitration has been rare, and cases in which jurisdiction has been contested because the respondent claimed not to have consented to jurisdiction even rarer.³⁵

Though the 1899 creation of the Permanent Court of Arbitration (PCA) is usually hailed as the beginning of modern

33. The first treaties of this kind were concluded in the 1820s and 1830s between various Latin American states. However, their effect was very limited, as the actual practice of arbitration between Latin American countries was almost unknown until 1880. HELEN MAY CORY, *COMPULSORY ARBITRATION OF INTERNATIONAL DISPUTES* 10 (1932).

34. Cory notes that about eighty ad hoc arbitral tribunals were set up in the period 1899-1914. Treaties of compulsory arbitration between the states in question existed in about twenty of these instances, but in only seven of them were these treaties referred to in the compromise as the reason for the agreement to arbitrate. Of these seven cases, six were referred to the PCA. As Cory recognizes, "it is impossible to determine whether, if there had been no treaty obligation to arbitrate, the states in question would have arbitrated these particular cases." *Id.* at 99-100.

35. PHOTINI PAZARTZIS, *LES ENGAGEMENTS INTERNATIONAUX EN MATIÈRE DE RÈGLEMENT PACIFIQUE DES DIFFÉRENDS ENTRE ÉTATS* 190 (1992). The only example of contested jurisdiction that Pazartzis reports is the *Radio-Orient* (France v. Egypt), 3 R. Int'l Arb. Awards 1871 (Perm. Ct. Arb. 1940). Louis Sohn, *Settlement of Disputes Relating to the Interpretation and Application of Treaties*, 150 *RECUEIL DES COURS* 195, 236-37 (1976).

international dispute settlement, it is not a significant landmark in this narrative because it did not alter the prevailing consensual paradigm.³⁶ It was only in the aftermath of the First World War, with the advent of the PCIJ, that significant changes were introduced and the shift toward the compulsory paradigm began.³⁷

The Covenant of the League of Nations was silent as to whether the jurisdiction of the PCIJ should be compulsory or consensual. That question was left to be determined by the Assembly of the League on the basis of proposals by the League's Council.³⁸ In turn, the Council delegated the drafting of the Statute of the Court, including the key question of consent, to a group of ten legal scholars called the Advisory Committee of Jurists.³⁹ Besides being eminent, these jurists were also independent and took full advantage of their lack of political restraint by boldly stepping in the direction of compulsory jurisdiction. In a dramatic departure from previous practice, the draft Statute provided for far-reaching compulsory jurisdiction.⁴⁰

36. See Hague Convention for the Pacific Settlement of International Disputes, July 29, 1899, U.N.T.S. 392, 32 Stat. 1779 (1899); Hague Convention of 1907 for the Pacific Settlement of International Disputes, Oct. 18, 1907, U.S.T.S. 536, 205 C.T.S. 233 (1907). On The Hague peace conferences, see generally 94 AM. J. INT'L L. 1 (2000) (special issue dedicated to the hundredth anniversary of the Hague Conference).

37. In theory, the first permanent international judicial body to exercise compulsory jurisdiction was the short-lived Central American Court of Justice (CACJ) (1908-1918). On the CACJ, see generally ALLAIN, *supra* note 28, at 67-92. In reality, of the ten cases in which the CACJ was involved during its existence, only one was important (the case adjudicating the legality of a treaty concluded between Nicaragua and the United States about building an interoceanic canal across Nicaragua). However, Nicaragua refused to accept the Court's decision. See *Judicial Decisions Involving Questions of International Law*, 11 AM. J. INT'L L. 181, 181-229 (1917).

38. League of Nations Covenant art. 14.

39. Nationals of the five big powers (the United States, Great Britain, Japan, France, and Italy) sat on the Committee, along with those of three European neutrals (Sweden, Norway, and the Netherlands), plus Belgium and Brazil. JAMES BROWN SCOTT, *THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS* 3 (1920) [hereinafter *THE PROJECT OF A PERMANENT COURT*].

40. See *id.* at 12-131 (containing the draft PCIJ Statute, including article 34 indicating compulsory jurisdiction, and the commentary reporting the debates within the Committee).

All members of the Committee but one supported this position.⁴¹ There appeared to be general agreement in the group that compulsory jurisdiction was a characteristic of a “true” court.⁴² The Committee’s thinking on international organizations had arguably been conditioned by the 1899 and 1907 Hague conferences and the predominantly legal approach taken toward international conflicts before 1914.⁴³ According to members of the Committee, the PCIJ was going to be different, as it would not engage in arbitration as demonstrated and institutionalized by the PCA, but rather in judicial settlement.⁴⁴ Compulsory jurisdiction, in their view, was one of the characteristics distinguishing the latter from the former.⁴⁵

The bold draft prepared by the Committee did not have much traction with the great powers, particularly with the British Foreign Office, as it was considered too drastic a departure from the prevailing consensual paradigm.⁴⁶ Eventually the debate was transferred to the Assembly of the League of Nations, where great powers opposed to compulsory jurisdiction (Great Britain, France, and Japan foremost among them) clashed with lesser powers (including Belgium, Portugal, and South American nations) that viewed compulsory jurisdiction as advantageous because it would level the playing field by allowing less powerful states to submit unilaterally to the PCIJ disputes with more powerful states.⁴⁷

A compromise was forged with the invention of the so-called optional clause. Besides being able to confer jurisdiction on the Court by way of ad hoc agreement or a compromis-

41. The exception to this enthusiasm was Mineitcuro Adatci of Japan, who reportedly was “as unwavering in his opposition to compulsory jurisdiction as his colleagues were in its support.” Lorna Lloyd, *A Springboard for the Future: A Historical Examination of Britain’s Role in Shaping the Optional Clause of the Permanent Court of International Justice*, 79 AM. J. INT’L L. 28, 31 (1985). Arturo Ricci-Busatti of Italy was also opposed to compulsory jurisdiction, voting against art. 34 of the draft Statute, but he ultimately voted in favor of the draft as a whole without formal reservations. THE PROJECT OF A PERMANENT COURT, *supra* note 39, at 99 n.6.

42. THE PROJECT OF A PERMANENT COURT, *supra* note 39, at 97-106.

43. *Id.*

44. *Id.*

45. Lloyd, *supra* note 41, at 32-34.

46. *Id.* at 35-37.

47. *Id.* at 40.

sory clause contained in a treaty, as had long been the case with arbitral tribunals, states could now submit a universal declaration to “recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court.”⁴⁸ Since the jurisdiction of the PCIJ was general and not restricted to any treaty, filing an optional declaration was a momentous step that exposed a state to the risk of legally unstoppable litigation over both obligations under general international law and potentially numerous treaty-based obligations.⁴⁹ The declaration could also be made at any time, meaning that compulsory jurisdiction over disputes did not necessarily have to be granted at the time the treaty was negotiated.⁵⁰

The optional clause was a major innovation in international practice, albeit not as radical as the Advisory Committee of Jurists might have wished. On one hand, states could lose control about when, with whom, and over what they would litigate before an international adjudicative body whose decisions were binding under international law. On the other hand, states did not have any obligation to make use of the optional clause and could word their optional declarations as narrowly as they wished by way of qualifications and reservations. It should not be surprising that it was only toward the end of the 1920s that the Great Powers of the League of Nations decided to subscribe to the optional clause system by filing their own declarations, or that those declarations were replete with reservations.⁵¹

B. *From the Optional Clause to the Rise of the Compulsory Paradigm*

The really dramatic change in international courts did not take place until after the Second World War. In the after-

48. Statute of the Permanent Court of International Justice art. 36, Dec. 16, 1920, 6 L.N.T.S. 380 (1926) [hereinafter PCIJ Statute].

49. In this Article, the term “World Court” is used to refer collectively to both the PCIJ and ICJ.

50. PCIJ Statute, *supra* note 48, at art. 36.

51. *See, e.g.*, WorldCourts.com, Permanent Court of International Justice, The “Optional Clause” and Declarations Accepting the Court’s Compulsory Jurisdiction, http://www.worldcourts.com/pcij/eng/documents/1942.12.31_optional.htm [hereinafter The Optional Clause and Declarations] (last visited Aug. 20, 2007).

math of one of the most devastating wars it ever suffered, Europe experienced a truly “Kantian epiphany”: the dawn of an international federation of states organized along the lines of the tripartite republican structure (legislature/executive/judiciary) and endowed with a judicial body—the Court of Justice of the European Communities (the “European Court of Justice” or ECJ)—enjoying compulsory jurisdiction.⁵²

Granted, the building of Europe started modestly. It took decades for the full-fledged federalist plan to unfold, and it remains a work in progress. Nonetheless, the ECJ has fundamentally broken with the hitherto prevailing consensual paradigm. Apart from minor categories of direct actions for which jurisdiction could only be conferred by consent of the parties,⁵³ the Court was granted wide and, most importantly, compulsory jurisdiction to ensure observation of the law in the interpretation and application of the Treaties establishing the European Communities and of measures adopted by the competent Community institutions. Noncompliance with the Court’s decisions can result in fines and sanctions directly enforceable by national courts.⁵⁴

As states outside Western Europe began creating regional economic and political integration areas, they tended to follow the basic template of the European Communities, providing for judicial bodies endowed with compulsory jurisdiction over disputes arising out of the implementation of the given regime’s obligations and/or decisions of the regime’s organs.⁵⁵

52. See generally Joseph Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991). The ECJ was established first by the Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140. After the creation of the European Atomic Energy Agency and the European Economic Community on March 25, 1957, the Court became the common judicial organ of the three communities.

53. Treaty Establishing the European Community arts. 238-39, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

54. Case C-387/97, *Comm’n v. Hellenic Republic*, 2000 E.C.R. I-05047. This is the first case in which the ECJ imposed a penalty on a Member State for failure to comply with one of its previous judgments. Greece was ordered to pay a penalty of 20,000 euros per day for its failure to comply with judgments of the Court requiring Greece to take the necessary measures to dispose of toxic and dangerous waste in the area of Chania.

55. For an account of the European judicial “miracle” and its ripple effects, see ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004) and KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW* (2001).

Examples abound, such as the Caribbean Court of Justice,⁵⁶ the European Free Trade Agreement (EFTA) Court,⁵⁷ the Court of Justice of the Common Market for Eastern and Southern Africa,⁵⁸ the Court of Justice of the Economic Community of West African States (ECOWAS),⁵⁹ the Mercosur Permanent Review Tribunal,⁶⁰ and the Court of Justice of the Andean Community,⁶¹ not to mention more than a dozen other courts that are either relatively inactive or dormant, that were created but later dismantled, or whose constitutive instrument is pending ratification.⁶²

A “Kantian” Europe also led the way toward compulsory jurisdiction in the field of human rights, but this took longer. For thirty-five years (1959-1994), there were two ways in which disputes over the implementation of the European Convention on Human Rights and Fundamental Freedoms (“European Convention”) could reach the European Court of Human Rights (ECHR): Contracting states could either submit disputes against other contracting states, or the European Commission on Human Rights could do so on behalf of individual applicants, but both mechanisms were restricted to disputes involving states that had expressly recognized the jurisdiction of the Commission and the Court by a declaration

56. Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2001, *available at* <http://www.caricom.org/jsp/archives/agreement-ccj.htm> (last visited Aug. 9, 2007) [hereinafter Caribbean Court Agreement].

57. Agreement on the European Economic Area and Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, May 2, 1992, 1994 O.J. (L 344) 1.

58. Treaty Establishing the Common Market for Eastern and Southern Africa arts. 19-44, Nov. 5, 1993, 33 I.L.M. 1067 (1994).

59. Treaty Establishing the Economic Community of West African States arts. 15-16, Jul. 24, 1993, 35 I.L.M. 660 (1996).

60. The Olivos Protocol for the Settlement of Disputes in Mercosur art. 33, Feb. 18, 2002, 42 I.L.M. 2 (2003) [hereinafter Protocol of Olivos].

61. Treaty Creating the Court of Justice of the Cartagena Agreement, May 28 1979, 18 I.L.M. 1203 (1979), *modified by* Cochabamba Protocol Modifying the Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1996, *and* Sucre Protocol Establishing the Andean Parliament, June 25, 1997. *See* <http://www.comunidadandina.org/ingles/treaties.htm> (last visited July 23, 2007).

62. For a comprehensive list, see Romano, *Proliferation*, *supra* note 7, at 723-28.

analogous to the optional declaration under the ICJ Statute.⁶³ As we will see, this is the template on which the IACHR is still based.⁶⁴ Though it took many years, the great majority of the states party to the European Convention eventually accepted the compulsory jurisdiction of the ECHR.⁶⁵

In 1994, the European system was fundamentally overhauled by Protocol 11 to the European Convention, which abolished the Commission and transformed the system from consensual to fully compulsory.⁶⁶ The realization of a “Kantian” Europe with respect to human rights is advanced by the fact that membership to the Council of Europe is now conditional upon ratification of the European Convention and thus on acceptance of ECHR jurisdiction.⁶⁷

63. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 25, 46, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

64. See *infra* Part III.A.1(b). The African Court of Human and Peoples’ Rights follows more or less the same pattern. Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights arts. 5, 34.6, June 9, 1998, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT (III) (entered into force Jan. 25, 2004), reprinted in 1 DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW 625 (Karin Oellers-Frahm & Andreas Zimmermann eds., 2d rev. ed. 2001).

65. For a chart of declarations made pursuant to former articles 25 and 46 of the European Convention, with dates, see <http://conventions.coe.int/treaty/en/Treaties/Html/005-1.htm> (last visited Aug. 9, 2007).

66. Protocol No. 11 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, 1994 Europ. T.S. No. 155.

67. Statute of the Council of Europe art. 3, May 5, 1949, 1949 Europ. T.S. No. 001 (“Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council.”); European Convention, *supra* note 63, at art. 65 (“Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to [the European Convention] under the same conditions.”). Currently, Belarus is the only major European state that has not yet ratified the European Convention and is not a member of the Council of Europe. The Parliamentary Assembly of the Council of Europe has determined that Kazakhstan could apply for membership, because it is partially located in Europe, but has also indicated that the country would not be granted any status whatsoever at the Council unless its democratic and human rights records improve. See EUR. PARL. ASS., *Situation in Kazakhstan and Relations with the Council of Europe*, Res. No. 1526 (2006).

The same trajectory from the consensual to the compulsory paradigm has been followed in the international trade field.⁶⁸ The dispute settlement system of the General Agreement on Tariffs and Trade (GATT) remained largely consensual for more than four decades, relying on diplomacy and consensus for its operation.⁶⁹ In 1994, however, about the same time the European human rights regime was reformed along on the compulsory model, members of the GATT adopted the final act of the Uruguay Round, creating the World Trade Organization (WTO).⁷⁰ Membership in the WTO requires acceptance of the dispute settlement system of the organization.⁷¹ In a radical departure from previous practice, states can no longer veto the establishment of panels or the adoption of dispute rulings under the new system. A negative consensus of all members is now required to block the establishment of a panel, making the dispute resolution process essentially automatically binding.⁷² The creation of a standing Appellate Body to hear appeals against panel rulings has also contributed significantly to the further judicialization of the process, and the level of discipline imposed both on recalcitrant respondents and unruly applicants has been significantly increased.⁷³

Finally, the rise of international criminal bodies over the last fifteen years has driven another nail into the coffin of the consensual paradigm. There are currently two ad hoc interna-

68. See generally Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005) [hereinafter Pauwelyn, *Transformation*]. But Pauwelyn argues that this might be a misrepresentation of the actual history of the metamorphosis of the regime's dispute settlement procedures. *Id.* at 2-9.

69. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

70. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 108 Stat. 4809, 1867 U.N.T.S. 14 [hereinafter WTO Agreement].

71. *Id.* at Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401, 33 I.L.M. 1226 [hereinafter DSU].

72. *Id.* at arts. 6.1, 16.4, 17.14.

73. Article 23 of the DSU obliges all WTO members to submit their WTO complaints exclusively to the WTO dispute settlement procedure and not to pursue them unilaterally. See *id.* at art. 23. In other words, complainants unhappy with the progress or result in WTO dispute settlement can no longer exit the WTO system or resort to self-help.

tional criminal tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). There are also the International Criminal Court (ICC) and a number of hybrid national-international bodies.⁷⁴

While it is typically states' consent that directly or indirectly determines an international adjudicative body's jurisdiction and scope, this is less true in the case of international criminal bodies. Because both the ICTY and the ICTR were established by the UN Security Council acting under Chapter VII of the UN Charter, all UN members are required to comply with their decisions and orders.⁷⁵ Their jurisdictions encompass all international crimes committed during specific time periods in the territory of, respectively, the former Socialist Republic of Yugoslavia and Rwanda.⁷⁶ However, the consent of Rwanda and the states of the former Yugoslavia was not necessary to establish the tribunals.⁷⁷ Granted, consent still lies at the core, for it is by becoming a member of the United Nations that a state gives authority to the Security Council to

74. On hybrid criminal tribunals, see generally INTERNATIONALIZED CRIMINAL TRIBUNALS (Cesare P.R. Romano, André Nollkaemper & Jann Kleffner eds., 2004) [hereinafter Romano, INTERNATIONALIZED].

75. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704 at 36, annex and S/25704/Add. 1 (May 25, 1993) [hereinafter ICTY Statute]; United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda (with Annexed Statute), S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or *decide* what measures shall be taken . . . to maintain or restore international peace and security." U.N. Charter art. 39 (emphasis added). See also Prosecutor v. Blaskic, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 26 (Oct. 29, 1997). Arguably, Security Council decisions made pursuant to Chapter VII authority are also binding on states not members of the UN. See *infra* Part V.C.2.

