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Litigating international law disputes: where to?

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The chapters in this book have tried to map which states, or groups of states, resort to international litigation and under what circumstances; the areas of international law and relations where most litigation seems to occur; and factors limiting the occurrence of international litigation. They yield a rich portrait of the actual state of international litigation at this time in history, a portrait with lights and many shadows. Indeed, despite the plethora of international adjudicative bodies created across time and regions, international judicialization (i.e. the creation and use of international adjudicative bodies) is still remarkably uneven.[1]

First, while there are regions of the globe where there are multiple, overlapping, international adjudicative bodies, there are others where there are none. While some states have accepted the jurisdiction of multiple international adjudicative bodies, others have accepted none. Second, patterns of utilization are inconsistent. Even where there are international adjudicative bodies, often they are used more frequently by certain actors than others. Third, certain areas of international relations have been judicialized significantly more than others.

As some wise person once said, 'Prediction is very difficult, especially about the future.'[2] It is all the more difficult when events are still tumultuously unfolding. After all, the big bang in the history of international adjudication took place only about two decades ago, at the end of the cold war – a few minutes ago in the timescale of the history of international law.

[1] For an overview of the uneven state of international judicialization, see Benedict Kingsbury, 'International Courts: Uneven Judicialization in Global Order', in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 203; Cesare Romano, 'The Shadow Zones of International Judicialization', in Cesare Romano, Karen Alter, and Yuval Shany (eds.), *The Oxford University Press Handbook of International Adjudication* (Oxford University Press, 2013) 90.

[2] Attributed to Neil Bohr (but also to Yogi Bear and Mark Twain). See, e.g., Niels Bohr, Wikipedia: the Free Encyclopedia, available at http://en.wikipedia.org/wiki/Niels_Bohr.

Be that as it may, at the risk of being derided by future generations of scholars, I will venture on some risky predictions.

These days it is popular to wonder whether international litigation has reached a high-water mark.[3] How many more international adjudicative bodies can be created? How much more international litigation can there be? The sense of saturation probably stems from comparison with the not-too-distant past when international courts could be counted on one hand, and litigation was a sporadic event, rarely grabbing headlines.

Will there be more international courts and tribunals in the future? The short answer is a qualified yes. States create international courts either because they need them to do something they cannot do unilaterally or through other means (e.g., the International Criminal Court), or because they are unhappy with the existing international courts (e.g., the International Tribunal for the Law of the Sea (ITLOS) was created as a reaction to the shortcomings of the International Court of Justice (ICJ)). These two factors driving the multiplication of international courts will remain. The question is where and what kinds of new international courts we are likely to see in the not-too-distant future.

Currently, at the global level there are only four judicial bodies active: the ICJ, the World Trade Organization (WTO) Dispute Settlement System; the ITLOS; and the International Criminal Court (ICC). Beside these, there are a number of global international arbitral bodies, the two most important of which are the Permanent Court of Arbitration and the International Center for the Settlement of Investment Disputes.

Granted, none of these is truly global, for none has jurisdiction actually extending to all states. That is either because the organization to which the judicial body is attached does not have universal membership (e.g., the WTO), or the treaty creating the judicial body has not attracted universal ratification (e.g., the ICC), or because, while the organization does have universal (or virtually universal) membership (e.g., the UN), the judicial bodies attached to it (e.g., the ICJ or ITLOS) have jurisdiction only insofar as states have expressly accepted it. Looking at the future from where I am writing, of the four global adjudicative systems the only one that seems to have a reasonable chance of becoming truly universal is the WTO Dispute Settlement System, because of the gravitational effect that the WTO is gaining by now having included in its membership all significant world economies. Despite the aspiration of its founders, the

[3] See, for instance, Vaughan Lowe, 'The Function of Litigation in International Society', (2012) 61 ICLQ 209, 210.

ICC does not seem capable of achieving universal membership for several decades, if ever.

