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How to cite

BOISSON DE CHAZOURNES, Laurence. Plurality of international legal proceedings in an era of multiple courts and tribunals. In: Reimagining The International Legal Order. Popovski, Vesselin ; Malhotra, Ankit (Ed.). London : New York : Routledge, 2023. p. 226–240. doi: 10.4324/9781003388821-19

This publication URL: https://archive-ouverte.unige.ch/unige:171778
Publication DOI: 10.4324/9781003388821-19

16 Plurality of international legal proceedings in an era of multiple courts and tribunals

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Introduction

Over the course of the nineteenth and twentieth centuries, the international legal order has witnessed the phenomenon of "proliferation" of international courts and tribunals and international legal proceedings. States and other non-state actors have used the international courts and tribunals with ever-increasing frequency. The plurality of courts and tribunals and legal proceedings in international order has become an intrinsic characteristic of international dispute settlement. At the end of the 1990s, the perceived risks associated with plurality started to attract more debate. Despite those risks, the plurality of dispute settlement mechanisms is not contested. This chapter aims to explore the whys and wherefores of plurality in the international legal order and show that the risks associated with it can be mitigated.

The chapter will begin by shedding light on the reasons behind plurality and by observing the recent practice in international litigation in which the plurality of courts and proceedings was actively used by States (Part II). Subsequently, the chapter will draw attention to the positively increasing interaction among the international courts and tribunals in the age of plurality (Part III). Against this backdrop, the chapter will underscore the need for judicial dialogue, and the use of legal tools available, to manage the perceived risks of plurality (Part IV). The chapter concludes with a few remarks on the role that could be played by judicial actors and stakeholders of the dispute settlement system in the plural world of international courts and tribunals (Part V).

* This chapter builds upon the previous works of the author. See Laurence Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach" (2017) 28 (1) EJIL 13; Laurence Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach: A Rejoinder—Fears and Anxieties" [2017] 28 (4) EJIL 1275; Laurence Boisson de Chazournes, "The Proliferation of Courts and tribunals: Navigating Multiple Proceedings—5th EFILA annual lecture 2019" [2019] 5 European Investment Law and Arbitration Review Online 447

Mary Ellen O'Connell and Lenore VanderZee, "The History of International Adjudication", in Cesare P.R. Romano, Karen J. Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* 60 (OUP 2013).

DOI: 10.4324/9781003388821-19

The plurality of international courts and tribunals and proceedings—How did we reach here?

International dispute settlement has always been characterized by its plurality. In fact, the legal history and architecture that surround the dispute settlement mechanisms in international law reveal that plurality was not only intended but often facilitated rather than restricted.[1] Right from the nineteenth century, which witnessed the flourishing of international arbitration for the resolution of legal disputes,[2] international legal order has come a long way. Since the United Nations (UN) Charter, which established the International Court of Justice (ICJ), multiple international courts and tribunals have been established. To name a few, the Appellate Body of the World Trade Organization (WTO)[3], the International Tribunal of the Law of the Sea (ITLOS)[4], the International Criminal Court (ICC)[5] and the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).[6] Furthermore, the trust in multiple international courts and tribunals is also evidenced with the adoption of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID)[7] and the Iran-US Claims Tribunal, which has been operating since 1980.[8]

The age of plurality ushered in a new international order through the UN. A clear testament to this effect is Article 33 of the UN Charter, which obligates the UN Member States "to resolve a dispute […] by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".[9] In the *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, the ICJ recognized that Article 33 "includes, on the one hand, political and diplomatic

1 Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals" (n 1).
2 Robert Kolb, *The Elgar Companion to the International Court of Justice* (Elgar 2014), 5.
3 Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, of the Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401.
4 United Nations Convention on the Law of the Sea (signed 10 December 1994, entered into force 19 November 1994) 1883 UNTS 3.
5 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.
6 The ICTY was established by United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. See UNSC Res 827 (25 May 1993), UN Doc S/Res/827; The ICTR was established by United Nations Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda. See UNSC Res 955 (8 November 1994) UN Doc S/Res/955.
7 Convention for the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966), 575 UNTS 159.
8 The Iran-US Claims Tribunal was established pursuant to the Algiers Accords of 19 January 1981, 20 ILM 224.
9 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 33.

means, and, on the other, adjudicatory means such as arbitration or judicial settlement".[10] Furthermore, the Court acknowledged the freedom of choice of States to settle their dispute by any peaceful means, as it observed that "both Guyana and Venezuela accepted that good offices were covered by the phrase 'other peaceful means of their own choice', which appears at the end of the list of means set out in Article 33, paragraph 1, of the Charter".[11]