76. See ICTY Statute, *supra* note 75, at art. 1; ICTR Statute, *supra* note 75, at art. 1.

77. Actually, at the time that the Security Council adopted Resolution 955 creating the ICTR, Rwanda was a member of the Security Council. It was the only state to vote against the resolution. China abstained. ICTR Statute, *supra* note 75. For the voting record, see <http://unbisnet.un.org> (last visited July 24, 2007).

create the tribunals.⁷⁸ But in these cases there are more degrees of separation between that original act of consent and the exercise of jurisdiction by the tribunals than in previous practice.

The point is even clearer in the case of the ICC. The ICC was created by a treaty (the so-called Rome Statute) and, as such, should follow the principle *pacta tertiis* and not create legal obligations for third-party states.⁷⁹ However, there are several ways in which the Court could affect the sovereignty of third-party states. For instance, nationals of states not party to the Rome Statute may be prosecuted by the Court if they have committed international crimes on the territory or against nationals of states party to the Statute.⁸⁰ Also, the Security Council acting under Chapter VII can refer a situation in which such crimes appear to have been committed to the ICC Prosecutor regardless of where, by whom, and against who the alleged violations were committed and regardless of whether the concerned state is party to the ICC Statute.⁸¹ The case of Sudan, which is not a party to the Rome Statute but which was nonetheless referred by the Security Council for international crimes committed by Sudanese against Sudanese in Darfur, Sudan, is illustrative of how far the system has shifted toward the compulsory paradigm.⁸²

Again, although significant, the multiplication of international courts and tribunals per se has not fundamentally changed the structure of international law and relations. The real divergence from the past is the fact that all of the international courts created after the end of the Cold War enjoy compulsory jurisdiction.

78. Arguably, the Security Council could create an ad hoc international criminal tribunal even if the state concerned is not a UN member. See *infra* Part V.C.2.

79. "A treaty does not create either obligations or rights for a third state without its consent." Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCT].

80. Rome Statute of the International Criminal Court art. 12(1)-(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Note that states can also accept ICC jurisdiction ad hoc without becoming party to the Statute. *Id.* at art. 12(2)-(3).

81. *Id.* at art. 13(b).

82. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

I mentioned previously that, for two centuries, arbitration was typically initiated with the agreement of both parties and that jurisdiction was rarely challenged.⁸³ Since the 1990s, this is increasingly no longer the case. Although there are no exact statistics, it is safe to say that unilateral resort to arbitration and contestation of jurisdiction for lack of consent have become rather frequent.⁸⁴ As we will see, there are several instances of major unilaterally-triggered international arbitrations in which the question of consent was raised in preliminary objections.⁸⁵

In the next section, I discuss how even adjudicative fora still technically relying on the consensual paradigm have in practice significantly decreased deference to the principle of consent and the will of states. In particular, I look at the cases of the ICJ and the IACHR. The IACHR has taken a strong compulsory bent, although the Court was designed on the consensual paradigm. The ICJ also has shown signs of moving in the same direction, albeit not so brashly as the IACHR, but rather hesitantly and *sotto voce*.

There is also a third partial exception: the dispute settlement system under the United Nations Convention on the Law of the Sea. The case of the LOS Convention is unclear. In one landmark case an ad hoc arbitral tribunal adopted an award that seems to support the consensual paradigm.⁸⁶ However, since neither another arbitral tribunal nor the International Tribunal for the Law of the Sea (ITLOS) has had the chance to return to the issue, the precedential value of that award is still to be tested. Accordingly, I first analyze the cases

83. See *supra* Part II.A.

84. The challenge of extracting such data is also compounded by the fact that there are no collections of international arbitral awards that are both comprehensive and up-to-date. The authoritative compilations by Coussirat-Coustère and Stuyt stop at 1988 and 1989, respectively. See ALEXANDER M. STUYT, *SURVEY OF INTERNATIONAL ARBITRATIONS 1794-1989* (3rd ed. 1990); VINCENT COUSSIRAT-COUSTÈRE & PIERRE M. EISEMANN, *RÉPERTOIRE DE LA JURISPRUDENCE ARBITRALE INTERNATIONALE* (1991). The Reports of International Arbitral Awards by the UN are more up to date (Volume 25 was published in 2006) but less comprehensive than those compilations. None indicates whether a case was initiated unilaterally or consensually.

85. See *infra* Part III.A.

86. See *Southern Bluefin Tuna (N.Z. v. Japan, Austl. v. Japan)*, Jurisdiction and Admissibility, Award of the Arbitral Tribunal, 39 I.L.M. 1359 (2000).

of the ICJ and IACHR, and then return to the special case of the LOS Convention.

III. THE ICJ, IACHR, AND THE UN LOS CONVENTION
DISPUTE SETTLEMENT SYSTEM AS ONLY PARTIAL
EXCEPTIONS TO THE COMPULSORY PARADIGM

A. *The Cases of the ICJ and the IACHR*

Both the ICJ and the IACHR exercise two main forms of jurisdiction: contentious and advisory. Decisions on disputes in contentious cases are binding, while advisory opinions are nonbinding, albeit authoritative, interpretations of international law. The issue of consent is relevant for both categories.

1. *Consent to Contentious Jurisdiction*

Consent to contentious jurisdiction of the ICJ and the IACHR follows essentially the same pattern: States can grant ad hoc consent to adjudicate individual disputes or can give consent ex ante, either by inserting a clause in treaties conferring jurisdiction over future disputes or by making a declaration under the optional clause.⁸⁷ Consent to jurisdiction by ad hoc agreement does not warrant consideration here, as it follows the quintessential consensual paradigm. Compulsion is an issue, however, when jurisdiction is found either in a compromissory clause in a treaty or in an optional declaration. The fundamental difference between granting consent via treaty and via an optional declaration is that while the former is a negotiated act, the latter is unilateral, producing its binding effects only when matched with a similar declaration by another state. Also, since it is a unilateral act, states can unilaterally modify or withdraw their optional declarations or qualify them with reservations and declarations, subject to the terms of the applicable legal instruments.⁸⁸ Be that as it may, one must also keep in mind another fundamental principle of international adjudication: The court itself decides its own competence (the *compétence de la compétence* principle) and is there-

87. See Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute]; American Convention on Human Rights art. 62, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

88. See VCT, *supra* note 79, at art. 19(a)-(b).

fore master of the interpretation of states' declarations and their effects.⁸⁹

a. *International Court of Justice*

Of all international judicial bodies, the ICJ is probably the one that still adheres most closely to the consensual paradigm. It is a forum where sovereignty is still treasured and where the limits imposed by the principle of consent are strongest, probably because the ICJ's jurisdiction *ratione materiae* is the widest possible, encompassing any dispute between sovereign states on any matter of international law.⁹⁰

The "optional clause" introduced first by the PCIJ and inherited by the ICJ has not met the expectations of its inventors. States have not rushed to make optional declarations.⁹¹ Even worse, the number of declarations relative to the number of states has steadily decreased to its current level of about one-third of all UN members.⁹² Second, as reciprocity is the underlying principle of the optional clause mechanism, jurisdiction is scaled down to the lowest common denominator of the declarations of the two parties. States can, and very often do, restrict the scope of declarations with reservations and "interpretative declarations," thus greatly reducing the area of overlap.⁹³ Although treaties in force worldwide number in the thousands, the ICJ currently reports only 268 treaties, both bilateral and multilateral, containing clauses granting jurisdic-

89. See generally IBRAHIM SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DECIDE ITS OWN JURISDICTION: COMPÉTENCE DE LA COMPÉTENCE* (1965).

90. See ICJ Statute, *supra* note 87, at arts. 34, 36.

91. See *supra* Part II.A.

92. During the PCIJ period (1920-1945), 32 out of 52 signatories of the PCIJ Statute made an optional declaration. In 1952, those 32 declarations of acceptance were carried over to the ICJ, but the members of the UN were now 64. Today, only 66 out of 191 UN members have made such a declaration. See International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited July 24, 2007).

93. However, reservations and declarations cannot be incompatible with the object and purpose of the treaty. VCT, *supra* note 79, at art. 19(c). On the functioning of the "Optional Clause," see J.G. Merrills, *The Optional Clause at Eighty*, in ANDO NIKUSE ET AL., *LIBER AMICORUM JUDGE SHIGERU ODA* 435-50 (2002).

tion to the Court in contentious proceedings.⁹⁴ Finally, despite the fact that the number of entities able to litigate before the Court is very limited (i.e., only sovereign states)⁹⁵ and that only a minority is willing to accept the jurisdiction of the Court *ex ante*, only one out of seven cases put on the ICJ docket in sixty years of existence has been submitted by way of agreement between the parties.⁹⁶ Thus, it should be no wonder that preliminary objections to jurisdiction are extremely frequent.⁹⁷

Nevertheless, the Court rarely finds against its own jurisdiction.⁹⁸ Unless jurisdiction is manifestly lacking, it tends to

94. International Court of Justice, Jurisdiction, Treaties, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4> (last visited July 24, 2007). Note that this source does not indicate how many of the treaties provide for unilateral activation of the Court and how many contain just a commitment to “agree to agree” to submit disputes to the Court.

95. See ICJ Statute, *supra* note 87, at art. 34.1.

96. There have been a total of 105 cases submitted to the ICJ, of which only 15 were submitted by way of *ad hoc* agreement. Note that, in the practice of the ICJ, cases submitted by way of *ad hoc* agreement are designated with a slash between the disputing states (e.g. France/Algeria), while cases submitted on the basis of compulsory jurisdiction are designated with the abbreviated Latin word “versus” between the names of the states (e.g. France v. Algeria). The other 90 have been submitted unilaterally, either on the basis of a compromissory clause included in a bilateral or multilateral treaty, or on the basis of an optional declaration, or both. Some cases have also been referred relying on the *forum prorogatum* doctrine. International Court of Justice, List of Cases referred to the Court since 1946 by date of introduction, <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (last visited July 24, 2007). The calculations are based on an unpublished chart of ICJ cases. Cesare P.R. Romano, International Court of Justice: Contentious Cases By Year (on file with author).

97. See Cesare Romano, *The Americanization of International Litigation*, 19 OHIO ST. J. ON DISP. RESOL. 89, 101-02 (2003) [hereinafter Romano, *Americanization*].

98. Since 1990, out of 38 cases submitted unilaterally, the ICJ has dismissed cases for lack of jurisdiction in: East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30); Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in Nuclear Tests (N.Z. v. Fr.), 1999 I.C.J. 31 (Mar. 25) [hereinafter Request for an Examination]; Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4); Aerial Incident of 10 August 1999 (Pak. v. India), 2000 I.C.J. 12 (June 21); Certain Property (Liech. v. F.R.G.), 2005 I.C.J. 6 (Feb. 10); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Jurisdiction of the Court, 2006 I.C.J. 126 (Feb. 3). All cases brought by Yugoslavia against ten NATO countries for the 1998 Kosovo campaign were dismissed as well. See Legality of Use of Force (Yugo. v. U.S.), Provisional Measures Or-

err in favor of the applicant and against the objections of the respondent, proceeding to the merits rather than dismissing the case.⁹⁹ In those cases in which jurisdiction is not clearly lacking, it has often been fiercely debated both in and outside the courtroom.¹⁰⁰

b. *Inter-American Court of Human Rights*

Membership to the Council of Europe is conditional upon ratification of the region's central human rights treaty: the European Convention.¹⁰¹ However, there is no analogous requirement in the Western hemisphere. The IACHR has jurisdiction over disputes regarding the interpretation and implementation of the American Convention submitted to it by

der, 1999 I.C.J. 916 (June 2) (dismissing because jurisdiction was clearly lacking); *Legality of Use of Force (Yugo. v. Spain)*, Provisional Measures Order, 1999 I.C.J. 716 (June 2) (same); *Legality of Use of Force (Serb. & Mont. v. Port., U.K., Neth., Italy, F.R.G., France, Can., Belg.)*, 2004 I.C.J. 720 (Dec. 15) (dismissing later in the adjudicative process, during consideration of preliminary objections).

99. For example, in *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.A)*, 1986 I.C.J. 14 (June 27), the Court, by majority and in the face of a very strongly argued dissent by the United States judge, held that the optional declaration of acceptance of PCIJ jurisdiction by Nicaragua was capable of founding the jurisdiction of the ICJ even though it had not been ratified by the Nicaraguan legislature. Famously, the U.S. delegation, unpersuaded by the Court's finding, left the courtroom. The same predisposition to find a source of consent even when its existence is not crystal clear reappeared in the Court's subsequent and related case brought by Nicaragua against Honduras. See *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69 (Dec. 20). There are other examples of the ICJ's relaxation of the imperatives of consent. In 1990, in the *Land, Island and Maritime Frontier Dispute*, which was submitted by way of a special agreement between El Salvador and Honduras, the Court allowed Nicaragua to intervene even in the absence of a specific jurisdictional link between the applicant state and the original parties. *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, Application to Intervene, 1990 I.C.J. 92 (Sept. 13).

100. See, e.g., dissenting opinions of Judges Weeramantry, Bedjaoui, Ranjeva, Vereshchetin, and Torres-Bernardes in *Fisheries Jurisdiction (Spain v. Can)*, 1998 I.C.J. at 496. On the *East Timor* case, 1995 I.C.J. at 90, see John Dugard, *1966 and All That: The South West African Judgment Revisited in the East Timor Case*, 8 AFR. J. INT'L & COMP. L. 549 (1996). On the *Request for an Examination* case, 1999 I.C.J. at 31, see Philippe Sands, *L'affaire des essais nucléaires II (Nouvelle-Zélande c. France): Contribution de L'instance au Droit International de L'environnement*, 101 R.G.D.I.P. 447 (1997).

101. See Statute of the Council of Europe, *supra* note 67.

the Inter-American Commission of Human Rights or by states party to the Convention.¹⁰² While the Organization of American States (OAS) has thirty-five members, only twenty-four have ratified the 1969 American Convention on Human Rights (American Convention) and made optional declarations accepting the jurisdiction of the IACHR.¹⁰³

Out of a total of seventy-one IACHR cases, rulings on preliminary objections have been made in thirty cases.¹⁰⁴ In only two of these thirty rulings, objections to jurisdiction were upheld and the cases dismissed.¹⁰⁵ While some objections may have been upheld in other cases, sufficient grounds for exercising jurisdiction were found nonetheless.¹⁰⁶

102. American Convention, *supra* note 87, at art. 61 (“Only the States Parties and the Commission shall have the right to submit a case to the Court.”).

103. American Convention, *supra* note 87. Ratifications are available at Organization of American States, Office of International Law, Multilateral Treaties, <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited July 24, 2007). Trinidad and Tobago ratified but later denounced the treaty. *See id.* For states that have accepted the jurisdiction of the IACHR, see Inter-American Court of Human Rights, History, <http://www.corteidh.or.cr/historia.cfm?&CFID=286778&CFTOKEN=92327806> (last visited July 24, 2007) (listing Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela as the twenty-four states currently under the jurisdiction of the IACHR).

104. Inter-American Court of Human Rights, Jurisprudence: Decisions and Judgements, <http://www.corteidh.or.cr/casos.cfm> (last visited Aug. 20, 2007) (listing thirty cases in which judgements on preliminary objections have been rendered). International judicial bodies sometimes decide to rule on preliminary objections at the same time that they rule on the merits. This is part of their procedural implied powers. A separate and previous ruling on preliminary objections is typically made only when the court decides that the objections are of such a relevance to warrant separate treatment. Hence, the figure of thirty preliminary objection rulings should be regarded only as a floor.

105. The two cases in which objections to jurisdiction were upheld are Case of Alfonso Martín del Campo-Dodd v. Mexico, 2004 Inter-Am. Ct. H.R. (ser. C.) No. 113, Preliminary Objections (Sept. 3, 2004) (no jurisdiction because the facts fell outside the scope *ratione temporis* of Mexico’s declaration); Case of Cayara v. Peru, 1993 Inter-Am. Ct. H.R. (ser. C) No. 114, Preliminary Objections (Feb. 3, 1993) (no jurisdiction because the Commission had not filed the case before the Court within the time-limits set by art. 51 of the American Convention).

106. *See, e.g.*, Case of the Serrano-Cruz Sisters v. El Salvador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 118, Preliminary Objections (Nov. 23, 2004). The

Two observations arise from the foregoing. First, for an OAS member to be subject to IACHR jurisdiction, express consent is required twice: first by ratifying the American Convention and second by making an optional declaration. The system was designed in the 1960s and was clearly meant to be highly consensual. However, the IACHR has gradually gained the upper hand in the tug-of-war with Latin American governments, showing a remarkable willingness (considerably more than the ICJ) to find jurisdiction despite states' objections. Since the end of the 1990s, the IACHR has been operating on the basis of a truly "compulsory doctrine," and this increasingly refined approach has become a fundamental element of its jurisprudence.

Two sets of cases decided in 1999 and 2001 serve as landmarks in the growth of the IACHR's compulsory doctrine: the *Ivcher-Bronstein* and the *Constitutional Court* cases against Peru and the *Hilaire, Benjamin*, and *Constantine* cases against Trinidad and Tobago.¹⁰⁷ In the cases concerning Peru, the IACHR faced the issue of a state trying to disengage itself from the Court's binding contentious jurisdiction by withdrawing its optional declaration, while the cases concerning Trinidad involved a matter of reservations to the declaration.

In 1981, Peru recognized the contentious jurisdiction of the Court without any significant reservations.¹⁰⁸ The Court

Court upheld El Salvador's objection that some facts fell outside the scope *ratione temporis* of its declaration, but at the same time found that other facts did not fall outside the scope of the declaration and that the case could therefore be subject to adjudication.

