

## CHAPTER 6

# TRIAL AND ERROR IN INTERNATIONAL JUDICIALIZATION

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“I didn’t fail 9,999 times. I just found 9,999 ways that do not work.”<sup>1</sup>

THERE is a lamentable tendency amongst scholars of our field to acclaim each flourishing adjudicative institution as a foreordained achievement, to think of them as permanent features of the landscape with indefinite lasting power and to study only what exists and is easy to research. International judicialization—that is to say the increasing creation and use of international judicial bodies—is generally depicted as moving slowly, steadily, and almost inexorably. In this handbook, Mary Ellen

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<sup>1</sup> Attributed to Thomas Alva Edison, allegedly answering a question regarding his many failed attempts at finding a long-lasting and practical light bulb.

O'Connell and Lenore VanderZee as well as Karen Alter told the story of international judicialization from inception to present day. They tell what could be dubbed the "standard narrative of international judicialization," a largely linear story of successes from nineteenth-century arbitration to the current constellation of adjudicative bodies.

The stars of the standard narrative are the International Court of Justice (ICJ), the dispute settlement system of the World Trade Organization (WTO), the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC). These are the protagonists of most of scholarly literature on international adjudication. However, there are other possible narratives, equally true and instructive. One could tell, for instance, the story of the many international courts that never opened their doors and exist only on paper. Or, one could tell the story of the lesser known and less successful siblings of the heroes of the standard narrative of international judicialization.

The addition of this alternative narrative yields a more credible and precise picture of the rise of international courts and its dynamics. Indeed, if one considers that for every contemporary thriving body, there are at least twice as many that failed to set sail, or got caught in the doldrums, or even sunk after launch, the most plausible account of the rise of international adjudication is one of progress through trial and error.

"Trial and error" is a heuristic, and rather primitive, method for problem solving. No theory or plan guides progress, there are no hypotheses and experiments, but rather repeated attempts and progressive fine-tuning based on inferences drawn from failures. Much of the development of international adjudication has taken place without the support of sophisticated theories. It is only recently that theorizing has been brought to bear on this field.<sup>2</sup> For at least the past 200 years, since the age of enlightenment, the building of national judiciaries has often been a centrally planned endeavor that benefits from vast and sophisticated scholarship from a wide range of social sciences. Conversely, the growth of the constellation of international adjudicative bodies, which has taken place between the end of the twentieth and the beginning of the twenty-first century, has been organic, unplanned, and uncoordinated. To the extent precedents have inspired new courts it is only the success stories of the stars of the standard narrative that have been taken into account.<sup>3</sup> As Karen Alter wrote, "[I]rrelevant institutions are mostly ignored."<sup>4</sup>

This chapter presents just a sample of the less-known, but hard-won, lessons of international adjudication. An exhaustive treatment is more suitable for a

<sup>2</sup> See in this handbook, Pollack, Ch. 17, at section 3. See also D Caron, "Towards a Political Theory of International Courts and Tribunals" (2006) 24(2) Berkeley J. Int'l L. 401.

<sup>3</sup> See in this handbook, Alter, Ch. 4, at section 1.1. See also K Alter, "The Global Spread of European Style International Courts" (2012) 35(1) West Eur. Pol. 135.

<sup>4</sup> See in this handbook, Alter, Ch. 4.

monograph. First, we will tell the stories of some of the courts that failed to come into existence or that were never activated. Second, we will look at the difficulties experienced by some contemporary international adjudicative bodies. Yet, in no case should inclusion in this chapter be read as a death certificate. In the long run, courts that were never activated could all of a sudden be marshaled into action at historical critical junctures and beleaguered courts might find a firm footing.

## 1 NIPPED IN THE BUD

It is remarkable how many international adjudicative bodies never started operating, or decided a couple of cases and then fell into disuse. An incomplete list might include:<sup>5</sup>

1. Arbitral Tribunal of the Inter-governmental Organization for International Carriage by Rail (1890)
2. Central American Arbitration Tribunal (1902)
3. International Prize Court (1907)
4. Central American Tribunal (1923)
5. Inter-American Court of International Justice (1938)
6. Arab Court of Justice (1945)
7. European Nuclear Energy Tribunal of the Organization for Economic Cooperation and Development (1957)
8. Arbitral College of the Benelux Economic Union (1958)
9. Court of Arbitration of the French Community (1959)
10. Arbitration Tribunal of the Central American Common Market (1960)
11. European Tribunal on State Immunity (1972)
12. Judicial Board of the Organization of Arab Petroleum Exporting Countries (1980)
13. Court of Justice of the Economic Community of Central African States (1983)
14. International Islamic Court of Justice (1987)
15. Court of Justice of the Arab Maghreb Union (1989)
16. Court of Justice of the African Economic Community (1991)
17. Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe (1994)

<sup>5</sup> The date of adoption of the legal instrument that created them or provided for their creation is provided in parentheses.

18. Court of the Union State between the Russian Federation and the Republic of Belarus (1999)
19. Court of Justice of the Central African Economic and Monetary Community (2000)
20. Court of Justice of the African Union (2003)

Some of these bodies have been condemned. Others can be said to be simply dormant. Indeed, as we said, the fact that a judicial body never started operating does not necessarily mean that it will never be called into action. Yet, all these bodies have been inactive for at least a decade and, for this reason, it is prudent to group them together in this list.

Of course, there is a story behind each that explains why, after spending significant negotiating time, states failed to ratify their constitutive instruments, or why, after the judicial body was officially open for business, cases failed to be brought. Literature on many of these is scant, with some offering no more than a few footnotes. Given the numbers, comprehensive treatment is beyond the scope of this chapter. However, a few will suffice to shed light on the most common problems that kill international adjudicative institutions in the crib, so to speak.

## 1.1 International Prize Court

The International Prize Court (IPC) was one of the first international adjudicative bodies ever. In 1907, the Second Hague Peace Conference convened and agreed on rules regulating conduct during wartime by belligerents, with a particular focus on naval warfare. Amongst the many legal documents adopted by the conference, there was the statute for an international court to adjudicate disputes over prize.<sup>6</sup>

“Prize money” is the reward paid out to the crew of a ship for capturing an enemy vessel, or a vessel of a neutral trying to run a blockade. The practice of paying prize money to captains and crews to reward and encourage their fighting zeal at no cost to their government had been widespread amongst European navies since the sixteenth century. Lawfulness of the confiscation was decided in court. The captain of the vessel executing the capture would choose a port—in a third, neutral state or the state of nationality of the captor—where the prize would be ordered; a “prize court” (a national court with specialized knowledge of maritime law and international law but sometimes even just a single individual, such as a consul or an ambassador) in that port would adjudicate on the matter. Typically, the flag state or the ship-owner could challenge the judgments of prize courts, and in several instances these legal

<sup>6</sup> Convention (XII) Relative to the Creation of an International Prize Court, concluded at The Hague, October 18, 1907, 3 Martens (3rd) 388, reprinted in (1908) 2 AJIL 174.

challenges led to international arbitrations,<sup>7</sup> but national courts were suspected of being highly partial and the practice of prize money was frequently abused for obvious reasons.<sup>8</sup>

