

## CHAPTER 5

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# THE SHADOW ZONES OF INTERNATIONAL JUDICIALIZATION

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DESPITE the plethora of international adjudicative bodies created over time and across regions, international judicialization is still remarkably uneven. First, while some regions of the globe contain multiple, overlapping, international adjudicative bodies, others have none. Second, patterns of utilization are inconsistent. Even where international adjudicative bodies exist, certain actors use them more frequently than others. Third, certain areas of international relations have been judicialized significantly more than others. This chapter describes the current state of judicialization along these three main dimensions, highlighting the areas and issues

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where judicialization has not arrived, and advances some possible explanations for this puzzle.

## 1 UNEVEN GEOGRAPHIC DISTRIBUTION

One can distinguish between two types of international adjudicative bodies: global ones, whose jurisdiction could be accepted by any state, and regional ones, whose jurisdiction extends only to states within a certain region of the world.

### 1.1 Global

Only four global judicial bodies are currently active: the International Court of Justice (ICJ); the World Trade Organization (WTO) dispute settlement system; the International Tribunal for the Law of the Sea (ITLOS); and the International Criminal Court (ICC). There are also a number of global international arbitral bodies, the two most important of which are the Permanent Court of Arbitration (PCA) and the International Center for the Settlement of Investment Disputes (ICSID).

All of these, however, are only global in theory because none has jurisdiction that actually extends to all states.<sup>1</sup> That is either because the organization to which the judicial body is attached does not have universal membership (i.e. the WTO); the treaty creating the court has not attracted universal ratification (i.e. the ICC); or because while the organization does have universal—or virtually universal—membership (e.g. the U.N.), the judicial bodies attached to it, such as the ICJ or ITLOS, have jurisdiction only insofar as states have expressly accepted it.<sup>2</sup>

Currently, the WTO has 159 members, including a few entities that are not sovereign states, such as the European Union, Hong Kong and Macao, and Taiwan, whose sovereignty is contested. Since Russia joined in 2012, all of the world's major economies are members. The most significant outliers of this system are found in

<sup>1</sup> For an overview at a glance of the reach of global judicial bodies, see, in this handbook, Fold-out Chart 1, International Judicial Bodies: Compulsory Jurisdiction Across the Globe (Inter-State Judicial Bodies) and Ch. 2.

<sup>2</sup> There is a clear trend toward locking in states' consent to jurisdiction and making it less dependent on ad hoc expressions of consent. See generally, C Romano, "The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent" (2009) 39 *NYU J Intl L & Pol* 791; K Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014).

North Africa, the Middle East, and Central Asia, while a few others reside in East Africa, the Balkans, and the Caribbean.<sup>3</sup> All are troubled states and second- or third-rate economies. Many, for various reasons, have been pariahs of the international community at some point since the birth of the WTO. Yet, considering the gravitational effect that the WTO has gained by now, boasting among its membership all of the world's significant economies, one day the WTO might reach global membership, thus turning its dispute settlement system into the first and only truly global jurisdiction.

Like the WTO dispute settlement system, in theory, the Rome Statute of the ICC could be ratified by any state, thus making it potentially a truly universal court. However, so far its statute has been ratified by just under two-thirds of the world's states (122).<sup>4</sup> What is more, ratification is quite uneven across the globe. Forty-two European states are party to the Rome Statute of the ICC, including all members of the European Union. Numerically, Europe is the most represented region in the Assembly of States Parties. However, as one moves east, commitment to the ICC decreases. Turkey, Russia, Ukraine, and Belarus are not parties and, for their own political and strategic reasons, unlikely to join anytime soon. Thirty-three African states (out of 55) have ratified the Rome Statute, making it the second largest group in the ICC. Notably absent are most of North Africa (but Tunisia is party) and Eastern Africa (Kenya and Djibouti are party), and a good swath of Southern Africa (although Angola, Zimbabwe, and Mozambique are party). Africa is also the site of all ongoing prosecutions, which, for practical purposes and for the time being, makes the ICC an African international criminal court of sorts. Twenty-eight out of 35 states of the Americas are party, including Canada, but not the United States, El Salvador, Nicaragua, Cuba or a number of other small Caribbean states. Finally, only 17 Asian and Pacific region states are ICC members. China, India, Pakistan, Iran, Iraq, and Indonesia are not. The only parties in the Arab world are Jordan and Tunisia. Each of these states has joined either because it is a western-style, liberal democracy (e.g. Japan, South Korea, Australia, New Zealand, and a handful of Pacific Island nations), or because it fears internal conflict or external aggression, and hopes the ICC might deter those threats (e.g. Mongolia, Afghanistan, Bangladesh, and Cambodia). The paltry acceptance of the ICC in Asia probably correlates with the absence of regional courts of any sort—human rights, economic integration, or otherwise—in this part of the world.

One day the ICC might reach universal acceptance, but that seems unlikely at least in this generation. Then again, the fact that a state has not ratified the Rome

<sup>3</sup> For a complete list, see in this handbook, Annex 2, States Subject to Compulsory Jurisdiction (as at July 1, 2013).

<sup>4</sup> For an overview at a glance of the reach of the ICC, see, in this handbook, Fold-out Chart 1, International Judicial Bodies: Compulsory Jurisdiction Across the Globe (International Criminal Court.)

Statute does not mean that it is beyond the ICC's reach. ICC jurisdiction can be extended by fiat of the Security Council to any state, which has happened in the cases of Sudan and Libya. This shields the five permanent members of the Security Council and their closest allies, but not always and not each ally. A state can also refer itself, as Mali recently did in order to grapple with a nasty Al Qaeda-inspired insurgency in the north.