107. Case of *Ivcher-Bronstein v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, Competence (Sept. 24, 1999); Case of the *Constitutional Court v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 55, Competence (Sept. 24, 1999); Case of *Hilaire v. Trinidad and Tobago*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 80, Preliminary Objections (Sept. 1, 2001); Case of *Benjamin et al. v. Trinidad and Tobago*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 81, Preliminary Objections (Sept. 1, 2001); Case of *Constantine et al. v. Trinidad and Tobago*, 2001 Inter-Am. Ct. H.R. (ser. C), No. 82, Preliminary Objections (Sept. 1, 2001); Note that in the *Ivcher-Bronstein* and *Constitutional Court* cases, as well as in the *Hilaire, Benjamin*, and *Constantine* cases, the Court rendered identical judgments on the same date for each cluster of cases. Therefore, I refer to these clusters only by their lead case, *Ivcher-Bronstein* and *Hilaire*. See also *Serrano-Cruz Sisters*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 118, at 1.

108. "[T]he Government of Peru hereby declares that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of the

was seized by the Commission for the *Ivcher-Bronstein* and *Constitutional Court* cases in May and June 1999 respectively, but Peru notified the Court and the General Secretariat of the OAS in July that the Congress of the Republic had approved, with immediate effect, the withdrawal of Peru's recognition of the contentious jurisdiction of the Court.¹⁰⁹

The Court found unanimously in favor of its jurisdiction by observing first, that acceptance of the Court's binding jurisdiction is "an ironclad clause" to which there can be no limitations except those expressly provided for in the American Convention, and second, that the scope of the clause "cannot be at the mercy of limitations not already stipulated but invoked by states Parties for internal reasons."¹¹⁰ The Court concluded that withdrawal was not allowed, since there is no provision in the Convention that expressly permits states to withdraw declarations recognizing the Court's binding jurisdiction, nor did Peru's original declaration provide for such withdrawal.¹¹¹ Thus, the only way Peru could "disengage itself from the Court's binding contentious jurisdiction [was] to denounce the Convention as a whole."¹¹² In sum, according to the unanimity of the IACHR judges, the Court does not have compulsory jurisdiction over a state that has ratified the American Convention but has not filed an optional declaration. However, to avoid the jurisdiction of the Court, a state cannot merely withdraw its declaration but must *also* denounce the treaty as a whole.

Unlike Peru, Trinidad and Tobago had attached reservations to its optional declaration accepting the Court's jurisdiction. In particular, it recognized the Court's jurisdiction "only to such extent that recognition is consistent with the relevant

Convention. This recognition of jurisdiction is for an unspecified period and on condition of reciprocity." *Ivcher-Bronstein*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 30.

109. *Id.* ¶ 23.

110. *Id.* ¶ 36.

111. *Id.* ¶ 53. The Court also cited principles of the law of treaties (good faith and the requirement of allowing reasonable delay before withdrawal) in support of its conclusion. Interestingly, it also cited the dictum of the ICJ in *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.A.)*, *Jurisdiction and Admissibility*, 1984 I.C.J. 392 (Nov. 26).

112. *Case of Ivcher-Bronstein v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, *Competence*, ¶ 40 (Sept. 24, 1999).

sections of the Constitution of the Republic of Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen.”¹¹³ The Court found the reservation to be manifestly incompatible with the object and purpose of the Convention and thus invalid. The reservation was general in scope and it subordinated the application of the American Convention to the internal legislation of Trinidad and Tobago as decided by its courts.¹¹⁴ However, invalidity of the reservation did not mean that Trinidad’s declaration was void *ab initio*; only the reservation was invalid, while the acceptance of jurisdiction stood.¹¹⁵

In sum, with the *Ivcher-Bronstein* and the *Constitutional Court* cases and the *Hilaire, Benjamin*, and *Constantine* cases, the IACHR has turned the principle of consent on its head.¹¹⁶ While the principle in its classical rendering implies a presumption in favor of the state against which jurisdiction is invoked,¹¹⁷ the San José court has claimed the existence of a sort of opposite presumption, at least in the field of human rights. In fact, the Court has been careful to distinguish international settlement of human rights cases (entrusted to bodies like the

113. Case of *Hilaire v. Trinidad and Tobago*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 80, Preliminary Objections, ¶ 43 (Sept. 1, 2001).

114. *Id.* ¶ 85-93.

115. *Id.*

116. The influence the ECHR has had on the IACHR cannot be overlooked. See *Ivcher-Bronstein*, Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 47; *Hilaire*, Inter-Am. Ct. H.R. (ser. C) No. 80, ¶ 69. It is clear that the transformation of the European human rights system from consensual to compulsory during the 1990s has encouraged the San José court to grow bolder. In a 1995 landmark case, the ECHR invoked the peculiar nature of the human rights regime to justify departures from observance of the strictures of the optional clause. In the *Loizidou v. Turkey* case, the ECHR warned that, in light of the letter and the spirit of the European Convention, restrictions to the optional clause relating to the recognition of its contentious jurisdiction could not be inferred by analogy to the permissive practice under article 36 of the Statute of the ICJ. Under the European Convention, the practice of states party developed precisely *a contrario sensu*, accepting such clause without restrictions. The ECHR also added that, given the fundamentally distinct context in which different international tribunals might operate, the ICJ was “a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention.” *Loizidou v. Turkey*, 310 Eur. Ct. H.R. 19, 26 (ser. A) (1995). See also dicta in *Belilos v. Switzerland*, App. No. 10328/83, 132 Eur. Comm’n H.R. Dec. & Rep. (1988).

117. See LAUTERPACHT, *supra* note 6, at 23.

IACHR and ECHR) from the peaceful settlement of international disputes involving purely interstate litigation (entrusted to a body like the ICJ). Human rights courts deal with abusive governments trying to weasel out of their most fundamental obligations to individuals. Classical interstate dispute-settlement courts like the ICJ, on the other hand, deal with disputes between states on any point of international law. Because of that essential difference, the IACHR has found that human rights regimes must derogate from the classical consensual paradigm.¹¹⁸

2. *Consent to Advisory Jurisdiction?*

Both the ICJ and the IACHR have, in addition to contentious jurisdiction, advisory jurisdiction—the capacity to give a formal legal opinion on a point of law outside adversarial proceedings.¹¹⁹ While they are not the only international judicial bodies with this capacity, the ICJ and the IACHR are probably the two bodies whose advisory jurisdiction is most open-ended and most often utilized.¹²⁰ The ICJ has received twenty-four

118. See *Case of Ivcher-Bronstein v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 54, Competence, ¶¶ 42, 46-49 (Sept. 24, 1999); see also *Hilaire*, Inter-Am. Ct. H.R. (ser. C) No. 80, ¶ 94. For greater insight into the legal and philosophical reasons behind the drift of the IACHR toward the compulsory paradigm, see the dissenting, concurring, and separate opinions of Judge Antonio Cançado Trindade in *Ivcher-Bronstein* and *Hilaire* as well as the *Case of Castillo-Petruzzi v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 41, ¶¶ 36-38 (Sept. 4, 1998) (Separate Opinion of Judge Cançado Trindade).

119. On the issues explored in this section, see generally Julie Calidonio Schmid, *Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory*, 16 DUKE J. COMP. & INT'L L. 415 (2006).

120. The WTO Appellate Body, ICC, ICTY, and ICTR do not have advisory jurisdiction. The ECHR and ECJ do, but it is limited. The ECHR's advisory jurisdiction includes only questions that do not relate "to the content or scope of the right or freedoms defined in [those instruments], or with any other question which the [European] Court or the Committee of Ministers might have to consider in consequence of any such proceeding as could be instituted in accordance with the Convention." *Decision on the Competence of the Court to Give an Advisory Opinion*, 2004-IV Eur. Ct. H.R. ¶ 16, available at <http://www.echr.coe.int/Eng/Press/2004/June/DecisionAdvisoryOpinionrequest.htm> (citing the European Convention, *supra* note 63, at art. 47, para. 2). Given this limited jurisdiction, only one advisory case has been brought before the ECHR. See *id.* ¶ 35. In that case, the ECHR concluded that it lacked jurisdiction because "the request for an advisory opinion relates to a question which the Court might have to consider in

advisory opinion requests in nearly sixty years of operation,¹²¹ the PCIJ rendered twenty-seven advisory opinions in fewer than twenty years,¹²² and the IACHR has rendered twenty advisory opinions over its twenty-five years of operation.¹²³

Advisory opinions of international judicial bodies do not usually bind the petitioner, and requesting advisory opinions is not compulsory. In the case of the ICJ, only certain specialized agencies of the UN have the power to request advisory opinions.¹²⁴ Conversely, both certain OAS organs and OAS member states can request such opinions from the IACHR.¹²⁵

The rationale for advisory jurisdiction is to give the main organs of the related organization or a member state the chance to obtain an expert legal opinion on the meaning of the organization's constitution or on the compatibility of certain proposed acts or laws prior to action. Examples of this canonical use include the opinion requested by the UN General Assembly in the early years of the organization on its competency to admit a state to the UN,¹²⁶ the opinion requested by the Inter-American Commission about exceptions to the exhaustion of local remedies rule,¹²⁷ and the opinion requested

consequence of proceedings instituted in accordance with the Convention.”
Id.

The ECJ can render advisory opinions on request of the Council, the Commission, or a member state with regard to the compatibility of international treaties concluded between the Community and third parties to the Treaties. EC Treaty, *supra* note 53, at art. 300(6). The limited scope of the ECJ advisory jurisdiction explains why it is very rarely utilized.

121. Int'l Ct. of Justice, List of Cases Referred to the Court Since 1946 by Date of Introduction, <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (last visited Aug. 9, 2007).

122. Permanent Ct. of Int'l Justice, Publications of the Permanent Court of International Justice (1922-1946), <http://www.icj-cij.org/pcij/index.php?p1=9> (last visited Aug. 9, 2007).

123. Inter-American Ct. of Human Rights, Jurisprudence: Advisory Opinions, <http://www.corteidh.or.cr/opiniones.cfm?&CFID=304587&CFTOKEN=21407943> (last visited Aug. 9, 2007).

124. U.N. Charter art. 96.

125. American Convention, *supra* note 87, at art. 64, ¶ 1.

126. Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 7-8 (Mar. 3) (construing U.N. Charter art. 4, para. 2).

127. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion, 1990 Inter-Am. Ct. H.R. (ser. A) No. 11 (Aug. 10, 1990).

by Costa Rica on the compatibility with the American Convention of legislation it planned to adopt.¹²⁸

It is also true that abstract “constitutional questions” addressed in a request for an advisory opinion may arise from an actual dispute between the organization and its members, as happened when some UN members in the 1960s refused to pay their assessed contributions¹²⁹ and when the Inter-American Commission raised the issue of international responsibility for the promulgation and enforcement of laws in violation of the Convention.¹³⁰

In contrast with these two “constitutional” or “quasi-constitutional” uses of advisory jurisdiction is a third and more problematic one: the use of the advisory opinion to overcome the stumbling block of consent. If “consent to international adjudication” means “*consent to be subject to judicial proceedings*” instead of “*consent to be bound by decisions*” of international adjudicative bodies, then a discussion of advisory procedures is warranted, for an international tribunal may scrutinize a state through such procedures even though the state has not consented to that tribunal’s jurisdiction.

The most recent and obvious use of advisory jurisdiction to submit an issue to the ICJ despite the fact that some of the states involved had not accepted its jurisdiction was *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.¹³¹ This opinion was requested by the UN General Assembly.¹³² Though there were no “applicants” or “respon-

128. Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights, Advisory Opinion, 1991 Inter-Am. Ct. H.R. (ser. A) No. 12 (Dec. 6, 1991).

129. Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), Advisory Opinion, 1962 I.C.J. 151 (July 20).

130. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion, 1994 Inter-Am. Ct. H.R. (ser. A) No. 11 (Dec. 9, 1994).

131. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *Legal Consequences*].

132. It should be noted that, in order to find the necessary majority to adopt the resolution requesting the opinion, the General Assembly resorted to an extraordinary meeting convened pursuant to Uniting for Peace, G.A. Res. 377A (V), U.N. Doc. A/RES/377 (Nov. 3, 1950). *Id.* at 145-56.

dents” as such, clearly the de facto respondent was Israel, which has had no standing optional declaration since 1985.¹³³

Taking advantage of the opportunity to submit information to the Court regarding the requested opinion, Israel argued that the Court could not exercise advisory jurisdiction because the request concerned a contentious matter between Israel and the Palestinians, and Israel had not given consent to jurisdiction.¹³⁴ It also emphasized that it had never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contended that the parties had repeatedly agreed that these issues were to be settled by negotiation, with the possibility of an agreement to submit to arbitration.¹³⁵

The unconvinced Court gave the General Assembly the opinion it requested and further clarified that no state can block an advisory opinion that the UN considers necessary to obtain enlightenment with regard to the course of action that the organization should take.¹³⁶ However, the Court also recognized that it had a margin of discretion in deciding whether to give an opinion and indicated that it might decline to do so if the opposition of “certain interested states” raised issues of “judicial propriety,” especially if the opinion would affect a state that had not accepted the Court’s jurisdiction.¹³⁷ Evidently, the Court found that *Legal Consequences* was not the time to exercise such restraint.¹³⁸

Though this was not the first time the Court decided to plow ahead despite the objection of interested states,¹³⁹ there

133. Israel filed an optional declaration in 1951, replaced it in 1956, and withdrew it on November 21, 1985 following the *Nicaragua* case. The text of the Israeli declarations can be found in SHABTAI ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 697-702 (1991).

134. *Legal Consequences*, 2004 I.C.J. at 157.

135. *Id.*

136. *Id.* at 157-58.

137. *Id.*; see also *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16), 16-17.

138. “In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.” *Legal Consequences*, 2004 I.C.J. 136, 159 (July 9).

139. See, e.g., *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 I.C.J. 65 (Mar. 30); *Reservations to the*

are precedents in which it exercised self-restraint. An example is the *Status of Eastern Carelia* advisory opinion, where the Court first articulated the principle of consent.¹⁴⁰ In 1923, the Council of the League of Nations requested an advisory opinion from the PCIJ as to whether an agreement between Finland and Russia regarding the region of Eastern Carelia constituted an engagement of an international character placing “Russia under an obligation to Finland as to the carrying out of the provisions contained therein.”¹⁴¹ The Court declined to give an opinion because it found that the request “bears on an actual dispute between Finland and Russia.”¹⁴² Russia had, “on several occasions, clearly declared that it accepts no intervention by the League of Nations in the dispute with Finland. The refusals which Russia had already opposed to the steps suggested by the Council [of the League] have been renewed upon the receipt by it of the notification of the request for an advisory opinion. . . .”¹⁴³ The Court went on to state that there are “other cogent reasons” why it could not entertain the request, but Russia’s opposition to the court’s jurisdiction remained the central reason for its denial of the Council’s request.¹⁴⁴

Granted, Russia was *not* a member of the League of Nations at the time of the *Status of Eastern Carelia*, while Israel is a member of the United Nations.¹⁴⁵ This difference may explain why the World Court felt obliged to depart from its own precedent in *Legal Consequences*. However, if the principle of

Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (June 21); *Western Sahara*, 1975 I.C.J. 12; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, 1989 I.C.J. 177 (Dec. 15).

140. *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (Jul. 23).

141. *Id.* at 7.

142. *Id.* at 27.

143. *Id.* at 28.

144. *Id.* at 28-29.

145. The USSR joined the League of Nations on September 18, 1934. See Indiana University, League of Nations Photo Archive, National Membership of the League of Nations, available at <http://www.indiana.edu/~league/nationalmember.htm>.

consent was and still is a fundamental and unquestioned centerpiece of international law, one would have expected the ICJ to take more consideration of Israel's objections.

b. *Inter-American Court of Human Rights*

In the IACHR context, there are two recent examples of bending the consent principle: the advisory opinions on the *Right to Information on Consular Assistance*¹⁴⁶ and *Undocumented Migrants*.¹⁴⁷ Both opinions were requested by Mexico. In each case, the questions posed to the Court were framed generally and no state was explicitly named, but it was obvious in both that the de facto respondent was the United States. The United States has not ratified the American Convention or made any optional declaration; thus, it is not subject to the IACHR's binding jurisdiction.¹⁴⁸ However, this did not prevent the San José court from scrutinizing U.S. actions and laws.

The first opinion, *Right to Information*, is clearly part of the general dispute between the United States and several other countries over the implementation of the Vienna Convention on Consular Relations.¹⁴⁹ This opinion was requested while the ICJ's docket included two cases on the same issue filed by

146. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999) [hereinafter *Right to Information*].

147. *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003) [hereinafter *Undocumented Migrants*].

148. It should be noted that the Inter-American Commission routinely receives petitions against the United States and issues reports. See Inter-American Commission on Human Rights, Annual Reports, available at <http://www.cidh.org/annual.eng.htm>. The legal basis for bringing such a petition is the OAS Charter, to which the United States is a party. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, as amended Feb. 27, 1970, 21 U.S.T. 607. The full text of the OAS Charter, as amended by all four protocols now in force, can be found at 33 I.L.M. 989 (1994). When petitions are brought against the United States, the Commission applies the standards set forth in the American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21, rev. 6 (1948), which is a nonbinding legal instrument.

149. Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

Paraguay and Germany against the United States (*Breard*¹⁵⁰ and *LaGrand*¹⁵¹). It should also be noted that, four years later, Mexico submitted its own case on the same issue to the World Court.¹⁵² The second opinion concerns a long-standing row between Mexico and the United States regarding the treatment of undocumented Mexican migrants entering the United States illegally.