The IPC was the supposed remedy to the need for an impartial forum. National prize court decisions were to be appealable before the IPC. Although the adoption of the IPC Statute by the Second Hague Conference was hailed at the time as a “first step toward the establishment of an international judicial system,”<sup>9</sup> it turned out to be a false first step. The IPC was dead in the water before it was launched. To begin with, there were grave divergences between the major maritime powers, especially Great Britain and Germany, with regard to the rules of prize law in question.<sup>10</sup> Second, there was a rift between the major maritime powers and the smaller ones on the composition of the court. The major powers were going to have eight permanent judges and the minor powers had seven rotating judges. Numerous states made reservations to the proposed rotation. In the end, agreement on a method of electing judges could not be reached. Finally, the United States harbored major reservations to the creation of a court that could hear appeals against decisions of the US Supreme Court, which had final jurisdiction upon appeal over prize cases.<sup>11</sup> At the insistence of the United States, a special protocol was adopted to permit a signatory to the convention to restrict the right of appeal.<sup>12</sup>

For these reasons, the treaty establishing the IPC failed to attract any ratification and never entered into force. It is likely, however, that the IPC was obsolete even before it was designed. First, for centuries states had given an incentive to crews to seize vessels by giving them a share of the value of the confiscated ship and cargo, but by the beginning of the twentieth century, it was believed that sailors could be trusted to do their duty without personal gain incentives. The United States had already abolished the practice of prize money in 1899.<sup>13</sup> Second, the rise of submarine warfare meant that navies were going to try to sink enemy and neutral shipping rather than capturing it, a complicated and perilous maneuver.<sup>14</sup>

<sup>7</sup> Claims in a dozen or more prize cases which had been decided by the US Supreme Court during or after the American Civil War in the United States, were later submitted to an American–British arbitral tribunal.

<sup>8</sup> On prize taking in the age of sails and prize courts, see, in general, D Petrie, *The Prize Game* (Annapolis, MD: Naval Institute Press 1999).

<sup>9</sup> M Hudson, *International Tribunals: Past and Future* (Washington D.C.: Carnegie Endowment for International Peace and Brookings Institution 1944) 165.

<sup>10</sup> A restricted conference with only ten maritime powers that was convened in London soon after the end of the Hague Conference adopted a declaration on that that failed to attract any ratification. Additional Protocol to the Convention Relative to the Creation of an International Prize Court, adopted at the Hague, September 19, 1910, reprinted in (1911) 5 AJIL Supplement 95.

<sup>11</sup> On prize cases decided by the US Supreme Court, see J Scott Brown, *Prize Cases Decided in the US Supreme Court (1789–1918)* (Oxford University Press 1923).

<sup>12</sup> Declaration Concerning the Laws of Naval War, 208 Consol. T.S. 338 (1909).

<sup>13</sup> 30 Statutes at Large 1007 (1899).

<sup>14</sup> The practice of prize money has been suspected of prolonging the practice of boarding and hand-to-hand fighting long after naval cannons developed the ability to sink the enemy from afar.

Still, the IPC and the Second Hague Conference were not quite complete dead-ends of international judicialization. It was the testing ground for some then still-novel concepts. For instance, the IPC Statute provided for judges ad hoc, an idea later adopted in the World Court and a number of other courts.<sup>15</sup> Moreover, it is little known that the Second Hague Conference of 1907 also considered the adoption of the statute of an International Court of Arbitral Justice, which is effectively the missing link in the evolutionary chain between the Permanent Court of Arbitration (PCA) and the Permanent Court of International Justice (PCIJ).<sup>16</sup>

## 1.2 Arab and Islamic courts

Another noteworthy non-starter is the Arab Court of Justice (ACJ). This adjudicative body is provided for in the constitutive act of the Arab League: the Pact of the League of Arab States, adopted in March 1945 by six Arab states (Egypt, Iraq, Transjordan (renamed Jordan in 1949), Lebanon, Saudi Arabia, and Syria), to expand eventually to the current 22-state membership. Article 19 provides for procedures to amend the Pact “. . . in particular for the purpose of . . . creating an Arab Court of Justice.”<sup>17</sup> Over the years, several draft statutes were prepared, but the required majority to adopt the amendment and bring the ACJ into existence could never be reached.<sup>18</sup>

Several factors have probably contributed to nip it in the bud. First, the Arab League has always been a very weak regional organization. It has never aspired to economic integration of its members, unlike many regional organizations that have successfully judicialized. It has worked mostly as a forum where Arab leaders could meet and discuss common concerns—and mostly to form a common front against Israel—rather than to coordinate and integrate. Member states have been careful not to cede any aspect of sovereignty to the Arab League; ruling elites prefer to maintain their power and independence in decision-making both from other Arab nations and their population, paying only lip service to Pan-Arab nationalism and the rule of law. Moreover, several feuds, if not outright wars, among Arab rulers and the influence of external powers that fear Arab unity, have been impassable obstacles to deeper integration.

What makes the ACJ worthy of notice is that it should have been able to apply, besides international law (customary and treaty-based), also the Shari’ah, the religious law of Islam.<sup>19</sup> Interestingly, the need for a dedicated international adjudicative

<sup>15</sup> Convention (XII) Relative to the Creation of an International Prize Court, note 6, Art. 16.

<sup>16</sup> On the International Court of Arbitral Justice, see Hudson, note 9, at 8.

<sup>17</sup> Pact of the League of Arab States, adopted in Cairo, March 22, 1945, UNTS Vol. 70 (1950), p. 247.

<sup>18</sup> AAF Thani, “The Projected Arab Court of Justice: A Study to Its Draft Statute and Rules, with Specific Reference to the International Court of Justice and Principles of Islamic Shariah.” Ph.D. thesis, University of Glasgow (1999).

<sup>19</sup> Draft Statute of the Arab Court of Justice, Art. 23.1.b, reproduced in Thani, note 18, at 335.

body, one that not only takes Shari'ah into full account, but gives it preeminence over international law, has inspired another project. In 1987, the Organization of the Islamic Conference, a 57-state organization, gathering all states where Islam prevails, from Suriname to Indonesia, adopted the statute of the International Islamic Court of Justice (IICJ).<sup>20</sup> This court, which also never came into existence, was to apply mainly Shari'ah law to settle international disputes.

Besides these two projects, the only three adjudicative bodies ever created in the Arab world are the Judicial Body of the Organization of Arab Petroleum Exporting Countries (OAPEC),<sup>21</sup> the Tribunal of the Arab Maghreb Union (AMU),<sup>22</sup> and the Arab Investment Court (AIC).<sup>23</sup> The first two barely ever functioned and have long been inactive. The third one was inactive for 20 years after its creation and has issued in the past decade just nine rulings.

In 1989, five North African states (Libya, Tunisia, Algeria, Morocco, and Mauritania) created the AMU, a political and economic integration organization. From the outset, the organization was endowed with a judicial body, to be based in Nouakchott, Mauritania, to settle disputes between member states or between the Council of the Heads of State and member states. The AMU Tribunal never issued any rulings. It was the victim of rivalries between members (between Morocco and Algeria over Western Sahara, and between Libya and Mauritania), which to this date paralyze the organization. Moreover, until the recent Arab Spring, none of the AMU members was seriously committed to democracy and the rule of law, the liberal values that are the lifeblood of international courts.

OAPEC was created in 1968 by three then-politically conservative oil producing States—Saudi Arabia, Libya, and Kuwait—as an exclusive club that would insulate oil from street pressures by excluding more radical and less oil-rich member states, namely Egypt and Algeria, who wanted to pool it as a weapon of the people of Arab nations. It was also an alternative, more easily controllable, club to the more prominent Organization of Petroleum Exporting Countries (OPEC). In the 1970s, nationalist objectives led a number of Arab countries to seize control of their oil industries. OAPEC also succumbed to political pressure following the 1973 Yom Kippur war, expanding membership, to include presently ten states, and becoming a coordinating organization for Arab responses to the conflict with Israel. In 1978,

<sup>20</sup> M Lombardini, "The International Islamic Court of Justice: Towards an International Islamic Legal System?" (2001) 14(3) LJIL 665.