Mapping the reach of the ICJ and ITLOS is a considerably more challenging exercise, for ratification of the legal instruments that created them—the UN Charter and the UN Convention on the Law of the Sea, respectively—does not guarantee acceptance of jurisdiction.<sup>5</sup>

To date, the Law of the Sea Convention has received 163 ratifications, including that of the European Union. Most prominent among the outliers is the United States. Notably, one of the reasons the United States has adduced for failing to ratify this global treaty, despite overwhelming evidence that it would be in its national interest to do so, is the fact that the treaty has a compulsory dispute settlement procedure for certain kinds of disputes.<sup>6</sup> Yet the United States is not alone in its rejection of the Law of the Sea Convention. It is joined by other significant states that are otherwise familiar with international adjudication, such as Turkey, Peru, Colombia, and Venezuela. Each of these has failed to ratify the Law of the Sea Convention for its own legal and political reasons. Finally, in the list of states that are not party to the Convention, we also find several of the usual outliers of international adjudication, such as Syria, most central Asian former Soviet Union Republics, Ethiopia, Eritrea, Iran, and Libya.

As previously explained, ratification of the Law of the Sea Convention, although necessary, is not sufficient to establish jurisdiction of its dispute settlement bodies and procedures.<sup>7</sup> Although under the Convention the default is compulsory adjudication of disputes—that is to say, dispute settlement procedures can be triggered unilaterally—disputes arising out of the exploration and exploitation of the seabed, and disputes concerning coastal states' sovereign rights with respect to the living resources in their exclusive economic zones, are not subject to compulsory adjudication.<sup>8</sup> Moreover, states can opt out of compulsory dispute-settlement procedures in disputes concerning sea boundary delimitations, historic bays or titles, military and law enforcement activities, and issues related to maintaining peace and security

<sup>5</sup> For a complete list, see in this handbook, Annex 2, States Subject to Compulsory Jurisdiction (as at July 1, 2013). See also Ch. 2.

<sup>6</sup> See J Alvarez, "Judicialization and Its Discontents" (American Society of International Law, President's Column, January 31, 2008). <<http://www.asil.org/ilpost/president/preso80131.html>> accessed February 1, 2013.

<sup>7</sup> UN Convention on the Law of the Sea (adopted December 10, 1982, entered into force November 16, 1994) 1833 UNTS 397.

<sup>8</sup> See generally N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005).

that are being dealt with by the UN Security Council.<sup>9</sup> At least 35 states have indeed opted out of compulsory adjudication for one of these issues.<sup>10</sup>

Further, the Convention does not provide for a single dispute settlement procedure, but rather offers four alternatives: the ITLOS, the ICJ, and two different types of special arbitration, called Annex VII and Annex VIII arbitration, respectively. The mechanism that will be used is the one that both parties accept. Should the parties not accept the same mechanism, and the dispute is of a type subject to compulsory adjudication, the default mechanism is not ITLOS but rather ad hoc arbitration under Annex VII of the Convention.

All of this creates an intricate and ever-changing matrix that makes it impossible to neatly and precisely map which states are subject to the jurisdiction of what procedures or bodies for a given kind of dispute.<sup>11</sup> To date, 33 states party to the Law of the Sea Convention have made a declaration indicating ITLOS as a chosen means of dispute settlement—either exclusively or in concurrence with others.<sup>12</sup>

Likewise, it is difficult to tell which states are subject to the jurisdiction of the ICJ at any given time. Cases can be heard by the ICJ if both states have agreed, ad hoc, to refer the matter; if there is a clause in the treaty at dispute conferring jurisdiction to the court; if both states have made a unilateral optional declaration conferring jurisdiction to the court; or if the state has not accepted jurisdiction at the time the case had been filed, but subsequently decides to nonetheless accept jurisdiction and appear before the court (*forum prorogatum*). There are hundreds of bilateral and multilateral treaties that give the ICJ jurisdiction to hear disputes at the request of any party. To date, 69 states have filed optional declarations of acceptance of the court's jurisdiction. Most of these are states that usually participate in international adjudication and are subject to the jurisdiction of other international courts. Often, however, their declarations to the ICJ are replete with exceptions. There are endless opportunities for states to agree to refer disputes ad hoc or to accept the court's jurisdiction after the beginning of proceedings.

The United States' history with the court perfectly illustrates the difficulty of mapping the ICJ's reach. While it is often said that the United States is reluctant to submit itself to compulsory international adjudication and, in particular, shuns the ICJ, in reality it is the state that has most often appeared before the court, both as applicant and respondent. Just by number of cases litigated—or attempted to

<sup>9</sup> UN Convention on the Law of the Sea, note 7, Art. 298.

<sup>10</sup> See United Nations Division for Ocean Affairs and the Law of the Sea, "Settlement of Dispute Mechanisms" <[http://www.un.org/Depts/los/settlement\\_of\\_disputes/choice\\_procedure.htm](http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm)> accessed February 1, 2013.

<sup>11</sup> For up-to-date data on choice of dispute settlement procedures, see "Settlement of Dispute Mechanisms," note 10.

<sup>12</sup> "Settlement of Dispute Mechanisms," note 10.

litigate—the United States should be considered the ICJ's most ardent supporter. But the story is much more complicated than that.<sup>13</sup>

At the global level, the two main bodies arbitrating disputes involving states are the PCA and ICSID. Again, participation in these two arbitration mechanisms is not complete. To date, 158 states have ratified the ICSID Convention,<sup>14</sup> a number comparable to the membership of another international regime that fosters international trade and investment: the WTO. However, there are significant discrepancies between the memberships of the two. Notable ICSID absences are: Canada; EU member Poland; several economic superpowers-to-be, including India, Brazil, Mexico, South Africa, and Russia; a populist trio of Latin American states comprised of Venezuela, Bolivia, and Ecuador, all of which withdrew recently; and some of the usual outliers of international adjudication, such as Libya, Iran, Iraq, Ethiopia, Myanmar, and Cuba. It should be stressed that states that are members of ICSID are not *ipso facto* exposed to litigation. Whether arbitral tribunals convened under the aegis of ICSID have compulsory jurisdiction depends on the given investment treaty. Moreover, disputes can still be arbitrated within the ICSID framework even if the investor state against which the case is brought is not party to the Convention. This is done under an additional set of rules, called the Additional Facility, but is a relatively rare event.

