

ADJUDICATION FALLACIES: THE ROLE OF INTERNATIONAL COURTS IN INTERSTATE DISPUTE SETTLEMENT

VITALIUS TUMONIS¹

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INTRODUCTION

The international dispute settlement system is strained. Interstate disputes naturally proliferate as international relations continue spreading out. For many legal scholars, international courts are the promised land of interstate dispute settlement: just as courts occupy the central place in

¹ LLB, LLM, PhD. Lecturer in Public International Law, Institute of International and European Union Law, Faculty of Law, Mykolas Romeris University.

domestic legal systems, so too international dispute settlement can revolve around international courts. As Douglas Johnston pointed out, for many international lawyers, adjudication “is not only *the ideal, most peaceful, method of settling inter-state disputes*, but also an opportunity for jurists to contribute to doctrinal development in a prestigious nonpolitical institution.”²

This article argues that such views are based on series of erroneous beliefs. First, champions of international adjudication usually pay no heed to the fundamental function of international dispute settlement, which is to settle underlying disputes and not just pertinent legal questions. Second, it is a fallacy of formalistic judicial decision making and the resultant belief that adjudication is alternative to power politics (i.e., right over might). Third, it is a fallacy of farfetched domestic analogy—the belief that international courts are essentially analogous to their domestic counterparts, when in fact there are many more differences between them than similarities. Fourth, it is a fallacy of composition—finding isolated examples of successful international courts, whether in particular fields or particular regions, and concluding that international courts in general hold a great promise. These fallacies do not always appear together nor are they always articulated explicitly. Yet, whether articulated implicitly or explicitly, these fallacies incorrectly point toward adjudication as the key method of interstate dispute settlement.

Regrettably, few legal scholars have paid attention to this problem.³ Instead, most commentators have focused on various aspects that can hinder or improve judicial dispute settlement.⁴ For example, in recent decades, many scholars have focused on the proliferation of international courts and analyzed whether it is desirable or dangerous to have so many courts when there is little coordination between them.⁵

² DOUGLAS M. JOHNSTON, *THE HISTORICAL FOUNDATIONS OF WORLD ORDER: THE TOWER AND THE ARENA* 129 (2008) (emphasis added).

³ See, e.g., Robert Y. Jennings, *The Proper Work and Purposes of the International Court of Justice*, in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 36 (A.S. Muller, D. Raic, & J.M. Thuránzky eds., 1997); Richard B. Bilder, *Some Limitations of Adjudication as a Dispute Settlement Technique*, 23 VA. J. INT'L L. 1 (1982).

⁴ See generally INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: PROCEEDINGS OF THE ICJ/UNITAR COLLOQUIUM TO CELEBRATE THE 50TH ANNIVERSARY OF THE COURT (Connie Peck & Roy S. Lee eds., 1997).

⁵ Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001); Benedict Kingsbury, *Foreword: Is The Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

Others have analyzed whether dependent international tribunals are preferable to independent tribunals.⁶ Most legal scholars, however, have not considered whether, from the bird's-eye view, it is at all desirable to focus so heavily on international adjudication.⁷

This fixation on international courts has had many side effects. One regretful side effect is that little attention has been paid to other dispute settlement methods. As Sir Robert Jennings pointed out, this is unfortunate because international adjudication cannot be developed alone; instead, its progress depends on simultaneous development of other dispute settlement methods.⁸ Most supporters of international adjudication, however, fail to realize that this fixation on international courts is self-defeating.⁹

I. ADJUDICATION WITHIN THE INTERNATIONAL DISPUTE SETTLEMENT SYSTEM

A. INTERNATIONAL DISPUTE SETTLEMENT SYSTEM

Article 33 of the UN Charter stipulates principal methods of dispute settlement: negotiation, mediation, inquiry, fact-finding, arbitration, and the International Court of Justice ("ICJ").¹⁰ These dispute settlement methods are usually classified into two categories: diplomatic methods, also known as political or noncompulsory, and legal methods, also known as compulsory.¹¹

Diplomatic methods comprise negotiation, mediation, fact-finding, conciliation. Legal methods comprise arbitration and adjudication. The only meaningful difference between legal and

⁶ See, e.g., Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. R. 1 (2005); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner & Yoo*, 93 CAL. L. R. 899 (2005).

⁷ While legal scholars have paid little attention to this problem, international relations scholars and representatives from other disciplines made some valuable contributions. See e.g., Robert Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT. ORG. 457 (2000).

⁸ Jennings, *supra* note 3, at 37.

⁹ JOHN G. MERILLS, INTERNATIONAL DISPUTE SETTLEMENT 177 (2005) ("[T]oo much is sometimes expected of judicial settlement . . . while it is certainly worth considering what can be done to improve the Court, it is important not to become fixated with adjudication and overlook the contribution which can be made by other techniques such as conciliation.").

¹⁰ UN CHARTER, art. 33, ¶¶ 1-2.

¹¹ MERILLS, *supra* note 9, at 199.

diplomatic methods is that the outcome of diplomatic settlement is not binding.

Within the each category of dispute settlement methods, differences between individual methods are more theoretical than practical.¹² The relations between specific dispute settlement mechanisms are horizontal (i.e., there is no hierarchy or superiority of particular settlement methods). For example, States at the same time can pursue negotiation and litigation. And there is almost no horizontal coordination between the different mechanisms.

B. RISE OF INTERNATIONAL ADJUDICATION

International adjudication has been largely an invention of the nineteenth century.¹³ No doubt, interstate arbitration already existed in Ancient Greece and probably even before that.¹⁴ But it was the *Alabama Claims* arbitration which spurred the development of adjudication in international law.¹⁵ The success of the *Alabama Claims* led to the Hague Peace conferences and increased attention to arbitration. Yet in the Hague conventions, States excluded important disputes from the arbitration. Thus, from the very beginning doubting that adjudication could become comprehensive and complete interstate dispute settlement method.

After the Hague Peace conferences, the promise of international adjudication became even more enchanting. The high point of this development was the establishment of the Permanent Court of

¹² According to the Advisory Committee of Jurists, which was set up to prepare the draft Statute of the Permanent Court, arbitration is distinguished from adjudication by three criteria: "the nomination of the arbitrators by the parties concerned, the selection by these parties of the principles on which the tribunal should base its findings, and finally its character of voluntary jurisdiction." ADVISORY COMMITTEE OF JURISTS, DOCUMENTS PRESENTED TO THE COMMITTEE RELATING TO EXISTING PLANS FOR THE ESTABLISHMENT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE 113 (1920).

¹³ See generally Ion Diaconu, *Peaceful Settlement of Disputes Between States: History & Prospects*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: AN ABRIDGED EDITION 123-49 (R. St. J. Macdonald & Douglas M. Johnston eds., 1989); JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 31-38 (1999).

¹⁴ See generally SHEILA L. AGER, INTERSTATE ARBITRATIONS IN THE GREEK WORLD: 337-90 B.C HELLENISTIC CULTURE AND SOCIETY (1996); JOHNSTON, *supra* note 2, at 130, 191, 194-97.

¹⁵ The *Alabama Claims* arbitration resolved a dispute between the United States and Great Britain; the US claimed damages against Great Britain for its assistance to the Confederates during the American Civil War. See Tom Bingham, *The Alabama Claims Arbitration*, 54 INT'L & COMP. L.Q. 1 (2005).

International Justice (“PCIJ”) under the auspices of the League of Nations. But the high hopes proved disappointing. Most States paid only lip service to the importance of judicial settlement: the political rhetoric about the importance of the PCIJ was inspiring, but States rarely submitted important disputes to the Court. The Court succeeded more in developing and clarifying international law than actually resolving interstate disputes. Overall, the PCIJ had limited success in the interwar period.