If the San José court pushed the legal envelope in overcoming reservations to its contentious proceedings against Peru and Trinidad and Tobago, it performed a sort of legal triple-somersault to justify overcoming U.S. objections to render the advisory opinions Mexico requested.¹⁵³ I single out these instances from several previous cases in which the Court was asked to render opinions on disputed matters¹⁵⁴ because the United States is notoriously opposed to being subjected to the IACHR's jurisdiction; hence, these are clear examples of the Court bending the consensual paradigm.

In both *Right to Information* and *Undocumented Migrants*, the IACHR resorted to the same arguments typically used by the ICJ to justify issuing such controversial advisory opinions: that advisory opinions are not binding; that the existence of a dispute concerning the interpretation of a norm does not per se constitute an impediment to the exercise of advisory functions; that the question asked was of a general nature; and that

150. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures Order, 1998 I.C.J. 248 (Apr. 9).

151. *LaGrand* (F.R.G. v. U.S.A.), 2001 I.C.J. 466 (June 27).

152. *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31).

153. A delegation from the U.S. Department of State and Department of Justice presented written and oral comments on the advisory proceedings in *Right to Information*, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, at 13-19, 26-30, 33-34 (Oct. 1, 1999). It should be noted that the United States did not bother sending a delegation to present objections during the subsequent hearings on *Undocumented Migrants*, Advisory Opinion, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, at 4-7 (Sept. 17, 2003).

154. *See, e.g.*, *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion, 1983 Inter-Am. Ct. H.R. (ser. A) No. 3 (Sept. 8, 1983); *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion, 1990 Inter-Am. Ct. H.R. (ser. A) No. 11 (Aug. 10, 1990); *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*, Advisory Opinion, 1991 Inter-Am. Ct. H.R. (ser. A) No. 12 (Dec. 6, 1991).

issues presented were only examples and not allegations of wrongdoing upon which the Court was called to rule.

However, there is a notable difference between the two courts. As we learned in *Legal Consequences*, no state can prevent the ICJ from delivering an advisory opinion that the UN considers desirable. Instead, the will of the individual state has to give way to the collective interest of the whole UN membership as expressed by the organ requesting an opinion. In the case of the IACHR, from which advisory opinions can be and often are requested by individual states, the will of the state requesting the opinion has to be weighed against that of the state whose behavior is at issue. The outcome, however, seems to be typically in favor of the former.

The *Right to Information* and *Undocumented Migrants* opinions are ill-disguised attempts by Mexico to seize the Court for the purpose of settling a dispute with (or just putting pressure on) another state despite that state's objections to the Court's jurisdiction. The fact that the Court did not exercise its discretion to deny these requests is consistent with and reinforces the trend toward the "compulsory" paradigm seen in the contentious field.

B. *Law of the Sea Convention*

The LOS Convention's dispute settlement regime is the result of a compromise between states favoring a comprehensive and compulsory dispute settlement system and those favoring a consensual system in which the parties retain control over forum selection.¹⁵⁵ While the ICJ and the IACHR are formally based on the classical negative notion of international jurisdiction (i.e., jurisdiction does not exist unless there is express consent), the LOS Convention has a mixed approach providing for a comprehensive duty to settle disputes and compulsory jurisdiction mitigated by several opt-out and choice of forum clauses.¹⁵⁶

155. See generally A.O. ADEDE, *THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND A COMMENTARY* (1987); see also R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* (2d ed. 1999).

156. LOS Convention, *supra* note 15, at arts. 286-96 (Compulsory Procedures), 297-99 (Limitations and Exceptions).

Parties to the LOS Convention have a general duty to settle disputes peacefully.¹⁵⁷ In order to achieve this, they are free at any time to agree by any means they choose. If peaceful settlement is not reached and if the dispute does not concern a matter for which the Convention excludes binding procedures, then either party is entitled to trigger the compulsory dispute settlement procedures of the Convention.¹⁵⁸ However, if “[s]tates . . . parties to a dispute . . . have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for [in the LOS Convention], unless the parties to the dispute otherwise agree.”¹⁵⁹

These provisions were at the core of the recent *Southern Bluefin Tuna* dispute pitting Japan against Australia and New Zealand. In 1993, the three states concluded a convention (the “1993 Convention”) regarding the conservation and management of southern bluefin tuna stocks. Article 16 of the agreement contains a typical dispute settlement clause found in many environmental agreements: “[W]ith the consent in each case of all parties to the dispute, [disputes will] be referred for settlement to the International Court of Justice or to arbitration.”¹⁶⁰

As often happens, when a dispute arose under the 1993 Convention, the parties could not agree to have it referred to the ICJ or arbitration. However, all three states were also parties to the LOS Convention. As previously noted, states party to the LOS Convention have a general duty to peacefully settle disputes under the Convention by any means upon which they can agree, but if settlement is not reached and if the dispute does not concern a matter for which the Convention excludes binding procedures, then *either party* is entitled to trigger the compulsory dispute settlement procedure. In this case, the question arose of which dispute settlement procedure was to be applied: The LOS Convention procedure providing for

157. *Id.* at arts. 279, 283.

158. *Id.* at art. 286.

159. *Id.* at art. 282.

160. Convention for the Conservation of the Southern Bluefin Tuna art. 16, May 10, 1993, 1819 U.N.T.S. 359 (emphasis added).

unilateral activation (i.e., the compulsory paradigm), or the procedure in the 1993 Convention providing for agreed-upon activation (i.e., the consensual paradigm)? The answer depends on whether the relevant provision in the 1993 Convention is interpreted as an actual agreement to a procedure in lieu of that of the LOS Convention or whether it is a mere “agreement to agree” and therefore not an actual agreement.

Two separate adjudicative bodies looked into the question and reached antithetical conclusions. First, the International Tribunal for the Law of the Sea (ITLOS) considered the matter, finding that the fact that the alternative dispute resolution procedures in the 1993 Convention applied to the parties *did not* preclude them from utilizing the procedures of the LOS Convention. Only in the event that the parties *could* agree to submit the dispute to arbitration under the 1993 Convention would the LOS Convention be overridden.¹⁶¹

The ad hoc Arbitral Tribunal found differently. It concluded that it lacked jurisdiction and dismissed the case, holding that the absence from the 1993 Convention of an express exclusion of any dispute resolution procedure was not decisive. According to the ad hoc tribunal, the fact that article 16 makes resort to binding settlement conditional upon agreement indicates that the parties intended to remove dispute resolution from the reach of compulsory procedures of any kind, including the compulsory procedures of the LOS Convention.¹⁶²

Since the *Southern Bluefin Tuna* dispute, there have not been any further cases touching on this issue. This system is still in its early years, as the LOS Convention entered into force only in 1994, and it therefore remains to be seen whether LOS will move toward the prevailing compulsory par-

161. *Southern Bluefin Tuna* (N.Z. v. Japan, Austl. v. Japan), 117 I.L.R. 148 (Int'l Trib. L. of the Sea 1999). Note that ITLOS reached this conclusion while seized by a request for provisional measures pending constitution of an Annex VII Arbitral Tribunal. Therefore, ITLOS needed only prima facie jurisdiction to proceed, while the Arbitral Tribunal had to rule on whether it actually had jurisdiction. LOS Convention, *supra* note 15, at art. 290.5. The threshold of prima facie jurisdiction is much lower than the one in the merits phase. For a finding of prima facie jurisdiction, it is simply necessary that lack of jurisdiction not be manifest.

162. *Southern Bluefin Tuna* (N.Z. v. Japan, Austl. v. Japan), Jurisdiction and Admissibility, 39 I.L.M. 1359 (Award of the Arb. Trib. 2000).

adigm or back toward the consensual standard. Considering the criticism that the Arbitral Tribunal's award has attracted and the general trend toward the compulsory model, it seems likely that the *Southern Bluefin Tuna* award will not establish a significant precedent.¹⁶³

IV: LEGAL BRIC-À-BRAC: FRAGMENTATION OF INTERNATIONAL LAW, UNEVEN JUDICIALIZATION OF SPECIAL LEGAL REGIMES, AND DISHARMONIC DISPUTE SETTLEMENT PROCEDURES AND INSTITUTIONS

In the previous sections, I demonstrated that there has been a progressive judicialization of international relations over the course of the last two centuries and that the shift from a consensual to a compulsory paradigm is a salient aspect of this phenomenon. Consent to jurisdiction has gradually moved from ad hoc expression to locked-in choice. I further showed that even in those few courts for which consent must still be explicitly granted, the requirements of consent have been gradually diluted and the courts in question have exercised jurisdiction even when the states involved have unmistakably expressed their resistance to the jurisdiction (both *stricto* and *lato sensu*) of the tribunal.

Admittedly, the judicialization of international politics can be overstated and blown out of proportion. Linear narrations tend to give the reader the impression that the phenomenon is moving progressively away from chaos and lawlessness toward the rule of law in international relations and the oversight of international judges. The march looks unidirectional and the destiny of humanity scripted. However, the move from the consensual to the compulsory paradigm has been far from homogeneous or global and is not inexorable. First, legalization and judicialization have disproportionately affected

163. See generally Alan Boyle, *The Southern Bluefin Tuna Arbitration*, 50 INT'L & COMP. L.Q. 447 (2001); Cesare Romano, *The Southern Bluefin Tuna Dispute: Hints of a World to Come . . . Like it or Not*, 32 OCEAN DEV. & INT'L L. 313 (2001); D. Colson & P. Hoyle, *Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get it Right?*, 34 OCEAN DEV. & INT'L L. 59 (2003); L. Sturtz, *Southern Bluefin Tuna Case: Australia and New Zealand v Japan*, 28 ECOLOGY L.Q. 455 (2001); J. Peel, *A Paper Umbrella Which Dissolves in the Rain?: The Future for Resolving Fisheries Disputes Under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration*, 3 M.J.I.L. 53 (2002).

certain areas of international law and relations. Economic and trade agreements have proven particularly fertile ground for international judicial bodies. Human rights is also an increasingly legalized and judicialized area, and the creation of a number of international criminal tribunals in recent years has turned international criminal law into a reality. Conversely, there are many areas of international relations that, while showing increasing degrees of “legalization,” have not been “judicialized.” In these fields, which include international financial and monetary relations, military and security affairs, regulation of migration, and cooperation in the fields of health, energy, and telecommunications, the low level of adjudicative activity shows that diplomatic bargaining still plays the predominant role.

More importantly, the proclivity toward the use of international courts and tribunals seems to vary greatly across the globe. Democracies seem to be much more likely to establish or submit to the jurisdiction of international courts and tribunals than non-democratic regimes. Smaller states appear to prefer international judicial bodies, as they provide a level playing field on which to engage major powers. Major powers, with the notable exception of the United Kingdom, tend to be more reluctant to take part in such bodies. The United States has an ambivalent attitude toward international judicial bodies, favoring judicialization in certain areas like trade but not in areas in which there is an even theoretical possibility that U.S. citizens might be subject to criminal trials outside U.S. courts or in those that would give the last word on potential U.S. human rights violations to a bench of “foreign judges” rather than to the U.S. Supreme Court.¹⁶⁴

Different regions of the globe are also judicializing to varying degrees and at varying paces. After the devastation of the Second World War, Western Europeans dedicated themselves to the building of continental peace, security, and prosperity. This project rested on two main judicial pillars: the European Court of Justice and the European Court of Human Rights. Africa, in the struggle to achieve a certain degree of stability and prosperity, has also given birth to a large number

164. See generally MURPHY, *supra* note 26.

of international judicial institutions.¹⁶⁵ However, the fact that many have been nonstarters, foundered after a few years, or are now languishing with a paltry docket indicates that this commitment to independent third-party adjudication is quite shallow, at least for the ruling elites of many states.

In contrast with Europe and Africa, no standing international judicial body has ever been created in Asia or the Pacific region. The Serious Crimes Unit/Panel in East Timor¹⁶⁶ and the Extraordinary Chambers in the Courts of Cambodia (ECCC) are partial exceptions, but the extremely convoluted and faulty process through which the ECCC was conceived casts doubt over its recent launch.¹⁶⁷

While there are several States that have accepted the jurisdiction of multiple international judicial bodies, most are subject to the jurisdiction of only one or two. Because of this, the overwhelming majority of people in the world do not have the chance to submit their rights violations to the scrutiny of an international judicial body even after exhausting domestic remedies. Forty-seven European states are subject to ECHR jurisdiction.¹⁶⁸ On the other hand, as previously mentioned, only two-thirds (twenty-four out of a total of thirty-five) of OAS members have accepted the IACHR's jurisdiction.¹⁶⁹ More than ninety UN members have still not accepted the jurisdiction of the ICC,¹⁷⁰ though the Security Council can submit alleged crimes to the Court's scrutiny regardless of whether af-

165. For a comprehensive overview of international courts and tribunals in Africa, see Project on International Courts and Tribunals, African International Courts and Tribunals, <http://www.aict-ctia.org> (last visited Aug. 16, 2007).

166. See generally Romano, INTERNATIONALIZED, *supra* note 74.

167. See generally Craig Etcheson, *The Politics of Genocide in Cambodia*, in Romano, INTERNATIONALIZED, *supra* note 74, at 182; Ernestine E. Meijer, *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal*, in Romano, INTERNATIONALIZED, *supra* note 74, at 207.

168. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Signatories, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last visited Aug. 16, 2007).

169. See *supra* note 103 and accompanying text.

170. Multilateral Treaties Deposited With the Secretary-General, Rome Statute of the International Criminal Court, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp> (last visited Aug. 16, 2007).

fectured states have consented to its jurisdiction.¹⁷¹ The ICTY and the ICTR have limited jurisdiction extending only over the territories of the former Yugoslavia (today fragmented into five independent states plus the UN protectorate of Kosovo) and Rwanda.¹⁷² The same applies in the case of the Special Court for Sierra Leone, although the effects of this Court have also been felt in neighboring Liberia.¹⁷³ Still, to a Chinese, a Fijian, or an Eritrean, protection of human rights by way of an international judicial body is not an option.

The process of judicialization is neither unidirectional nor irreversible. In fact, there are signs that the world is reaching a saturation point with regard to international judicial bodies, as the breakneck pace of the 1990s gives way to smaller and less dramatic developments. In areas that have made headlines for the drive toward judicialization, like international trade, some are already arguing that governments should consider bringing politics back to the fore.¹⁷⁴

The building of an “international judiciary” has been by and large an unplanned affair, thus giving rise to a potentially uncontrollable series of legal, political, and practical problems that were not anticipated by legal philosophers, scholars, or policy-makers. This is because real world problems often straddle boundaries and disciplines. Indeed, what would happen if there were multiple international legal regimes, each endowed with its own procedures and bodies, touching upon different aspects of the same dispute? Which body and which procedure would be used? In a world based solely on the consensual paradigm, the answer would be straightforward: whatever the parties can agree to use. In the contemporary world, however, where consent to jurisdiction may be locked-in and the principle of consent enfeebled, the question becomes much more complex.

Treaties should ideally contain provisions identifying the dispute settlement procedure or forum that will take precedence in case of a dispute. In the absence of such provisions,

171. See *supra* note 82 and accompanying text.

172. ICTY Statute, *supra* note 75, at art. 1; ICTR Statute, *supra* note 75, at art. 1.

173. See Alison Smith, *Sierra Leone: The Intersection of Law, Policy, and Practice*, in Romano, *INTERNATIONALIZED*, *supra* note 74, at 125-180.

174. See Pauwelyn, *Transformation*, *supra* note 68.

general principles of law like the *lex specialis* and the *lex anterior* principles or rules contained in the 1969 Vienna Convention on the Law of the Treaties could help solve the riddle.¹⁷⁵ Yet because of the abstract nature of these general principles and rules, their application to concrete cases may not be automatic and parties to the dispute may disagree on them as well. This creates a circular situation in which a third party is needed to make a binding decision about the dispute settlement procedure to be used to settle the dispute. But what international adjudicative body can legitimately make this decision? The first to be activated? The first to which consent was given? Or the latest? The one with the largest jurisdiction? Should UN-based international judicial bodies have the final word or rather judicial bodies of particular regimes?

Several disputes illustrate that these problems reach far beyond idle conjecture and instead extend to legal regimes both regional and global and covering a variety of subject matters. In the past few years, there have been several instances in which the same dispute has been subject to parallel or serial decisions of multiple international and sometimes domestic courts and tribunals, giving rise to a cacophony of judgments and leaving unaddressed the question of the will of sovereign states.¹⁷⁶

A. *Two Different Legal Regimes With Two Different Dispute Settlement Procedures, One Based on the Compulsory Paradigm and the Other on the Consensual Paradigm*

Several cases raise the question of what forum should decide a dispute when the dispute is covered by two legal regimes with different dispute settlement procedures, one based on the compulsory paradigm and the other based on the consensual paradigm. The *Southern Bluefin Tuna* case referenced in the previous section is one such case.¹⁷⁷

175. See VCT, *supra* note 79.

176. On the issues addressed in this and the next section, especially in the context of international environmental agreements, see generally Cesare P.R. Romano, *International Dispute Settlement*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1036, 1038-56 (Daniel Bodansky, Jutta Brunneé & Ellen Hey eds., 2007).