As for the PCA, 115 states have acceded to one or both of the regime's founding conventions: the 1899 and 1907 Hague Conventions.<sup>15</sup> All major developed states are members of the PCA. Again, the absences are concentrated in Africa, Central Asia, the Caribbean, the Pacific Islands, and parts of Southeast Asia. As in the case of the ICSID, PCA members are not exposed *ipso facto* to litigation. Whether a PCA arbitral tribunal has jurisdiction and whether that is compulsory depends on the language of the given treaty. In the end, being a member of the PCA just means having a stake in its functioning—including paying for its expenses and having a say in its management—but it does not signal acceptance of international adjudication *per se*.

## 1.2 Regional

As Karen Alter illustrated, most international adjudicative bodies are not found at the global level, but at the regional one.<sup>16</sup> There are several dozen of them if one

<sup>13</sup> See S Murphy, "The United States and the International Court of Justice: Coping with Antinomies" in C Romano (ed.), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press 2009) 46.

<sup>14</sup> For information on ICSID, see, in this handbook, Schreuer, Ch. 14.

<sup>15</sup> For information on the PCA, see, in this handbook, Murphy, Ch. 9.

<sup>16</sup> See, in this handbook, Alter, Ch. 4, at section 1. See also Fold-out Chart 1, International Judicial Bodies: Compulsory Jurisdiction Across the Globe (Judicial Bodies of Regional Integration Agreements and Human Rights Courts: Overlapping Jurisdictions).

includes those that are barely active or dormant.<sup>17</sup> A complete review is beyond the scope of this chapter, but we will examine the major ones.

### 1.2.1 *Europe*

Europe is arguably the most judicialized continent, although one probably needs to distinguish between Western and Eastern Europe. Indeed, judicialization is high in the west but less so in the east. After the devastations suffered during World War II, Europeans seem to have had a “Kantian epiphany,”<sup>18</sup> launching a continent-wide quest for peace, security, and prosperity hinged on democracy and the rule of law, first in the West and then, after the end of the Cold War, extending to the East. The construction of Europe essentially rested on two main judicial pillars: the European Court of Justice (ECJ), now called the Court of Justice of the European Union (CJEU), and the European Court of Human Rights (ECtHR). Of the two, only the ECtHR has continent-wide reach.

Forty-seven European states, all members of the Council of Europe, are subject to the jurisdiction of the ECtHR, the only notable exception being Belarus. However, only the 28 members of the European Union are subject to the jurisdiction of the CJEU. Unlike the Council of Europe, the European Union does not have continent-wide reach. Its reach into the North, Balkans, Alps, and East is somewhat limited, spurring alternative projects of judicialization. Thus, Norway, Iceland, and Lichtenstein are subject to the European Free Trade Association (EFTA) Court, an appendix of the EU project.<sup>19</sup> At the eastern end of the continent, Russia has led a judicialization project that serves as an alternative to that of the EU and CJEU. Together with other former Soviet republics it has created two regional courts: the Economic Court of the Commonwealth of Independent States, which has been striving to make its voice heard and respected in a region of the world where the rule of law still struggles mightily,<sup>20</sup> and, more recently, the Court of the Eurasian Economic Community, an organ of the five-member Eurasian Economic Community, Customs Union and Common Economic Space.<sup>21</sup>

In the European landscape, one intriguing peculiarity is the Holy See. Although it has a tradition of welcoming international adjudication as a peaceful alternative

<sup>17</sup> See, in this handbook, Romano, Ch. 6, at section 1 and Ch. 1, at section 2, and Fold out Chart 1, International Judicial Bodies: Taxonomic Timeline.

<sup>18</sup> J Alvarez, “The New Dispute Settlers: (Half) Truths and Consequences” (2003) 38.3 *Tex. Int’l L.J.* 405–44, 429 and ff.

<sup>19</sup> See, in this handbook, Baudenbacher and Clifton, Ch. 12, at section 2.2.

<sup>20</sup> See Z Kembayev, *Legal Aspects of the Regional Integration Processes in the Post-Soviet Area* (Berlin: Springer 2009) 60 (“... As of the present, the Court consists of merely five judges representing only five CIS countries: Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan, which fully reflects a rather insignificant volume of workload of this judicial body and consequently the corresponding degree of unwillingness on the part of the CIS states to solve their disputes through the Court.”).

<sup>21</sup> See <<http://sudevrazes.org/en/main.aspx>> accessed June 1, 2013.

to power and violence—and has supported, in words, the creation of many international courts and tribunals—it is the only state in Europe not to have accepted the compulsory jurisdiction of any judicial body. This can probably be explained by the idiosyncratic nature of that state and its politics. A study of the Holy See's attitude towards international adjudication is still missing.

### 1.2.2 *Americas*

The Western Hemisphere has been primarily shaped by Spanish colonization and decolonization, the rise of the United States and, during the second half of the twentieth century, resistance to communism. Bound together by their common Spanish heritage and the Bolivarian myth, states in Central and South America have tried since the nineteenth century to bring about economic and political integration. Remarkably, Central America started moving toward judicialization a half-century before Europe.<sup>22</sup>

After the end of World War II, a desire to keep communism outside the western hemisphere led to the creation of the Organization of American States (OAS), which, in turn, gave rise to the only pan-continental judicial body: the Inter-American Court of Human Rights (IACtHR). Yet unlike the ECtHR, whose jurisdiction is obligatory for all Council of Europe member states, the jurisdiction of the IACtHR is only optional for member states of the OAS. Currently, only 21 out of a total of 35 OAS members have accepted its jurisdiction. Canada and the United States in North America, Cuba and Jamaica in the Caribbean, and, recently, Venezuela in South America are the most glaring absences. The other outliers are mostly small Caribbean island states. The hostility of “Chavista” Venezuela toward international adjudication has manifested itself also in its withdrawal from the ICSID, and the like-minded governments of Ecuador and Bolivia have followed suit.<sup>23</sup>

The long tradition of integration between states in the region has given rise to several more regional adjudicative bodies promoting regional economic integration. However, it should be noted that, with the exception of Bolivia, soon to be member of both the Andean Community and Mercosur, regional bodies in the Americas so far do not overlap.<sup>24</sup> They interlock like a puzzle. States are subject to the jurisdiction of one regional court and, possibly, the IACtHR. The only OAS members not subject to any adjudicative system are the Bahamas and Cuba, plus a handful of micro-states such as Antigua and the Turks and Caicos Islands, which are not members of the OAS. While the United States and Canada are not subject to the jurisdiction of any regional adjudicative bodies, they are party to the North

<sup>22</sup> See, in this handbook, Romano, Ch. 6, at section 2.4.