Additionally, the UN Charter, while establishing the ICJ did not introduce any hierarchy between international courts and tribunals, in turn facilitated the plurality in international law. Although Article 92 of the UN Charter recognizes that "[t]he International Court of Justice shall be the principal judicial organ of the United Nations", the use of the word "principal" suggests that there may be other judicial organs.[12] It could be also argued that the word "principal" also suggests some form of hierarchy. While the ICJ enjoys special importance (especially within the UN system), it is fair to say that no hierarchy has ever been envisaged.[13] The idea that there should be a plural world of dispute settlement is also included in Article 95 of the UN Charter, which allows the UN Member States to submit "their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future".[14]

Two recent examples from international litigation exemplify the interest in the plurality of courts and proceedings. The first example concerns the ongoing multi-forum international legal proceedings between Ukraine and Russia.[15] The legal disputes in these proceedings broadly relate to the annexation of the Crimean Peninsula in 2014 and the alleged Russian support to the armed groups in Ukrainian territory (particularly in eastern Ukraine in Donetsk and Luhansk). Before the ICJ, Ukraine has instituted proceedings alleging violations of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[16] It has also instituted two arbitral proceedings before the Annex VII tribunal, constituted

10 *Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction of the Court, Judgment* (ICJ Reports 2020), para. 83.

11 Ibid., para. 98.

12 Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals" (n 1), 22.

13 Ibid; See also, *Prosecutor v. Kvocka (Judgment)*, IT-98-30/1, Appeals Chamber (25 May 2001), 15.

14 Charter of the United Nations (n 10).

15 For a detailed study on the Ukraine and Russia dispute, see Lawrence Hill-Cawthorne, "International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study" [2019] 68 (4) International and Comparative Law Quarterly 779.

16 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment* (ICJ Reports 2019) 55.

under the UN Convention on the Law of Seas (UNCLOS)[17] and five proceedings before the European Court of Human Rights (ECtHR).[18] In July 2021, Russia also filed an inter-state complaint against Ukraine before the ECtHR.[19] Both States are also litigating against each other in five disputes before the WTO.[20] Apart from inter-state disputes, multiple individual complaints have been lodged against Russia before the ECtHR.[21] Additionally, in April 2014, a preliminary examination into the situation in Crimea and eastern Ukraine was conducted by the Office of the Prosecutor of the International Criminal Court (ICC), which concluded that there was a reasonable basis to believe that war crimes and crimes against humanity were committed.[22]

In 2022, the relations between Ukraine and Russia dramatically worsened following the invasion of Ukraine by the Russian Federation, which has led to a severe armed conflict. Amidst the war, Ukraine has launched a legal counteroffensive by instituting various legal proceedings against Russia. It has submitted an application instituting proceedings, and a request for provisional measures, under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide before the ICJ.[23] A number of State Parties to the

17 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation* (21 February 2020) <https://pca-cpa.org/en/cases/149> accessed 3 March 2022; *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation), PCA Case No. 2019-28, Procedural Order No. 2 (Bifurcation)* 27 October 2020 <https://pca-cpa.org/en/cases/229> accessed 3 March 2022.

18 *Ukraine v. Russian Federation (re Crimea)* (no. 20958/14); *Ukraine v. Russian Federation (VII)* (no. 38334/18); *Ukraine and the Netherlands v. Russian Federation* (nos. 8019/16, 43800/14 and 28525/20); *Ukraine v. Russian Federation (VIII)* (no. 55855/18); *Ukraine v. Russian Federation (IX)* (no. 10691/21); See also, *Russia v. Ukraine* (no. 36958/21).

19 ECHR Press Release, *Inter-State Application Brought by Russia against Ukraine* [2021] ECHR 240.

20 WTO, *Russia—Measures Affecting the Importation of Railway Equipment and Parts Thereof* (5 March 2020) WT/DS499/AB/R; WTO, *Russia—Measures Concerning Traffic in Transit* (26 April 2019) WT/DS512/R; WTO, *Russia—Measures Concerning the Importation and Transit of Certain Ukrainian Products* (13 October 2017) WT/DS532/1; WTO, *Ukraine—Anti-Dumping Measures on Ammonium Nitrate* (30 September 2019) WT/DS493/AB/R; WTO, *Ukraine—Measures Relating to Trade in Goods and Services* (19 May 2017) WT/DS525/1; See also, Lawrence Hill-Cawthorne (n 16).

21 Lawrence Hill-Cawthorne (n 16) (Around ten investor-state arbitrations have also been launched against Russia by Ukrainian investors).