177. See *supra* text accompanying notes 158-61.

In the 1930s, the PCIJ faced a similar dilemma in the *Electricity Company of Sofia and Bulgaria* case.¹⁷⁸ In this case, the Court was confronted with two different sources of jurisdiction: a Belgian-Bulgarian treaty of conciliation, arbitration, and judicial settlement¹⁷⁹ and the optional declarations made by the two countries. The treaty made recourse to the PCIJ conditional upon agreement of the parties.¹⁸⁰ As in the section of the LOS Convention at issue in *Southern Bluefin Tuna*, the Belgian declaration excluded cases in which the parties had agreed to another method of pacific settlement. Unlike the Arbitral Tribunal in *Southern Bluefin Tuna*, though, the PCIJ rejected Bulgarian objections and decided that it had jurisdiction over the dispute. Two passages of that judgment are of particular significance. First, the PCIJ observed that the multiplicity of concluded agreements accepting compulsory jurisdiction was evidence that the contracting parties intended to create new routes to the Court.¹⁸¹ As a corollary, the parties did not intend to foreclose existing routes or allow the new and existing routes to cancel one another out with the ultimate result that no jurisdiction would remain.¹⁸² Secondly, the Court remarked the intent of the two countries in concluding the treaty was to institute a complete system of mutual obligations with a view to the settlement of any disputes that might arise between them.¹⁸³ The Court held that there was no justification for contending that, in so doing, they intended to weaken the obligations they had previously entered into, espe-

178. *Electricity Company of Sofia and Bulgaria* (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B) No. 77 [hereinafter *Electricity Company*].

179. *Treaty of Conciliation, Arbitration and Judicial Settlement*, Belg.-Bulg., June 23, 1931, 137 L.N.T.S. 191.

180. *Id.* at art. 6.

181. *Electricity Company*, 1939 P.C.I.J. (ser. A/B) No. 77, at 76. This decision was not unanimous. Judge Van Eysinga concluded that, because of the existence of the reservation in the Belgian declaration, the declaration was “intended to be subsidiary; it is not to apply when and insofar as another method of pacific settlement has been established” and “the Treaty of 1931 does in fact establish another method for the pacific settlement.” *Id.* at 111 (Van Eysinga, J., dissenting). Judge Hudson, concurred with the latter point and concluded that “the reciprocal declarations . . . are not to be applied as a source of jurisdiction in this case, and the Court’s jurisdiction may be sought only in the 1931 Treaty.” *Id.* at 124 (Hudson, J., dissenting).

182. *Id.* at 76 (majority opinion).

183. *Id.*

cially if such obligations were more extensive than those ensuing from the treaty.¹⁸⁴

It is not difficult to imagine other situations in which similar problems might arise.¹⁸⁵ For instance, what mechanism would resolve a dispute over certain biotechnologies related to the decoding and patenting of genetic resources and involving a U.S. company and the developing country in which the resources in question are found? Would the dispute be resolved within the framework of the WTO, thus using WTO laws and compulsory dispute settlement procedures? Would it be resolved within the framework of the Convention on Biodiversity and its Biosafety protocol, which provide for optional recourse to judicial or arbitral settlement?¹⁸⁶ Or, alternatively, would it be settled within the framework of the Biosafety Protocol's compliance procedure, which can be triggered unilaterally but which lacks binding effects?¹⁸⁷ What would happen if the procedures of the WTO and of the Convention on Biodiversity were activated simultaneously or consecutively?

B. *Multiple Legal Regimes, All Based on
the Compulsory Paradigm*

Because compulsory jurisdiction has become the prevailing paradigm, there are even more examples of problems created by disputes arising under various legal regimes *all* based on the compulsory paradigm. For instance, the *Swordfish* dispute between Chile and the European Community (EC) was submitted unilaterally by the EC to both the WTO dispute settlement procedure and to a five-judge Special Chamber of

184. *Id.*

185. See, e.g., Kal Raustiala and David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004).

186. Convention on Biological Diversity art. 27, June 5, 1992, 1760 U.N.T.S. 143, 31 I.L.M. 818 (1992); Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027.

187. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, *supra* note 186, at art. 34. The Biosafety Protocol's compliance procedure was adopted by Decision BSI/7 of the Parties to the Protocol. See Report of the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol on Biosafety, Annex 1, Decisions adopted by the first meeting of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety, 98, U.N. Doc. UNEP/CBD/BS/COP-MOP/1/15, available at <https://www.biodiv.org/biosafety/cop-mop/mop-01-dec-en.pdf>.

ITLOS (the second only after Chile threatened to refer the matter to ITLOS unilaterally).¹⁸⁸ The *Bosphorus Airways* dispute between a Turkish airline and Ireland was considered first by the ECJ and then the ECHR.¹⁸⁹ The ECJ was first seized by the Irish High Court for a preliminary ruling on the compatibility of actions of the Irish Government with EC laws, while the ECHR was seized directly by the Turkish company raising the question of a possible violation by Ireland of the rights protected by the European Convention on Human Rights.

In the *MOX Plant* dispute between Ireland and the United Kingdom, Ireland seized no fewer than three different international adjudicative bodies.¹⁹⁰ In each case, the United Kingdom could do nothing to oppose proceedings because it had given ex ante consent to jurisdiction when ratifying the relevant conventions. At the same time, the European Commis-

188. Request for the Establishment of a Panel by the European Communities, Chile—Measures Affecting Transit and Importation of Swordfish, WT/DS193/2 (Nov. 7, 2000) (suspended Mar. 23, 2001); Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. E.C.), Order 2000/3 (Int'l Trib. L. of the Sea 2000); *see also* Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. E.C.), 40 I.L.M. 475 (Int'l Trib. L. of the Sea 2001); Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. E.C.), Order 2003/2 (Int'l Trib. L. of the Sea 2003); Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. E.C.), Order 2005/1 (Int'l Trib. L. of the Sea 2005) (extending time-limits), *available at* http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=6&lang=en.

189. Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Minister for Transportation, Energy & Commc'ns* ("Bosphorus Airways"), 1996 E.C.R. I-3953; *Bosphorus Airways v. Ireland*, App. No. 45036/98, Eur. Ct. H.R. (2005). Though both the ECJ and the ECHR heard the Bosphorus Airways dispute, the ECHR does not have appellate jurisdiction over judgments of the ECJ. Rather, they are two courts of two different organizations, and each has a different (if partially overlapping) membership.

190. Access to Information Under Article 9 of the OSPAR Convention (Ir. v. U.K.), 42 I.L.M. 1118 (OSPAR Trib. 2003); *The MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea* (Ir. v. U.K.), 126 I.L.R. 310 (Perm. Ct. Arb. 2003); *The MOX Plant Case* (Ir. v. U.K.), Request for Provisional Measures, 41 I.L.M. 405 (Int'l Trib. L. of the Sea 2002). On the jurisdictional problems raised by the MOX dispute, see Yuval Shany, *The First MOX Plant Award: the Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures*, 17 LEIDEN J. INT'L L. 815 (2004) [hereinafter Shany, *MOX Plant*].

sion initiated infringement proceedings against Ireland before the ECJ, claiming that by submitting the dispute to a tribunal outside the Community legal order, Ireland had violated the exclusive jurisdiction of the ECJ with regard to issues concerning the interpretation or application of EC law.¹⁹¹

Recently, a row between Canada and the United States over softwood lumber has brought about a flurry of uncoordinated legal proceedings both international and domestic. Canada initiated legal proceedings under the North American Free Trade Agreement (NAFTA) and the WTO agreement, both of which provide for unilateral activation.¹⁹² On August 10, 2005, a NAFTA Extraordinary Challenge Committee confirmed an earlier NAFTA (Chapter 19) panel conclusion in favor of Canada.¹⁹³ Yet on November 15, 2005, a WTO panel ruled in favor of the United States, finding that Canadian imports of softwood lumber did threaten to cause material injury to U.S. competitors.¹⁹⁴ To complicate matters further, Canada sued the United States before the U.S. Court of International Trade.¹⁹⁵ In response, the U.S. Coalition for Fair Lumber Imports challenged the constitutionality of NAFTA chapter 19 before the U.S. Court of Appeals for the District of Columbia.¹⁹⁶ Finally, three Canadian lumber companies, in their capacities as investors in the United States, each invoked the investor-state dispute mechanism of NAFTA chapter 11. These

191. Case C-459/03, *Commission v. Ireland*, 2004 O.J. (C 7) 39. See Cesare P.R. Romano, *Commission v. Ireland*, 101 AM. J. INT'L L. 171, 171-78 (2007).

192. North American Free Trade Agreement, Can.-U.S.-Mex., ch. 20, Dec. 17, 1992, 32 I.L.M. 289, 32 I.L.M. 605 (1993).

193. Extraordinary Challenge Committee, *In re Certain Softwood Lumber Products from Canada*, ECC-2004-1904-01-USA (Aug. 10, 2005).

194. Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse by Article 21.5 of the DSU by Canada*, WT/DS277/RW (Nov. 15, 2005). Canada appealed the WTO panel decision to the WTO Appellate Body. In Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse by Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW (Aug. 15, 2006), the Appellate Body reversed the findings of the panel and *recommended* that the Dispute Settlement Body ask the United States to bring its measure into conformity with its obligations under the WTO Agreements.

195. Joost Pauwelyn, *The U.S.-Canada Softwood Lumber Dispute Reaches a Climax*, ASIL INSIGHTS (Nov. 30, 2005), <http://www.asil.org/insights/2005/11/insights051129.html> [hereinafter Pauwelyn, *Softwood Lumber*].

196. *Id.*

companies claimed, inter alia, that U.S. treatment of Canadian lumber imports is discriminatory and constitutes “indirect expropriation.”¹⁹⁷ Should the United States refuse to comply with NAFTA chapter 19, moreover, Canada could request the establishment of a Special Committee under NAFTA article 1905.

Likewise, in the early 2000s, Brazil and Argentina were locked in a dispute over trade in frozen poultry. The dispute was first addressed within the framework of the Mercosur legal regime after Brazil activated the Protocol of Brasilia’s dispute settlement procedure, asking unilaterally for the establishment of an ad hoc arbitral tribunal.¹⁹⁸ In 2001, the tribunal rendered its award in favor of Argentina.¹⁹⁹ Having lost the case in one forum, Brazil then referred the dispute to the WTO dispute settlement procedure, which eventually led to the establishment of a panel to consider the matter.²⁰⁰ During the proceedings, Argentina argued that Brazil failed to act in good faith by first challenging Argentina’s anti-dumping measure before a Mercosur ad hoc tribunal and then, having lost that case, initiating WTO dispute settlement proceedings with re-

197. To avoid the risk of further inconsistent rulings by the three Chapter 11 panels, a NAFTA panel consolidated these three requests in a single proceeding. See Consolidation Tribunal, In re NAFTA and a Request for Consolidation by the U.S.A. of the Claims in: Canfor Corp. v. U.S.A., Tembec et al. v. U.S.A. and Terminal Forest Products Ltd. v. U.S.A (Sept. 7 2005), *available at* <http://naftaclaims.com/Disputes/USA/Softwood/Softwood-Con-Order.pdf>.

198. Protocol of Brasilia for the Settlement of Disputes art. 7, Dec. 17, 1991, 36 I.L.M. 691.

199. Aplicación de medidas antidumping contra la exportación de pollos enteros, provenientes de Brasil, Resolución N° 574/2000 del Ministerio de Economía de la República Argentina (Braz. v. Arg.), 21/V/01 (Trib. Arb. de Mercosur 2001), *available at* <http://www.mercosur.int/msweb/portal%20intermediario/es/controversias/archivos/IV%20LAUDO.pdf>. In accordance with Article 22 of the Protocol of Brasilia, the Arbitral Tribunal issued a clarification following the award on June 18, 2001. Aclaración del laudo del Tribunal Arbitral Ad Hoc del Mercosur constituido para decidir sobre aplicación de medidas antidumping contra la exportación de pollos enteros, provenientes de Brasil, Resolución 574/2000 del Ministerio de Economía de la República Argentina, *available at* <http://www.mercosur.int/msweb/portal%20intermediario/es/controversias/archivos/IV%20LAUDO%20ACLARACION.pdf>.

200. Panel Report, Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil, WT/DS241/R (Apr. 22, 2003).

gard to the same measure.²⁰¹ Argentina also argued that Brazil was estopped from pursuing the WTO dispute settlement proceedings²⁰² and that even if Brazil was not estopped, that the Panel itself should be bound by the ruling of the Mercosur arbitral tribunal.²⁰³ The Panel eventually rejected Argentina's claims, finding that it had failed to prove both Brazil's lack of good faith and the existence of the preconditions for invoking the principle of estoppel.²⁰⁴ Consequently, it also declined Argentina's request that the Panel follow the ruling of the Mercosur arbitral tribunal. On the merits of the case, the WTO Panel disagreed with the Mercosur tribunal and ruled against Argentina, finding fundamental violations of the WTO agreements.²⁰⁵

V. APPROACHES

The shift from the consensual to the compulsory paradigm has led not only to increased resort to international adjudication but also to states litigating, simultaneously or consecutively, essentially the same dispute in multiple fora. How can we rein in the disruptive forces unleashed by the uneven judicialization of international relations and the shift to the compulsory paradigm? A careful survey of the most recent scholarly literature and international practice points to three possible solutions, which I have labeled the *technocratic/legalistic*, the *sociologic/jurisprudential*, and the *non-engagement/disen-gagement* approach. Part V.A illustrates the nature of these solutions and provides a critique of their shortcomings.

201. *Id.* ¶ 7.18.

202. *Id.* ¶ 7.20.

203. *Id.* ¶ 7.17. A number of other WTO members intervened as third parties, some presenting observations on the question of serial proceedings. The EC argument is particularly interesting for turning the principle of consent on its head. The EC argued that “[t]he facts alleged by Argentina [were] not sufficient to conclude that Brazil [had] consented, whether explicitly or implicitly, *not to* bring this dispute before the WTO.” *Id.* at Annex C-2, ¶¶ 17-18 (emphasis added). It pointed out that “[t]he Protocol of Brasilia contains no provision which limits in any manner the right of the parties to request a panel under the WTO [agreements] with respect to a measure that has already been the subject of a dispute under that Protocol.” *Id.*

204. *Id.* ¶ 7.33-7.42.

205. *Id.* ¶ 8.1-8.7.

A. *Technocratic/Legalistic Approach*

When confronted with the problems arising out of the multiplication of international judicial fora and the shift to the compulsory paradigm, the natural first reaction of legal scholars and practitioners has been to rummage in the legal toolbox to find techniques or principles that could counteract the disruptive forces at play.²⁰⁶

The checklist used in this approach is very familiar to international law scholars.²⁰⁷ First, one must determine whether there are any specific rules written in relevant treaties that could be applied to the cases at hand. Second, one must consider whether international practice could offer any guidance and whether there are any principles of international law that could help. Finally, one must check which principles of law could be borrowed from national legal systems and whether these could be applied internationally.

With regard to the first step, a few provisions addressing issues of forum selection and multiple proceedings can be found in international legal documents such as constitutive instruments of the various international judicial bodies, general dispute settlement treaties' compromissory clauses, instruments of ratification of international agreements, and declarations of acceptance of jurisdiction. Exclusive jurisdiction clauses are one example: Some allow no exceptions,²⁰⁸ others are less strict,²⁰⁹ and still others permit the parties to refer the dispute to any other fora *if they agree to do so*.²¹⁰ Provisions providing for complementarity of jurisdictions or primacy of certain jurisdictions over others may also be of use in this technique.²¹¹ Another example is jurisdiction-regulating provi-

206. See generally YUVAL SHANY, *COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003) [hereinafter SHANY, *COMPETING*]; ANDREW BELL, *FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION* (2003); Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285 (1999).

207. See ICJ Statute, *supra* note 87, at art. 38.

208. See, e.g., EC Treaty, *supra* note 53, at art. 292 (former art. 219).

209. See, e.g., DSU, *supra* note 71, at art. 23.

210. See, e.g., European Convention, *supra* note 63, at art. 55 (former art. 62).

211. For complementarity, see Rome Statute, *supra* note 79, at pmb., art. 1. For primacy, see ICTY Statute, *supra* note 75, at art. 9; ICTR Statute, *supra* note 75, at art. 1. However, one should stress that the ICC, ICTY, and ICTR

sions dealing with multiple proceedings, which corresponds to the legal doctrines of *lis alibi pendens*,²¹² *res judicata*,²¹³ and *electa una via*.²¹⁴

However, the problems highlighted in this Article are only *partially* regulated by these kinds of provisions. Moreover, such provisions are often of an inconclusive nature, and there is not enough established practice to make definitive statements about their implementation.²¹⁵ In any case, when properly understood, the general legal doctrines cited above are too narrow to be of much use. For these tools to be applied according to their purpose, the parties, the subject matter, and the legal claims involved in each case must be identical. Multiple proceedings involving the same parties and underlying dispute are frequently not addressed by these doctrines, since even in self-contained legal regimes the subject matter or legal claims involved in various proceedings are not necessarily the same.²¹⁶

statutes regulate the potential problem of competing for jurisdiction with national courts but remain silent about conflicting jurisdiction among international tribunals or among internationalized criminal courts. See generally Markus Benzing & Morten Bergsmo, *Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court*, in Romano, INTERNATIONALIZED, *supra* note 74, at 407-16.

212. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights art. 5.2, Dec. 16, 1966, 999 U.N.T.S. 302.

213. See, e.g., Conference on Security and Co-operation in Europe, Convention on Conciliation and Arbitration within the CSCE art. 19.1(a), Dec. 15, 1992, 32 I.L.M. 551.