<sup>23</sup> Romano, Ch. 6, at section 2.3.

<sup>24</sup> See in this handbook, Fold-out Chart 1, International Judicial Bodies: Compulsory Jurisdiction Across the Globe (Judicial Bodies of Regional Integration Agreements and Human Rights Courts: Overlapping Jurisdictions).

American Free Trade Agreement, which provides for compulsory dispute settlement and arbitration on a limited number of issues.<sup>25</sup>

### 1.2.3 *Sub-Saharan Africa*

Sub-Saharan Africa is home to the largest number of international adjudicative bodies.<sup>26</sup> To date, the only two states in this continent not subject to any international court are São Tomé and Príncipe and Somalia.<sup>27</sup> Much of Africa's international judicial landscape has been shaped by the forces of the Cold War and rejection of European colonialism. The continent's fight for self-determination culminated in the early 1960s with the birth of 32 new sovereign states. In 1963, these states created the Organization of African Unity (OAU), a precursor to today's African Union. The goal of the OAU was to promote African solidarity and cooperation, and to help African countries overcome the legacy of colonialism. For nearly 20 years the OAU focused on decolonization and fighting the apartheid systems of South Africa and Rhodesia—two objectives that the various African governments could all endorse.

The OAU (or African Union since 2002) is the linchpin of the only pan-African adjudicative body: the African Court on Human and Peoples' Rights (ACtHPR). The institution emerged slowly, starting in 1979 with the drafting of the Banjul Charter of Human and Peoples' Rights, then the African Commission, then the Court, and maybe someday the African Court of Justice and Human Rights. Still, most of the AU members have not yet accepted the ACtHPR's jurisdiction. To date, only 23 states have done so. Those that have not include the whole of the Horn of Africa, half of Northern Africa (although Algeria, Tunisia, and Libya have ratified), and most of Southern Africa.

From Africa's big bang in 1960 through to the end of the 1980s, African countries began a number of initiatives aimed at intra-Africa integration. They generally failed. Recently emerged from colonization, new African leaders gave priority to crafting specific national identities, an exercise that ran counter to economic and political integration. Moreover, most African states traded very little with each other. Privileged economic relationships with former colonial powers (and now with the EU) diminished the importance of inter-African integration. Finally, support for authoritarian leaders during the Cold War and the funding of proxy wars kept African governments divided.

The end of the Cold War left free trade and market-based economies the only viable paradigm for development. It also opened the way for democracy and accountability of national leaderships, creating space for the rise of regional economic courts and criminal courts. Thus, in the struggle to achieve a certain degree of stability and

<sup>25</sup> See, in this handbook, Baudenbacher and Clifton, Ch. 12.

<sup>26</sup> For an overview of African international courts and tribunals, see, *African International Courts and Tribunals*, <<http://www.aict-ctia.org/>> accessed February 1, 2013.

<sup>27</sup> However, São Tomé and Príncipe is a member of ICSID.

prosperity, Africa has given birth to a large number of international judicial institutions—although the overwhelming majority has only sub-regional scope.<sup>28</sup> As we saw, the only potentially pan-African court is the ACtHPR. Yet many of these courts have either been nonstarters, have floundered after a few years, or are languishing with a paltry docket.<sup>29</sup> All in all, given that most of these institutions are very new, it is hard to know what they will become. This, however, could also suggest that commitment to independent third-party adjudication and international rule of law might be, at least for the ruling elites of many African states, only skin-deep.

#### 1.2.4 *Arab World*

The contemporary history of the Arab world is similar to that of Africa: colonialism gave way to self-determination, and during the intoxicating nationalist days that followed independence it seemed that waning colonial influence would bring with it democracy, respect for human rights, and greater economic justice. However, as in Africa, Cold War tensions stymied calls for democracy and human rights and instead gave birth to and nurtured dictatorial political leaderships. Still, there are a few crucial differences between Africa and the Arab world. First, several Arab states have significant oil and gas deposits. The West's thirst for these resources kept oil-rich Arab leaders close to the West and away from the USSR. Also, oil and gas revenue meant that these states were not dependent on outside powers or international institutions for financial and economic support. Second, Arab politics have long been monopolized by the Israeli question, with some states taking a hard line and others accepting co-existence. Third, the 1979 Iranian revolution and the Soviet invasion of Afghanistan—along with the decade-long jihad to liberate it—exacerbated tensions in the Islamic world, creating a divide between secularly minded and theocratic and fundamentalist actors.

To these political and historical factors, one might add some general cultural ones, particularly relating to Islam and the Arab milieu from which it sprang. These cultural preferences typically disfavor layering judicial remedies, the absence of hierarchy in religious—and, consequently, legal—authority, and hesitation to admit into the adjudicative process sources of law other than Sharia.<sup>30</sup> But one has to be extremely wary of cultural stereotypes and generalization. A satisfactory treatment of the attitudes and behaviors of the Islamic world, or at least the Arabic world, toward international adjudication has yet to be written.

<sup>28</sup> See K Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014) 98–9 and 151–2. See in this handbook, Fold-out Chart 1, International Judicial Bodies: Compulsory Jurisdiction Across the Globe (Judicial Bodies of Regional Integration Agreements and Human Rights Courts: Overlapping Jurisdictions).

<sup>29</sup> See, in this Handbook, Romano, Ch. 6.

<sup>30</sup> M Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981) 194–222.