<sup>21</sup> لورتبيلل تردصملا ةيبرعلا راطقالا ةمظنمل ةيئاضقلا ةئيهلا) —Al-Hay'ah al-Ga-dha-'Yyah Le-mona-ddha-mat al-ag-Tar al-'Arabiya al-Mo-sad-De-rah Le-al-Pet-rool) <<http://oapecorg.org/>> accessed February 1, 2013.

<sup>22</sup> —Al-amanah Al-'Ammah Le-Ittihad Al-Maghrib Al-'Arabi— Instance Judiciaire de l'Union du Maghreb Arabe) <<http://www.maghrebarabe.org/>> accessed February 1, 2013.

<sup>23</sup> See in this handbook, Romano, Ch. 5, at section 1.2.4.

OAPEC was endowed with the Judicial Body of the OAPEC, based in Kuwait City.<sup>24</sup> The body has rarely been utilized, with just two cases to its record,<sup>25</sup> and four vacancies on its bench have been unfilled for years. As the AMU, OAPEC has been hampered by bitter rivalries between its members and a weak culture of the rule of law, which is a necessary precondition to accept binding rulings by independent judges.

All in all, the Arab world has proven to be impervious terrain for judicialization. Should the Arab Spring bring about robust democracies in the region, however, this might change. The Arab Spring might inspire, for example, the creation of an Arab Court of Human Rights, or to some quasi-judicial body.<sup>26</sup>

### 1.3 ICJ and PCA rivals: The Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe

The need for courts of general jurisdiction, like the ICJ, but headquartered closer to its users and able to take into account regional preferences, priorities, and traditions, has inspired other projects, particular in Latin America. For instance, the PCA had barely been established when, at the Second Conference of American States, Mexico proposed the creation of an American Permanent Court of Arbitration, on the blueprint of the PCA, to be based in Quito, Ecuador.<sup>27</sup> At the Fifth Conference of American States, in 1923, Costa Rica proposed the creation of an American Court of Justice, to provide for a regional alternative to the Europe-centered PCIJ.<sup>28</sup> The Eighth Conference, in 1938, led to the adoption of a draft by a Committee of Experts on the Codification of International Law of the statute of an Inter-American Court of International Justice (IACIJ).<sup>29</sup> All these projects met strong opposition from the United States and Brazil, which believed that a regional court of general jurisdiction would undermine the PCIJ, and because the troubled relations between many Latin-American states would make it impossible to devise an effective mechanism to select its judges.<sup>30</sup>

Many of these regional attempts have ultimately failed to take off for fear of fragmenting international law by allowing regional interpretation of its norms. Also,

<sup>24</sup> Protocol establishing the Judicial Tribunal of the Organization of the Arab Petroleum-Exporting Countries (OAPEC), concluded in Kuwait, May 9, 1978.

<sup>25</sup> The first judgment was rendered in Kuwait in 1989 and the second was rendered in Cairo in 1994. The first one was dismissed by the tribunal because of its political character (*Iraq v. Syria*). The second case was between Algeria and the Arab Transportation Company.

<sup>26</sup> See in this handbook, Romano, Ch. 5, at section 1.2.4.

<sup>27</sup> Hudson, note 9, at 175.

<sup>28</sup> Hudson, note 9, at 175.

<sup>29</sup> Hudson, note 9, at 169–79.

<sup>30</sup> Hudson, note 9, at 175–6.

the lives of many more adjudicative bodies have been cut short due to an unwillingness to create competition for the Hague-based World Court (first the PCIJ and then the ICJ), believed to be the ultimate custodian of the unity of international law, and the PCA.

One such body is the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe (OSCE).<sup>31</sup> This court was the result of a long process of negotiations, which was started by Switzerland in 1978 and lasted throughout the end of the Cold War. It finally came to light in 1992 with the adoption of the Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe.<sup>32</sup> Its mission is to settle disputes between states: first, by conciliation, which can be triggered unilaterally by any party to the statute, and, should that fail, by arbitration, but only if both parties have agreed to it. Like the PCA, this court in itself is not permanent. It has a small secretariat, based in Geneva, and a list of conciliators and arbitrators. To date, it has not yet been activated.

To begin with, it enjoys limited support. Only 33 out of 57 OSCE members have ratified its statute.<sup>33</sup> Those states that have declined to ratify are a mixed bag, including the United States, United Kingdom, Canada, Spain, Netherlands, Ireland, Iceland, Russia, Kazakhstan, Turkmenistan, Georgia, Estonia, Turkey, and the Holy See. Each has its own reasons to disregard it. For instance, the Netherlands does not want to endorse an institution that duplicates the ICJ and PCA, two courts based in The Hague. The United States has an ambivalent attitude toward state-to-state litigation. It begrudgingly accepts to litigate before the ICJ, but not without reservations. Moreover, it enjoys a prominent role as mediator of European disputes; a role that it would not want to delegate to this or any other court.<sup>34</sup> The other major power in the OSCE, Russia, is even colder toward international litigation. Second, this court does not have compulsory jurisdiction, since arbitration can take place only if both states have agreed to it. Although states can file a declaration accepting compulsory arbitration, along the lines of the optional declaration used at the ICJ, to date only six have done so.<sup>35</sup>

In the end, what hinders the OSCE Court is competition from already-established international adjudicative bodies. The ICJ needs every case it can get to buttress its

<sup>31</sup> On the history and politics behind the creation of this adjudicative body, see P Schneider and TJA Müller-Wolf, "The Court of Conciliation and Arbitration within the OSCE: Working Methods, Procedures and Composition," Centre for OESC Research (CORE), Working Paper 16 (2007) <<http://www.isn.ethz.ch/isn/Digital-Library/Publications/>> accessed February 1, 2013.

<sup>32</sup> Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe, adopted in Stockholm on December 15, 1992, Annex II <<http://www.osce.org/mc/40342>> accessed February 1, 2013.

<sup>33</sup> <<http://www.osce.org/cca/40119>> accessed February 1, 2013.

<sup>34</sup> L Caflisch, "Cent ans de règlement pacifique des différends Interétatiques" (2002) 288 *Recueil des Cours de l'Académie de Droit International* 245, 362.

<sup>35</sup> <<http://www.osce.org/cca/40119>> accessed February 1, 2013.

legitimacy. When it comes to arbitration, the PCA offers a valid alternative, and the PCA, too, needs every state-to-state case it can get. Of course, the OSCE Court cannot compete with the institutions of the European Union, including the Court of Justice of the European Union (ECJ), in the settlement of intra-EU disputes, nor can it tackle trade disputes over which the WTO has a monopoly. Most disputes within the European Energy Charter are settled under the aegis of the International Center for the Settlement of Investment Disputes (ICSID), a judicial body with greater expertise over financial and investment matters. Finally, since individuals do not have access to it, it cannot be an alternative to the ECtHR, which could very well delegate a few cases, for instance on matters of treatment of minorities. For the OSCE Court to have a chance, it needs a major re-design and mission reconfiguration, but few states other than Switzerland seem to be willing to dedicate the necessary negotiating time that this would require. For the time being, it will remain a sleeping beauty.