22 ICC, "Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine" (11 December 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine> accessed 3 March 2022.

23 See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Application instituting proceedings* (27 February 2022) < https://www.icj-cij.org/en/case/182 > accessed 3 March 2022; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of*

Rome Statute have referred the situation in Ukraine to the ICC Prosecutor for investigation of alleged crimes committed by Russia following its invasion in Ukraine.[24] According to the Prosecutor, the referrals by States enables "an investigation into the Situation in Ukraine from 21 November 2013 onwards", which includes "within its scope any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person".[25] Moreover, the Ukrainian foreign minister, Dmytro Kuleba, is also campaigning for the establishment of a Special Tribunal to adjudicate the alleged crimes of aggression committed by Russia, which is not within the jurisdiction of the ICC in this dispute.[26]

A similar trend of plurality can be witnessed from the recent litigation between Qatar, on the one hand, and Saudi Arabia, the United Arab Emirates (UAE), Bahrain and Egypt (the "Quartet"), on the other hand. After the Quartet severed its economic and diplomatic ties with Qatar, imposed restrictions on airspace and maritime space and travel bans on Qatari nationals,[27] Qatar instituted legal proceedings against the measures adopted by the Quartet before the ICJ,[28] the WTO[29] and the Universal Postal Union.[30] In addition,

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Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures (27 February 2022) <https://www.icj-cij.org/en/case/182> accessed 3 March 2022; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order* (16 March 2022) <https://www.icj-cij.org/en/case/182> accessed 18 March 2022.

24 ICC, "Statement of ICC Prosecutor, Karim A.A. Khan KC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation" (2 March 2022) <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine> accessed 3 March 2022.

25 Ibid.

26 Cristina Gallardo, "Ukraine Calls for Nuremberg-Style Tribunal to Judge Vladimir Putin" (4 March 2022) <https://www.politico.eu/article/ukraine-calls-for-nuremberg-style-tribunal-to-judge-vladimir-putin/> accessed 3 March 2022

27 Alexandra Hofer, "Sanctioning Qatar: The Finale?" (16 June 2021) <https://www.ejiltalk.org/sanctioning-qatar-the-finale/> accessed 3 March 2022.

28 ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) Preliminary Objections (Judgment of 4 February 2021)* <https://www.icj-cij.org/en/case/172/judgments> accessed 3 March 2022.

29 WTO, *Saudi Arabia—IPRs* (16 June 2020) WT/DS567/R; WTO, *Saudi Arabia—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (31 July 2017) WT/DS528/1; WTO, *Bahrain—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (31 July 2017) WT/DS527/R; WTO, *United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (31 July 2017) WT/DS526/R; WTO, *Qatar—Certain Measures Concerning Goods from the United Arab Emirates* (28 January 2019) WT/DS576/R.

30 PCA, *Arbitration pursuant to Article 32 of the Constitution of the Universal Postal Union (The State of Qatar v. The United Arab Emirates)*, PCA Case No. 2020-28 (20 September 2018) <https://pca-cpa.org/en/cases/253/#:~:text=In%20a%20notice%20to%20initiate,Union%20or%20the%20responsibility%20imposed> accessed 3 March 2022.

Qatar also instituted two conciliation proceedings against Saudi Arabia and UAE, respectively, before the CERD Committee.[31]

Both situations demonstrate the menu of options that States have at their disposal to resolve their international disputes. They also provide an insight as to why States have been keen to preserve the choices they have and why they resort to them for protecting their rights and promoting their interests in the overall context of their disputes.

The plurality of proceedings is often played as a lawfare strategy by States and other non-state actors. This new form of international litigation involves the breakdown of a dispute between States into multiple different disputes, or "discrete legal claims" that are often brought before different international courts and tribunals.[32] Plurality can be seen as a reason for such litigation since it led to the establishment of different courts and conferred on them jurisdiction and competence over specific matters, such as the WTO, the ICC or the human rights bodies. This strategy has both yin and yang features. States deploy this strategy not only to resolve the dispute but also to expose to the Court or the public the alleged cases of international law violations.[33] They can also use it to score political points[34] or to build pressure on other disputing States that can be advantageous in settlement negotiations. For instance, the dispute between Qatar and the Quartet witnessed multiple proceedings across different forums yet the parties reached a settlement, through the conclusion of the *Al Ula Declaration*.[35] The discontinuance of multiple proceedings was probably used as a bargaining chip by Qatar during the settlement. Section 2 of the *Al Ula Declaration*, as provided in the *ad hoc* CERD Conciliation Commission Decision, specifically provides that "[a]ll lawsuits, complaints, measures, protests, objections and disputes shall automatically terminate on the first anniversary of the signing of this Declaration, provided such lawsuits, complaints, measures, protests, objections and disputes under review by the relevant entities (domestic, regional, and international courts, bodies, committees, authorities, etc.) shall be suspended or stayed within one week from the date of signing this Declaration".[36]

31 See United Nations Human Rights, Office of the High Commissioner, "Inter-State Communications", <https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx> accessed 3 March 2022.