Be that as it may, these are some factors that might explain why, in stark contrast to Africa, the Arab world is one of the least judicialized areas of the world despite somewhat similar political evolutions. But it was not destined to be so. The main international organization in this region is the Arab League, which comprises 22 states, including Somalia, stretching from the Atlantic Ocean in the west to the Arabian Sea in the east, and from the Mediterranean Sea in the north to the Horn of Africa and the Indian Ocean in the southeast. Although the Arab League should have been endowed from the outset with an Arab Court of Justice, the project did not take off.<sup>31</sup> In the early 1980s, the League successfully gave birth to a judicial body with very limited jurisdiction, the Arab Investment Court (AIC). Yet, the AIC started operating only in 2003 and, to date, has issued only nine rulings.<sup>32</sup> In the larger Islamic World other attempts at judicialization have also been made, mostly to ensure a prominent role of Islamic Sharia in judicial decision-making, but with no success.

As to international criminal law, again, attitudes are lukewarm if not outright hostile in this part of the globe. The only states in the region that have ratified the Rome Statute are Tunisia and Jordan. Palestine might be next, should its statehood finally be accepted. There is also a hybrid international criminal court, the Special Tribunal for Lebanon, but the Byzantine process that led to its creation—and the fact that, for reasons of security, it is not based in Lebanon but in a suburb of The Hague—is telling of the generally hostile attitude toward international adjudication that prevails in the region.

Judicialization can hardly take root in a region where the rule of law is not firmly accepted and entrenched domestically. But if politics change in the Arab region, the fortunes of international judicialization might do so as well. Starting with the end of the Cold War and Iraq's invasion of Kuwait, the whole Arab world has entered a turbulent phase of its history that has not yet ended. The "Arab Spring," which begun in 2011 and swept away many of the historical leaders in the region, is just its latest chapter. In March 2013, at the Arab League Summit in Doha, Qatar, a proposal presented by Bahrain to create an Arab Court of Human Rights was approved.<sup>33</sup> A high-level committee of legal experts was charged with drafting the statute of the court, and asked to submit its conclusions to the Ministerial Council of the League at its next session.<sup>34</sup> Yet, the fact that, to date, the Arab Charter of Human Rights has been ratified by only 11—including embattled Syria—out of 22 members of the Arab League,<sup>35</sup> and that the proposal was presented by the Kingdom of Bahrain, a state

<sup>31</sup> See, in this handbook, Romano, Ch. 6, at section 1.2.

<sup>32</sup> See WB Hamida, "The First Arab Investment Court Decision" (2009) 75 *Journal of World Investment & Trade* 699–721.

<sup>33</sup> <<http://www.mofa.gov.bh/egovservices/achr/InfoEn.aspx>> accessed April 1, 2013.

<sup>34</sup> Final Statement of the Doha Meeting, held on March 26, 2013, Order 573 (p. 6) (translated from Arabic), available at <[www.lasportal.org/](http://www.lasportal.org/)> accessed April 1, 2013.

<sup>35</sup> Arab Charter on Human Rights, concluded on May 22, 2004, reprinted in 12 *Int'l Hum. Rts. Rep.* 893 (2005), entered into force March 15, 2008.

that has responded to Arab Spring uprisings in its territory with a ham fist, makes one question the actual aims of this project.

### 1.2.5 *Asia-Pacific*

Finally, as is the case of the Arab World, there are few adjudicative bodies in the vast Asia-Pacific region, stretching from Iran to the west, to the Pacific shores in the east. So far, the only active regional courts with jurisdiction extending into the Asian continent—which for that matter only cover former Soviet Republics—are actually European courts: the ECtHR, the Economic Court of the Commonwealth of Independent States, and the Court of the Eurasian Economic Community.<sup>36</sup>

The shortage of adjudicative bodies in a vast region—home to two-thirds of the world population—is a puzzle to scholars and a mortgage on the future of the international judicialization project. History, power, philosophical and religious traditions, and geography could all provide some explanations. However, the vastness and sheer diversity of the region make it impossible to articulate plausible pan-Asian accounts.

Emphasis on social harmony—a distinctive trait of Confucianism, Daoism, and Buddhism—and the corresponding rejection of the typical Western system of adversarial legalism (in favor of mediation as dispute-settlement tool of choice) might explain diffidence towards international adjudication in Eastern Asia.<sup>37</sup> But those factors do not explain the growing share of litigation of East Asian nations in the international trade and commercial sector before international and transnational adjudicative bodies. Further, these cultural factors do not explain the attitude of India, or of the many predominantly Islamic states of Central, Southern, and Western Asia.

The larger historical forces that sparked judicialization in other regions did not have the same effects here. Decolonization did not give rise to any pan-Asian integration movement, as it did in Africa. Throughout the Cold War and beyond, communist China remained domestically and regionally powerful, able to support friendly local leaders and challenge the United States. The robust presence of a socialist/communist alternative in the region reduced demands for liberal reform. The absence of a common external threat provided few incentives for Asian states to cooperate, whereas opposition to communism unified many states in the Americas and Western Europe. After the end of the Cold War, while the market-economy paradigm spread—and was embraced even by China—democracy and guarantees of human rights did not follow suit. Again, China, which historically has shunned

<sup>36</sup> One should add to these the OSCE Court of Conciliation and Arbitration, which is not active. See, in this handbook, Romano, Ch. 6, at section 1.3.

<sup>37</sup> See generally, R Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (London: Routledge 2003); Shapiro, note 30, 157–93.

international adjudication (with a partial and very recent exception of the WTO), provides a convincing alternative to paradigms of judicialization, be them of the EU–ECJ or the NAFTA–WTO kind.

Power distribution and imbalances might be another explanation. The area is the scene of bitter rivalries between many major powers: India/Pakistan; India/China; Iran/Iraq; China/Japan; Japan/South Korea; or Thailand/Cambodia. In other parts of the globe, judicialization has often happened because there has been one or more hegemonic power that has taken the lead toward first integration and then judicialization. Here, none of these—each for its own cultural, political, and historical reasons—has taken on a similar role. The lack of catalysts and the lack of near-neighbors willing to submit to robust regional or global judicial oversight have reduced peer pressure to submit to international judicial oversight.