214. See, e.g., European Convention, *supra* note 63, at art. 35.2 (former art. 27.1).

215. See SHANY, COMPETING, *supra* note 206, at 227.

216. The *Soft Lumber* dispute is an example in which the parties are not the same in all proceedings. See *supra* Part IV.B. The NAFTA Chapter 11 cases are between private Canadian investors and the U.S. government. See *supra* note 197 and accompanying text. In contrast, the WTO and NAFTA Chapter 19 disputes are between Canada and the United States as states. See *supra* text accompanying notes 190-94. The subject matter is not the same:

[T]he NAFTA panel rejecting a U.S. finding of threat of material injury was made with reference to a U.S. determination of May 2002. In contrast, the WTO panel accepting a U.S. finding of threat of material injury relates to a December 2004 re-determination concerning the same period of investigation but made on the basis of a different (i.e., reopened) record. Finally, the different proceedings do not exactly involve the same legal claims (the third requirement for *res judicata*). WTO panels examine claims of vio-

Customary international law, general principles, and the case law of international courts and tribunals do not provide much guidance either. State practice is far from consistent, and international courts and tribunals have not yet developed sufficiently large and consistent jurisprudence to suggest any practical solution. The work of the International Law Commission (ILC) regarding standard principles of international law (such as those codified in the Vienna Convention on the Law of Treaties) is unlikely to have much practical impact, especially when both parties have consented to multiple obligatory jurisdictions before which the same dispute could be considered.²¹⁷ Indeed, because of the abstract and general nature of the principles and rules codified by the ILC, their application to concrete cases might be far from self-evident.

Also, while domestic and international courts exercise quite similar functions, they operate in radically different contexts, making the wholesale transfer of legal procedures and principles from one system to the other impracticable. For instance, antisuit injunctions, a tool well known in Anglo-American legal systems, have limited application internationally, at

lation of WTO rules. NAFTA Chapter 11 tribunals examine claims of violation of those of NAFTA. Crucially, while the WTO panel accepting a U.S. finding of threat of material injury did so pursuant to WTO rules, the NAFTA Chapter 19 panel rejecting a U.S. finding of threat of material injury did so pursuant to the United States' own trade laws. Indeed, the applicable law under NAFTA Chapter 19 is not NAFTA but the domestic law of the defending country.

Pauwelyn, *Softwood Lumber*, *supra* note 195, paras. 8-9.

217. See International Law Commission, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.702 (July 18, 2006) [hereinafter Fragmentation of International Law]; International Law Commission, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskeniemi). Regrettably, “[a]t the outset, the Commission recognized that fragmentation raises both institutional and substantive problems. The former have to do with the jurisdiction and competence of various institutions applying international legal rules and their hierarchical relations inter se. The Commission has decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves.” Fragmentation of International Law ¶ 8, U.N. Doc. A/CN.4/L/.702.

least in the public international domain.²¹⁸ Due to the lack of hierarchy and formal linkages between international courts, an international tribunal could not formally order another to refuse to hear a claim nor, lacking enforcement power, could it credibly order parties (often sovereign states) not to engage other fora.

In sum, law as is (*lex lata*) does not help much. It is always theoretically possible to design better provisions to address future problems and then either include them in new international legal instruments or retrofit existing instruments. However, these are not particularly viable alternatives, since the onus of renegotiating and amending several dozen high-profile treaties to harmonize their dispute settlement procedures is politically and diplomatically so heavy as to make the event very unlikely.²¹⁹ There is no precedent for such sweeping, cross-treaty, international lawmaking activity. It is not even clear what forum would be appropriate to carry out such negotiations and how the negotiators should treat the complex matrix created by the differing memberships of the various regimes. In addition, while scholars can and should provide normative guidance to policymakers to help them design better dispute settlement provisions and thus to avoid future problems, the international community is still left with a complex jumble of dispute settlement clauses and regimes which pose problems in the present and will continue to do so as long as they remain in force or until they are amended.

218. For some applications in private international law, see generally PETER NORTH & J.J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* 359-373 (13th ed. 1999); Daniel Tan, *Anti-Suit Injunctions and the Vexing Problem of Comity*, 45 *VIRG. J. INT'L L.* 283 (2005).

219. Introducing amendments that do not require harmonization across regimes is feasible, though still politically burdensome. For instance, in the wake of the Argentine/Brazil dispute on frozen poultry, litigated before both a Mercosur arbitral tribunal and the WTO, *supra* notes 196-202, Mercosur member states adopted the Protocol of Olivos providing that disputes "that may also be referred to the dispute settlement system of the [WTO] or other preferential trade systems that the Mercosur state Parties may have entered into, may be referred to one forum or the other, as decided by the requesting party. . . . Once a dispute settlement procedure pursuant to the preceding paragraph has begun, none of the parties may request the use of the mechanisms established in the other fora." Protocol of Olivos, *supra* note 60, at art. 1.2.

Regardless of the sophisticated legal solutions that could be introduced to combat international adjudicative confusion, the fact remains a third party will be required to make a binding decision whenever there is disagreement as to what is provided for by different dispute settlement procedures and which procedure takes precedence in the event that both rely on the compulsory paradigm.

B. *The Sociologic/Jurisprudential Approach*

Recognizing that the *compétence de la compétence* principle is in essence a logical loop and that, in the absence of a structured judicial system, legal certainty cannot be achieved, a growing part of international legal scholarship puts the stress on the capacity, if not the legal duty, of international judges to tame the disruptive forces unleashed by the multiplication of international judicial fora and the shift to the compulsory paradigm.

In a nutshell, what I dub the sociologic/jurisprudential approach calls for judges of international as well as national courts and tribunals to reach across divides and, in the absence of clear-cut norms and principles that can frame their relations, spontaneously build a sort of informal judicial system. As much as the technocratic/legalistic approach is top-down, requiring the action of states and international decision makers, the sociologic/jurisprudential approach is grassroots and bottom-up.

While fundamentally different, the two approaches have common ground in the legal doctrine of judicial comity, according to which courts in a given jurisdiction should show respect and demonstrate a degree of deference to the decisions of judicial bodies operating in other jurisdictions.²²⁰ Comity is often invoked before and applied by national courts, especially in common law systems, to resolve problems created by overlapping jurisdictions within the same legal system.²²¹ It is also used as a principle of private international law to settle

220. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900).

221. *See generally* Lawrence Collins, *Comity in Modern Private International Law*, in *REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF SIR PETER NORTH* 91 (James Fawcett ed., 2002).

problems of conflicting jurisdictions between courts of different nations.²²²

Nonetheless, there has been very little use of comity in relations between international courts and tribunals. If there is any consensus in this regard, it is that comity, in the sphere of public international law, does not impose a legal obligation on courts.²²³ There are sound reasons for this. Domestic courts can be required to respect and defer to the proceedings and decisions of other courts *within the same legal and political system*. In the United States, comity will ordinarily prevent a federal court from interfering with a pending state criminal prosecution.²²⁴ Domestic courts can also be required or encouraged to respect and demonstrate deference to the proceedings and decisions of foreign courts, although reciprocity is far from guaranteed and happens more on a case-by-case basis rather than systematically.²²⁵ International courts and tribunals, on the other hand, are the expression of a multiplicity of sovereign wills. The number and identity of the states party to their constitutive instruments often differ; they are organs of different international organizations; their legal basis lies in different international legal instruments; and they are paid for and supported by different groups of states. The only things that various international tribunals have in common are the fact that they operate within the same (fragmented) legal space—the international legal order—and the fact that they all carry out the same judicial function. This common ground is arguably too thin to provide a foundation for a principle

222. *Id.* at 91-99.

223. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991). The Restatement does not provide any evidence that comity as a rule limiting jurisdiction in private transactions is compelled by customary international law. *Id.* at 27-29; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 cmt. e (1987). While Shany points out that there have been a number of situations in which “the doctrine [of comity] was relied upon directly or indirectly by international institutions, or at least invocation was considered or advocated. . .,” he nonetheless stops short of claiming its binding force. Instead, he writes that “. . .[c]omity *should* arguably be acknowledged as a positive device in the promotion of the systematic nature of international law.” SHANY, *COMPETING*, *supra* note 206, at 261 (emphasis added).

224. *Younger v. Harris*, 401 U.S. 37, 43-54 (1971).

225. Paul, *supra* note 223, at 48-49.

mandating the various international judicial bodies to apply comity in their relations as a matter of international law.

It is probably because of this inherent limitation that comity, legally understood, has not attracted much attention in public international law, and legal scholarship has preferred to focus on metalegal arguments to connect disparate international jurisdictions. Some have suggested that a “global community of courts” encompassing both domestic and international tribunals is emerging.²²⁶ This community is not formally organized, but rather based on a sort of “class-consciousness,” to use a term once popular, a “self-awareness of the national and international judges who play a part.”²²⁷ It is argued that the members of this “epistemic community”²²⁸ “see each other not only as servants and representatives of a particular polity, but also as fellow professionals in a common judicial enterprise that transcends national borders.”²²⁹ They are bound together because they face common substantive and institutional problems: They pay attention to each other’s judgments beyond what might be formally mandated by any *stare decisis* principle or judicial structures, and they learn from one another’s experience and reasoning. Most of all, they tend to work as a team, cooperating directly to resolve specific disputes.

226. See, e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 192 (2003) [hereinafter Slaughter, *Global Community*]; Jenny S. Martinez, *Toward an International Judicial System*, 56 STAN. L. REV. 429 (2003); William W. Burke-White, *A Community Of Courts: Toward A System Of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1, 3 (2002); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); Helfer & Slaughter, *Toward a Theory*, *supra* note 25, at 372 (referring to a “recognition of a community of courts around the world, units engaged in a common endeavor”); Anne-Marie Slaughter, *A Real New World Order*, 76 FOREIGN AFF. 183, 187 (1997) (noting that citing international decisions helps courts “gain legitimacy by linking [themselves] to a larger community of courts”).

227. Slaughter, *Global Community*, *supra* note 226, at 192.

228. In international anthropology and studies of global governance, these aggregations made up of transnational networks of knowledge-based experts are called “epistemic communities”. See generally Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT. ORG. 1 (1992).

229. Slaughter, *Global Community*, *supra* note 226, at 193.

Some recognize that this “judicial band of brothers” might not necessarily be as harmonious and open-minded as the model anticipates and therefore argue in favor of the adoption of antiparochial canons and cross-court dialogues.²³⁰ Absent action by national and international legislatures, functional necessity will require the judges belonging to this community to adopt and implement judicial system-enhancing principles and rules.²³¹

At least in the sphere of public international law, there are plenty of signs that such a community is not imaginary.²³² International courts and tribunals are indeed engaged in such a system-enhancing dialogue, as they tend to pay attention to each other’s jurisprudence.²³³ Much as in the case of domestic courts, cooperation between international tribunals conducting serial or parallel proceedings is sometimes based on the legal principles just mentioned (*lis pendens*, *electa una via*, and comity)²³⁴ or accomplished by distinguishing cases carefully so as not to violate the requirements of *lis pendens* or exclusive jurisdiction clauses.²³⁵

230. See Martinez, *supra* note 226, at 434.

231. *Id.*

232. See generally *id.*; Slaughter, *Global Community*, *supra* note 226, at 198; Burke-White, *supra* note 226, at 96.

233. See Nathan Miller, *An International Jurisprudence? The Operation of “Precedent” Across International Tribunals*, 15 LEIDEN J. INT’L L. 483 (2002).

234. For an example stemming from the MOX dispute, see Shany, *MOX Plant*, *supra* note 190. In this case, the Annex VII ad hoc arbitral tribunal decided to suspend proceedings while the question of the exclusive jurisdiction of the European Court of Justice over disputes between EC member states was pending before the Luxemburg court: “[B]earing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two states, the Tribunal considers that it would be inappropriate for it to proceed further.” The MOX Plant Case, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, ¶ 28, 42 I.L.M. 1187 (Int’l Trib. L. of the Sea 2003).

Also, in the *Soft Lumber* dispute, a NAFTA panel consolidated three claims advanced by private companies against the United States into a single proceeding to order to avoid the risk of inconsistent rulings by the three Chapter 11 panels. See *supra* note 197.

235. In the Iron Railway arbitration between the Netherlands and Belgium, an Arbitral Tribunal found that Article 292 of the EC Treaty, *supra* note 53, did not prevent it from ruling on the merits because the dispute did not involve questions of EC law. In the Arbitration Regarding the Iron

This community is largely brought about by the fact that the large demand for international judges exceeds the limited supply of qualified people to fill the positions. Consequently, there are several judges who, over the course of their careers, have served in multiple international judicial bodies, both regional and global.²³⁶ Although they are drawn from different countries, international judges often have similar educational backgrounds and have frequently studied, at least at the graduate level, in the same universities and schools.²³⁷ Also, the existence of an epistemic community of international judges is the result of the fact that the pools from which judges are drawn are epistemic communities themselves: academia, the judiciary, and civil and diplomatic service. Finally, judges from various international courts increasingly meet in both their official and unofficial capacities.²³⁸

Rhine (“Ijzeren Rijn”) Ry., (Belg./Neth.), ¶¶ 120, 137, 141 (Perm. Ct. Arb. 2005).

236. For example, Judge Thomas Burgenthal of the ICJ has been a judge of the IACHR (1979-1991). Georges Abi Saab, a member of the WTO Appellate Body, has been a member of the ICTY/ICTR Appeals Chamber and an ad hoc judge at the ICJ; Mohamed Shahabudeen, a member of the ICTY/ICTR Appeals Chamber, was a judge at the ICJ (1988-1997); Judge Elizabeth Odio Benito of the ICC served at the ICTY (1993-1998), as did Judge Claude Jorda (1994-2003, ICTY President between 1999-2003); Navanethem Pillay was President of the ICTR (1999-2003); and ECJ judges Jerzy Makarczyk, Pranas Kuris, Uno Lohmus, and Egils Levits have also been judges at the ECHR.

237. For a comprehensive overview of international judges’ backgrounds, see DANIEL TERRIS, CESARE ROMANO & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES* (forthcoming 2007).

238. For example, since the late 1990s, the President of the European Court of Human Rights has been present at the opening of the judicial year of the ECJ, and the two courts visit one other on a regular basis. Likewise, judges of regional economic integration agreement courts have visited the ECJ on several occasions, and judges of the IACHR have visited the ECHR. See Antonio Augusto Cancado Trindade, President, Inter-American Court of Human Rights, Speech at the Opening of the Judicial Year of the European Court of Human Rights: The Development of International Human Rights Law by the Operation and the Case-law of the European and the Inter-American Courts of Human Rights ¶¶ 1-2, (Jan. 22, 2004), available at http://www.echr.coe.int/NR/rdonlyres/29AC6DBD-C3F8-411C-9B97-B42BE466EE7A/0/2004_Wildhaber_Cancado_Trindade_BIL_opening_legal_year.pdf (noting the success of the two courts in “establishing a fruitful scheme of cooperation, by means of holding periodic or annual joint meetings, in rotation in Strasbourg and San José of Costa Rica”). Outside the intercourt

However, this idyllic picture hides some troubling realities. First, the dialogue between international judges takes place almost exclusively in English. Understandably, judges of both domestic and international courts take notice of judgments of other courts only if they can read them. This combination of factors provides fuel to those fretting about the emergence of an Anglo-American (less Anglo and very American) legal empire.²³⁹ While many international judges might be polyglots, the reality is that the international judicial dialogue includes only certain judges and courts and primarily uses terms and ideas belonging to the common law tradition.²⁴⁰

The second problem is that the international judicial community is far from egalitarian. There seems to be an informal and unconscious but tangible pecking order among international courts and tribunals. Some courts prefer talking, or worse lecturing, to listening and when it comes to listening, the level of attention depends on which court is doing the talking.²⁴¹ These pecking orders tend to reflect old rifts between former colonial powers and formerly colonized states or, in contemporary terms, developed-developing or rich-poor divides. But while hierarchies might be inevitable, they have emerged in a system that should by definition have no hierarchies. If hierarchies must exist in such a system, the system itself should be able to control them or should allow states to design them in their role as the ultimate source of legitimacy in the international legal order.

And this leads to the third fundamental problem. Epistemic communities of judges lack both democratic and international legal legitimacy. International judges have only the powers that have been conferred on them by states and codi-

framework, one should point out the "Brandeis Institute for International Judges," a semi-annual initiative of the Brandeis International Center for Ethics, Justice, and Public Life that brings together judges from several international judicial bodies for a week-long retreat. See http://www.brandeis.edu/ethics/international_justice/bij.html (last visited Aug. 16, 2007).

239. See, e.g., Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 *IND. J. GLOBAL LEGAL. STUD.* 383 (2003); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 *EUR. J. INT'L L.* 369 (2005).

240. See Romano, *Americanization*, *supra* note 97, at 115-18.

241. Miller, *supra* note 233, at 489-90.

fied in the constitutive instruments of the specific court or tribunal. They may also have some residual powers that are implicit in the judicial function.²⁴² As has been remarked, “the fact is that proliferating tribunals, overlapping jurisdictions and ‘fragmenting’ normative orders arise as effects of politics and not as technical mistakes or unfortunate side-effects of some global logic.”²⁴³ International courts and tribunals are not created accidentally or spontaneously. To the extent that they are or are not legally and functionally related to each other, it is because there has been a specific and deliberate will to make it so.

But it is also true that, like international organizations, international courts and tribunals, once created, tend to develop their own logic, agenda, and politics. Sometimes these reflect the views of the states that support the court or tribunal, but often they do not. The struggle for hegemony takes place both between international courts, as previously demonstrated, but also between courts and states²⁴⁴ and between courts and the organizations of which they are organs.²⁴⁵

242. These are the so-called implied powers. *See generally* Paola Gaeta, *The Inherent Powers of International Courts and Tribunals*, in MAN’S INHUMANITY TO MAN 353, 353 (Lal Chand Vohrar et al. eds., 2003); SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-1996*, at 600-01 (3rd ed. 1997).