At this time in history, perceptible changes in the global distribution of power among major states and shifts in the dominant approaches to the international legal order put in question the prospects of governance through major new comprehensive global legal regimes.[4] As a consequence, this diminishes the chances of witnessing the creation of new courts under such treaties. Presently, no new adjudicative body with global scope is in the making. The last 'global court' was the ICC, a turn-of-the-millennium adjudicative body. While a World Court of Human Rights would be desirable, if not necessary, to ensure that everyone has access to a binding international remedy, the project still needs to gain sufficient traction among governments to start taking the long road towards actual establishment.[5]

That being said, the global level has traditionally been difficult terrain for judicialization. Most international adjudicative bodies that populate the current scene have sprung up at the regional or sub-regional level. If new courts are going to be created, it is at this level that we shall find them. Thus it is safe to say that more regional economic integration agreements will be negotiated. Most will feature some type of adjudicative body, either with marked judicial features and mimicking the European Court of Justice (ECJ), or with more pronounced arbitral features along the lines of the North American Free Trade Agreement (NAFTA)/WTO model.[6] It is hard to imagine a United States–European Union free trade agreement – a much talked-about project these days – without some sort of dispute settlement arrangement.

Gazing at the puzzle of international adjudicative bodies, one can spot several gaps. For instance, one could imagine that one day, besides regional human rights courts in Europe, the Americas and Africa, there will be one or more in Asia, or at least some of its sub-regions. There are some

[4] Kingsbury, above n. 1, 223.

[5] Manfred Nowak, 'It's Time for a World Court of Human Rights', in Cherif Bassiouni and William Schabas (eds.), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Mortsel, Belgium: Intersentia, 2011) 17; Julia Kozma, *A World Court of Human Rights, Consolidated Statute and Commentary* (Vienna: Neuer Wissenschaftlicher Verlag, 2010); Cesare Romano, 'Can You Hear Me Now? Making the Case for Extending the International Judicial Network', (2009) 9 *Chicago Journal of International Law* 233, 267–8.

[6] Karen Alter, 'The Global Spread of European Style International Courts', (2012) 35 *West European Politics* 135; Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2013).

encouraging signals that South-East Asia might be heading in that direction, and maybe the Arab world might one day have a regional human rights court, too.[7] It would also not be implausible to imagine a regional human rights court gathering together the various island nations of the Pacific.[8] Also, more human rights courts might emerge as a reaction to the shortcomings of existing courts.

In the criminal field, the future is likely to see more hybrid international criminal courts.[9] These ad hoc exercises in national/international justice fill a niche and help an accountability gap. As stated before, the ICC does not enjoy, and will likely never enjoy, universal membership. It also does not have retrospective jurisdiction, since it can only adjudicate on events that took place after 1 July 2002. For these reasons alone, hybrid international courts will continue to be the most dynamic – albeit quite dysfunctional – part of the international criminal judicial landscape.

More international adjudicative bodies might result from the judicialization of quasi-judicial bodies. There are dozens of international commissions, panels, and sundry bodies that exercise functions very similar to those of international courts and tribunals, the only difference being that the outcome of their proceedings is not legally binding on the parties.[10] The two largest orders are those of human rights bodies and the non-compliance procedures of multilateral environmental treaties. Again, if it were not for the non-binding nature of their decisions, they would be indistinguishable from international adjudicative bodies. At least in the case of some, such as the Human Rights Committee, the distinction is becoming blurred.[11] Giving them binding powers would obviate the need to create new and expensive international adjudicative bodies.

In sum, if the establishment of more adjudicative bodies 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. First, by and large there is an excess capacity in the so-called international judicial system that has not yet been tapped. Second, patterns of utilization

[7] Romano, above n. 1. [8] Romano, above n. 8, 264 ff.

[9] Cesare Romano and Théo Boutrouche, 'Tribunaux pénaux internationalisés: état des lieux d'une justice "hybride"', (2003) 107 *Revue générale de droit international public* 109.

[10] Cesare Romano, 'A Taxonomy of International Rule of Law Institutions', (2011) 2 *Journal of International Dispute Settlement* 241, 260.

[11] See, in general, International Law Association, 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies', Berlin Conference on International Human Rights Law and Practice, 2004.

are significantly twisted, with a handful of actors being repeat users while most are rare participants or not participants at all.

In terms of docket size, the ICJ seems to have all the cases it can handle. It is difficult to imagine it busier than it is for two reasons. The first is the fact that it is open only to sovereign states and that there are only slightly fewer than 200 of those in the world. To this, one should add its considerable jurisdictional limits. Many states have not accepted its jurisdiction, are not party to a treaty giving it jurisdiction, and do not show any inclination to do so ad hoc. China is but one example. How many cases can those states that did accept its jurisdiction or are willing to do so ad hoc be expected to litigate in a given year? The second reason is that as it is currently organized and operates it cannot handle a docket larger than it does currently. Since time and again the ICJ has proven to be impervious to reform – bar a few cosmetic retouches – it is, and will remain, a forum where states can now and then turn for the settlement of certain kinds of disputes – a noteworthy forum because of its unique role and position within the UN – but with this structural limit it will surely not become the pivot of an international judiciary as many of its disciples would like it to be.