#### 1.4 Yet, sometimes they come back: The Permanent Court of Arbitration

The fact that an adjudicative body has never been activated does not mean that it could not be activated at some point in the future, or that it could not be re-designed to address some of the issues that keep it slumbering. Indeed, sometimes, sleeping beauties do wake up. The PCA is a fitting example. Accounts of the history of international adjudication usually start with the creation of the PCA in 1899 in The Hague. Then, the success of the PCA led to the creation of a universal and permanent jurisdiction, the Permanent Court of International Justice (PCIJ), which morphed into a very similar court after the end of World War II: the ICJ. What is not usually told is what happened to the PCA once the PCIJ entered the scene.

Over the 15 years between the birth of the PCA and the outbreak of World War I, 17 state-to-state arbitrations and three inquiries were conducted under the auspices of the PCA, a remarkable figure not only for the time, but even for some contemporary adjudicative institutions. In the 20 years between the two world wars, however, the number of arbitrations administered by the PCA dropped to seven, of which only five were actually decided before the outbreak of World War II, and it handled one inquiry. Clearly, the PCA thrived while it had no rivals. The arrival of the PCIJ marked the beginning of its end. Both were competing for the same pool of cases: disputes between sovereign states. As the PCA, the PCIJ offered states the possibility of having their disputes bindingly decided, but as an organ of the League of Nations, it had the extra advantage of being able to count on the support of that organization to ensure compliance

with its decisions. When given a choice, states decided to bring their dispute to the PCIJ. The Peace Palace, which had been built to host the PCA, was taken over by the new World Court. Like Sleeping Beauty sidelined by the arrival of the step-mother, the International Bureau, the PCA secretariat, was rapidly confined to a few rooms of the palace and staffed with skeleton personnel to oversee a few minor cases.

After the end of World War II, as the ICJ replaced the PCIJ and regional and specialized international adjudicative bodies started spreading, the caseload of the PCA further dwindled and then completely dried up. Between the end of World War II and the end of the Cold War (1946–1989), the only arbitration conducted was between a private company and Sudan over the interpretation of a construction contract.<sup>36</sup> By the end of the Cold War, the PCA was a relic of the past. The only function the list of arbitrators of the PCA continued serving was to provide a pool of qualified jurists to states looking for fitting candidates for the ICJ bench.

However, the end of the Cold War proved to be a critical juncture that, besides leading to the multiplication of international courts, led also to the resurgence of the PCA. In the mid-1990s, Sleeping Beauty began stirring. A combination of factors led to its resurgence. First, the PCA had reinvented itself, adopting new rules of procedure for various kinds of disputes, and expanding its jurisdiction to disputes between private entities and states, or between private entities.<sup>37</sup> Second, it started providing services and support to states and international organizations wanting an arbitration option regarding disputes falling under various legal regimes. It facilitated, for instance, disputes arising under the compulsory dispute settlement clauses of the United Nations Convention on the Law of the Sea, or other regional treaties. Since the beginning of the 2000s, the PCA has facilitated dozens of arbitrations.<sup>38</sup> Granted, by diversifying, the PCA entered into competition with other adjudicative regimes, such as the ICSID and the North American Free Trade Agreement (NAFTA), but by the beginning of the 2000s, the number of international commercial investment disputes being litigated had expanded so much that there was still plenty to go around for multiple players. While not active at levels comparable to those of major international courts, these days the PCA docket compares quite well with that of the ICJ, which still occupies most of the Peace Palace.

<sup>36</sup> *Turriff Construction (Sudan) Limited v. Sudan*, Award of April 23, 1970, <<http://www.pca-cpa.org/>> accessed February 1, 2013.

<sup>37</sup> Permanent Court of Arbitration <<http://www.pca-cpa.org/>>, (Rules of Procedure), accessed February 1, 2013.

<sup>38</sup> Permanent Court of Arbitration <<http://www.pca-cpa.org/>>, (Cases), accessed February 1, 2013.

## 2 GROWING PAINS

The story of many international adjudicative bodies is far from linear. Many, during their early years, face significant challenges, and it is not uncommon for adjudicative bodies to experience prolonged periods of low levels of activity or downright irrelevance before they can entrench themselves and become significant players in their legal regime. Some survive this phase, while others remain crippled for a long time or succumb.

There is a growing body of literature on the criteria that could be used to gauge an adjudicative body's degree of effectiveness. Much of the debate has been well summarized by Helfer in this handbook.<sup>39</sup> We will not test here those criteria, and we deliberately refrain from passing a final judgment on the relative degree of effectiveness or ineffectiveness of this or that institution. This would be a task that could not be satisfactorily undertaken within the confines of a chapter of this handbook. Besides, many others have shied away from this challenge. Indeed, if a criticism can be leveled to existing literature, it is that it has resulted yet again in the survey of the well-known and largely effective adjudicative bodies, but has largely ignored the less-known and more problematic ones.<sup>40</sup>

All we aim to do is to put forward a few examples out of the many possible to illustrate the insight that walking the less-known paths of the story of international adjudication can yield. For instance, Africa and Latin America, two regions which have given birth to the largest number of international judicial bodies, provide several illuminating anecdotes. At this time in history, in each region there are a number of adjudicative bodies facing significant difficulties.

### 2.1 Southern African Development Community

The Southern African Development Community (SADC) is a regional organization grouping all states in Africa south of Congo (15 in total). As many other regional economic integration organizations, it is equipped with an adjudicative body—the SADC Tribunal—to ensure compliance with the community laws and which can hear cases brought by member states, community organs, and individuals to that

<sup>39</sup> For a discussion of the various dimensions along which the “effectiveness” of an international adjudicative body can be measured, see in this handbook, Helfer, Ch. 21.

<sup>40</sup> Two notable exceptions are L Helfer, K Alter, and F Guertzovich, “Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community” (2009) 103(1) AJIL 1; KJ Alter, L Helfer, and J McAllister, “A New International Human Rights Court for West Africa: The Court of Justice for the Economic Community of West African States” (2013) 107 AJIL (4).

effect. Yet, the SADC Tribunal's life has been star-crossed from the very beginning.<sup>41</sup> Although established on paper in 1992, the judges were only appointed in late 2005. The court's building in Windhoek, Namibia, burned down before the court heard its first case. After restoration, it started operating, but soon ran into the super-charged question of human rights, racial politics, and the transition from apartheid, locking horns with Robert Mugabe, an influential and despotic regional player, charismatic leader of the 1960s and 1970s liberation movement against the white-minority apartheid rule, and turned dictator of Zimbabwe in the 1990s.

In 2000, Mugabe started expropriating land from white farmers for redistribution to black ones, mostly his cronies, in an attempt to right historical wrongs. It was a populist move welcomed by the black majority of Zimbabwe's population and the governments of many SADC member states, largely black. Yet, it was an economically disastrous measure, plunging Zimbabwe into economic collapse and hyperinflation and, eventually, international sanctions. Besides, legal justification was lacking. The legality and constitutionality of the expropriation process was regularly challenged in the Zimbabwean High and Supreme courts, but with little result, as the Mugabe dictatorship could not tolerate an independent judiciary. Eventually, in a desperate attempt to obtain recognition of their property rights, some white farmers turned to the SADC Tribunal, which ruled in their favor.<sup>42</sup> When the Zimbabwean government proceeded with evictions, the tribunal declared Zimbabwe in contempt. After the ruling, Mugabe's government immediately denounced the Tribunal and then moved to kill it. First, it filibustered and blocked the nomination of new judges, paralyzing it. Then, it put on the agenda of the SADC Summit of Heads of State and Government the review of its jurisdiction and functioning. Relying on the large network of old-fighters' friendships and alliances, and the unwillingness of South Africa, the largest and most influential state in the region, to oppose Mugabe, Zimbabwe eventually managed to convince the SADC summit of 2012 to turn the tribunal into an ICJ-like adjudicative body, narrowing its jurisdiction to state-to-state disputes only. This move not only shielded Zimbabwe from legal suit by farmers, but also by any member of the opposition to Mugabe's government. Crucially, it also protected many illiberal governments in central and southern Africa, too.