32 Lawrence Hill-Cawthorne (n 14) 781, fn 9. ("Each claim is often not merely a different way of framing the broader dispute but a specific legal claim arising from that broader dispute and existing in parallel with other specific legal claims".)

33 Tullio Treves, "Litigating Global Crises. Setting the Scene: Legal and Political Hurdles for State-to-State Disputes" [2021] 85 Questions of International Law 5, 9.

34 ibid.

35 Qatar Ministry of Foreign Affairs, "Qatar Welcomes Al-Ula Declaration" (5 January 2021) <https://www.mofa.gov.qa/en/statements/qatar-welcomes-al-ula-declaration> accessed 3 March 2022.

36 Committee on the Elimination of Racial Discrimination, *Decision of the Ad Hoc Conciliation Commission on the Request for Suspension Submitted by Qatar Concerning the Interstate Communication Qatar v Kingdom of Saudi Arabia*, footnote 1, (15 March 2021).

The flip side of this strategy is that it could make an effective exercise of an international court or tribunal's judicial function difficult as adjudicating a part of a dispute might not solve the whole dispute between States, or it might require a court or tribunal to adjudicate on a part of a claim that falls outside its subject matter jurisdiction or expertise.

There are, however, other reasons why the plurality of proceedings can be found in various areas of international law. First, several instruments may apply to the same situation, each with its own dispute resolution mechanism.[37] Second, in international law, particularly under international investment instruments such as bilateral investment treaties, protection is afforded to both direct and indirect investors, so that several entities within a same corporate structure can be protected investors for a single investment. As a result, each entity in the chain may potentially seek to challenge the same measures taken by the host State and claim compensation for the same damage.[38] Lastly, the potential for multiple claims does not only concern proceedings before international courts. Domestic courts are also part of the plurality phenomenon. For instance, in the "Enrica Lexie" dispute between Italy and India, while Italy had instituted international legal proceedings before ITLOS and UNCLOS Annex VII arbitral tribunal, both Italy and India had also instituted proceedings before their respective national courts.[39] ITLOS, however, had ordered both to "suspend all court proceedings" and "refrain from initiating new ones".[40]

In this context of multiple international courts and tribunals and the ensuing number of proceedings, judicial actors increasingly play a prominent role as "guardians of the fabric of international dispute settlement by ensuring its coherence through coordination".[41] This raises the question of how the

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< https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9382_E.pdf> accessed 3 March 2022.; See also, Committee on the Elimination of Racial Discrimination, *Decision of the Ad Hoc Conciliation Commission on the Request for Suspension Submitted by Qatar Concerning the Interstate Communication Qatar v. United Arab Emirates* (15 March 2021) < https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9381_E.pdf > accessed 3 March 2022.

37 PCA, *Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in Respect of the Faroe Islands v. The European Union) Termination Order, PCA Case no 2013-30* (23 September 2014) <https://pca-cpa.org/en/cases/25/> accessed 3 March 2022.; WTO, *European Union – Measures on Atlanto-Scandian Herring* (21 August 2014) WT/DS469/1.

38 *Ronald S. Lauder v. Czech Republic, Award* (3 September 2001) <https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf> accessed 3 March 2022; *CME Czech Republic B.V. v. The Czech Republic*, *Final Award* (14 March 2003) <https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf> accessed 3 March 2022.

39 PCA, *The 'Enrica Lexie' Incident (Italy v. India) PCA Case no 2015-28, Award* (21 May 2020) 13 < https://pca-cpa.org/en/cases/117/> accessed 3 March 2022.

40 *"Enrica Lexie" (Italy v. India), Provisional Measures, Order of 24 August 2015* (ITLOS Reports 2015), 141.

41 Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals" (n 1), 14.

a-hierarchical relationship between different courts and tribunals influenced the interactions between them.