Granted, more states could and should be involved in litigation before the ICJ. Since 1946, as at the time of writing 152 cases have been submitted to it.[12] Altogether, slightly fewer than half of the states of the world (ninety) have been either applicants or respondents, or joint submitters. The United States is by far the most frequent user with twenty-three cases (thirteen as applicant, nine as respondent, and one by ad hoc agreement), to be followed by the United Kingdom and France with thirteen each (respectively seven, five, and one, and five, seven, and one). Yugoslavia would be next, but the figures are debatable. It would total eleven cases, but only if one adds those of Yugoslavia, Serbia, and Serbia-Montenegro, and counts individually the volley of cases it filed against several NATO members in 1999. Then there is the first developing country, Nicaragua, with nine cases (six and three), followed by Germany and Belgium with seven each (respectively three, two, and two, and four, two, and one).

The most noticeable thing, however, is that of those ninety states that have been involved in cases before the ICJ, seventy-eight have four or fewer cases to their name and sixty, two or less. In other words,

[12] International Court of Justice, List of All Cases, available at www.icj-cij.org/docket/index.php?p1=3.

utilization of the ICJ is quite diffuse, but, at the same time, only a handful of countries are repeated users. The most glaring absence from the list is China, a permanent member of the UN Security Council, which has so far disdained the principal judicial organ of the UN. All Russia, another permanent member, has to its name is being respondent in a case brought by Georgia (and the ICJ eventually found that it did not have jurisdiction),[13] and, if one counts those of the USSR, four cases that were brought by the United States for the downing of aircraft did not go anywhere.[14]

The fact that the United States, the United Kingdom, and France together have appeared in about one case in three brought before the ICJ, and the cold attitude of the superpowers-to-be (China, Brazil, Russia, and India, but also Indonesia, South Africa, South Korea, and Japan), should give much pause to those who wish the ICJ to be the pivot of the international judicial system.[15] Again, patterns of utilization suggest that it is, and will remain, at best a useful tool to settle certain kinds of disputes mostly by a select group of serial users, but not much else.

States will continue to generate relatively considerable amounts of international litigation. For instance, in this book, Coalter Lathrop told us that maritime boundary delimitations might be a significant source of litigation in the years to come.[16] After all, fewer than 200 of the approximately 430 potential maritime boundaries worldwide have been delimited (and some only partially).[17] However, he also told us that negotiation is by far the tool most frequently used to delimit maritime boundaries. So far litigation has accounted for the settlement of just two dozen maritime boundaries.[18] Moreover, most of those few disputed boundaries that will be litigated will most likely be litigated through arbitration, not before the ICJ or ITLOS.

The WTO, another adjudicative system open only to states, could well see more litigation. As Rafiqul Islam told us, the overwhelming majority of cases litigated in the WTO are between the superpowers of international

[13] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation) (Preliminary Objections)*, [2011] ICJ Rep. ___.

[14] *Aerial Incident of 7 October 1952 (United States* v. *USSR)*, [1956] ICJ 9; *Aerial Incident of 4 September 1954 (United States* v. *USSR), Order*, [1958] ICJ Rep. 158; *Aerial Incident of 7 November 1954 (United States* v. *USSR), Order*, [1959] ICJ Rep. 276; *Treatment in Hungary of Aircraft and Crew of United States of America (United States* v. *USSR), Order*, [1954] ICJ Rep. 99.

[15] Romano, above n. 1. [16] See Chapter 11 in this volume. [17] Ibid. [18] Ibid.

trade (i.e. the United States, the European Union, and Japan).[19] Because of the reliance on countermeasures as the tool to enforce judgments in the WTO, developing countries, and most of all the least developed countries, do not participate. This largely untapped pool, together with expansion in the overall membership and China climbing the curve, will likely make the docket of the WTO dispute settlement system (panels and Appellate Body) rise.