Civil society tried to fight back. In November 2012, two African NGOs requested the African Court on Human and Peoples' Rights (ACtHPR) an advisory opinion

<sup>41</sup> See in this handbook, Ginsburg, Ch. 22, at section 3.2.2. For a detailed review of the troubles affecting the SADC Tribunal, see E de Wet, "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" (2013) 28 ICSID Review, 1.

<sup>42</sup> *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (November 28, 2008), <<http://www.saflii.org/sa/cases/SADCT/2008/2.html>> accessed February 1, 2013. On the Campbell case, see P Ndlovu, "Campbell v Republic of Zimbabwe: A Moment of Truth for the SADC Tribunal" (2011) 1 SADC L.J. 63.

on whether the actions of the SADC leaders to curtail the tribunal amounted to violations of the African Charter of Human and Peoples' Rights provisions on judicial independence, access to justice, the right to effective remedies, and the rule of law.<sup>43</sup> It remains to be seen what effect this move will have. First, the ACtHPR might find a way not to answer the question and wisely avoid being engulfed in a fight that has already consumed another international tribunal. Besides, while international courts have regularly reviewed national governments' decisions to change the structure of their judiciary, an international tribunal reviewing the decision of a separate and independent international organization to change the jurisdiction of its own judicial body would be unprecedented. This is yet another reason for the ACtHPR to tread lightly. Second, even if it does issue an opinion, it is not binding and it is unclear how this might compel SADC leaders to undo the 2012 decision. Finally, the referral of the matter directly to the court as an advisory opinion and not to the African Commission on Human Rights as a case sounds like a vote of no-confidence in the commission, undermining its tenuous credibility in the eyes of African civil society.

As Erika de Wet wrote, the rise and fall of the SADC Tribunal can be attributed first to the member states' lack of understanding of the legal implications of the SADC Treaty regime.<sup>44</sup> States in the region tend to enter into ambitious, western-modeled regimes for economic and political integration, without sufficiently reflecting on the legal implications resulting from a comprehensive and consistent application of the rules embodied in the treaty regime in question.<sup>45</sup> Second, many SADC states lack a rule-of-law culture. Most have a poor domestic track record in relation to human rights protection and judicial independence.<sup>46</sup> With these considerations in mind and with hindsight "one may question the wisdom of bringing the Zimbabwean land cases to a fledgling tribunal, which hardly had any opportunity to foster a culture of acceptance amongst member States. Had the Tribunal instead been allowed to deal with less controversial cases for a number of years, its credibility—and therefore its chances of survival—might have improved by the time it took on controversial human rights disputes."<sup>47</sup> While in West Africa the Court of Justice of the Economic Community of Western African States (ECOWAS) has successfully managed, so far, to expand its role and carry out functions of human rights courts, in Southern Africa the SADC Tribunal's troubles are a cautionary tale.<sup>48</sup>

<sup>43</sup> Open Society Initiative for Southern Africa (Johannesburg), "Southern Africa: Court Asked to Rule on SADC Tribunal" (November 26, 2012) <<http://allafrica.com/stories/2012112700666.html>> accessed February 1, 2013.

<sup>44</sup> De Wet, note 41, at 18.

<sup>45</sup> De Wet, note 41, at 18.

<sup>46</sup> De Wet, note 41, at 18.

<sup>47</sup> De Wet, note 41, at 18.

<sup>48</sup> On human rights courts in Africa, see in this handbook, Ebobrah, Chapter 11.

## 2.2 The Court of Justice of the West African Economic and Monetary Union and the Court of Justice of the Common Market of Eastern and Southern Africa

In Africa there are two further troubled courts: The Court of Justice of the West African Economic and Monetary Union (WAEMU) and the Court of Justice of the Common Market of Eastern and Southern Africa (COMESA). The WAEMU Court was created in 1994, started operating in 1995 and, to date, has issued about 50 rulings. The COMESA Court was created in 1993, started operating in 1998 and, to date, has decided about as many cases. Neither of the two has managed to assert itself in a region crowded with international adjudicative bodies and shaken by periodic conflicts. All eight members of the WAEMU are also members of ECOWAS, which is endowed with a thriving regional court.<sup>49</sup> Moreover, six out of eight are also members of the Organization for the Harmonization of Business Law in Africa (Organisation pour l'Harmonisation en Afrique du Droit des Affaires—OHADA), which is also endowed with a successful regional court.<sup>50</sup> While the WAEMU Court, the COMESA Court and the OHADA Common Court of Justice and Arbitration exercise different kinds of jurisdiction, it is doubtful whether this region of the world is economically and democratically developed enough to sustain three international courts.

A large number of states are members of COMESA (to date 20), including Libya and Egypt in the north and Zambia in the south. Probably, the court has a membership too large for its own good. Over the years, it has lost five members, for various reasons, and the fact that much of central Africa, and in particular in and around Congo, has been engulfed in protracted conflicts for almost two decades now does not help the organization to achieve its ambitious goals of economic integration. The decision to move the court from Lusaka, Zambia, to Khartoum, Sudan, only to suspend the move when Sudan started becoming an international pariah, has surely not helped the court entrench itself.

It remains to be seen whether the WAEMU and the COMESA courts will be able to establish themselves in this judicially crowded region. Their fate is ultimately tied to the success of the organizations to which they are attached, and the stabilization of the Central African region.

## 2.3 The Mercosur Permanent Review Tribunal

In the Americas there are two currently beleaguered regional adjudicative bodies: the Mercosur Permanent Review Tribunal and the Central American Court

<sup>49</sup> See, in this handbook, Ebobrah, Chapter 11, at section 2.2.2, Alter, Chapter 4, at section 2.1.3 and Alter et al., note 40.

<sup>50</sup> On OHADA, see in this handbook Alter, Chapter 4, at section 2.1.2.

of Justice. Mercosur, short for *Mercado Común del Sur*, or Common Market of the South, is a regional economic integration organization established in 1991. Originally, it had four members: the two southern America giants, Argentina and Brazil, and two small states pinned between them, Uruguay and Paraguay. Since inception, Mercosur has gone through several mutations, including of its dispute settlement procedure. Recently, its membership has expanded to include Venezuela (in 2012) and Bolivia (in 2013).

The organization is endowed with a dispute settlement body, but unlike many which mimic the structure and function of the ECJ, the Mercosur dispute settlement system, in its current incarnation, resembles the WTO and NAFTA systems: a two-stage process where disputes are adjudicated first by an arbitral panel and then awards can be appealed before a standing appellate body, in this case the Permanent Review Tribunal.<sup>51</sup>

The tribunal started operating in 2004 but never quite took off, hamstrung by two factors. The first one is of jurisdictional nature: the Mercosur system cannot consider cases that have been brought before the WTO dispute settlement system.<sup>52</sup> The WTO system, being a much larger, stronger, and well-established system, naturally siphons off much of the potential caseload of the Mercosur system, which explains the paltry docket of its tribunal. The second problem is much more severe and has to do with political rifts between Mercosur members. In 2008, Fernando Lugo, a Catholic bishop and liberation theologian, won Paraguay's presidential election and broke the 61-year chokehold on power of the right-wing Colorado Party. Shortly after his inauguration, the Liberal party, whose support had propelled Lugo to the presidency, repudiated him. In June 2012, after he was accused of mishandling a clash between police and landless peasants, Congress summarily impeached him and removed him from office, installing a temporary president until political elections could be held. In the eyes of the leftist leaders of Argentina, Brazil, and Uruguay the lightning-fast impeachment was a coup. They suspended the country from Mercosur for the violation of the "democratic clause" contained in the Protocol of Ushuaia. At the same time, they admitted Hugo Chavez's Venezuela into Mercosur—a hardly democratic country in itself and whose application for membership had been blocked by Paraguay since 2006—and, later in the year, Bolivia, currently headed by another populist and leftist leader, Evo Morales.