243. Koskeniemi & Leino, *supra* note 24, at 561.

244. “If a human rights treaty body or a WTO panel interprets the 1969 Vienna Convention on the Law of Treaties (‘VCT’) so as to reinforce that body’s jurisdiction or the special nature of the relevant treaty, and in so doing deviates from the standard interpretation, then this is bound to weaken the authority of that standard interpretation and to buttress the interests or objectives represented by the human rights body or the WTO panel. The interpretations express institutional moves to advance human rights or free trade under the guise of legal technique. In the language of political theory, the organs are engaged in a *hegemonic* struggle in which each hopes to have its special interests identified with the general interest.” *Id.* at 561-62.

245. Examples include the tension between the Security Council and the ICTY on a “completion strategy” and the disagreement between the WTO Appellate Body and the WTO Dispute Settlement Body on *amici curiae*. *See* Daryl Mundis, *The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT’L L. 142, 142-43 (2005); Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION 317, 317-329 (Armin Von Bogdandy et al. eds., 2002).

International judges at present are too little understood by the public and too little studied by scholars to be given—either individually, as a bench, or as a whole class—any mandate broader than the one narrowly defined by the constitutive instruments of their respective courts. Where is their allegiance? Domestic judges take an oath of office by which they swear to uphold the ultimate source of sovereignty and power of the state that they serve (e.g., the constitution, the sovereign, the party).²⁴⁶ But what kind of oath can international judges take, given that the ultimate source of their power is collective state action? The allegiance of international judges, then, inevitably tends to be toward procedure and due process, the honorable exercise of judicial functions, independence and impartiality, and the maintenance of secrecy in all deliberations.²⁴⁷ While this might appear a satisfactory guarantee, the fact remains that international courts and tribunals operate in a context in which checks and balances are often lacking or weak and the independence of a judge from her or his own country depends largely on good faith.²⁴⁸ Procedures for disciplining judges who break their (modest) oaths are weak, almost totally controlled by the judge's respective bench, and rarely used.

In this light, the epistemic communities of the international judiciary begin ominously to resemble secret societies in which interaction takes place along unclear and twisted lines, behind curtains, and most importantly, possibly at odds with the ultimate source of all international legitimacy: the will and consent of sovereign states, which in turn represents the will of people freely expressed through democratic state governments. A defender of this system might point to the fact that

246. See, e.g., 28 U.S.C. § 453 (2000).

247. For example, the Rules of the European Court of Human Rights require a judge of that body to state: "I swear—or I solemnly declare—that I will exercise my functions as a judge honorably, independently and impartially and that I will keep secret all deliberations." Similarly, the Rules of the International Court of Justice include a provision that states: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously." The Rules of these bodies can be found in Oellers-Frahm & Zimmerman, *supra* note 64, at 53, 456, 1957.

248. See generally Posner & Yoo, *supra* note 25; cf. Gilbert Guillaume, *Some Thoughts on the Independence of International Judges Vis-à-Vis States*, 2 L. & PRAC. OF INT'L CTS. & TRIBUNALS 163, 168 (2003).

far too many governments still lack democratic legitimacy themselves and that overzealous respect for the will of such governments might not necessarily be beneficial to the furtherance of human rights, peace and security, free trade, and the punishment of international crimes. In certain cases, the judgment of an international judge, however unknown and mysterious she or he is, is better than the decision of a well-known dictator. However, it should also be noted that most international courts have been created by states run by freely-elected governments, since such tribunals tend to receive little attention from dictatorships.

In sum, international judges must be explicitly legitimized by sovereign states in order to be entrusted with the crucial tasks of weaving the international judicial web and deciding what is provided for in conflicting dispute resolution procedures and which of several compulsory jurisdictions should take precedence. Without such clear lines of control and allegiance in the international judiciary, these decisionmakers lack sufficient legitimacy to take on structural tasks (such as that of building a judicial network) beyond the basic responsibilities of their respective dockets.

C. *The Non-Engagement/Disengagement Approach*

The principle of consent to adjudication implies that, as much as states are free to accept third-party binding adjudication, they are also free not to do so (non-engagement) and to remove themselves from the jurisdiction of a court even after they have accepted such jurisdiction (disengagement).²⁴⁹

Non-engagement and disengagement are the third potential reaction to the problems created by the multiplication of international judicial bodies and the shift toward the compulsory paradigm. Of the three, this category is also the least explored by scholars of international law and international rela-

249. In this article, I use the term “disengagement” as a more flexible and generic placeholder for the legal terms “denunciation” and “withdrawal.” Disengagement refers to the act by which a state unilaterally discontinues its membership in a treaty (including a treaty that establishes an intergovernmental organization endowed with an international judicial body) pursuant to the terms of that treaty, or “withdraws” or “denounces” a unilateral declaration of acceptance of an international court’s jurisdiction.

tions.²⁵⁰ The neglect has perhaps more to do with ideological than scientific reasons. Maybe non-engagement and disengagement are considered to be antisocial practices that weaken the structure of treaty-created international obligations and the international legal fabric,²⁵¹ or maybe they are perceived as antipodal to the idea of a law-based international legal order administered by third-party adjudicators.²⁵² Regardless, it is evident that non-engagement and disengagement (or the mere threat thereof), far from pure expressions of antisocial behavior, actually provide states with useful mechanisms of increasing their voices within international legal regimes and of influencing judicial bodies' future jurisprudence.²⁵³ They are an essential part of the ongoing dialectic interaction between states and international judicial bodies. Since non-engagement and disengagement are lawful options currently in use, and their employment is becoming increasingly common, these practices deserve greater attention if the consequences of the shift from the consensual to the compulsory paradigm are to be properly understood.

1. *Non-Engagement*

States have the option of refusing to accept the jurisdiction of an international judicial body. If the body is based on the compulsory paradigm, states can avoid being subject to its jurisdiction by simply not ratifying the relevant treaty.²⁵⁴ When China became a member of the WTO in 2001, it departed from a long tradition of not subjecting itself to international judicial bodies. Iran, North Korea, Vietnam, Laos, Azer-

250. Laurence Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1585-86 (2005).

251. See, e.g., C. WILFRED JENKS, *A NEW WORLD OF LAW?: A STUDY OF THE CREATIVE IMAGINATION IN INTERNATIONAL LAW* 180 (1969).

252. In his study of exit from treaties, Helfer sharply observes: "To a profession anxious to prove that nations obey international legal obligations, a state's right to unilaterally abrogate its treaty obligations—often without substantive restraint or meaningful sanction—is not something to be advertised. In fact, major public international law treatises (and even most specialized studies of treaty law and practice) all but ignore exit or give the issue only passing attention." Helfer, *supra* note 250, at 1592.

253. See *id.* at 1587.

254. In the case of systems based on the compulsory paradigm, conditional engagement is typically, and logically, not an option. Reservations to the jurisdiction of the regimes' judicial body are not allowed for the same reasons that the judicial body has been given compulsory jurisdiction.

baijan, Yemen, and Belarus are some of the countries that are not party to any treaty providing for compulsory adjudication through a regime-based judicial body.²⁵⁵ If one considers that there are certain international judicial bodies that exist only on paper (e.g., the tribunals of the Arab Maghreb Union or the Organization of Arab Petrol Exporting Countries) or are active at very minimal levels (e.g., the Court of the Commonwealth of Independent States), then one could also add to the list Syria, Iraq, Kazakhstan, and Uzbekistan.²⁵⁶

While non-engagement is possible, it obviously has a tangible price. Indeed, non-engagement “carr[ies] much the same reputational cost as a track record of violating treaty commitments.”²⁵⁷ It signals not only the intent to avoid multilateral interactions with other nations but also a general dislike of the very idea of the rule of law. Indeed, it is evident that many of the states that are not subject to the jurisdiction of any international judicial body happen also to be pariahs in the contemporary international community.

Also, to the extent that the work of international courts and tribunals can be considered a public good,²⁵⁸ states not engaging with such bodies could be accused of reaping the

255. It must be said that, as members of the UN, all these states have a duty to cooperate with the ICTY and ICTR. That is implied in the fact that the two tribunals were created by the Security Council under its Chapter VII compulsory powers. See *supra* text accompanying note 75. However, for all practical purposes, these states are not subject to the jurisdiction of the ICTY and ICTR, as the tribunals have jurisdiction restricted only to the territory of the former Yugoslavia and Rwanda, and, at least so far, no citizens or residents of the above-referenced countries have been indicted.

256. See ALVAREZ, *supra* note 11, at 404-07, available at http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf (noting courts that exist in name but are functionally dormant).

257. Helfer, *supra* note 250, at 1623. For examples of scholarship discussing the significance of reputation, see generally George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

258. See generally Cesare P.R. Romano, *International Courts and Tribunals: Price, Financing and Output*, in 23 INTERNATIONAL CONFLICT RESOLUTION: CONFERENCES ON NEW POLITICAL ECONOMY 189-245 (Stefan Voigt, Max Albert & Dieter Schmidtchen eds., 2006) [hereinafter Romano, *International Courts*]. Cf. Wolfgang Kerber, Comment on Romano, Cesare P.R.: *International Courts and Tribunals: Price, Financing and Output*, in INTERNATIONAL CONFLICT RESOLUTION, *supra*, at 247-52.

benefits of engagement by others without incurring any corresponding burdens. Stated another way, if international adjudicative activity helps the world to become less violent, more protective of fundamental human rights, and more law-based and international law to expand, deepen, and develop more specific content, it is because of those states that participate in the “international judicial system.”²⁵⁹

If a judicial body is based on the consensual paradigm, acceptance of its jurisdiction is voluntary. As we have seen, more than two-thirds of states have not made any optional declaration of acceptance of ICJ jurisdiction.²⁶⁰ Despite the fact that jurisdiction can also be accepted ad hoc, the majority of states have never appeared before the World Court. In addition, few states have opted for fora under the LOS Convention other than the default Annex VII arbitral tribunal.²⁶¹

In the case of systems based on the consensual paradigm, the alternative to non-engagement is carefully worded engagement. States can and often do qualify their acceptance of jurisdiction of international judicial bodies to a great degree by attaching reservations and declarations, although there are limits to how far-reaching these can be.²⁶²

It should also be mentioned that systems based on the consensual paradigm are potentially affected by a peculiar problem: that of “opportunistic engagement” by states accepting the jurisdiction of a judicial body solely with the aim of litigating a specific case against another state that has, conversely, made an open-ended declaration of acceptance.²⁶³ It

259. This point yields an important prescriptive insight for treaty makers. When negotiating agreements creating courts whose output could be considered mostly as a public good, the consensual paradigm might be more appropriate than the compulsory as it will encourage broader ratification and enhance depth. *Cf.* Helfer, *supra* note 250, at 1636-39.

260. *See supra* Part III.A.1(a).

261. For a comprehensive table, see United Nations Office of Legal Affairs, Oceans and Law of the Sea: Settlement of Disputes Mechanism Recapitulative Tables, http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm (last visited Aug. 16, 2007).

262. For example, consider the limits imposed by the VCT, *supra* note 79.

263. *See, e.g.*, Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. 240 (June 26). Australia accepted the jurisdiction of the ICJ without any major reservations at the time of the Court's founding in 1945. In 1987, Nauru, which at the time was not a member of the UN, applied to become party to the Statute of the ICJ. The Secretary

might be that states engaging opportunistically are subject to lesser reputational costs than states not engaging at all.²⁶⁴

2. *Disengagement*

In theory, as much as states are free to subject themselves to third-party binding adjudication, they are also free to withdraw themselves from the jurisdiction of such a court. The legal problems raised by disengagement and the dynamics according to which it takes place differ depending upon whether it occurs within a consensual or a compulsory paradigm.

In dispute settlement systems based on the compulsory paradigm, withdrawal from the legal regime's central treaty or treaties, or even from the organization itself, is the only possibility for a state wishing to avoid judicial scrutiny.²⁶⁵ Express

General, *Summary Statement by the Secretary-General on Matters of Which the Security Council is Seized and on the Stage Reached in their Consideration*, Addendum, UN Doc. S/18570/Add.42 (Nov. 3, 1987). In 1988, Nauru deposited with the UN Secretary General a declaration of acceptance of the Court's jurisdiction that closely mirrored that of Australia. See U.N. SEC'Y GEN., I MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 31 DECEMBER 2003 at 21, U.N. Doc. ST/LEG/SER.E/22 (Vol. 1), U.N. Sales No. E.04.V.2 (2004) (declaration of Nauru); The Optional Clause and Declarations, *supra* note 51 (original declaration of Australia). Finally, in 1989, Nauru instituted proceedings against Australia before the ICJ. See *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Application Instituting Proceedings, 1989 I.C.J. 4 (May 19). To protect themselves from the kind of opportunistic behavior demonstrated by Nauru, certain states have qualified acceptance of the ICJ jurisdiction by reserving that ". . . this declaration shall not apply . . . to disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court." *Declaration of Cyprus Recognizing the Jurisdiction of the Court as Compulsory*, Sept. 3, 2002, available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Aug. 16, 2007); see also *Declarations of Australia* (Mar. 22, 2002), *New Zealand* (Sept. 22, 1977), *Slovakia* (May 28, 2004), and the *United Kingdom* (July 5, 2004) *Recognizing the Jurisdiction of the Court as Compulsory*, available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

264. This will occur as long as international litigation is perceived to be a better form of settling disputes than other, non-adjudicative, means including diplomacy.

265. However, jurisdiction remains even after withdrawal over disputes that arose prior to the date that the denunciation or withdrawal took effect as well as over situations that arose prior to that date and continue in the

preclusion of unilateral disengagement is uncommon: Conditions and procedures for withdrawal are usually regulated or, less often, not mentioned at all.²⁶⁶ However, upon closer look, it is evident that disengagement might be more or less burdensome and/or possible depending on the structure of the given legal regime. For example, in order not to be subject to the jurisdiction of the WTO dispute settlement system, a state must withdraw from the organization altogether. It seems that a state could withdraw from the European Convention on Human Rights, however, and still remain a member of the Council of Europe.²⁶⁷ In the case of judicial bodies created by regional economic and political integration agreements, withdrawal from the parent organization is typically the only method by which a state can avoid the jurisdiction of the legal regime's judicial body.²⁶⁸

International criminal tribunals are a peculiar case because of the unique role played by the UN Security Council and the UN Charter in the international legal order. It is

present. See VCT, *supra* note 79, at art. 70(1). See, e.g., Papamichalopoulos v. Greece, App. No. 14556/89, Preliminary Objections, 16 Eur. H.R. Rep. 440, ¶ 40 (1993); Loizidou v. Turkey, 310 Eur. Ct. H.R. 19 (ser. A) at 26, ¶ 41 (1995).

266. In the case of treaties that are silent as to withdrawal, the Vienna Convention on the Law of Treaties introduced a rebuttable presumption that states may not unilaterally exit from a treaty that lacks a denunciation or withdrawal clause. VCT, *supra* note 79, at art. 56(1). Nonetheless, scholars writing after the VCT's adoption in 1969 continue to debate whether this presumption accurately reflects customary law. See generally Kelvin Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clause*, 53 BRIT. Y.B. INT'L L. 83 (1982).

267. For example, Greece joined the Council of Europe in 1949. See Council of Europe, http://www.coe.int/T/E/Com/About_Coe/Member_states/e_gr.asp#TopOfPage (last visited Aug. 16, 2007). Shortly thereafter, on March 28, 1953, Greece ratified the European Convention on Human Rights and its Protocol No. 1. See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=3/28/2007&CL=ENG> (last visited Aug. 16, 2007). In the aftermath of the military coup of 1967, though, Greece denounced the Convention in 1969, effective 1970 (under art. 58.1, former art. 65.1, of the Convention), while still remaining a member of the Council of Europe. See *id.* After democracy was re-established, Greece ratified the Convention anew in 1974. Whether a state could denounce the Convention today and remain a member of the Council of Europe is far from clear under the new human rights regime.

268. See generally *supra* Part II.B.

more difficult to avoid jurisdiction of these judicial bodies. As I already mentioned, while in principle the ICC has jurisdiction only over crimes committed by or against nationals or on the territory of states that have ratified the Rome Statute, and states can denounce the Statute, the ICC can nonetheless gain jurisdiction even in the case of states that have not ratified the Rome Statute (and arguably in the case of states that have withdrawn from it) if the matter has been referred to the Court by a decision of the Security Council.²⁶⁹

It is unlikely but not impossible that governments in the states of the former Yugoslavia or Rwanda might decide to shield certain individuals from prosecution by the ICTY or the ICTR. Could these states avoid the jurisdiction of those tribunals by withdrawing from the United Nations? The answer is not straightforward, as it mainly hinges upon the interpretation of article 2.6 of the UN Charter, whereby “[t]he Organization shall ensure that states which are not members of the United Nations act in accordance with [the principles set forth in the Charter] so far as may be necessary for the maintenance of international peace and security.”²⁷⁰ Thus, if prosecution by the ICTY and ICTR is considered “necessary for the maintenance of international peace and security,” even withdrawal from the UN may not prevent the tribunals from exercising jurisdiction.²⁷¹

In theory, disengagement should be easier in systems based on the consensual paradigm than in those based on the compulsory paradigm. For example, acceptance of the jurisdiction of the ICJ and membership in the UN are totally separated. A state can withdraw acceptance of the jurisdiction of the ICJ and remain a member of the UN, and states that are

269. Rome Statute, *supra* note 79, at art. 13b.

270. Simma states that “[t]wo opposing views toward this question can be identified. According to one opinion, Art. 2(6) is a particular legal expression of the comprehensive authority of the principles laid down in the UN Charter and, as such, takes precedence over the principle of non-interference in the domestic affairs of other States, . . . According to the other opinion, Art. 2(6) is no more capable of imposing obligations on third States without their consent than any other international treaty.” 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 141 (Bruno Simma ed., 2d ed. 2002).