After World War II, despite the limited success of the PCIJ, many political leaders and visionaries hoped that the PCIJ reborn in the United Nations as the International Court of Justice (“ICJ”) would prove to be different. Yet, the ICJ and the United Nations in general had very limited impact during the Cold War. After the end Cold War, however, the docket of the ICJ expanded. But most of the disputes in its docket were the traditional cases—delimitation of boundaries and interpretation of the treaties. The Court’s track record in more politically charged cases, like the use of force or State responsibility for serious violations of international law, has been controversial. Overall, as it has been for the past hundred years, States still rarely submit their political disputes; even when they do, these are rarely cases of major political importance. As Sir Arthur Watts observed at the time when the ICJ docket apparently reached its peak, “[t]he number of disputes resolved by the Court remains depressingly small in a world which for the whole period of the Court’s existence has experienced no shortage of disputes, large and small.”¹⁶

After the end of the Cold War, the proliferation of international courts became very noticeable.¹⁷ In 1994, for example, the new World Trade Organization chose to replace the diplomatic dispute settlement of the General Agreement on Tariffs and Trade [hereinafter “GATT”] with the new legalized dispute settlement system, essentially based on adjudication. International courts became a noticeable feature in other fields, especially international criminal law. After the UN Security Council established criminal tribunals for Rwandan genocide and former Yugoslavian conflict, the international community finally established the

¹⁶ Sir Arthur Watts, *Enhancing the Effectiveness of Procedures of International Dispute Settlement*, 5 MAX PLANCK Y.B. UNITED NATIONS L. 21, 22 (2001).

¹⁷ Romano, *supra* note 5, at 709 (“When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion of the international judiciary as the single most important development of the post–Cold War age.”)

International Criminal Court. Yet international criminal law, like international human rights law, does not deal with interstate disputes, so developments in these fields do not reflect developments in interstate dispute settlement.

When it comes to interstate dispute settlement, and especially more politically sensitive disputes, despite the lip service paid to international courts, States are as unwilling today as they were unwilling hundred years ago to submit bulk of their disputes to international courts.¹⁸ They prefer to remain selective.

II. FUNCTION OF INTERNATIONAL DISPUTE SETTLEMENT AND FUNCTION OF INTERNATIONAL COURTS

A. SETTLEMENT OF DISPUTES VS. SETTLEMENT OF LEGAL QUESTIONS

The most important function of international dispute settlement is not to settle legal questions but rather to settle underlying disputes and restore good relations. Sometimes, of course, when an international tribunal settles a legal question, the underlying dispute is also settled. Very often, however, legal questions are only part of the problem. Thus, successful settlement of legal questions does not guarantee the successful settlement of the dispute itself.

This is not a new idea, and it is not peculiar only to international law. This idea is cemented in various cultures around the world and anthropologists find this idea embedded even in dispute settlement of primitive societies.¹⁹ As Justice Brandeis observed in a slightly different context, “it is more important that the applicable rule of law be settled

¹⁸ MERILLS, *supra* note 9, at 164 (“[L]itigation is a wholly exceptional act and the vast majority of disputes are handled by other means”).

¹⁹ Will Durant wrote in his classic *The Story of Civilization* that for many so-called primitive societies it was more important to settle the dispute, not to settle it right: “Frequently the primitive mind resorted to an ordeal not so much on the medieval theory that a deity would reveal the culprit as in the hope that the ordeal, however unjust, would end a feud that might otherwise embroil the tribe for generations.” WILL DURANT, *THE STORY OF CIVILIZATION: VOLUME 1 – OUR ORIENTAL HERITAGE* 28 (1935). Similarly, in Asian cultures, the parable of poisoned arrow reflects the idea that it is more important to remove the problem and not to ponder who is right, how the problem came up to be and under what circumstances. THICH NHAT HANH & PHILIP KAPLEAU, *ZEN KEYS* 42 (2005).

than that it be settled right.”²⁰ The problem with judicial dispute settlement is that it mostly settles legal questions, not disputes.

The Beagle Channel dispute illustrates this misunderstanding very well. The *Beagle Channel* case arose between Argentina and Chile over a cluster of islands in the eastern region of Beagle Channel. The parties signed an Arbitration Agreement in 1971. In 1977, the Tribunal unanimously awarded most islands, islets, and rocks to Chile.²¹ Argentina reacted furiously: Argentina declared the award void just several months after it was made. On December 22, 1978, Argentina began military invasion into the Beagle Channel islands and continental Chile. Fortunately, a few hours later Argentina canceled the invasion when Pope John Paul II sent his envoy to mediate. The conflict escalated further. In 1979, the parties accepted the Vatican Mediation, but the conflict was settled only five years later. Finally, Argentina and Chile agreed to the Vatican-mediated compromise and signed the Treaty of Peace and Friendship.²²

One of the most interesting developments was that this treaty established essentially the same boundaries as the arbitral award.²³ So it was not the fundamental legal position adopted by the Arbitral Tribunal that caused all the problems, but rather some underlying Argentinean concerns that were ignored. Thus, the Tribunal probably settled the core legal questions correctly, but it failed to settle the dispute; on the contrary, the dispute, if anything, got out of control.

Granted, not every time an international court settles legal questions correctly the underlying dispute gets out of control; such instances, thankfully, are rare. And to argue that the Beagle Channel aftermath was caused solely by the arbitral decision might be a narrative fallacy—reducing countless events and alternative causes to one simple and causal narrative, where all the blame falls on one actor (i.e., the Arbitral Tribunal). Yet, even if it is an exaggeration, it is a useful exaggeration nonetheless because it shows that settled legal issues do not automatically settle the underlying dispute.

²⁰ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting).

²¹ DISPUTE BETWEEN ARGENTINA AND CHILE CONCERNING THE BEAGLE CHANNEL, 21 UN REPORTS OF INTERNATIONAL ARBITRAL AWARDS 53 (1977).

²² Treaty of peace and friendship, Chile - Arg. Nov. 29, 1984, 1399 U.N.T.S. 23392.

²³ See generally Sir Elihu Lauterpacht, *Whatever happened to the Beagle Channel Award*, in LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DEVELOPPEMENT 359–71 (Michael Virally ed., 1991).

International courts are well-equipped to settle legal questions, but ill-equipped to settle underlying legal disputes.²⁴ Even Sir Hersch Lauterpacht, one of the greatest idealists of international adjudication, had to admit that, for example, the PCIJ was created primarily for peaceful settlement of interstate disputes but that its most important function became clarification and development of international law.²⁵ Thus, international adjudication is at variance with the main purpose of dispute settlement. It fails to serve this function well because it has a very limited focus on legal questions. A typical international case is litigated usually after all other attempts fail. Courts usually cannot resolve the dispute when it is still underdeveloped. Sometimes it is possible for international courts to pay more attention to early phases of dispute development, like the occasional efforts of the ICJ to engage in preventive diplomacy,²⁶ but this is very limited because it largely depends on parties' goodwill.

One way for international courts to better serve the basic function of the dispute settlement is to embrace more policy reasoning and interact with litigants more diplomatically. Some commentators noted, for example, that the fate of the Beagle Channel dispute might have been different if the Tribunal was "less absolute in the expression of its legal conclusion" and it could "express itself in a manner which might have limited Argentina's concerns and eased the way to an earlier solution."²⁷ In this sense, successful international judges differ from their domestic counterparts—they also have to be diplomats.²⁸

But most international courts are not sensitive enough to policy reasons or worse yet—they pretend to pass over it altogether. Governments, however, realize that all disputes have some political connotations. Yet, even if international courts would be more sensitive to policy reasons, litigation would still remain adversarial by its nature.