<sup>51</sup> See A Perotti, *Tribunal permanente de revisión y estado de derecho en el Mercosur (Permanent Tribunal of Review and rule of law in Mercosur)* (Madrid: Pons 2009). The original Mercosur dispute settlement system was provided for in the Protocol of Brasilia, concluded on December 17, 1991, 36 ILM 3 (1997). The system was reconfigured to add the Permanent Review Tribunal by the Protocol of Olivos, concluded on February 18, 2002, 42 ILM 2 (2003).

<sup>52</sup> Protocol of Olivos, Art. 1.

Paraguay dragged the Permanent Review Tribunal, which is headquartered in Asunción, Paraguay, into the dispute. In July 2012, it filed a request for provisional measures challenging the legality of its suspension and the accession of Venezuela. Within a few days the tribunal rejected the request because its power to issue provisional measures is limited only to order the release of confiscated perishable goods, or goods necessary in times of crisis in the importing state.<sup>53</sup> It is anyone's guess what the tribunal's future will be. General elections were held in Paraguay in April 2013, returning government back to the right-wing Colorado party. To date, Paraguay has not yet been readmitted to Mercosur.

Paraguayan crisis notwithstanding, the longer-term prognosis is uncertain. The accession of Venezuela and Bolivia has permanently altered the politics of the Mercosur. Enlargement might dilute the sway of the two super-powers of the region—Argentina and, mostly, Brazil—and create more breathing room for the Mercosur tribunal by enlarging its potential support basis. However, the accession to Mercosur of Bolivia accelerated the process of integration between Mercosur and the Andean Community, the other South American trading block, which is already endowed with a well-established and somewhat effective adjudicative body: the Andean Tribunal of Justice.<sup>54</sup> Finally, neither Bolivia, under Evo Morales, nor Venezuela, both under Hugo Chavez and under the Chavistas who succeeded him, has shown any inclination to accept decisions of independent international adjudicators.<sup>55</sup>

## 2.4 Central American courts

Central America has a long history of attempts to unite politically, which, at times, have also led to the creation of regional adjudicative bodies. It is the first region of the world to move towards judicialization. In 1902, with the Treaty of Corinto, Nicaragua, Honduras, Costa Rica, and El Salvador established the Central American Arbitration Tribunal.<sup>56</sup> It was an attempt to create a PCA-like regional forum of international adjudication. The Central American Arbitration Tribunal never became operative, but it is worth remembering for a few features. First, the

<sup>53</sup> Procedimiento Excepcional de Urgencia solicitado por la República del Paraguay en relación con la suspensión de su participación en los Órganos del Mercado Común del Sur (MERCOSUR) y la incorporación de Venezuela como Miembro Pleno (Extraordinary Urgent Proceedings Instituted at the Request of the Republic of Paraguay on its Suspension from the Organs of the Southern Common Market and the Admission of the Republic of Venezuela as Full Member), Judgment N° 01/2012 <[http://www.tprmercotur.org/es/docum/laudos/Laudo\\_01\\_2012\\_es.pdf](http://www.tprmercotur.org/es/docum/laudos/Laudo_01_2012_es.pdf)> accessed February 1, 2013.

<sup>54</sup> On the Andean Tribunal, see Helfer, Alter, and Guertzovich, note 40.

<sup>55</sup> See in this handbook, Romano, Ch. 5, at section 1.2.2.

<sup>56</sup> *Treaty Between Central American States Providing for the Arbitration of Differences*, 1902 Papers Relating to Foreign Rel. U.S. 881 (1903).

Treaty of Corinto provided for compulsory adjudication of any kind of dispute between members,<sup>57</sup> a feature that was ahead of its time and not to be found again in international adjudication until the rise of regional courts in Europe. Second, the tribunal was composed of an arbitrator and an alternate arbitrator for each of the four member states. Singularly, in case of dispute between two parties, the arbitrators of their nationality would sit out and the dispute would have been resolved by the arbitrators of the other members.<sup>58</sup> In case of a deadlock preventing adoption of the award, an arbitrator selected by lottery amongst the alternate arbitrators of the states not involved in the dispute was to cast the decisive vote.<sup>59</sup>

The United States played a prominent role in regional politics throughout the twentieth century. Protection of American companies' interests (particularly those growing crops such as bananas) and the project to build a canal across the isthmus led to numerous interventions, political and military, in the region to buttress this or that dictator. The first years of the 1900s were tumultuous with constant armed interventions and counter-interventions between Guatemala, Honduras, Nicaragua, and El Salvador. To stabilize the region, in 1907 the United States called for and hosted a Central American Peace Conference in Washington D.C. where the five republics of Central America (Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica) adopted the statute of a Central American Court of Justice (Corte de Justicia Centroamericana), a permanent judicial institution, as opposed to the arbitral body of 1902, to be based in Cartago, Costa Rica.<sup>60</sup>

The "Court of Cartago" was permanent in the sense that it had a seat and judges ready to hear any cases submitted to it, but like the ICTY and ICTR in modern times it was not to last indefinitely. When its status expired after ten years, few, and especially the United States, had little interest in keeping it alive.<sup>61</sup> Among the many ailments that killed it are some judicial ones (such as scarce independence of its judges, who were paid directly by their national states; probably too broad jurisdiction; and poorly written rules of procedure) and political ones (such as the court was no longer viewed as a neutral environment; and perceived over-influence of the United States in its functioning). But what sank the court for good was a politically supercharged case involving the Bryan-Chamorro Treaty between the United States and Nicaragua.<sup>62</sup> The treaty gave the United States rights to any canal built in Nicaragua in perpetuity (thus making sure no canal could be build to rival the

<sup>57</sup> *Treaty Between Central American States*, note 56, Art. II. However, territorial disputes could be submitted for resolution to a single arbitrator of US nationality: Art. X.

<sup>58</sup> *Treaty Between Central American States*, note 56, Art. IV.

<sup>59</sup> *Treaty Between Central American States*, note 56, Art. V.

<sup>60</sup> *Convention for the Establishment of a Central American Court of Justice*, 1907 Papers Relating to Foreign Rel. U.S. 697, 697 (1910).

<sup>61</sup> The ten-year life of the court was agreed upon in the treaty, but could have been modified through Article 27 of the Convention.

<sup>62</sup> Convention between the United States and Nicaragua ceding rights for construction of ship canal by Nicaraguan route, etc., concluded in Washington D.C., August 5, 1914, 39 Stat. 1661 (1916).

US-controlled Panama Canal), a renewable 99-year option to establish a naval base in the Gulf of Fonseca, and a renewable 99-year lease to the Great and Little Corn Islands (Islas del Maíz) in the Caribbean.<sup>63</sup> Both Costa Rica and El Salvador brought cases before the court challenging the validity of that treaty, particularly the provisions giving the United States rights to the Corn Islands.<sup>64</sup> When the court found in favor of Costa Rica and El Salvador, it lost support of both the United States and Nicaragua, sealing its fate.