Increasing Judicial Interaction of International Courts and Tribunals toward Each Other

The rise in multiple courts and tribunals did not negatively impact the interaction of different dispute settlement bodies toward each other. International courts and tribunals have explicitly recognized the plurality of mechanisms in the fabric of international dispute settlement. For example, the ICTY has stated:

> [i]nternational law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals.[42]

In some circumstances, awards and decisions from one judicial mechanism have been the object of a dispute before another forum. This allowed for a space to have a judicial dialogue based on respect for the jurisdiction of the other courts and tribunals. For instance, in 1953, the ICJ in the *Ambatielos* case recognized that the parties to that dispute, Greece and the United Kingdom, had concluded an arbitration agreement according to which they were under an obligation to resort to arbitration. The ICJ noted in that case:

> [t]he Court must refrain from pronouncing final judgment upon any question of fact or law falling within "the merits of the difference" or "the final validity of the claim". If the Court were to undertake to decide such questions, it would encroach upon the jurisdiction of the Commission of Arbitration.[43]

Plurality exists not only across regimes but also within a specialized regime of international law. For instance, the WTO has a variety of options for States to settle their trade disputes.[44] Articles 4 to 20 of the WTO Dispute Settlement Understanding (DSU) set out in great detail the procedures that have been predominantly resorted to in practice, including consultations, the possibility of establishing a panel and recourse to the Appellate Body before it was defunct.

The parties to a dispute can agree to resort to other means of dispute settlement, of a more diplomatic nature, such as negotiations,[45] good offices,

42 See *Prosecutor v. Tadić* (Judgment) IT-94-1 (15 July 1999).

43 *Ambatielos (Greece v. UK) Judgment of May 19th, 1953* (ICJ Reports 1953), 16.

44 See Laurence Boisson de Chazournes, "Arbitration at the WTO: A Terra Incognita to Be Further Explored", in Steve Charnovitz, Debra P. Steger and Peter Van den Bossche, Universiteit Maastricht, Netherlands (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (CUP 2005).

45 DSU (n 3) art 3.7.

conciliation and mediation[46] as well as arbitration.[47] In the DSU, arbitration, under Article 25, appears as a stand-alone procedure.[48] Not only can it be seen as a procedure complementing the mainstream dispute settlement procedures but also, in fact, in recent times Article 25 has helped States to mitigate the consequence of the ongoing WTO Appellate Body crisis. Since the Appellate Body of the WTO is currently defunct, and as a result, there is no forum to appeal the reports of the Panels, some WTO Members have referred to Article 25 of the DSU to create an interim solution. On 27 March 2020, these WTO members agreed on the Multi-party Interim Appeal Arbitration Agreement Pursuant to Article 25 of the DSU (the MPIA). The MPIA allows States to appeal the reports of the Panels "as long as the Appellate Body is not able to hear appeals of panel reports in disputes among them due to an insufficient number of Appellate Body members".[49] In this way, plurality is not only endorsed within the regime but also provides a way to deal with a crisis.

Additionally, other Member States have agreed to resort to appeal in the application of Article 25 of the DSU outside of the MPIA. A notable example is the recent agreement concluded between the United States and the European Union through which the parties have suspended the two panel proceedings[50] initiated against each other and resorted to arbitration. As per the Agreed Procedures for Article 25 arbitration, the parties have deviated from the DSU to provide more flexibility. While the arbitrators are the panel members of the two suspended proceedings, once the appointment of arbitrators is concluded the arbitration will remain suspended unless one of the parties unilaterally "notifies the arbitrator of the resumption of the arbitration".[51]

This provides an interesting example of plurality within the DSU. It also highlights that the flexibility to settle disputes is a positive and useful characteristic of plurality. It will be interesting to see how the judicial dialogue plays out in case the options, in these different types of situations i.e., the MPIA and others, are effectively resorted to by the parties.

46 Ibid., art 5.6.

47 Ibid., art 25.1.

48 Boisson de Chazournes, "Arbitration at the WTO" (n 44).

49 WTO, "Multi-party Interim Appeal Arbitration Agreement Pursuant to Article 25 of the DSU" (30 April 2020) JOB/DSB/1/Add.12 <https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf> accessed 3 March 2022.

50 WTO, *EU — Additional Duties* (16 July 2018) WT/DS559/1; WTO, *US—Steel and Aluminium Products (EU)* (1 June 2018) WT/DS548/1.

51 EU—Additional Duties (n 50) WT/DS559/7 [3]; US—Steel and Aluminium Products (EU) (n 50) WT/DS548/19 para. [3]; See also Caroline Glockle "Guest Post: Agreed Procedures under Art. 25 DSU in the US and EU Steel and Aluminum Disputes" (26 January 2022) <https://ielp.worldtradelaw.net/2022/01/guest-post-agreed-procedures-under-art-25-dsu-in-the-us-and-eu-steel-and-aluminum-disputes.html> accessed 3 March 2022.