²⁴ Some scholars use the existence of underlying tension as distinguishing criterion between legal disputes and political disputes. See Richard A. Falk, *Realistic Horizons for International Adjudication*, 11 VA. J. INT'L L. 314, 321 (1970–71) (judicial settlement can resolve only "pure disputes" which do not reflect underlying tension).

²⁵ HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 5 (1958).

²⁶ Adronico O. Adede, *Judicial Settlement in Perspective*, in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 63–64 (A.S. Muller, D. Raic, & J.M. Thuránszky eds., 1997).

²⁷ Elihu Lauterpacht, *The International Lawyer as a Judge*, in *THE INTERNATIONAL LAWYER AS PRACTITIONER* 135 (2000).

²⁸ *Id.* at 133–34.

B. LITIGATION AS UNFRIENDLY ACT

Another reason why adjudication is at odds with the main function of dispute settlement is that most States consider it an unfriendly act. Often, whenever a State brings a case against another State, it will be seen as the escalation of a dispute to the legal plane and not its settlement. After the litigation, the loser will usually feel resentful, and this resentment rarely helps settlement of the underlying dispute.

One of the main reasons for this is that litigation is by its nature adversarial. This is inherent in litigation because courts think in binary terms—right or wrong. An international court, as Sir Hersch Lauterpacht said, “states the law, it does not choose between the views of the parties, it states what the law is.”²⁹ Yet, when it states the law, one party loses and the other party wins. And international courts often neglect to make the losing side save its face. Of course, courts could systematically practice conciliatory justice—split the difference between the parties so each party would be at least partially satisfied.³⁰ Yet, even if they would systemically practice conciliatory justice—which is very unlikely—such practice still would not transform litigation from adversarial to conciliatory.

In international affairs, continuous friendly relations are more important than analogous relations between domestic subjects. States have to interact with the same States all the time; interstate relations resemble more of a family relationship than a typical business relationship, hence the notion of family of nations or community of nations. Admittedly, it is politically correct to view litigation as a “friendly” act. The Manila Declaration on the Peaceful Settlement of International Disputes proclaims that clearly: “Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States.”³¹ In reality, however, filing a lawsuit against another State is like filing a lawsuit against one’s cousin—not a friendly act, even if the

²⁹ LAUTERPACHT, *supra* note 25, at 21.

³⁰ Vitalius Tumonis, *The Complications of Conciliatory Judicial Reasoning: Causation Standards and Underlying Policies of State Responsibility*, 11 *BALT. Y.B. INT’L L.* 135 (2011); Yuval Shany, *Bosnia, Serbia and the Politics of International Adjudication*, 45 *JUST.* 21 (2008).

³¹ Manila Declaration on the Peaceful Settlement of International Disputes, U.N. G.A. Res. 37/10, (68th plenary meeting), 51 U.N. GAOR Supp. 261, U.N. Doc. A/37/51 (Nov. 15, 1982) (Part II(5)). Part I(1) also states that States “shall live together in peace with one another as good neighbours.”

Manila Declaration would proclaim that a lawsuit against one's cousin should not be considered an unfriendly act.

In contrast to adjudication, negotiation and other diplomatic dispute settlement methods are not adversarial and can serve the main function of international dispute settlement very well. Courts think in binary terms, but negotiators and mediators can think out of box and come up with novel solutions. International dispute settlement would get a much better payoff if legal scholars would devote as much energy on cultivating diplomatic methods as they spend on pondering ways to fix—often unfixable—adjudication flaws. This applies especially to the so-called problem-solving negotiation and other dispute settlement methods based on it.³² Problem-solving negotiation strives for a mutually satisfactory agreement by finding underlying interests of both parties and not choosing between competing parties' positions. Yet, so far, most international lawyers have preferred adjudication because of the negotiation phobia—the flawed belief that negotiation is all about power politics, while adjudication ensures that the right will prevail over the might.

III. ADJUDICATION AS ALTERNATIVE TO POWER POLITICS

A. FALLACY OF FORMALISTIC DECISION MAKING

The promise of right over might—international law as an alternative to power politics—is one the major reasons for the preoccupation with international courts. International lawyers often think that international courts are immune to political considerations and therefore power politics do not play important role. This seems to be especially the case with permanent courts. Thus, Rosenne stated that: “[t]he permanency of the [ICJ], which transforms into constants most of the variables inherent in international arbitrations, makes of the Court the most refined instrument at present existing for the depolitization of the

³² ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981); ROGER FISHER ET. AL., *COPING WITH INTERNATIONAL CONFLICT: A SYSTEMATIC APPROACH TO INFLUENCE IN INTERNATIONAL NEGOTIATION* (1997); ROGER FISHER, ELIZABETH KOPELMAN, & ANDREA KUPFER SCHNEIDER, *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* (1996). This model is also sometimes called integrative negotiation, principled negotiation or negotiation on merits.

process of pacific settlement and its implementation through the application of legal techniques . . .”³³

It might be true that permanent international courts are more depoliticized than others; however, the whole idea that international courts are immune to nonlegal considerations, including political considerations, is based on a fallacy of formalistic decision making. This formalistic fallacy takes for granted that international courts apply legal rules objectively, even mechanically, and exclude all nonlegal considerations; thus, it is only natural that international courts must be unaffected by political considerations.

Yet, in reality, even though international courts justify their decisions only by reference to legal rules, it does not necessarily mean that they actually decide cases that way. Thus, they are not necessarily better at disregarding political considerations, but they are better at pretending to do so.

This idea may be traced to the legal realist movement. Overall, legal realists maintained a two-fold thesis.³⁴ First, how judges actually make decisions depends on many factors; these include policy preferences, political considerations, a judge’s personality, characteristics of litigating parties, and the like. Judges usually take into account legal rules, but these are only one of the many factors and are often nondecisive. Second, having made a decision on nonlegalistic grounds, judges will find some legal rules in a convoluted legal system to justify that decision.

It is beyond the scope of this article to show how the legal realist thesis applies to international courts. However, legal scholars have successfully argued that international courts, like their domestic counterparts, fall short of formalistic ideals—in fact, international courts will often make decisions on other grounds than legal rules and then will use legal rules only for justification, but not actually decision making.³⁵

³³ SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 8 (1965).

³⁴ See generally RICHARD A. POSNER, *HOW JUDGES THINK* 3, 7–8 (2008); Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145–46 (1999); BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* (2010); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2 (2007).

³⁵ Georges Abi-Saab, *The International Court as World Court*, in *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE* 11 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); Edward McWhinney, *The International Court of Justice and International Law-making: The Judicial Activism/Self-Restraint Antinomy*, 5 CHINESE J. INT’L L. 1, 3 (2006); Tumonis, *supra* note 30; Shany, *supra* note 30; Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT’L & COMP. L.Q. 58, 61 (1968).