Yet, this was not the end of attempts to set up an adjudicative body in that tormented region. After a failed attempt to create a Federation of Central America (El Salvador, Guatemala, Honduras) between 1912 and 1922, the five Central American states tried judicialization again in 1923, always under the tutelage of the United States, concluding in Washington D.C. a treaty to establish the International Central American Tribunal (Tribunal Internacional Centroamericano).<sup>65</sup> Like the 1902 Central American Arbitration Tribunal, this was an arbitral tribunal, PCA-style. The tribunal foundered when Guatemala and Honduras failed to agree to refer to it a territorial dispute. While Guatemala—and the United States—insisted that the tribunal had competence to hear the case and the dispute should be decided under its authority, Honduras resisted. The question was eventually referred to an ad hoc arbitral tribunal, presided by Charles Evans Hughes, Chief Justice of the US Supreme Court.<sup>66</sup>

After World War II, the same five states tried for the fourth time. In 1951, they adopted the Charter of the Organization of Central American States (Organización de Estados Centroamericanos—ODECA). The charter was modified in 1962 by adding to the organization a new Central American Court of Justice (Corte Centroamericana de Justicia), this time based in Managua, Nicaragua. Yet, the new court remained idle for the next three decades. It was only in 1991 that the Protocol of Tegucigalpa injected new life into the ODECA by creating the Central American Integration System (Sistema de Integración Centroamericana—SICA). The Central American Court of Justice was accordingly reconfigured, taking stock of the lessons learned with the Court of Cartago, and started functioning again in 1994.<sup>67</sup>

The Court of Managua suffers from multiple problems. For example, it has limited support amongst SICA members and it is prone to jurisdictional overreach. For the first ten years, the only three states to have ratified its statute were Nicaragua,

<sup>63</sup> Both the Gulf of Fonseca and the Corn Islands have been subject to several arbitrations and decisions of the ICJ.

<sup>64</sup> See SM Jordison, “The Central American Court of Justice: Yesterday, Today and Tomorrow?” (2009) 183 *Conncticut J. Int’l L.* 201–2.

<sup>65</sup> CE Hughes et al., “Protocol Between the United States and the Central American States, Signed at Washington, February 7th, 1923”, 1923 *Papers Relating to Foreign Rel.* Vol. I 327 (1938).

<sup>66</sup> Honduras borders (Guatemala, Honduras), January 23, 1933, *Reports of International Arbitral Awards*, Volume II 1307–66.

<sup>67</sup> Jordison, note 64, at 220.

Honduras, and El Salvador. In 2004 Honduras suspended its participation in the court, refusing to appoint its judges, leaving only Nicaragua and El Salvador to support it. Eventually, Honduras rejoined in 2007 and Guatemala followed suit, joining in 2008. Yet, to date the other four SICA members (Costa Rica, Panama, Dominican Republic, and Belize) have not yet ratified the statute. Recently, the question of whether all state members of SICA are subject to the jurisdiction of the court or only those that have ratified its statute has become the focus of a heated dispute.

In 2011, two Nicaraguan environmental NGOs filed a case before the court against Costa Rica, claiming that the construction of a freeway near the border with Nicaragua is in violation of a number of SICA legal instruments as well as several regional environmental treaties.<sup>68</sup> The court argued that by virtue of having ratified the Protocol of Tegucigalpa and becoming member of SICA, Costa Rica is *ipso facto* subject to the jurisdiction of the court, with no need for separate ratification of the court's statute.<sup>69</sup> Costa Rica refused to participate in proceedings and rejected the decision. The governments of Panama, Belize, and the Dominican Republic cried foul as well.

Further, its functions are probably too extensive, particularly for a relatively young court in a turbulent region. They encompass the whole spectrum of possible international judicial powers, including contentious, advisory, preliminary, arbitral, appellate, constitutional, and administrative functions. On the whole, the court can hear cases brought before it by member states of SICA; states which are not members of SICA that have a dispute with member states and agree to the court's jurisdiction; organs of SICA; Supreme Courts of the members of SICA; national courts; and natural and legal persons.<sup>70</sup> It can issue advisory opinions when requested by SICA members on any international treaty, including on the compatibility of those treaties with domestic laws of member states,<sup>71</sup> and can issue advisory opinions on the laws of the SICA legal system, which become binding for all SICA member states.<sup>72</sup> That notwithstanding, requests for advisory opinions are almost 40 percent of its caseload.<sup>73</sup> The only thing that is excluded from the court's jurisdiction is human right cases, which, the court's statute says,

<sup>68</sup> The case was filed on December 6, 2011. On December 22, 2012, Nicaragua filed a case before the ICJ on the same issue: *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. The case is currently pending.

<sup>69</sup> Central American Court of Justice, Judgment No. 12-06-12-2011, June 21, 2012 <<http://vianica.com/downloads/docs/1.pdf>> accessed February 1, 2013.

<sup>70</sup> Estatuto de la Corte Centroamericana de Justicia [Convention on the Statute of the Central American Court of Justice], Dec. 10, 1992, 1821 U.N.T.S. 280, Art. 22.

<sup>71</sup> Convention on the Statute of the Central American Court of Justice, note 70, Art. 23.

<sup>72</sup> Convention on the Statute of the Central American Court of Justice, note 70, Art. 24.

<sup>73</sup> Between 1994 and 2011, the Court received 69 cases and 41 requests for advisory opinions. <<http://portal.ccej.org.ni/ccj2/Historia/tabid/57/Default.aspx>> (Casos) accessed February 1, 2013.

are only for the IACtHR to decide.<sup>74</sup> Yet, even a statutory prohibition has not prevented the court, from time to time, to hear cases touching on human rights issues.

Third, unlike many international adjudicative bodies, the court also has strong supra-national features. It acts as a permanent consultative organ for supreme courts of the region and, under Article 22(f) of its statute, can even hear disputes between constitutional organs of member states. This latter aspect of its jurisdiction accounts for much of the troubles affecting the Court of Managua.

In 2005, the President of Nicaragua filed a case before the court against the Nicaraguan National Assembly, the national legislature, claiming violation of a number of regional and UN treaties as well as several articles of the Nicaraguan Constitution.<sup>75</sup> The constitutional dispute was triggered by the adoption by the National Assembly of a legal reform that would make any appointment made by the president subject to the approval of the National Assembly. Not only did the court take the case, but it also issued provisional measures, issuing an injunction to the National Assembly.<sup>76</sup> Throughout proceedings, the National Assembly refused to send an agent to appear before the court or to argue its case. Eventually, the court found in favor of the President and declared the National Assembly in violation of Nicaraguan law.<sup>77</sup> It also added that its decision should be treated as if it were a decision of a Nicaraguan court. Yet, at the same time, the matter had also been reviewed by the Nicaraguan Supreme Court, which not only disagreed with the court, but also declared Article 22(f) of the court's statute unconstitutional because it was in conflict with the Nicaraguan Constitution.<sup>78</sup> The dispute caused a major crisis in Nicaragua, the state on whose territory the court has its seat, at a time in which, with Honduras in auto-suspension, the only two SICA states supporting the court were Nicaragua itself and El Salvador. It also caused a major debate in the press, public, and at governmental level throughout the SICA region, with many accusing the court of grossly overreaching.