Judicial Dialogue and Legal Tools Available to Manage the Perceived Risks of "Plurality"

International courts and tribunals, in a time of global multilateral crisis, are witnessing signs of a backlash. A losing State dissatisfied with the ruling of a court or tribunal could refrain from engaging with the dispute settlement mechanisms altogether. The recent WTO Appellate Body crisis squarely illuminates the threat. It is thus important for international courts and tribunals to steer clear from the political resistance and campaigns that are launched after they exercise their judicial function in a particular way. Plurality can also expose the vulnerability of international courts and tribunals, since risks exist with the multiplicity of international legal proceedings.[52] It can lead to contradictory interpretations or decisions or give rise to issues of double recovery. It also has a cost that can be misused by the parties to the dispute. At times, the plurality can affect the very integrity of one of the proceedings. This is why it is important to assess the tools that are available to courts and tribunals to avoid these risks and any existential threats that might follow.

Judicial actors have pursued coherence in the system through various tools of communication, such as cross-referencing of awards and decisions or other forms of judicial dialogue.[53] In a world of plural dispute settlement, judges have come to recognize their role in achieving unity of law and dispute settlement through a judicial dialogue or interaction. As Judge Greenwood said in the *Ahmadou Sadio Diallo* case between Guinea and Congo:

> [i]nternational law is not a series of fragmented specialist and self-contained bodies of law, … it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other courts and tribunals.[54]

Judicial dialogue not only helps in the development of substantive aspects of international law but also assists in cross-fertilisation of specialized regimes in international law. It also offers judges solutions and valuable resources to both new and old legal problems that they may face during adjudication. For instance, in the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, the ICJ while determining whether the "salaries of government officials dealing with a situation resulting from an internationally wrongful act are compensable" referred to the practice of the United Nations Compensation Commission and the ITLOS.[55]

52 Boisson de Chazournes, "The Proliferation of Courts and Tribunals: Navigating Multiple Proceedings" (n 1), 463.

53 Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals" (n 1), 36.

54 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment*, (ICJ Reports 2012), Declaration of Judge Greenwood, para. 8.

55 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment* (ICJ Reports 2018), para. 101.

Similarly, in the recent *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* the Court had a challenging task of determining reparations in the context of armed conflict. The Court considered it "helpful to refer to the practice of other international bodies" such as the Eritrea-Ethiopia Claims Commission (EECC) and the ICC. The EECC had acknowledged the difficulty that surrounds the "questions of proof in its examination of compensation claims for violations of obligations under the jus in bello and jus ad bellum committed in the context of an international armed conflict".[56] The ICC, on the other hand, in the *Katanga* case had ordered reparations in the context of conflict between DRC and Uganda. The ICC had observed that "the Applicants were not always in a position to furnish documentary evidence in support of all of the harm alleged, given the circumstances in the DRC".[57] This *inter alia* allowed the Court to introduce some flexibility in the standard of proof in the reparations phase of the case.[58]

This type of judicial dialogue, in form of cross-fertilisation, has been conducted by other courts too.[59] It helps international courts and tribunals to not only bolster their decision and reasoning but also provides more legitimacy to their decisions.[60] As the Court noted in the *Diallo* case:

> [a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.[61]

Procedural law is another source that offers tools judges can resort to for managing and coordinating multiple proceedings. Some of these tools come into play at the start of the proceedings. They are provided by the text of the constitutive instruments containing dispute settlement mechanisms. These tools require choosing between the different dispute resolution mechanisms

56 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Compensation, Judgment* (9 February 2022) <https://www.icj-cij.org/en/case/116/judgments> accessed 3 March 2022 para. [123].

57 Ibid.

58 Ibid., para. 124.

59 *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment* (ITLOS Reports 2012), para. 233.

60 Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals" (n 1), 41–42.

61 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment* (ICJ Reports 2010), 664, para. 66.

proposed. Once the choice has been made, resorting to the other means is usually not possible.[62]

Whenever proceedings are initiated by a party, the court or tribunal has the possibility to establish whether such a step is taken in good faith by the parties or it simply serves as a pretext to evade obligations and frustrate the rights of the other party. A good faith requirement can provide a means of sanctioning any party that abuses the plurality of options at its disposal.[63] The principle of good faith can take multiple forms, such as the doctrine of estoppel, abuse of rights or a possibility for a tribunal to dismiss claims that are frivolous or vexatious.[64] A frivolous claim can be defined as one "without legal basis or value", "not serious" or "without reasonable cause".[65] The constitutive instrument of a court or tribunal could include such a possibility. For example, Article 8.32 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) permits the Tribunal to dismiss at the outset a claim that is "manifestly without legal merit".[66] In the absence of such a possibility one may consider that the court or a tribunal may have a "right to take similar action, on similar grounds, as being part of the inherent powers or jurisdiction of the Court as an international tribunal".[67]