Judicialization on a continent-wide scale in Asia is probably not attainable as it happened in Europe. Regional courts could emerge, but only away from the shadow of major regional hegemony. In this regard, Southeast Asia seems to have all the necessary ingredients. The Association of Southeast Asian Nations (ASEAN) was created in 1967 in the heat of the Vietnam War by Indonesia, Malaysia, the Philippines, Singapore, and Thailand. The five founding members were brought together by the common fear of communism, a reduced faith in or mistrust of external powers, and a desire for economic development. From the outset the mantras of the organization have been sovereignty, non-interference, minimal institutionalization, and non-confrontation. Judicialization was definitively not on the cards. Indeed, the “ASEAN Way” has been described as a process of “regional interactions and cooperation based on discreteness, informality, consensus building and non-confrontational bargaining styles” that contrasts with “the adversarial posturing, majority vote and other legalistic decision-making procedures in Western multilateral organizations.”<sup>38</sup>

Over the years, ASEAN membership expanded to ten and included former communist states, such as Vietnam and Laos, and troubled countries, such as Myanmar and Cambodia. Yet this did not prevent ASEAN from evolving—and probably caused it to change. Since the beginning of the 2000s there has been a shift in attitudes within ASEAN, calling into question the “ASEAN Way” and moving toward greater institutionalization, legalization, and possibly judicialization. First, in November 2004, the bare-bones ASEAN dispute settlement system was enhanced via adoption of a WTO-style process—ad hoc panels for the first stage and then an ASEAN Appellate Body, called the Enhanced Dispute Settlement Mechanism.<sup>39</sup> As in the case of Mercosur (Southern Common Market, an association of Latin American States),

<sup>38</sup> A Acharya, *Constructing a Security Community in South East Asia: ASEAN and the Problem of Regional Order* (London: Routledge 2001) 63.

<sup>39</sup> W Woon, “The ASEAN Charter Dispute Settlement Mechanisms” in T Koh, R Manalo and W Woon (eds), *The Making of the ASEAN Charter* (Singapore: World Scientific Publishing 2008).

ASEAN member states can choose to adjudicate cases in the WTO system instead of the ASEAN system, and thus far member states seem to prefer the WTO system. This probably explains why the ASEAN mechanism remains unused. Second, the adoption of the ASEAN Charter in 2007 turned ASEAN into a formal international organization that aims to create a single free-trade area, EU-style, for the region.<sup>40</sup> Among the fundamental principles inspiring the new ASEAN are: adherence to the rule of law, good governance, the principles of democracy and constitutional government, respect for fundamental freedoms, and promotion and protection of human rights—all precursors of judicialization. The Charter also led to the creation of the ASEAN Intergovernmental Commission on Human Rights in 2009,<sup>41</sup> which in turn led to adoption of the ASEAN Human Rights Declaration in 2012.<sup>42</sup> Should ASEAN follow the same trajectory followed by the OAS and the Council of Europe, there might one day be an ASEAN Charter of Human Rights whose implementation might be supervised by a quasi-judicial and/or a judicial body.

Finally, only 17 out of about 40 states in the Asian Pacific are ICC members—and most of these are Pacific Islands, including Australia and New Zealand. The overall scarcity of judicialization in the Asian-Pacific region probably explains the generally cold attitude toward international criminal adjudication. Yet again, in relative terms, Southeast Asia seems to be more positively inclined toward international adjudication than most of the continent. The three states in this sub-region that have ratified the ICC statute are Cambodia, the Philippines, and Timor-Leste. The same sub-region is home to two Asian hybrid criminal courts: the Serious Crimes Unit/Panel in East Timor (now discontinued) and the troubled Extraordinary Chambers in the Courts of Cambodia.

## 2 UNEVEN USAGE

Existence of an international adjudicative body and acceptance of its jurisdiction create only a *potential* for litigation. Whether the body is going to be activated in any given situation depends on a cost–benefit analysis done by the applicant (the plaintiff or, in the case of international criminal courts, the Prosecutor), or both

<sup>40</sup> Association of South East Asian Nations Charter, adopted November 20, 2007, entered into force December 15, 2008, <<http://www.asean.org/asean/asean-charter/asean-charter>> accessed February 25, 2012.

<sup>41</sup> ASEAN Intergovernmental Commission on Human Rights <<http://aichr.org/>> accessed February 1, 2013.

<sup>42</sup> ASEAN Human Rights Declaration, adopted November 18, 2012, <<http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>> accessed February 1, 2013.

parties (if litigation is consensual). However, even when jurisdiction has been accepted and is compulsory, cases often fail to be litigated for a number of factors, including issues of admissibility or jurisdiction, or because the issue is addressed through alternative dispute resolution means.<sup>43</sup>

Thus, actual use by all kinds of parties is a much more precise indicator of the attitudes toward international adjudication than availability. In this handbook, Natalie Klein's chapter analyzes patterns of utilization of several bodies.<sup>44</sup> She has also published recently a collection of scholarly essays that map for what themes and by which states which international adjudicative bodies are resorted to.<sup>45</sup> It is not the place here to summarize that extensive research. However, the main takeaway is that patterns of utilization are considerably uneven. While a significant number of actors (states or non-governmental entities) at some point have participated in the odd international litigation, a large share of all cases in any given international adjudicative forum has been litigated by a small number of repeat users. As international litigation has the effect of reasserting and reinforcing the institutions of international law where cases are being litigated, thus strengthening the international legal system as such, arguably those actors that do not participate in international litigation are free riding, reaping the benefits of the existence of an adjudicative system, paying neither the price of its financing, nor sharing the risks inherent in litigation.<sup>46</sup> Normatively, one can wonder whether action should and could be taken to ensure that as wide a range of actors as possible participates in the system.

### 3 UNEVEN THEMATIC COVERAGE

The areas of international law and relations where judicialization has been so far the most salient are largely those close to the classical liberal interests: trade liberalization, intellectual property, property rights—including territorial delimitation, investors' rights, protection of basic human rights (including those of corporations and associations), and retrospective trials of perpetrators of certain kinds of carefully delimited atrocities.<sup>47</sup>

<sup>43</sup> On jurisdiction and admissibility, see generally, in this handbook, Shany, Ch. 36.

<sup>44</sup> See, in this handbook, Klein, Ch. 26.