271. The ICTY/ICTR Appeals Chamber has answered this question affirmatively. Prosecutor v. Tadic, Case No. IT-94-I-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 28-48 (Oct. 2, 1995).

not UN members can accept the Court's jurisdiction.²⁷² However, as the IACHR signaled in the *Ivcher Bronstein* case, a state's withdrawal of its optional declaration of acceptance of IACHR jurisdiction is not enough for that state to remove itself from the Court's jurisdiction; denunciation of the American Convention itself is necessary.²⁷³ The judgment did not go so far as to affirm that a state needs to withdraw from the OAS itself to escape the Court's jurisdiction. However, the fact that the Court has time and again questioned whether the acts of certain states that are OAS members but are not party to the American Convention (namely the United States) are compatible with the regional human rights regimes leaves ample room for doubt.²⁷⁴

Given the foregoing, it should not be surprising that there are few examples of states disengaging from the jurisdiction of international adjudicative bodies²⁷⁵ and that the examples that do exist indicate that more states have pulled out of, or considered pulling out of, judicial systems based on the consensual paradigm²⁷⁶ than systems based on the compulsory paradigm.²⁷⁷ It is also evident that the cost of non-engagement,

272. UN Charter art. 93.2; *see, e.g.*, *Certain Phosphate Lands in Nauru* (*Nauru v. Austl.*), 2002 I.C.J. 240 (June 26).

273. *Case of Ivcher-Bronstein v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, Competence, ¶ 40 (Sept. 24, 1999).

274. *See supra* Part III.A.2(b).

275. However, there are many more examples of states exiting treaties. *See Helfer, supra* note 250, at 1603 fig.1, 1605 fig.3.

276. Since 1951, twelve declarations relating to the jurisdiction of the International Court of Justice have expired, been withdrawn, or been terminated without being subsequently replaced. These were the declarations of Bolivia, Brazil, China, El Salvador, France, Guatemala, Iran, Israel, South Africa, Thailand, Turkey, and the United States. *See* I.C.J., 57 YEARBOOK 2002-03, at 127 n.1, U.N. Sales No. ICJ900 P (2006). Figures on the denunciation of agreements providing for compulsory jurisdiction of the ICJ, such as the United States withdrawing from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24 1963, 21 U.S.T. 325, 596 U.N.T.S. 487, on March 7, 2005, are not readily available. In the case of the IACHR one can point out the cases of Peru and Trinidad and Tobago. *See supra* Part III.A.1(b).

277. One example of a state pulling out of a system based on the compulsory paradigm is that of Greece and the European Convention. *See supra* note 267. There are also examples of "near-withdrawals," such as the two times legislation was introduced in the U.S. House of Representatives to establish a commission to review dispute settlement decisions taken by the WTO against the United States. This took place in 1994 (the so-called Dole-

conditional engagement or disengagement necessarily varies from state to state and that it might be inversely proportional to the power of a country. This may explain why most examples in this field relate to the behavior of the United States.

Finally, it should be pointed out that disengagement from a system based on the compulsory paradigm has different effects than disengagement under the consensual paradigm. A state that disengages from a system based on the compulsory paradigm becomes, to use game-theory parlance, a “non-player.” It no longer contributes to the functioning of the judicial body. Because of this, it might lose the privilege of nominating judges for election, and it might also lose the control and power over the court that comes from contributing to the court’s budget. In other words, the state is foreclosed from the mechanisms that can be used to influence both future judicial decisionmaking as well as other parties’ current behavior (insofar as those parties take into account the jurisprudence of the body in question). By contrast, in the case of disengagement from a system based on the consensual paradigm, loss of voice is much less momentous, as states retain the right and duty to participate in the institutional life of the judicial body without being subject to its jurisdiction.²⁷⁸

From these simple observations, some interesting hypotheses and normative inferences arise. First, the shift from the consensual to the compulsory paradigm has raised the oppor-

Moynihan proposal) and again in June 2000. H.R. 4706, 103d Cong. (2d Sess. 1994) (as introduced by Rep. Benjamin L. Cardin) (discussing proposal of 1994); Gary G. Yerkey, *Rep. Cardin Revives Dole Plan to Create Panel to Review WTO Rulings Against U.S.*, 17 INT’L TRADE REP. 997, 997-98 (2000) (discussing proposal of 2000). The so-called WTO Dispute Settlement Review Commission would consist of five federal appellate judges who would review all approved WTO dispute settlement reports. If the Commission reported that the WTO had acted improperly, any member of Congress would be able to introduce a joint resolution calling on the President to renegotiate the dispute settlement procedure or withdraw from the WTO. *See* WTO Dispute Settlement Review Commission Act, S. 1438, 104th Cong. (1st Sess. 1995).

278. For example, as the largest contributor to the OAS budget, the United States is also the largest contributor to the IACHR’s budget, and although the United States does not have a judge on the Court, nothing in its statute prevents the country from putting forward a U.S. candidate to be elected. John F. Maisto, U.S. Permanent Representative to the Organization of American States, Opening Statement at the OAS Special General Assembly (Jan. 31, 2006).

tunity cost for lawful disengagement from both consensual and compulsory systems.²⁷⁹ As states become aware of the shift, it is likely that they will negotiate harder and longer whenever new legal regimes endowed with an institutionalized dispute settlement procedure are created, because they realize that exit is becoming more difficult. This will likely further slow down the judicialization of international relations.

It is also likely that, in a system based on the compulsory paradigm and where disengagement has a high opportunity cost, states that disagree with the relevant judicial body's jurisprudence will focus on modifying the rules of the legal regime, trying to restrict the judges' interpretative leeway, or filling gaps that could be filled later on by disadvantageous case law rather than pull out altogether. Conversely, in a system based on the consensual paradigm, as disengagement is relatively less costly, states are more likely to criticize the judicial body, question its competence, legitimacy and reasoning, and possibly disengage rather than spend time and energy trying to modify the underlying legal regime.

VI. CONCLUSION

To summarize, the settlement of international disputes has undergone a fundamental transformation over the past two centuries, changing from a predominantly consensual to a predominantly compulsory paradigm. However, because the judicialization of international relations has been far from complete and homogeneous, the international community is facing a disturbing phenomenon of litigation in multiple fora, serially or in parallel, of essentially the same disputes.

279. This reduces the cost (in comparative terms) of disengaging in violation of rules and procedures, not cooperating in proceedings, or not complying with judgments. Consider, for example, Iceland not appearing in proceedings before the ICJ brought by West Germany and the United Kingdom, *Fisheries Jurisdiction (U.K. v. Iceland)*, 1973 I.C.J. 3 (Feb. 2) and *Fisheries Jurisdiction (F.R.G. v. Iceland)*, 1973 I.C.J. 49 (Feb. 2); France not appearing in the Nuclear Tests cases, and then withdrawing from the General Act for Pacific Settlement of Disputes, Sept. 26, 1928, 93 L.N.T.S. 343, *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20) and *Nuclear Tests (N. Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20); and Albania not complying with the adverse ruling in the Corfu channel case, *Corfu Channel (U.K. v. Alb.)*, 1948 I.C.J. 15 (Apr. 9) and *Corfu Channel (U.K. v. Alb.)*, Judgment on Compensation, 1949 I.C.J. 244 (Dec. 15).

Granted, the various fora will not necessarily reach different conclusions as to the underlying points of law or the dispute, nor are the cases the same, legally speaking, as parties might be different, different aspects of the dispute might be considered, different violations of different norms might be invoked, and so on. Nonetheless, if one abandons a narrow legalistic approach and rises to a higher level of analysis, it becomes clear that the current state of affairs is unsatisfactory, as it frustrates one of the fundamental goals of both domestic and international judicial proceedings: closure. Such confusion also goes against the grain of fundamental legal principles such as certainty of law and encourages opportunistic state behavior in defiance of the principle of good faith that borders on abuse of rights.

Part V of this Article illustrated the forces that are currently at work to counteract this unsettling phenomenon, yet also hinted at the many shortcomings that affect each of them. The first normative finding that emerges from this analysis is that for any strategy to successfully address the contemporary ailments of international adjudication, it must rely on a combined therapy. The three antidotes—technocratic/legalistic, sociologic/jurisprudential, and non-engagement/disengagement—ought to be used simultaneously, since reliance on just one or predominantly one of these techniques will not suffice. This conclusion is not intuitive. As this Article has shown, policy-makers and international legal scholars have thus far explored one solution at a time to the detriment of the others. It seems that a complex blend of the three, balanced in such a way that their respective weaknesses cancel each other out, is in order. Most importantly, this mix might vary from state to state. While the current U.S. administration has largely preferred the non-engagement/disengagement approach, it is clear that the international judicial system at large and ultimately the United States itself would greatly benefit from more American participation in the advancement of the other two approaches.

Each of the three approaches considered is flawed in some fundamental way, and the following flaws need to be addressed at least to a certain degree before these approaches can produce benefits.

First, with regard to the technocratic/legalistic approach, there is an urgent need for more and better thinking about

the design of dispute settlement clauses. The law and procedure of international dispute settlement has long been the Cinderella of international law, neglected both by mainstream international legal scholarship and diplomats.²⁸⁰ Diplomats, for one, hope to never venture into this terrain. Indeed, dispute settlement is to international law what pathology is to medicine—the worst-case scenario, the point at which the consensus that made it possible for rules to be created no longer exists and the parties disagree as to what these rules actually mean and whether, by whom, to what extent, and with what consequences they have been violated. Given the depressing nature of this outcome, diplomats tend to devote themselves to lengthy negotiations on treaty substance and then cut and paste dispute settlement procedures from previous treaties without much thought about what would happen if the procedures were actually needed. Most dispute settlement clauses are coarse in many regards and could be greatly improved.

Likewise, international procedural law and its mechanics have understandably less appeal to scholars than does research into substantive international law. Moreover, serious inquiries into what happens when states do not agree on what they should and should not do tend inevitably to run into the enduring problem of the horizontal nature of international society, the “original sin” of the international system. Evidently, international legal scholars are still far too self-conscious, especially when confronting their colleagues in domestic law areas, to improve the system *within* its structural limits. These limits should, however, be subjected to rigorous and intense discussion (e.g., “Is an international judicial system possible? If so, how should it be structured?”) rather than simply wished away.

280. The United Nations Handbook of Final Clauses of Multilateral Treaties dedicates only eight pages to dispute settlement clauses and does not touch on problems of conflicting and overlapping jurisdictions. U.N. OFFICE OF LEGAL AFFAIRS, FINAL CLAUSES OF MULTILATERAL TREATIES HANDBOOK at 88-95, U.N. Sales No. E.04.V.3 (3d ed. 2003). The latest edition of the Handbook on the Peaceful Settlement of Disputes between States does not touch on these issues either. UNITED NATIONS, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES, U.N. Sales No. 92.V.7 (1992). For an example of dispute settlement provisions that take contemporary problems into consideration, see Central America-Dominican Republic Free Trade Agreement art. 20.6.4, Aug. 5, 2004, 43 I.L.M. 514 (draft text) *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

Second, it is evident that the sociologic/jurisprudential approach also falls short of what is needed. Some of the problems of this approach have already been mentioned, the most significant of which is probably the legitimacy deficit. International judges must be legitimized by sovereign states in order to be entrusted with the crucial tasks of weaving the international judicial web and deciding which consent to jurisdiction of which state should prevail in any given circumstance. Legitimacy is particularly important in this case because international judges currently exercise these functions in the absence of an explicit mandate, relying instead on implicit powers. To credibly rely on “implicit powers,” judges must appear to act in the interest of the overall system rather than that of this or that state, or worse, on personal whim. Judges must be independent in fact and in perception, for perception of independence matters almost as much as actual independence in the administration of justice. This is all the more true when courts lack real coercive powers.

Much can be done to improve the mechanisms by which international judges are elected, and different mechanisms to select candidates and elect international judges could increase those judges’ perceived and actual independence and increase overall legitimacy. Also, as long as seats on the bench are allocated by equitable geographical representation or by the one-state-one-judge criterion, the claim that international judges are independent will always sound less than fully credible.

Moreover, the inherent and natural parochialism of international courts and tribunals cannot be dismissed. Since the international judiciary is made up of myriad courts that lack formal coordination and often have jurisdiction over different aspects of essentially the same disputes, it is unlikely that comity will produce any results—as long as such comity is not mandatory, of course. The question is not only one of prestige or a court’s vision of its position within the international judicial Olympus. Rather, the funding of international judicial bodies is strictly correlated to their caseloads.²⁸¹ Thus, a court whose caseload stagnates or decreases will see its usefulness questioned and suffer budgetary cuts. Especially for those courts whose yearly caseload can be counted on one or two hands, like the ICJ, ITLOS, IACHR, and the WTO Appellate

281. See Romano, *International Courts*, *supra* note 258.

Body, deferring to another jurisdiction can have important practical consequences in addition to legal and political ones. Ensuring more stable financing over longer periods instead of the current one- or two-year cycles would discourage parochialism more than any generic exhortation and discourage courts from consciously or unconsciously pandering to those states that have a strong voice in the body that approves their budgets.

Third, as has been shown, the non-engagement/disengagement approach can have significant political and reputational costs as well as steep opportunity costs. Conditional engagement is also a gamble, because the final word on jurisdiction ultimately belongs to the court by virtue of the *compétence de la compétence* principle. Non-engagement/disengagement is a viable strategy for only a few states, either those that are already at the fringe of diplomatic relations (e.g., Syria, Iran, Myanmar, and Zimbabwe) or those that have the political, economic, or military weight to bear the costs (e.g., the United States, China, India, Japan, and Russia). But then again, one has to wonder whether, in the contemporary world, a state can really pull itself out of the growing web of agreements and jurisdictions and thus avoid judicial deliberation about its behavior. The frequent exercise of advisory jurisdiction by the ICJ and the IACHR as well as the capacity of the UN Security Council to establish jurisdictions *de imperio* show that no state is beyond international judicial reach. It is not farfetched to think that one day the General Assembly might request from the ICJ an advisory opinion about the legality of the Chinese occupation of Tibet or that the Security Council might create an international criminal tribunal for Zimbabwe or decide to refer the situation to the ICC. Given this, governments that merely follow the non-engagement/disengagement approach are ill-advised. Instead of ignoring, at their own peril, the realities and complexities created by the judicialization of international politics, they would be better off by judiciously engaging and steering this judicialization.

Is there another antidote, a silver bullet capable of fixing the problems created by the uneven and partial judicialization of the international sphere? Logically, if judicialization were complete and universal, the problems addressed in this article would not exist: There would be one international legal system and one international judiciary. Coordination between

international courts and tribunals would take place through carefully crafted international procedural norms, even before epistemic communities were enlisted. When Kant claimed that compulsory and permanent international jurisdictions were not so much an optional means of resolving disputes alternative to other instruments like mediation and conciliation but rather a *commandment of the reason* [Vernunftgebot] necessary to achieve an international order founded on peace, he implied that, for peace to be universal, the jurisdiction of international courts and tribunals should be universal as well.²⁸²

The judicialization of inter-European international relations was not only conceivable, but also possible, as history proved two centuries later. Yet it is understandable that, from Kant's perspective and in his time, the only world that really mattered was Europe. For him, a judicialization of the European space would have been enough to ensure universal peace. He was not interested in exploring what would happen at the fringe of the phenomenon, where the judicialized area overlaps with the non-judicialized one.²⁸³ Nonetheless, the Kantian dream, which lives on especially among supporters of the ICC and admirers of the WTO dispute settlement system, presupposes a degree of centralization and concentration of power that is clearly unattainable and probably undesirable at

282. See KANT, *Perpetual Peace*, *supra* note 30, at 102-05; KANT, *Metaphysics of Morals*, *supra* note 30, § 44.

283. Kant himself recognized that universality is a lofty, but probably unattainable, aim. "Only within a universal *union of states* . . . can such rights and property acquire *peremptory* validity and a true *state of peace* be attained. But if an international state of this kind extends over too wide an area of land, it will eventually become impossible to govern it. . . . It naturally follows that *perpetual peace*, the ultimate end of all international right, is an idea incapable of realisation." KANT, *Metaphysics of Morals*, *supra* note 30, § 61. "Just like individual men, [states] must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an *international state* . . . , which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present concept of international right. . . the positive idea of a world republic cannot be realised." KANT, *Perpetual Peace*, *supra* note 30, at 105. Still, Kant also wrote: "If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding *federation* . . ." *Id.* Moreover, ". . . the political principles which have this aim . . . are not impracticable. For this is a project based upon duty, hence also upon the rights of man and of states, and it can indeed be put into execution." KANT, *Metaphysics of Morals*, *supra* note 30, § 61.

a global level for the time being. History teaches that the creation of a unified and coordinated judiciary always follows the unification of political power, not the reverse. It is not by accident that the contemporary international judicial system is incomplete and fragmented, as it simply reflects the reality of a society still made of sovereign states, many of which are in no hurry to transfer sovereignty.

Ultimately, there is a need for a general cultural change. Kantian posturing should be abandoned, and non-engagement and disengagement should be recognized as legitimate options, especially as long as the other two antidotes are not improved. Given this, it would be desirable for international courts and tribunals, especially those still relying on the consensual paradigm, to practice greater judicial restraint and opt for declining jurisdiction whenever the states involved have clear reasons for objecting to its exercise.