At the same time, litigation might decrease in other areas. As Chester Brown explained, the number of bilateral investment treaties has gone from zero in 1959 to 2,833 at the end of 2011.[20] At the same time, litigation of investment disputes under bilateral investment treaties has gone from zero in 1987 to 450 in 2011.[21] That is a phenomenal growth, by any standard. However, as Brown also explains, in recent years there has been a marked move away by states, developed and developing, east, west, north, and south, from similar dispute settlement clauses or agreements, a fact which, all other things being equal, will necessarily affect overall litigation numbers.[22]

The same warped patterns of utilization can be found in the case of ICSID, one of the many forums that can be used to litigate investment disputes.[23] To date, it is reported that 250 arbitrations have been completed and 169 are pending.[24] Counting both completed and pending cases, a total of 107 states have been involved in ICSID litigation – almost invariably as respondents, the rationale for the mechanism being to give investors an impartial forum to litigate disputes with states. This is a considerable participation rate. However, of these, more than half (fifty-six) have been involved in just two or fewer cases, and eighty-nine in five or fewer cases. Just 10 per cent of states have been involved in 44 per cent of the total (182 cases). They are Argentina, which tops the list with fifty cases (twenty-five completed and twenty-five pending), Venezuela, Egypt, Mexico, Ecuador, Peru, Ukraine, Hungary, Romania, and the Democratic Republic of the Congo. Most of the Argentine cases stem from one single event – its default on sovereign debt of 2001. Likewise, most of Venezuela's cases stem from anti-business steps taken by the government of the late Hugo Chávez. Even controlling for that, the large majority of cases have been brought against a handful of states. From the plaintiff's side, utilization is likewise very spread and concentrated at the same time. Only twenty-four companies have used ICSID more than once. Among

[19] See Chapter 17 in this volume. [20] See Chapter 18 in this volume. [21] Ibid.
[22] Ibid. [23] Romano, above n. 1. [24] See 'Cases', https://icsid.worldbank.org/.

the most frequent users are two oil companies (Mobil and Shell), which have used the system repeatedly through their various subsidiaries, and Impregilo, an Italian infrastructure company. All others have just one or two cases to their name.

The greatest potential for growth in litigation, however, is to be found not in forums open only to states, or to states and corporations, but in those forums where individuals have access. Granted, the caseload of the European Court of Human Rights has reached gargantuan proportions. In 2012, it reported 128,100 cases pending.[25] The number might very well keep on growing. Awareness of the existence of the court and specialized knowledge in how to seize it has constantly grown in Europe, particularly in eastern Europe. However, it is obvious that the number of cases has far outstripped the court's capacity to process them. The process of reform of the court to stem the flood started several years ago. The entry into force of Protocol 14, after years of stalling and blackmailing by Russia, has given the court some limited powers to limit the number of cases it will have to decide, but much more radical reforms will need to be undertaken, lest the court asphyxiate under the weight of its own success.

On a different scale, the same could be said of the Inter-American Court of Human Rights. Since 1988, when it handed down its first judgment on the merits, the court has decided about 150 cases. In the last few years, the tempo of the growth of its docket has picked up, and now it receives about twenty to twenty-five cases a year. The increased number of cases brought before the court is the result of reforms that have taken place at the level of the Inter-American Commission on Human Rights, the feeder of cases to the Court.[26] The commission's docket has grown exponentially during the past decade. In 2011, it reported having received 1,658 cases (petitions) for that year.[27] In 1999, the number was 581.[28] As in Europe, growing numbers reflect growing awareness of the existence of this remedy and how to access it. It will certainly grow exponentially,

[25] European Court of Human Rights, Annual Report (2012), 147 (Statistical Information).

[26] 'If the State in question has accepted the jurisdiction of the Inter-American Court . . . and the Commission considers that the State has not complied with the recommendations of the report . . . it shall refer the case to the Court, *unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary*' (emphasis added). Inter-American Commission on Human Rights, Rules of Procedure, Art. 45(1), as amended during the Commission's 137th regular session, held from 28 October to 13 November 2009, and entered into force on 31 December 2009.

[27] Inter-American Commission on Human Rights, Annual Report (2011), Chapter 3.b, Table A.