<sup>45</sup> N Klein (ed.), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014).

<sup>46</sup> C Romano, "Litigating international Disputes: Where to?" in Klein, note 45.

<sup>47</sup> B Kingsbury, "International Courts: Uneven Judicialization in Global Order" in J Crawford and M Koskeniemi (eds), *Cambridge Companion to International Law* (Cambridge University Press 2012) 203–27.

Yet, while extensive, judicialization has not reached many aspects of international law and relations. Many issues, while sometimes largely legalized,<sup>48</sup> are not judicialized. The list is long. These include most military and intelligence activities, including collective defense, arms control, disarmament, nuclear weapons, nuclear energy governance, and counter-terrorism; global and regional financial governance; cyberspace policing and data-sharing; most religious issues; migrations and most refugees' rights; most issues of taxation, education, social welfare, labor, and local government; urban policy; corruption; social violence; land, water, and atmosphere—including climate—management, as well as management of global commons and natural resources; hazardous waste management and disposal; decision-making processes in international bodies; forms of pressure (e.g. sanctions) or encouragement (e.g. aid) by global bodies toward specific governments and their policies; humanitarian assistance and disaster response; and most forms of inequality and distributive justice.<sup>49</sup>

Granted, occasionally issues in some of these broad areas do reach an international court. For instance, the ICJ has ruled on some security-related issues, such as the legality of nuclear weapons or the wall in Palestine.<sup>50</sup> Environmental disputes have been litigated before a wide variety of adjudicative bodies—global and regional, judicial and arbitral—and there is definitively potential for more, especially under the Law of the Sea Convention.<sup>51</sup> But what these areas are lacking are specialized and dedicated bodies, which are to be found in the more judicialized fields. There is not yet an international court for the environment,<sup>52</sup> an international bankruptcy court,<sup>53</sup> or an international loans tribunal,<sup>54</sup> a cyberspace and Internet international court,<sup>55</sup> or a NATO court. The relative scarcity of judicialization of these subject areas, or dedicated adjudicative bodies, is explicable.<sup>56</sup> In many cases it

<sup>48</sup> K Abbot et al., “The Concept of Legalization” (2000) 54.3 Int'l Org. 401–19.

<sup>49</sup> Kingsbury, note 47, at 212.

<sup>50</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, 226; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, 136.

<sup>51</sup> For examples of international environmental disputes litigated before international adjudicative bodies, see generally, C Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (The Hague: Kluwer 2000).

<sup>52</sup> Romano, note 51, at 125–9.

<sup>53</sup> C Seavey, “The Anomalous Lack of an International Bankruptcy Court” (2006) 24 Berkeley J. Int'l L. 499–520.

<sup>54</sup> M Hudson, *International Tribunals: Past and Future* (Washington D.C.:Carnegie Endowment for International Peace and Brookings Institution 1944) 204.

<sup>55</sup> However, the Arbitration and Mediation Center of the World Intellectual Property Organization adjudicates disputes over Internet domain names. See WIPO ADR Arbitration and Mediation Center, “Domain Name Dispute Resolution” <<http://www.wipo.int/amc/en/domains/>> accessed February 1, 2013.

<sup>56</sup> See e.g., A Mondré et al., “Uneven Judicialization: Comparing International Dispute Settlement in Security, Trade, and the Environment” (2010) 4.1 New Global Studies 1–32; Seavey, note 53; Kingsbury, note 47; Romano, *Environmental Disputes*, note 51.

may even be welcome, given the severe limits of what adjudication per se can manage or achieve.

Even in those areas where judicialization has taken place, it might be rather thin. For instance, while human rights in general are fairly judicialized, not all aspects of human rights are. The jurisdiction of most human rights judicial and quasi-judicial bodies is limited to civil and political rights. The judicialization of economic, social, and cultural rights is limited. Also, so far, the ICJ is the only adjudicative body with jurisdiction over "... any question of international law."<sup>57</sup> The subject-matter jurisdiction of all other international courts, global or regional, is limited to a specific area of international law. Almost all new adjudicative bodies have been created to serve and enhance specialized regimes, rather than as courts of general jurisdiction that might reach too far beyond what the creating states wish to see investigated and adjudicated. Moreover, many of these specialized bodies do not have mandates to adjudicate issues concerning the conduct of institutions of which they are part. For instance, the WTO Appellate Body does not rule on major actions or inactions of the WTO, only on what member states do. In NAFTA and the WTO, the contracting states retain the power to re-interpret a treaty if they disagree with a tribunal's interpretation, without needing to formally amend the treaty.<sup>58</sup>

One day these areas of international law and relations might become more judicialized. The global financial crisis that started in 2007 has led many to wonder whether new international judicial institutions would be needed to unravel the complex issues of who owes what to whom when markets melt down. In 2012, a new arbitral institution called the Panel of Recognized International Market Experts in Finance (PRIME) was launched in The Hague with the aim of providing a settlement mechanism for disputes over complex financial products such as derivatives.<sup>59</sup> PRIME offers mediation and arbitration services to settle disputes between private entities such as banks, insurance firms, and pension funds; institutions such as clearinghouses, exchanges, and regulators; and possibly even customers. This is a private endeavor, not unlike a law firm, that is not supported by states. As such, it does not qualify as an international adjudicative body,<sup>60</sup> but its creation might signal a significant trend.

Since the early 1990s, many multilateral environmental regimes have been equipped with so-called "non-compliance procedures."<sup>61</sup> These serve two main

<sup>57</sup> Statute of the International Court of Justice, 33 U.N.T.S. 993, Art. 36.2.b, adopted on June 26, 1945, entered into force on October 24, 1945.

<sup>58</sup> The NAFTA Free Trade Commission used this power in 2001 in response to the first *Pope & Talbot Inc. v. Canada* arbitral award. See NAFTA Claims, "Pope & Talbot Inc. and Canada" <[http://www.naftaclaims.com/disputes\\_canada\\_pope.htm](http://www.naftaclaims.com/disputes_canada_pope.htm)> accessed February 1, 2013.