Overall, it seems naïve to expect that judicial settlement is really an alternative to power politics. Moreover, as Grant Gilmore observed many decades ago, it is dangerous to believe that the law can do something it is not equipped to do—to make the less powerful prevail over the more powerful:

Governments govern and courts adjudicate, effectively, only where disputes arise between groups none of which has power to threaten the State, or where disputes arise between power groups on minor issues, which both sides are willing to submit to the arbitration of chance or justice. . . . It is dangerous to believe that “law” can do something it is not equipped to do, *viz.*, make the less-powerful prevail over the more-powerful on the ground that the less-powerful is “right” - morally, economically, or traditionally - and the more powerful is “wrong.”³⁶

In this context, judicial dispute settlement is not necessarily superior to diplomatic methods. Proponents of international adjudication juxtapose negotiation and adjudication. For some, international negotiation means that a more powerful State will impose its will on a less powerful one. In the words of German diplomat Konrad Adenauer, the one sure way “to conciliate a tiger is to allow oneself to be devoured.”³⁷ Likewise, for a small State to negotiate with a powerful one is to allow itself to be devoured. At the very least, such arguments rely on the simplistic view of negotiation. For one, structural power of States (economic, political, or military resources) does not predict success at the negotiating table.³⁸ As two noted negotiation scholars observe, “[I]f size were power, parties could calculate ahead of time and decide (like dogs or baboons) to avoid certain social encounters, notably negotiation, because they could figure out who would lose. Yet the small and weak

³⁶ Grant Gilmore, *The International Court of Justice*, 5 YALE L. J. 1049, 1062 (1946).

³⁷ Manoranjan Kumar, *Dictionary of Quotations* 235 (2008).

³⁸ Social scientists usually define power as the ability of one party to move another in an intended direction. Most negotiation scholars distinguish between structural power and relational power. Structural power refers to resources of all kind, from economic resources and military strength to moral authority and leadership. Relational power refers to ability to get the desired outcome at the negotiating table. Hence, the so-called “structuralists’ paradox”: the structural power of a State does not guarantee its relational power. See I. William Zartman & Jeffrey Z. Rubin, *The Study of Power and the Practice of Negotiation*, in POWER & NEGOTIATION 3–28 (I. William Zartman & Jeffrey Z. Rubin eds., 2000).

often do very well in negotiation.”³⁹ In general, power dynamics in negotiation are much more complicated than many simplistic notions present them.⁴⁰ No doubt, powerful States often have better negotiators. Yet they likewise have better litigators.

Moreover, negotiation is not the only alternative to adjudication. For example, mediation or conciliation has the same advantage as adjudication of being a third-party procedure; the only legally meaningful difference is the binding force of the final judicial decision.⁴¹ Admittedly, diplomatic methods are also less prestigious than international adjudication. Yet, as the following sections show, the binding quality is overrated and prestige of an international court by itself will seldom make a substantive difference.

B. ADJUDICATION AND RESOURCES

“Right over might” heavily depends on human and material resources that States have available for litigation. Poor States usually do not litigate their rights because they are economically incapable of litigating in the first place. For example, studies have shown how true this is in the WTO system when it is compared to the old GATT dispute settlement. The GATT, a system that existed before 1994, used a diplomatic model of dispute settlement, which was essentially based on conciliation. The current WTO model is an adjudicatory system. Legalization of the WTO meant that some 26,000 pages of new treaty text were added. The case law has been rapidly expanding. Moreover, numerous additional stages of dispute settlement were also introduced, including appeals, compliance review, and compensation arbitration.⁴² Also, the new system allows two years or even more of permissible

³⁹ *Id.* at 10.

⁴⁰ *Id.*

⁴¹ Conciliation has been defined as:

A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested.

See MERILLS, *supra* note 11, at 64.

⁴² Marc Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 457, 467 (Daniel Kennedy & James Southwick eds., 2002).

delays in compliance with adverse rulings.⁴³ All of this, coupled with the need to hire external legal assistance to construct sophisticated legal arguments, has made it less likely that developing States will even consider litigation. Developing countries in the WTO are one-third less likely to file complaints against developed states when compared to the GATT regime; moreover, a developing country is more likely to become a target of litigation in the WTO—the possibility in the GATT was 19 percent compared to 33 percent in the WTO.⁴⁴ So judicialization, at least in the WTO, did not increase chances of weak States prevailing over the powerful ones, but instead had the opposite effect.⁴⁵

The promise of right over might is likewise unimpressive in other international organizations. For example, the World Bank provides most assistance to developing countries through loan and guarantee agreements. These agreements stipulate that disputes will be settled by international arbitration. By 2005, a total number of loans and credits made by the Bank amounted to approximately 9,000.⁴⁶ Yet, out of 9,000 agreements, not a single dispute has been submitted to international arbitration. One of the reasons is the David and Goliath's syndrome—a borrower is usually in the position of weakness and is unlikely to challenge the World Bank's actions, probably because such actions may result in decreased future loans or development aid in general.⁴⁷

None of this is limited to economic organizations like the WTO or the World Bank. In the ICJ, for example, poor States normally have to entrust their defense to foreign nationals simply because their own nationals lack expertise.⁴⁸ And this is only a fraction of total costs.⁴⁹ Also,

⁴³ *Id.*

⁴⁴ *Id.* at 466–67.

⁴⁵ See also CHAD P. BOWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT (2009); Amin Alavi, *African Countries and the WTO's Dispute Settlement Mechanism*, 25 DEVELOP. POL. REV. 25 (2007); Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, in TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM IN THE WTO 37–58 (International Centre for Trade and Sustainable Development, Resource Paper No. 5, 2003).

⁴⁶ *IBRD and IDA Cumulative Lending by Country (June 30, 2005)*, World Bank, in BANK ANNUAL REPORT 2005, <http://go.worldbank.org/YLTBMVE5Y0>.

⁴⁷ Sophie Smyth, *World Bank Grants in a Changed World Order: How Do We Referee This New Paradigm?*, 30 U. PA. J. INT'L L. 483, 537 (2008).

⁴⁸ Luis Ignacio Sanchez Rodriguez & Ana Gemma López Martín, *The Travails of Poor Countries in Gaining Access to the International Court of Justice*, in THE LEGAL PRACTICE IN INTERNATIONAL LAW AND EUROPEAN COMMUNITY LAW: A SPANISH PERSPECTIVE 95 (Carlos Jiménez Piernas ed., 2007).

even before hiring external legal assistance, someone has to spot the legal issues and suggest at least tentative strategy; this is often problematic because internal staff usually lacks sufficient expertise.

IV. FARFETCHED DOMESTIC ANALOGY

A. SYSTEMIC DIFFERENCES

Proponents of international adjudication look up to international courts for another flawed reason—a belief that international courts, with some differences, are analogous to their domestic counterparts. Yet this is a farfetched analogy at its best. It is largely due to the natural preference in analogical reasoning to focus on similarities and neglect differences. However, when it comes to analogy between domestic and international courts, one would rather neglect similarities and focus on the differences.

Compared with domestic courts of most Western states, international courts are still infants. Arguably, in the last century, international dispute settlement has evolved much less than other fields of international law. For example, the basic problems of the International Court of Justice are almost the same today as they were in 1950s or even in 1920s: lack of compulsory jurisdiction, inaccessibility to international organizations, et cetera.

As a minimum, dispute settlement in domestic law is compulsory. Few interstate tribunals have general compulsory jurisdiction, and none has compulsory jurisdiction like that of domestic courts. Also, international law has no safeguards that exist in domestic systems, such as appellate reviews, general checks and balances, and so forth.⁴⁹

Further, domestic law is less ambiguous than international law. International law does not even have clear constitutional principles; and, even if it did, it probably would not simplify judicial decision making.

⁴⁹ *Id.* at 84–85. (“Although the justice administered by the ICJ is basically free of charge, the very dynamics of an international dispute generate substantial costs. Costs of the fees of the technical and specialised personnel taking part in the action, who compile legal and other reports or items, costs of reproduction of documents and letters of all kinds, travel, supporting human resources (frontier services or marine exploration, for example)—in a word, costs of an infinitely varied nature.”)