[28] Inter-American Commission on Human Rights, Annual Report (1999), Chapter 3.b.

unless the system is reformed. As a matter of fact, at the time of writing, a quarrelsome process of discussion of possible reform of the commission has started, spearheaded by certain Latin American states that would like to see the Inter-American system of protection of human rights made less accessible and probably less incisive.[29]

Yet, as the history of all international adjudicative bodies shows, once individuals are given access, they eventually develop a penchant for litigation. The number of cases brought is initially small, as knowledge of the existence of these mechanisms and how to use them is limited. But as cases are brought and litigated, knowledge expands. This is the only plausible explanation behind the seemingly odd statistics of certain human rights quasi-judicial bodies. For instance, in the case of the Committee Against Torture (CAT), Switzerland, Sweden, and Canada are respectively first, second and third on the list of countries against which most complaints ('communications' in such bodies' parlance) have been brought (respectively 135, 111, and 82).[30] Of the sixty-four states that have accepted the jurisdiction of the committee for complaints by individuals, thirty-four states have never been the object of a complaint, many of which have a less than stellar human rights record. For instance, although Russia accepted the jurisdiction of the committee in 1991, up to the time of writing there has been only one complaint brought against it.[31]

Of all the UN human rights quasi-judicial bodies, only the Human Rights Committee has a total docket of note (2,145 cases in its history), while those of the others range from zero (Rights of Persons with Disability) to twenty-seven (Discrimination against Women – CEDAW) to forty-five (Racial Discrimination).[32] Considering the fact that these are bodies of the United Nations, not regional organizations, and that several dozen states have accepted their jurisdiction to receive individual communications (e.g., 115 in the case of the Human Rights Committee; 102 for CEDAW; 64 for Torture and 54 for Racial Discrimination), these numbers will certainly grow if and when awareness of these mechanisms

[29] See 'Consultation to Actors of the Inter-American System for the Protection of Human Rights', available at www.oas.org/en/iachr/strengthening/consultation.asp.

[30] 'Status of Communications Dealt With by the CAT under Article 22 Procedure (24/07/2012)', available at www2.ohchr.org/english/bodies/petitions/StatisticalInformation.htm (statistical survey, CAT 48th session).

[31] Ibid.

[32] 'Communications/Complaints Procedures', www2.ohchr.org/english/bodies/complaints.htm.

becomes as commonplace as that of the European Convention on Human Rights and the Inter-American systems.[33]

Thus, far from having reached the high-water mark, on aggregate international litigation has just taken off. But what does this mean for the international legal system as a whole? If one thinks of international adjudication merely as a dispute-settlement exercise, obviously these developments are mildly interesting or plainly immaterial. In the end, it does not matter where – nationally or internationally – and how – through adjudication or diplomacy – disputes are settled or rights are recognized, as long as they are. Every act of adjudication is a story in itself. Litigation is essentially a retrospective, private exercise, mostly for the benefit of the parties.

But litigation has another important public dimension. It not only looks backwards, to see who was right and who was wrong in doing whatever was done. It is also system-building and forward-looking. Consider the significant public, *erga omnes*, effects of international adjudication. Only a clueless legal scholar would nowadays affirm that decisions of international adjudicative bodies do not add to the fabric of international law. Nowadays, more so than before, international courts and tribunals contribute to the making of international law by weaving webs of precedents, imbuing treaties with meaning, and, generally, by establishing new reference points for legal argument.[34] Judicial decisions frequently amount to influential arguments in later legal discourse. This is patent in all fields of international law. Whoever wants to formulate an argument about human rights anywhere in the world, before any human rights body, will hardly do so without drawing on the rich jurisprudence of the European Court of Human Rights. Normative assessments of international judicial law-making aside, international adjudication's significant role in thickening at least some fields and questions of international law is today beyond dispute.[35]

So far, two dozen international courts have issued about 37,000 binding legal judgments – 90 per cent of them since 1990 – not to mention thousands of arbitral awards.[36] This mass of judicial reasoning cannot easily be relegated to the ancillary role that the canonical sources of international

[33] Ibid.

[34] See Armin von Bogdandy and Ingo Venzeke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals', in Cesare Romano, Karen Alter, Yuval Shany (eds.), *The Oxford University Press Handbook of International Adjudication* (Oxford University Press, 2013) 503.

[35] Ibid. [36] Alter, *New Terrain*, above n. 6.

law claim it should have. Yet, as the body of international adjudicative precedents mushrooms, the question of who litigates, and, even more importantly, the question of *who does not litigate*, raise important normative issues.