<sup>59</sup> See P.R.I.M.E. Finance, "Finance Experts" <<http://www.primefinancedisputes.org/index.php/expert-list/financial-experts.html>> accessed February 1, 2013.

<sup>60</sup> See in this handbook, Romano, Alter, and Shany, Ch. 1, at section 1.

<sup>61</sup> At the last count (2011), there were 18 of them. See C Romano, "A Taxonomy of International Rule of Law Institutions" (2011) 2.1 JIDS 259–61.

functions: the review of periodic reports by states about the measures they have taken to implement obligations contained in the relevant treaties, and consideration of cases of alleged non-compliance. Typically, non-compliance procedures are “non-confrontational, non-judicial and consultative in nature.”<sup>62</sup> In most cases, they are made of representatives of states, even though sometimes they might be bound to “serve objectively and in the best interest of the Convention.”<sup>63</sup> However, in a few significant cases, such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change, they are comprised of independent experts serving in their personal capacity, as international judicial bodies do. Some of these procedures might one day acquire more judicial features.

## 4 CONCLUSIONS

International judicialization is inevitably uneven.<sup>64</sup> As long as the world is divided into sovereign states, judicialization that is truly universal, complete and homogeneous across regions and subjects will never happen. The international judicial system will remain incomplete and fragmented, reflecting the wide and uneven international distribution of power. Indeed, if there is any lesson to draw from the history of the creation of national judicial systems, it is that where power is not centralized and consolidated, a true judicial system, with comprehensive coverage, will not emerge.

If incomplete judicialization is thus an inevitable, if not outright desirable, fact, what should be made of it? We tried to tease out historical, political, and cultural reasons for variations in judicialization between the regions of the globe. We showed how participation in litigation before international judicial bodies is increasing, involving a large number of states and non-state actors, but also how only a handful of states have become repeat users and been strongly socialized to the practice of international litigation. We showed how starting from issues close to the classical

<sup>62</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 2161 UNTS 447, Art. 15 (adopted on June 25, 1998, entered into force on October 30, 2001).

<sup>63</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 UNTS 126 (adopted on March 22, 1989, entered into force on May 5, 1992); Decision VI/12 on Establishment of a Mechanism for Promoting Implementation and Compliance (February 10, 2003), UNEP/CHW.6/40, Annex, para. 5.

<sup>64</sup> C Romano, “Progress in International Adjudication: Revisiting Hudson’s Assessment of the Future of International Courts” in R Miller and R Bratspies (eds), *Progress in International Law* (Leiden: Nijhoff 2008) 433–50, at 449.

liberal interests, international courts have gradually addressed a longer list of concerns, but that several salient aspects of international law and relations still show little sign of judicialization. The aim was not to put forward an exhaustive treatment of the shadow zones of international adjudication, but rather to highlight how little we still know about why and where international adjudicative bodies are not created; when states decide not to subject themselves to international jurisdiction and why; why certain issues seem to be off-limits for international courts; and why certain states or other actors still do not litigate, or litigate less than they would be expected to do.

It is just as important to understand the conditions under which international judicialization does not happen as it is to understand the conditions under which it does. Knowing the limits of international judicialization helps us to trace its future trajectory with greater confidence. As Benedict Kingsbury observed, at the beginning of the twenty-first century, perceptible changes in the global distribution of power among major states—and shifts in dominant approaches to the international legal order—put into question both the prospects of governance through major new comprehensive global legal regimes, and the creation of new courts under such treaties.<sup>65</sup> No new adjudicative bodies with global scope are in sight, and a World Court of Human Rights is a necessity that remains a hardly attainable dream.<sup>66</sup> Yet the global level has traditionally been difficult terrain for judicialization. If new international courts are going to emerge, it will be at the regional level.

If the establishment of more is unlikely, at least at the breakneck pace of the past two decades, the increase in caseload and judicial output of existing adjudicative bodies is likely to continue. With few exceptions, most bodies have excess capacity that has not yet been tapped and potential users are still climbing the learning curve. Yet beyond these incremental advances, shifts in the tectonic plates of international politics raise serious questions over the long term.

Adjudication is a product of liberal and legalist juridical orders that are particularly associated with democracy, rule of law, open markets and information flows, basic liberal property and political rights setting limits on state powers, and some hierarchical governance structures dominated by liberal polities and their corporate and civil society groupings.<sup>67</sup> A multi-polar global political order, especially one where the relative power of the United States and Europe is decreasing, is already bringing about ideas about what global governance is and how law and legal

<sup>65</sup> Kingsbury, note 47, at 223–4.

<sup>66</sup> M Nowak, “It’s Time for a World Court of Human Rights” in C Bassiouni and W Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Cambridge: Intersentia 2011); J Kozma, *A World Court of Human Rights, Consolidated Statute and Commentary* (Vienna: Neuer Wissenschaftlicher Verlag 2010); C Romano, “Can You Hear Me Now? Making the Case for Extending the International Judicial Network” (2009) 9 *Chi. J. Int’l L.*, 233, 267–8.

<sup>67</sup> Kingsbury, note 47, at 223–4.

institutions can and should function that are quite different from those embodied by contemporary international adjudicative bodies. In this regard, the marginal role played so far in the judicialization project by the vast Asia-Pacific region and the Arab World should be a concern, and not just an academic curiosity.

## RESEARCH QUESTIONS

1. What are the historical, cultural and political factors explaining differences in judicialization between regions? What factors explain the different attitudes and practices of the rising major players of the twenty-first century (e.g. China, India, South Korea, Japan, Brazil, Russia, South Africa, Nigeria)? How do they compare with those of the major members of the European Union (e.g. Germany, France, the United Kingdom, or Italy) and/or the United States?
2. Does participation in international adjudication make states more willing to participate in the future? In other words, does international litigation socialize states to international adjudication? Does participation in one judicial forum increase chances a state will also participate in litigation in another? What does empirical evidence tell us?
3. What are the patterns of utilization of international adjudicative bodies by non-state actors, and what are the factors explaining utilization or neglect?
4. How is it possible to reconcile uneven judicialization of human rights across the globe with their postulated universality and the right of everyone to an effective judicial remedy?

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