⁵⁰ JAMES L. BRIERLY, *THE LAW OF NATIONS* 369 (1963).

Naturally, States hesitate to accept litigation as a dispute settlement method when most of the applicable law is hazy.⁵¹

B. INTERSTATE ELEMENT AND POLITICAL ISSUES

A typical international case involves more important issues than an analogous domestic case. In domestic legal systems, political issues are also seldom settled in courts; that is usually the province of political fora. International law still revolves mostly around political issues and for many States international adjudication is simply an inappropriate method for solving political disputes.

Successful international courts are successful largely because political disputes have been removed from their domain. For example, human rights courts are fortunate enough to evade interstate disputes. Thus, their typical cases are not interstate disputes; instead, a typical case looks more like a domestic issue with some “supranational” extension. Actual interstate litigation in human rights courts illustrates this point. For example, in 2010 alone, the European Court of Human Rights delivered 1,499 judgments regarding 2,607 individual applications, and since the reform of the Convention system in 1998, the Court delivered its 10,000th judgment regarding individual petitions in less than ten years.⁵² In contrast, by 2007, the Court delivered only three judgments in interstate cases since the Court’s creation in 1959.⁵³

To convince States that compulsory jurisdiction is essential, early supporters of international courts presented a seemingly sound dilemma—international courts must have general compulsory jurisdiction, which would of course cover political disputes, or there will be wars. Obviously, as Sir Robert Jennings notes, this is a fallacy of false dilemma.⁵⁴ Courts can have compulsory jurisdiction and the war may still be unavoidable; courts may have no jurisdiction and the wars can be averted. In national crises, even domestic courts seldom successfully perform such legal rescue operations. On the contrary, as Brierly noted

⁵¹ MERILLS, *supra* note 9, at 308–09.

⁵² European Court of Human Rights in Facts and Figures 2010, at 8, Council of Europe, *available at* http://www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2012_VERSION_WEB.pdf.

⁵³ HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT: LAW, POLITICS, MORALS* 947 (2008). The first three judgments were *Ireland v. the United Kingdom* (1978), *Denmark v. Turkey* (2000), and *Cyprus v. Turkey* (2001). Judgment regarding Georgia’s application filed against Russia in 2007 was the fourth.

⁵⁴ Jennings, *supra* note 3, at 41.

about American courts, it was the U.S. Supreme Court's decision in *Dred Scott* case that made the American Civil War unavoidable.⁵⁵

C. INACCESSIBILITY OF INTERNATIONAL COURTS

Another major difference between international courts and domestic courts is inaccessibility. Domestic courts usually can adjudicate disputes between all kinds of legal actors and all kinds of issues with the exception of political and similar issues. International courts fail to contribute to dispute settlement because they keep out some of the most damaging conflicts: noninternational armed conflicts, sometimes also called civil wars. Although international law does not govern these conflicts to the same extent as it governs international armed conflicts, it does prescribe the basic legal standards. Yet, only with the consent of the State involved in such conflict can an international tribunal consider it; few States are willing to give such consent because they fear this will imply the recognition of the rebel movement. This is not a new concern. Brierly pointed out at the beginning of the twentieth century that it is a "curious and unfortunate fact that discussions about war and its causes and prevention give so little attention to studying the problem of civil wars."⁵⁶ Indeed, it is unfortunate because, as development economists estimate, noninternational armed conflicts usually last ten times longer than international conflicts⁵⁷ and cost the country and its neighbors ten times more—around sixty-four billion dollars.⁵⁸

It is not only the most damaging armed conflicts that are kept out of international courts. International organizations and other prominent

⁵⁵ JAMES L. BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 93–107 (1958).

⁵⁶ *Id.* at 99.

⁵⁷ PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 26–27 (2007) ("Civil wars are highly persistent. The average international war, which is nasty enough, lasts about six months. You can do a lot of damage in six months. But the average civil war lasts more than ten times as long, even longer if you start off poor. In part, such conflicts continue because they become normal. On both sides interests develop that only know how to do well during war. Given the massive costs of war, it should be possible to find a deal that benefits everyone, but often the rebels decide to continue the struggle rather than take the risk of being lured into a peace deal on which the government subsequently reneges."). See also Paul Collier, Anke Hoeffler, & Måns Söderbom, *On the Duration of Civil War*, 41 *J. PEACE RES.* 253 (2004).

⁵⁸ *Id.* at 32 ("All in all, the cost of a typical civil war to the country and its neighbors can be put at around \$64 billion. In recent decades about two new civil wars have started each year, so the global cost has been over \$100 billion a year, or around double the global aid budget. This is obviously only a ballpark figure, although in building it we have erred on the side of caution.")

international actors are also excluded. Article 34 of the ICJ Statute is a classical example of this state-centric view: “only states may be parties in cases before the Court.”⁵⁹ Various commentators heavily criticized this state-centric view on many occasions, yet it remains today as it was almost one hundred years ago.⁶⁰

D. BINDING FORCE AND JUDICIAL REMEDIES

Another appeal of international courts lies in their promise to provide finality of disputes through the binding force of their decisions. Thus, an authoritative judgment of an international court will end a dispute, just as judgments of domestic courts ensure finality. Yet, this is a huge oversimplification; the binding force of international judgments is more of a replica rather than equivalent of their domestic counterparts.

First, there is no enforcement of decisions either at all or it is more illusory than real. Consider the enforcement of the ICJ decisions. The UN Charter provides that the Security Council may enforce ICJ judgments,⁶¹ but in practice this is an unrealistic scenario. Voluntary compliance with the Court’s judgments is the way it normally works.⁶²

Self-help always was and still remains one of the keystones of international law: each State has to use measures available to it to enforce its rights. In the end, the compliance of an international decision will have to be negotiated. In negotiations, however, a judgment is used only as a bargaining chip, an important chip, but not the only one. Thus the expression, “bargaining in the shadow of law.”⁶³ Whether a State will comply with a decision depends on many factors; one important factor

⁵⁹ Statute of the International Court of Justice, June 26, 1945, T.S. No. 993, 3 Bevens 1179.

⁶⁰ Jerzy Sztucki, *International Organisations as Parties to Contentious Proceedings before the International Court of Justice*, in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 141–67 (A.S. Muller, D. Raic, & J.M. Thuránszky eds., 1997); Paul Szasz, *Granting International Organisations Jus Standi in the International Court of Justice*, in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 141–167 (A.S. Muller, D. Raic, & J.M. Thuránszky eds., 1997); Pierre-Marie Dupuy, *Commentary of the Article 34*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 545 (Andreas Zimmermann et. al. eds., 2006).

⁶¹ U.N. Charter art. 94.

⁶² See generally CONSTANZE SCHULTE, *COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE* (2005); Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 *EUR. J. INT’L L.* 815 (2007); Attila Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 *EUR. J. INT’L L.* 539 (1995).

⁶³ Shaffer, *supra* note 45, at 13.

may be whether the reputational loss from noncompliance will be greater than other losses resulting from compliance.⁶⁴

Thus, a crucial difference from domestic courts is that a judgment of an international court rests largely on its moral authority. Therefore, a dispute mediated by some authoritative body, although nonbinding, might be more useful than a legally binding decision that is not persuasive enough. For example, a negotiation backed up only by the good faith of both parties is more valuable than a judgment of the ICJ against a State that refuses to comply with the judgment, as it happened in the *Nicaragua* case when the United States refused to comply.⁶⁵

Another major problem with international adjudication is that international courts have seldom provided effective remedies. For example, although in theory restitution is a primary remedy, international courts very rarely impose it. Most often, an international court will declare that its judgment is the appropriate remedy.⁶⁶ International courts normally cannot impose mandatory orders or specific injunctions (e.g., an implementation of a breached treaty in a specific manner or corrective actions like modifying inconsistent domestic legislation).⁶⁷ Certainly, there are, as international relations scholars call it, “embedded” decisions—decisions that operate without governments’ actions;⁶⁸ these are mostly declaratory judgments. Yet, “embedded” decisions will not fix the systemic problem of ineffective remedies.