The powers given to the court under Article 22(f) have been controversial since the outset. In 1997 the XIX Summit of the Presidents of Central America issued a declaration (Panamá II) aimed at reforming the Central American parliament and the court. In the case of the court, one of the reforms they agreed to was abolishing the controversial provision.<sup>79</sup> The reform, however, was never implemented because

<sup>74</sup> Statute of the Central American Court of Justice, note 70, Art. 25.

<sup>75</sup> Corte Centroamericana de Justicia, *La Gaceta [L.G.] Oficial Corte Centroamericana de Justicia* No. 19, at 1, (May 24, 2005) <<http://portal.ccj.org.ni/ccj2/CeDoc/GacetitasOficiales/tabid/82/ItemId/48/Default.aspx>> accessed February 1, 2013.

<sup>76</sup> Corte Centroamericana de Justicia, *Anexo a Memoria Período 2004–2005*, <<http://portal.ccj.org.ni/CCJ2/LinkClick.aspx?fileticket=DvcCfypBidI%3D&tabid=70>> accessed February 1, 2013.

<sup>77</sup> Corte Centroamericana de Justicia, note 76.

<sup>78</sup> Corte Centroamericana de Justicia, note 76.

<sup>79</sup> XIX Cumbre de Presidentes Centroamericanos, *Declaración de Panamá II* (XIX Summit of Central American Presidents, Declaration of Panama II), “Sobre la Corte Centroamericana de Justicia”

the SICA states could not subsequently agree to take the formal legal step to implement the reform. When Honduras suspended its participation in the court, one of the reasons it cited for the step was that all attempts to modify the court's statute, in particular Article 22(f), had not produced results and a general lack of compliance with the court's decisions.<sup>80</sup> Finally, one of the reasons Costa Rica adduces for refusing to accept the jurisdiction of the court is exactly the powers the court has, and uses, under Article 22(f).<sup>81</sup>

### 3 CONCLUSIONS

The building of an international judiciary has been a largely unscientific, trial-and-error process. Some bodies, like the IPC, have been on clear dead-end roads. They were either ahead of their time, made moot before they could start operating or sapped by design flaws. Yet, some might still wake up from their slumber. After all, most international courts have been created since the end of the Cold War. It took the ECtHR and the ECJ three decades before their dockets took off, states accepted them, key actors figured out how to use them, and their overall effectiveness increased.

Although one has to be cautious in drawing too-firm conclusions in such a large field, populated with considerably different institutions, there are a few lessons that can be drawn even from a quick survey such as this. To begin with, international courts appear to be fragile institutions—probably more fragile than most international institutions—that need to be carefully designed, groomed, and tended to, especially in their early days. Overly ambitious constitutive legal instruments can cripple them from the outset, as the Central American stories tell us. International courts can also be suffocated by too much competition. Excessive enthusiasm for the promise of adjudication or impatience can lead states to create duplicates or alternative courts, crowding the field. The case of the OSCE Court and courts in Sub-Saharan Africa are illustrative of this problem. Regional clones of the ICJ or the

(on the Central American Court of Justice), 12/7/1997, para. B, available at <<http://www.sica.int/>> accessed February 1, 2013.

<sup>80</sup> Jordison, note 64, at 233.

<sup>81</sup> People Daily, "Costa Rica propondrá suprimir Corte Centroamericana de Justicia (Costa Rica Will Propose Abolishing the Central American Court of Justice)" (May 7, 2012) <<http://spanish.people-daily.com.cn/31617/7866767.html>> accessed February 1, 2013.

PCA, that is to say judicial bodies with function to settle disputes between states, have not taken root in part because there is a tacit, or deliberate, desire to keep The Hague at the center of that kind of international adjudication. It is very telling that most of the courts that have populated the field since the end of the Cold War are not ICJ- or PCA-like.

Once established, the early taking on of cases that are too big or too difficult can make testy governments pull the plug or head for the exit, as happened to the SADC Tribunal or the Central American Court of Justice. On the other hand, while civil society often has great expectations about what international adjudication could do, it rarely has the necessary patience to wait for international courts to root themselves. International adjudicative bodies can be prone to yield to the pressure to take on marquee cases to show their relevance. Yet, this strategy can backfire. A slow and low-aim approach can pay off. For example, it took almost three decades for the ECtHR and the ECJ to take off. The IACtHR took at least a decade and dozens of cases before it started taking on truly controversial issues that could irk major regional players.

All in all, for international judicialization to take roots there must be a fair degree of peace and stability. Leaving aside the somewhat special case of international criminal courts, which are expected to play a part in becalming and healing, international judicial bodies cannot function when members are deeply polarized or outright fighting, as the examples of the Mercosur, Central America, Arab League and COMESA illustrate. The rise of the European courts—the ECJ and ECtHR—has largely been possible due to the fact that both had a chance to grow over a few decades within a peaceful political space: Western Europe. Many clones of those two courts are struggling to achieve comparable results because they have to grow in significantly more polarized environments.

All of this is largely unexplored terrain for all scholars from various disciplines. Granted, one of the biggest challenges is finding information as often failed courts have left little trace behind them, while ailing courts do not have the resources to let the world know about their existence. Yet, this is a gap that can be filled by entrepreneurial scholars willing to hit the road to shed light on some relatively obscure corners of the international judicial landscape.<sup>82</sup> The future of international adjudication depends on learning and internalizing what are the factors that stymie international judicialization.

<sup>82</sup> For examples of entrepreneurial scholars, see note 40.

## RESEARCH QUESTIONS

1. If the growth of the international judiciary was not a trial and error affair, but a planned endeavor sustained by the application of theoretical inquiry, what would the international judicial landscape look like?
2. If one was to apply existing literature on the criteria to determine the relative effectiveness/ineffectiveness of international adjudicative bodies to the less known and research bodies, what insight would be gained?
3. Why do states spend considerable negotiating time and energies creating new international adjudicative bodies but then fail to follow through by ratifying the constitutive instrument, or accepting the body's jurisdiction, or using it?
4. What lessons can be drawn from the long history of largely failed judicialization in Central America?

## SUGGESTED READING

- Allain, J, *A Century of International Adjudication: The Rule of Law and its Limits* (The Hague: T.M.C. Asser Press 2000).
- Alter, K, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014).
- Caflich, L, "Cent ans de règlement pacifique des différends interétatiques (A Century of Peaceful Settlement of Disputes between States)" (2001) 288 *Recueil des Cours de l'Académie de Droit International* 245.
- Eyffinger, A, *The International Court of Justice: 1946–1996* (The Hague: Kluwer 1996).
- Fernández-Liesa, C (ed.), *Tribunales internacionales y espacio iberoamericano (International Tribunals and the Spanish-American Space)* (Madrid: Thompson Reuters 2009).
- Hudson, M, *International Tribunals: Past and Future* (Washington D.C.: Carnegie Endowment for International Peace and Brookings Institution 1944).
- Jordison, SM, "The Central American Court of Justice: Yesterday, Today and Tomorrow?" (2009) 25 *Connecticut J. Int'l L.* 183.
- Lombardini, M, "The International Islamic Court of Justice: Towards an International Islamic Legal System?" (2001) 14(3) *LJIL* 665–80.
- Perotti, A, *Tribunal permanente de revisión y estado de derecho en el Mercosur (Permanent Tribunal of Review and Rule of Law in Mercosur)* (Madrid: Pons 2009).
- Shany, Y, "Assessing the Effectiveness of International Courts: A Goal-Based Approach" (2012) 106 *AJIL* 225.
- Thani, AAF, "The Projected Arab Court of Justice: A Study to its Draft Statute and Rules, with Specific Reference to the International Court of Justice and Principles of Islamic Shariah" (University of Glasgow 1999).