As I have written elsewhere, the 'goods' that international adjudicative bodies produce (e.g., the judgments, awards, and orders, the settlement, the predictability, and the stability that they bring, etc.) are 'global public goods'.[37] In short, and to keep it simple, *public goods* are goods whose use by one person does not reduce their availability for others (non-rivalrous), and, once created, it is impossible (or too costly) to exclude third parties from their benefits (non-excludable).[38] A textbook example of a public good is a street sign. It will not wear out, even if large numbers of people are looking at it, and it would be extremely difficult, costly, and inefficient to limit its use to only one or a few persons and try to prevent others from looking at it, too. Likewise, the decision of an international court is non-rivalrous and non-excludable. It is non-rivalrous in the sense that if an adjudicative decision is relied on by an actor it does not diminish the chance of another actor to invoke it in the same way. The more a precedent is invoked, the more confidently parties in disputes will invoke it to argue their own cases persuasively. Additionally, international judicial precedents are non-excludable because they have *erga omnes* effects, as just explained. While the dispositive part of a judgment speaks only to the parties in the case in question, the reasoning leading to the dispositive and the dicta add to the body of international precedent. They speak to all categories of international actors (sovereign states, international organizations, and so on) in all places, at all times.

Conversely, *private goods* are both excludable and rivalrous. I can buy a cake and have exclusive property rights over it (excludable). Once I have eaten it, no one else can enjoy that same cake (rivalrous). The award of an

[37] Cesare Romano, 'The United States and International Courts: Getting the Cost–Benefit Analysis Right', in Romano, *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press, 2009) 419, 433; Cesare Romano, 'International Courts and Tribunals: Price, Financing and Output', in Stefan Voigt, Max Albert, and Dieter Schmidtchen (eds.), *International Conflict Resolution, Vol. 23: Conferences on New Political Economy/Jahrbuch für neue Politische Ökonomie* (Tübingen: Mohr Siebeck, 2006) 189, 189–91. On 'global public goods' see Inge Kaul, Isabelle Grunberg, and Marc A. Stern (eds.) *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press, 1999).

[38] Paul A. Samuelson, 'The Pure Theory of Public Expenditure', (1954) 36 *Review of Economics and Statistics* 387; Paul A. Samuelson, 'A Diagrammatic Exposition of a Theory of Public Expenditure', (1955) 37 *Review of Economics and Statistics* 350.

arbitral tribunal that is kept secret, and thus does not contribute to the body of international law, is also an example of a private good. It benefits the parties but no one else.[39]

The fundamental problem of public goods is the 'free-rider'. The cost of international litigation is high. It includes financial and political costs. The financial costs are those of creating and maintaining operative adjudicative bodies and of the lawyers to actually litigate. The political costs include the reduction in sovereignty, the risk of being exposed to litigation, if the adjudicative body in question has compulsory jurisdiction, and the risk of losing the case, to name just the most obvious ones. Because public goods are non-excludable, they provide benefits equally to those who bear the costs of producing the good and those who do not. Free-riders do not bear the costs of producing the good, but reap the benefits.

As we saw, so far in history, the cost of creating the international adjudicative infrastructure and justifying its existence by using it has been shouldered by a relatively small group of actors. Like every other state they pursue their own national interest, but unlike most of their peers they understand the long-term benefits of having an international legal system that is sustained by a network of adjudicative bodies that interpret and apply its rules. Frequent users of the international adjudicative system – be they states, large corporations, human rights advocacy groups, or even the lawyers who actually litigate cases – are interested not only in whether they win or lose a particular case, but also in *how* they win it or lose it.[40] They understand that international litigation always has the effect of reasserting and reinforcing the institutions of international law through which the dispute is pursued, and in this way strengthening the international legal system as such.[41] Thus, asking why states litigate, or when, or under what circumstances, is just a starting point. We need to start talking also about why states should do so, and what can be done to enlarge participation beyond the small circle of the usual repeat players. As the mapping exercise is being completed, the next challenge is to enter solidly into normative terrain.

[39] To be precise, economists would call it a 'club good'. Club goods are non-rivalrous (or largely non-rivalrous), but excludable. See, for instance, James M. Buchanan, 'An Economic Theory of Clubs', (1965) 32 *Economica* 1.

[40] Lowe, above n. 3, 213. [41] Ibid.