Empirical research has also shown that sanctions, formal rulings, or other forms of public pressure often have counterintuitive effects.⁶⁹ For example, empirical studies of compliance with the GATT/WTO rulings from 1948 through 1999 show that a defendant is less likely to

⁶⁴ Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171 (2008).

⁶⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98 (June 27). See also HAROLD N. MEYER, *THE WORLD COURT IN ACTION: JUDGING AMONG THE NATIONS* 183–95 (2002).

⁶⁶ See, e.g., Christian Tomuschat, *Reparation in Cases of Genocide*, 5 J. INT’L CRIMINAL JUST. 905 (2007); Andrea Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment*, 18 EUR. J. INT’L L. 706, 707 (2007).

⁶⁷ CHESTER BROWN, *COMMON LAW OF INTERNATIONAL ADJUDICATION* 209–15 (2007); CHRISTINE GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 11–21, 95–110 (1987).

⁶⁸ Keohane et al, *supra* note 7, at 458.

⁶⁹ In the last decade, empirical studies in behavioral economics showed that the traditional deterrence hypothesis is flawed. In some cases, sanctions have a paradoxical effect of not decreasing but increasing the unwanted behavior. In one field study, for example, a financial penalty had the perverse effect of increasing the unwanted behavior. Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1 (2000).

make trade concessions after the formal ruling is issued.⁷⁰ In other words, a formal ruling against the defendant makes it less likely that the defendant will make trade concessions to the complainant. There are many explanations for this. For one, uncertainty about the final outcome may induce defendants to make early concessions.⁷¹

Another explanation is that the compliance with the formal ruling of an international institution will make the government appear weak—being hammered by some international court. Thus, a government may decide that it is politically more fitting to defy the ruling. As Carl von Clausewitz famously said, “war is merely a continuation of policy by other means.” Likewise, for most governments international adjudication is merely a continuation of domestic policy by other means. And if there is an antagonism between the two, it is usually not the respect for international courts that will carry the day. In this context, the empirical findings are perhaps unsurprising: “Counter to conventional wisdom, *democracies*, even controlling for their (typically) greater market power, *are less likely to comply*. . . once GATT has thrown down the gauntlet, it will be harder for a government that is highly sensitive to public opinion to cave in.”⁷²

Of course, it is possible that in some cases, when public opinion favors compliance with international rulings, the democratic government may be more likely to comply than it would otherwise be willing. Yet, more often than not, democratic governments adopt certain measures because public opinion supports such measures in the first place, and it is unlikely that public opinion will change because of an international ruling.

Any generalizations here are hazardous: in some cases formal rulings and public pressure will induce compliance, in other cases they may have zero effect, and yet in others they may have detrimental effect. A simplistic approach to this issue will likely produce complex and unexpected consequences. Until empirical research provides us with better understanding on the effects of various sanctions and formal rulings, a cautious approach to international adjudication will be a wise policy.

⁷⁰ Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 *FORDHAM INT’L L. J.* 158, 161–62 (2000).

⁷¹ *Id.* at 165.

⁷² *Id.* at 168 (emphasis added).

A related drawback of international adjudication is publicity. No doubt, there are many benefits to having arguments made in an international court being publicly available to anyone. But settlement of disputes may not be among these benefits. Often, a government may be willing in private to advance certain arguments or rely on certain censored evidence. It may even concede certain points and admit certain mistakes. Yet, such admissions or reliance, when made public, may hurt its domestic politics and so the government would rather not use them at all than use them and suffer domestically. Here again democracies stand out: “The need for privacy is especially acute for resolution of disputes between democracies, which disproportionately settle early in consultations, suggesting that they find it easier to compromise in a setting that is relatively less transparent.”⁷³

This may not be the problem with international arbitration because arbitral tribunals are much more flexible than permanent courts.

V. FALLACY OF COMPOSITION

Another reason why legal scholars are preoccupied with international courts can be explained by a fallacy of composition—extrapolation from part to whole: scholars find examples of successful judicial settlement in certain fields or in certain regions and mistakenly conclude that international adjudication in general is advantageous. In other words, because parts of international adjudication (certain international tribunals in certain episodes) proved to be successful, it “follows” that international adjudication, as a general method of international dispute settlement, will be successful. Yet, when we look at the overall practice of international tribunals, we find mixture of failures and successes, and successes are very limited.

A. JUDICIAL EXPERTISE AND JUSTICIABILITY

Judicial dispute settlement has prevailed only in a few fields of international law, such as trade and investment disputes, human rights, boundary claims, and maritime delimitation. No doubt, these are all important issues. But economic disputes and human rights cases have been adjudicated for more than a hundred years, albeit under a different rubric. In the beginning of the twentieth century, most of international

⁷³ *Id.* at 171.

adjudication revolved around the so-called state responsibility for injuries to aliens.⁷⁴ The typical causes of action that belonged to this rubric now belong to either human rights law or international economic law. Of course, now the law governing these fields is more elaborate and dispute settlement is more specialized, but the underlying nature of these disputes remains the same.

It is a hasty generalization, nonetheless, to say that because economic dispute settlement is successful, it must mean that judicial dispute settlement in general is a good idea. There is much more to international law than human rights or economic disputes.

A host of other disputes either stay away from international courts or have been adjudicated with very limited success. These disputes comprise political and military issues including peacekeeping and arms limitations; serious breaches of international law; environmental issues; and economic disputes beyond trade and investment. Thus, some commentators have concluded that arbitration cannot resolve political disputes.⁷⁵ One reason is that international law governing these fields is immature and brittle. Naturally, because of great uncertainty, States do not want to trust these cases to international tribunals.

Further, the view that judicial settlement is not suitable for certain international disputes is embodied doctrinally. Since Vattel distinguished between political disputes and legal disputes, States also followed this distinction.⁷⁶ Thus, the doctrine of justiciability says that only legal disputes are justiciable (i.e., suitable for judicial settlement). Political disputes are the opposite—nonjusticiable.

⁷⁴ See generally CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* (1928); INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (Richard B. Lillich ed., 1983); CHITARANJAN F. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (1967).

⁷⁵ Karl-Heinz Bockstiegel, *The Effectiveness of Inter-State Arbitration in Political Turmoil*, 10 *J. INT'L ARBITR.*, no. 1, 1993, at 43, 50 (“on the basis of experience gained, highly political and perhaps even military disputes cannot be resolved by inter-State arbitration. Exceptions may come up . . .”)

⁷⁶ EMMERICH DE VATTEL, *LE DROIT DES GENS: PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* (THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW) § 332 (Charles Ghequiere Fenwick transl., 1916) (“In the disputes which arise between sovereigns, a careful distinction must be made between essential rights and less important rights, and a different line of conduct is to be pursued accordingly.” Duty to negotiate and seek arbitral resolution applies only “where interests that are not essential, or are of small consequence, are involved”)

International courts themselves usually refuse to entertain defenses based on nonjusticiability. Of course, courts are unlikely to admit that they cannot solve certain disputes. More likely, courts will proclaim that in principle all disputes can be judicially resolved and then use some juridical techniques to avoid particular decisions.