Amongst procedural tools, the election clause, also known by its Latin nickname of *electa una via*, is a legal tool aimed at assisting in ordering, *ab initio*, the multiplicity of proceedings. Its purpose is to bar multiple litigations in the same legal order. In practice, the claimant is offered a right to choose between different fora of the same jurisdictional system. Once made, the choice is irrevocable.[68] An example of an *electa una via* rule can be found in the trade area, in Article 31.3 of the USMCA.[69]

62 Boisson de Chazournes, "The Proliferation of Courts and Tribunals: Navigating Multiple Proceedings" (n 1), 452.

63 ibid; *See Transglobal Green Energy llc and Transglobal Green Panama S.A. v. Republic of Panama, ICSID Case No arb/13/28, Award* (2 June 2016) para. 118 <https://www.italaw.com/sites/default/files/case-documents/italaw7336.pdf> accessed 3 March 2020

64 Boisson de Chazournes, "The Proliferation of Courts and Tribunals: Navigating Multiple Proceedings" (n 1), 456.

65 B.A. Garner (ed), *Black's Law Dictionary* (8th edn, Thomson West 2004) 692.

66 See European Commission, "Comprehensive and Economic Trade Agreement" (signed 30 October 2016). <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 3 March 2022, ch VIII, art 8.32.5. ("The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit.").

67 *Northern Cameroon (Cameroon v UK), Preliminary Objections, Separate Opinion of Judge Fitzmaurice* (ICJ Reports 1963) 106-107.

68 Boisson de Chazournes, "The Proliferation of Courts and Tribunals: Navigating Multiple Proceedings" (n 1), 454.

69 See Agreement between the United States of America, the United Mexican States and Canada (signed 30 November 2018, entered into force 1 July 2020) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 3 March 2022, Chapter Thirty-one, Dispute Settlement, art 31.3: Choice

Another set of tools can be resorted to after the interconnected legal proceedings are instituted. They are available for courts and tribunals to coordinate multiple proceedings and ensure that the same case is not litigated twice. *Res judicata* and *lis pendens* count among them. Both these tools have the effect of precluding an international court and tribunal from acting.[70]

Res Judicata occurs when a claim has already been litigated. As a result, it cannot be reopened if the subsequent proceedings concern the same object, legal grounds and parties.[71] As the ICJ noted in its decision in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*:

> [t]he underlying character and purposes of the principle [of res judicata] [is] the stability of legal relations requires that litigation come to an end… [and] … it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articulates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.[72]

While there are some cases where the doctrine has been applied, its non-application generally prevails[73] as the triple identity test that is usually not met.[74]

The second situation in which a tribunal may be precluded from acting is where the same dispute is pending before another court. This is a situation arising out of *lis pendens*. The doctrine of *lis pendens* requires the combination of three elements: first, the parties must be the same; second, the cause of action should be identical; third, the object of the dispute must coincide.[75]

The *lis pendens* rule suffers from a scarce and rather chaotic application. Moreover, its strict application[76] calls into question the appropriateness and

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of Forum; See also North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 I.L.M. 289 and 605, Chapter Twenty, art 2005.

70 Boisson de Chazournes, "The Proliferation of Courts and Tribunals: Navigating Multiple Proceedings" (n 1), 453.

71 *Interpretation of Judgments Nos. 7& 8 Concerning the Case of the Factory at Chorzow, Dissenting Opinion of Judge Anzilotti* [1927] PCIJ Series A 13, 23.

72 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment* (ICJ Reports 2007), paras. 115-116.

73 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment* (ICJ Reports 2016), paras. 58-59.

74 *CME v. Czech Republic* (n 39), 432–436.