There is some doctrinal debate on the exact distinction between legal and political disputes. Usually nonjusticiable disputes include vital peace and security efforts, military strategy, and others that States consider more appropriate for political institutions. Higgins pointed out that there are four diverse meanings of nonjusticiable disputes: (1) that the matter relates to a State's vital interests; (2) that the dispute is incapable of objective judicial determination; (3) that the motives of a State seeking judicial determination are in question; (4) that post-adjudicative compliance is in doubt.⁷⁷ All of these are nonjusticiable (i.e., not suitable for judicial dispute settlement).

Most exponents of international courts have battled the idea of nonjusticiability. They argue that international courts can settle all kinds of disputes; there are simply no disputes that courts cannot settle. Sir Hersch Lauterpacht was the most famous proponent of this view:

[T]here is no fixed limit to the possibilities of judicial settlement; that all conflicts in the sphere of international politics can be reduced to contests of a legal nature; and that the only decisive test of the justiciability of the dispute is the willingness of the disputants to submit the conflict to the arbitrament of the law.⁷⁸

Lauterpacht's contention is problematic for two reasons. First, not all conflicts in international politics can be reduced to legal questions. For example, courts cannot deal with a situation where there is tension but no specific question that they have to resolve; political institutions, however, can do that.⁷⁹ More importantly, Lauterpacht might be wrestling with an irrelevant question. The proper question is not whether courts, in theory, can turn any international dispute into a legal question and settle that question. The question is whether it will do any good. Most decisions in theory could be made by flipping a coin but very

⁷⁷ Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L & COMP. L.Q. 58, 65 (1968).

⁷⁸ HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN INTERNATIONAL COMMUNITY* 164 (1933).

⁷⁹ MERILLS, *supra* note 9, at 20.

few would consider such problem-solving approach enviable. Similarly, just because courts in theory can reduce any dispute to a legal question and then solve that legal question is a different question from whether States appreciate that.

Although the distinction between justiciable and nonjusticiable disputes seems academic, it reflects the deeper conviction of States that judicial expertise is good only for certain kinds of disputes. Thus, governments probably still thought about justiciable and nonjusticiable disputes even when this distinction became unfashionable in theory. Edward Carr, in his classic international relations treatise published before the World War II, pointed out the gap between State practice and the idealist visions:

No government has been willing to entrust to an international court the power to modify its legal rights . . . Some theorists have, however, been more ready than practical statesmen to brush this difficulty aside, and are quite prepared to entrust to a so-called arbitral tribunal the task not only of applying existing rights, but of creating new ones⁸⁰

The main problem, as Carr alludes to in this excerpt, is that international law is incomplete and much more so than any domestic legal system; while filling these gaps, international courts inevitably create new rights or change existing ones. And most governments are not enchanted by this prospect. Some tribunals tried to assure States that they would fill these gaps with mathematical precision.⁸¹ Most governments, however, are unimpressed, perhaps because they know very well that judicial decision making and mathematical sciences are very distant relatives.

⁸⁰ EDWARD H. CARR, *THE TWENTY YEARS' CRISIS (1919-1939)* 259 (1945).

⁸¹ *E. Extension, Australasia and China Tel. Co., Ltd. v. U.S.*, 6 R.I.A.A. (Gr. Brit. v. U.S.) 112, 114-115 (9 November 1923), available at http://untreaty.un.org/cod/riaa/cases/vol_VI/112-118_Eastern_Extension.pdf:

“International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to *find - exactly as in the mathematical sciences - the solution of the problem*. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.” (emphasis added).

B. FALLACY OF UNIVERSALISM

Some exponents of international courts think that judicial settlement holds a great promise as a general dispute settlement method because of its outstanding success in particular regions. The European Court of Human Rights and the European Court of Justice are the two courts that are usually mentioned in this context. The Inter-American Court of Human Rights also could be considered as relatively successful. Yet, it is apparent that at least the Asian and the African continents are missing from this picture.

Why exactly judicial settlement succeeded in these regions and in these organizations (EU and Council of Europe) is a difficult question. It is difficult to even pinpoint approximate reasons, not to mention controlled studies which would confirm any hypothesis. Some would argue that it is because of homogeneity of their member states. Others argue that one of the main reasons is because they are based on “deep” international agreements (i.e., those that require changing the behavior significantly),⁸² treaties that regulate public goods or common problems,⁸³ and treaties that create rights or benefits for private parties.⁸⁴

In any event, the success of these regional courts is no indication that judicial dispute settlement, as a general method, is welcomed worldwide.⁸⁵ More generally, it could be argued that judicial settlement succeeds in certain regions because the preoccupation with adjudication is a Western phenomenon and it is the legacy of Western rhetorical tradition. George Kennedy, an eminent rhetorician, compares Western rhetoric, influenced mostly by Greek rhetorical tradition, with many other traditions, including Chinese, Indian, Native American, Aboriginal Australian, Egyptian, Mesopotamian, Aztec, and others.⁸⁶ Greek society was characterized by contentiousness, which is reflected in not only rhetoric, but also mythology, athletics, poetry, public address, and democratic governance.⁸⁷ Because of the Greek influence on later Western thought, this competitiveness would influence Western legal

⁸² Helfer & Slaughter, *supra* note 6, at 937.

⁸³ *Id.* at 938–39.

⁸⁴ *Id.* at 940–41.

⁸⁵ JOHNSTON, *supra* note 2, at 130.

⁸⁶ GEORGE KENNEDY, *COMPARATIVE RHETORIC: AN HISTORICAL AND CROSS-CULTURAL INTRODUCTION* 46–191 (1998).

⁸⁷ *Id.* at 191–214.

traditions, including love for adjudication. As Kennedy finds in his comparative study:

[G]enerally speaking, throughout the non-Western world, rhetoric has been used for purposes of agreement and conciliation, and emotionalism The Greeks were contentious from the very beginning, and acceptance and indulgence of open contention and rivalry has remained a characteristic of Western society except when suppressed by powerful authority of church or state.⁸⁸

For Asians, adjudication is dreadful because it is based on binary thinking—right or wrong—and requires logical consistency. To the Asian mind, “to argue with logical consistency . . . may not only be resented but also be regarded as immature.”⁸⁹ Here again, the best explanation why Greeks created logic is that they saw its utility in argumentation.⁹⁰ Eastern thought, contrary to Western, is comfortable with logical contradictions; instead of rejecting one of the contradictory propositions, it aims to transcend and find the truth in both of them.⁹¹

For Easterners, contextualization is also central to their outlook and it explains why they resent adjudication; the structure of an argument cannot be separated from its context. Naturally, it distrusts any inferences based on abstract propositions.⁹² “[I]t knows no distinction between the truth of a proposition and its morality.”⁹³ Yet, the essence of adjudication is application of abstract principles to concrete cases. In this context, we can see how easily an Eastern mind could be repulsed by judicial pronouncements such as that of the ICJ in the *South West Africa* that moral considerations are separate from legal considerations.⁹⁴

Some scholars correctly pointed out that prevailing judicial reasoning of international courts, based on logic, is more than just

⁸⁸ *Id.* at 198

⁸⁹ RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* 166 (2003) (quoting anthropologist Nobuhiro Nagashima)

⁹⁰ *Id.* at 166–67.

⁹¹ *Id.* at 174.

⁹² *Id.* at 167–68.

⁹³ *Id.* at 167.

⁹⁴ *S. W. Afr. (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6 (July 18), available at <http://www.icj-cij.org/docket/files/46/4931.pdf>. (“It is a court of law and can take account of moral principles only in so far as these are given a sufficient expression in legal form”; “Law exists, it is said, to serve a social need; but precisely for that reason . . . [the Court] can do so only through and within the limits of its own discipline. Otherwise it is not a legal service that will be rendered”).

unpersuasive—it alienates those States.⁹⁵ True, if international courts would embrace policy reasoning more, it could make adjudication more attractive to Asian nations.⁹⁶ Yet even the judgment style based on policy reasoning is unlikely to make non-Western States true believers in international adjudication. For one, their underlying idea of responsibility contradicts the foundations of international law, which are built on Western ideals. The Eastern view demands responsibility for any harmful action, regardless whether it was unintentional or indirect.⁹⁷ This view is closer to the Western concept of strict liability, only all-encompassing.

Overall, the non-Western cultural-legal aversion toward adjudication is due to the fundamental nature of adjudication and is unlikely to be decreased by fine-tuning of technical concepts.⁹⁸

ALTERNATIVES TO ADJUDICATION

The only legally significant difference between adjudication and diplomatic dispute settlement methods is the binding quality of judgment. Yet, as the previous sections showed, these qualities are either overrated or can even have the adverse effects. Sometimes, no doubt, binding judgment or judicial remedies can have very beneficial effects. Yet, any generalizations here are risky. Also, when it comes to permanent international courts, a reasoned opinion has been traditionally seen as a necessary component. Yet, this is not an essential component of all international adjudication—international arbitral tribunals, for example, sometimes produced unreasoned opinions.⁹⁹

Apart from the binding quality of judgment, prestige and moral authority is the only meaningful difference between an international

⁹⁵ Lyndel Prott, *The Style of Judgment in the International Court of Justice*, 5 AUSTRALIAN Y.B. INT'L L. 75, 82 (1971).

⁹⁶ *Id.* at 88 (“The new audience of the Court, particularly the Afro-Asian nations, are not responsive to formal, logical, technical legal arguments which might impress Western jurists; they are far more impressed by reasoning which is based on social policy, history, culture and so on.”)

⁹⁷ NISBETT, *supra* note 89, at 198.

⁹⁸ One way to increase the appeal of adjudication in the globalization era, where different value systems increasingly clash, is through the Rawlsian concept of overlapping consensus, which allows both parties to integrate a decision in their value and belief systems. See Andreas Paulus, *International Adjudication*, in THE PHILOSOPHY OF INTERNATIONAL LAW 219–24 (Samantha Besson & John Tasioulas eds., 2010). Yet, even Rawlsian overlapping consensus is unlikely to increase the appeal of adjudication to Asian and other non-Western nations – they resent adjudication not necessarily because of the different value system reflected in particular cases, but because of its fundamental nature.

⁹⁹ MERILLS, *supra* note 9, at 92.

court and conciliation or other diplomatic methods. Yet, the prestige and moral authority depends on particular institutions and it is not something that comes automatically as a by-product of being a court. If some permanent conciliation commission would be given the same attention as the ICJ, it is possible that it could achieve similar standing.

A conciliation commission, for example, can provide everything that international adjudication provides, such as proceedings based on formal legal arguments or a (nonbinding) decision based solely on legal rules. And diplomatic methods such as mediation or conciliation can also provide much more—privacy, possibility of discarding certain international treaties or custom (an international court could not, for example, discard altogether the entire UN Charter), engaging in conciliatory justice without the additional need to juggle legal rules. Diplomatic methods are also less resource-intensive than adjudication, they are accessible to international organizations, and they can be used to settle the so-called civil wars because the governments will fear less that this dispute settlement will imply recognition of the rebel movement. They can be used to settle sensitive political or military disputes and other types of disputes. They are also acceptable to non-Western States as their procedures do not have to rely on rigid and sophisticated logical argumentation.

Of course, mediation, conciliation, and other diplomatic methods will have little impact on development of international law and this is one of the main reasons why international lawyers have traditionally focused on adjudication, and especially permanent courts. Admittedly, development of international law by international courts is inevitable and invaluable.¹⁰⁰ Yet, just because adjudication is good for development of law, it does not automatically mean that it is also good for dispute settlement. And to suggest that a government should consider making its disputes more legalized and complicated because it would help the development of international law is like suggesting that a patient should

¹⁰⁰ Many judges and prominent scholars emphasize one reason why development of international law by international courts is invaluable – lack of legislature in international law. Judge Fitzmaurice admitted that clearly in his separate opinion in the *Barcelona Traction* case:

“... since specific legislative action with direct binding effect is not at present possible in the international legal field, judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development. I agree with the late Judge Sir HerschLauterpacht that it incumbent on international tribunals to bear in mind this consideration, which places them in a different position from domestic tribunals...”

Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 1, 64 (Feb. 5).

consider developing a rare disease because it would encourage the progress of medicine.

CONCLUSIONS

As this article has shown, adjudication cannot provide a solution to the strained international dispute settlement. It never was a primary method of international dispute settlement and never was intended to be such. This flawed obsession with adjudication as the omnipotent dispute settlement method is due to several reasons.

First, it is because legal scholars conflate settlement of disputes with settlement of legal issues. Adjudication often fails to perform the main function of dispute settlement—settle the underlying dispute and restore good relations. In practice, adjudication is the last resort after all else fails; thus, it is not the primary method of dispute settlement but rather a fallback option. Further, in international relations, initiating a case against another State is often viewed as unfriendly act and the added bitterness seldom helps settlement of the underlying dispute.

Second, it is the promise of right over might—international law as alternative to power politics. Thus, the triumph of international courts would mean the triumph of law over politics. The illusion that adjudication ignores political considerations is driven largely by a flawed understanding of judicial decisionmaking; the formalistic view that because courts only apply legal rules and nothing else, that they are not swayed by political considerations. The “right over might” also ignores the fact that adjudication requires significant resources; in the WTO, for one, it seems that judicialization only made matters worse for the weak parties.

Third, it is the fallacy of farfetched domestic analogy: focusing on features that international courts share with their domestic counterparts and disregarding enormous differences. One of these is the belief that international courts provide finality through the binding decisions. A related misconception relates to overrated remedial powers of international courts.

Fourth, it is the composition fallacy; legal scholars find several isolated examples of successful adjudication and infer that adjudication in general can be successful as the overall method of dispute settlement. International courts are in fact successful in several fields, like human rights and trade disputes; they are also highly successful in certain

regions, particularly Europe. But it does not follow that international courts have universal appeal.

Overall, as the former President of the ICJ Sir Robert Jennings puts it, “adjudication is a technical, intellectual, artificial method.”¹⁰¹ And as a technical and artificial method, it should not be considered the omnipotent method of dispute settlement.

All of this can explain, largely, why governments are not that enthusiastic about adjudication as the omnipotent dispute settlement method. For States, international adjudication is a highly specialized dispute settlement method, which is suitable only for small number of specific disputes. States themselves usually want to decide on case-by-case basis which disputes are suitable for adjudication. Another major reason is that governments find judicial decision making unpredictable. Probably because they realize that it is hard to predict even for lawyers how an international court is likely to decide a case. If it is hard for international lawyers, then most diplomats and other public officials understandably are even less inclined to rely on international courts.

None of this means that international courts are of little use. International courts have blossomed in some fields of international law, especially in the fields of technical expertise, such as maritime boundaries, territorial delimitation, treaty interpretation, and economic disputes. It is arguably preferable that international adjudication would be developed further along these lines.

Nonetheless, the international community would get a better payoff if it invested in development of nonadjudicatory dispute settlement at least as much as legal scholars want it to invest in international courts. International adjudication, a technical and specialized dispute settlement method, should not be viewed as the panacea for all maladies of international relations.

¹⁰¹ Jennings, *supra* note 3, at 36.