75 Boisson de Chazournes, "The Proliferation of Courts and Tribunals: Navigating Multiple Proceedings" (n 1), 460.

76 *Lauder v. Czech Republic* (n 39) [171–175]; *CME v. Czech Republic* (n 39) 409–412; See *UNCLOS Annex VII Tribunal, Southern Bluefin Tuna Case between Australia and Japan*

efficacy of the triple identity test, which, like *res judicata*, is difficult to meet. The criteria of the identity of the parties and the cause of action should be approached flexibly to improve the use of this rule.[77]

What happens if the principles of good faith, *res judicata* or *lis pendens* fail to regulate the situation of multiple proceedings arising out of a dispute between the parties? In such a situation, the focus should be on active cooperation between various international courts and tribunals. This call for active cooperation is not mandatory and is only discretionary. It depends on the awareness of judicial bodies in the sense of how they locate themselves in the jurisdictional fabric and if they require coordinated action. In this respect, the application of considerations of comity is a striking example, which comes into play "when it appears that proceedings exist before another court and that it may have an impact on the resolution of the claim"[78]. As Judge Rüdiger Wolfrum, former President and Judge of the International Tribunal for the Law of the Sea (ITLOS) stressed:

> [j]udicial comity among courts and tribunals should encourage them to cooperate and to act rigorously within their own jurisdictional powers.[79]

Comity, however, is a discretionary power of the "first seized court, and cannot prevent every possible jurisdictional clash".[80]

A principle similar to comity that deserves to be mentioned at this juncture is the principle of *connexité* (related actions). This principle applies when there is a risk of a related question being decided in a contradictory manner by different judicial fora.[81] The intention behind this principle is to avoid decisions that could be irreconcilable.[82] As a result, the application of this principle will lead to suspension of the proceedings in one of the two courts or tribunals until the decision is rendered in the other forum.[83] Consolidation of proceed-

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and between New Zealand and Japan, Award on Jurisdiction and Admissibility, Decision of 4 August 2000, XXIII RIAA 1 [52 & 59].

77 Boisson de Chazournes, "The Proliferation of Courts and Tribunals: Navigating Multiple Proceedings" (n 1), 461.

78 Ibid., 462.

79 ITLOS, "Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs" (29 October 2007) 9 <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_291007_eng.pdf> accessed 3 March 2022; See *MOX Plant Case (Ireland v. United Kingdom), PCA Case no. 2002-01, Order no. 3 Suspension* (24 June 2003) para. 28 <https://pca-cpa.org/en/cases/100/> accessed 3 March 2022.

80 Mohamed Bennouna, "How to Cope with the Proliferation of International Courts and Coordinate Their Action", in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012), 290.

81 Boisson de Chazournes, "The Proliferation of Courts and Tribunals: Navigating Multiple Proceedings" (n 1). 463.

82 Ibid.

83 See *In the Matter of a Conciliation before a Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic*

ings is another device available when the claims are linked with each other. It results in the combination of the different proceedings, or parts of the proceedings, into one single set of proceedings. Cooperation among courts can take a more informal dimension. For example, in the case of the *Bay of Bengal Maritime Boundary* arbitration between Bangladesh and India, the Annex VII arbitral tribunal granted extensions in the filing of written pleadings to allow the parties to consider the ITLOS judgement also concerning the Bay of Bengal between Bangladesh and Myanmar.[84]

Concluding remarks

With the proliferation of international courts and tribunals, the plurality of proceedings was and will continue to be inevitable. The legal architecture of the international dispute settlement is conducive for the multiplication of proceedings. To coordinate multiple proceedings, judicial actors have interpreted and devised various procedural law tools. Moreover, judicial dialogue, in the form of cross-referencing in awards and decisions, or through principles of comity or *connexité*, is also a way to pursue coherence and coordination of multiple proceedings. But we need another set of discourse as well, one that involves other architects of the dispute settlement system—States and litigants. They play an important part in the management of multiple proceedings. States, in particular, can play a useful role in not only organising and regulating "ex-ante (during the drafting of a treaty)" the relationship between multiple courts and tribunals, but they can also undertake "ex-post evaluations" in the event of conflicting decisions or interpretations. Litigants, including non-state actors such as investors, can also contribute to the coherence. Some of the risks that are associated with plurality arise only when parties have an effective opportunity to initiate proceedings before different courts and tribunals.[85] As a result, it puts all concerned actors in a position to contribute towards the coordination of a plurality of proceedings. International courts and tribunals have taken proactive measures to coordinate the multiple proceedings and ensure coherence in the dispute settlement system. It is, however, also for the parties to think about how to preserve the benefits and mitigate the risks arising from the plurality of courts and proceedings.

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of Timor-Leste and the Commonwealth of Australia, PCA Case No 2016-10, Decision on Australia's Objections to Competence (19 September 2016) paras. 88-89 <https://pcacases. com/web/sendAttach/1921> accessed 3 March 2022

84 *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), PCA Case no. 2010–16, Award* (7 July 2014) paras. 27–36 <https://pcacases.com/web/sendAttach/383> accessed 3 March 2022.

85 Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach: A Rejoinder—Fears and Anxieties" (n 1), 1277.