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The Procedural Cross-Fertilization Pull

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THE PROCEDURAL CROSS-FERTILIZATION PULL

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Abstract

This paper argues that there is a distinct ‘pull’ towards cross-fertilization on procedural questions, meaning cross-fertilization between international courts and tribunals may be more likely for procedural issues than for questions of substantive law. As well as describing in a representative manner the substantial amount of cross-fertilization between international adjudicatory bodies that is occurring in relation to procedural issues, we attempt to provide a framework that helps explain this phenomenon. Our core suggestion is that procedural cross-fertilization is an ongoing process and is not just about borrowing by adjudicators, but involves contributions by a range of other actors, including the disputing parties, counsel, administering institutions and secretariats, professional bodies (eg the International Bar Association), and states as drafters of constitutive instruments and operators of control mechanisms. We suggest that three main considerations facilitate procedural cross-fertilization and even make it somewhat likely: the broad degree of discretion afforded to adjudicators on procedural issues; adjudicators’ duty to decide numerous procedural issues that arise throughout the proceedings; and sociological considerations concerning the circulation of a small number of personnel across multiple fora. We then analyse two wide-ranging considerations that counter-balance adjudicators’ broad discretion. On the one hand, various control mechanisms can be, and are, used by states to push adjudicators to remain faithful to their mandates, thus limiting the space for procedural cross-fertilization. On the other, procedural cross-fertilization feeds, and is fed by, an emerging model of international due process that is affecting all areas of international adjudication and that, by consolidating, becomes a constraining frame. This model of international due process has many components and we analyse its influence on two cross-cutting issues: expectations around the independence and impartiality of adjudicators and expectations around the transparency of adjudicatory processes.

Keywords

International Courts and Tribunals; Cross-fertilization; International Procedure; Due Process; Independence and Impartiality; Transparency and International Adjudication.

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1. Introduction

The numerous interactions between international courts and tribunals trigger a twofold hypothesis with regard to procedural issues. This hypothesis is not only of cross-fertilization as a kind of by-product of the multiplication of international adjudicatory bodies but also of a distinct 'pull' towards cross-fertilization on procedural issues.¹ Thus, judicial cross-fertilization may be more likely for questions of procedure than for questions of substantive law. The latter often differs across contexts and depends on delicate political equilibriums, whereas the former is first and foremost related to the performance by all international adjudicatory bodies of the same broad judicial function. This does not exclude variations in relation to the context but these commonalities seem to provide a particularly fertile ground for cross-fertilization, all the more so as procedural law is often regarded as formal and technical, and thus rather neutral and more easily adaptable across contexts.

Such an approach fits well with an optimistic vision of cross-fertilization, as characterised in the introduction of this book. Indeed, the chronic underestimation of the political dimension of procedure might facilitate cross-fertilization, and explain why these issues remain under-investigated. However, it might also be that processes of cross-fertilization reveal this political dimension of procedure, and therefore some stakes of power, and that such processes are not as smooth as one could expect based on the reasons mentioned above.

Our approach to procedural cross-fertilization relies on a broad definition of 'procedure', rather than a narrower one. The latter sees procedure as including 'all rules and principles regulating the manner in which the proceedings (*le procès*) are conducted', or 'the way in which the parties' requests are dealt with by the court, from the institution of proceedings until the moment of the final decision'.² The former understands procedure as concerning the conduct of proceedings, 'but also the constitution of international tribunals, and questions relating to their jurisdiction'.³ In other words, procedure in the broad sense includes all 'matters which are connected to the functioning of a judicial institution',⁴

* This chapter has been greatly enriched thanks to the comments on two previous drafts by the participants to the two workshops held in the course of the preparation of this book (who are for most of them also contributors). Our gratitude goes especially to Chiara Giorgetti and Mark Pollack for their additional insightful and challenging comments. We also thank the researchers of the Department of International Law and Dispute Resolution of the MPI Luxembourg who provided background notes on examples of cross-fertilization in their various fields of expertise. All remaining errors or approximations are ours.

¹ The terminology of a 'pull' is loosely borrowed from Tom Franck's idea of a 'compliance pull': see eg T.M. Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law*, 712.

² R. Kolb, 'General Principles of Procedural Law', in A. Zimmermann et al. (eds.) *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2012), p. 871, para. 3.

³ This is the definition adopted by C. Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007), p. 8.

⁴ S. Punzhin, 'Procedural Normative System of the International Court of Justice' (2017) 30 *Leiden Journal of International Law* 662 and 679-680 (jurisdiction is part of procedural law); See also E. Lauterpacht, 'Principles of procedure in international litigation' (2009) 345 *Collected Courses of The Hague Academy of International Law*, 437 (same); Kolb, 'General Principles of Procedural Law', p. 871, para. 3 (procedure in a broad sense as including 'all rules relating to international judicial action'); M.N. Shaw, *Rosenne's Law and Practice of the International Court 1920-2015* (5th ed., Brill Nijhoff, 2016) vol. III, pp. 1049-1053 (suggesting that procedure concerns 'the relations between the parties and the court or tribunal before which a dispute is brought', rather than 'the rights of the parties').

in contrast with primary international norms concerning the legality of particular conduct, and secondary rules concerning the consequences of breaches of obligations.⁵

By explaining how and why procedural cross-fertilization is occurring, this chapter aims to investigate some underexplored aspects of cross-fertilization.⁶ Of course, the topic of procedural cross-fertilization is not new. A decade ago, Chester Brown advanced the thesis that international courts and tribunals were increasingly considering each other's approaches to procedural issues and adopting common approaches and he proposed to speak of 'a common law of international adjudication', although he was aware that any overgeneralisation should be avoided.⁷ Since then, two broad developments have occurred. First, the caseloads of international courts and tribunals have continued to increase markedly. Second, anxieties related to the fragmentation of international law have receded and debates over the proliferation of international courts and tribunals have fallen from view,⁸ reflecting that these developments have been normalized, at least to a certain extent.⁹ A number of recent contributions have sought to reframe the debate over fragmentation by foregrounding the strong tendency towards convergence, and offered explanations for why such convergence may be occurring.¹⁰ Yet most of the debate continues to focus on convergence or divergence with respect to questions of substantive law.¹¹

Cross-fertilization is an under-theorised concept, although there have been some attempts.¹² This chapter builds on an understanding of cross-fertilization as a complex and continuing process. It is complex inasmuch as it involves a plurality of systems (thus, the 'cross-'); of actors (judges, the states that create and sustain an international tribunal, the disputing parties, counsel, administering institutions and secretariats, and relevant non-governmental organizations such as the International Bar Association (IBA), etc.); and of tools (eg drafting of constitutive instruments or procedural rules,

⁵ Puzhin, 'Procedural Normative System of the International Court of Justice', 662; Brown, *Common Law*, p. 8.

⁶ The literature is indeed rather sparse on procedural aspects. Beside C. Brown's book, *Common Law*, see T. Treves, 'Cross-fertilization between Different International Courts and Tribunals: The *Mangouras* Case' in H. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum R. Wolfrum* (Brill, 2011), vol. II, pp. 1787-1796; C. Giorgetti, 'Cross-fertilization of Procedural Law among International Courts and Tribunals: Methods and Meanings' in A. Sarvarian et al. (eds.), *Procedural Fairness in International Courts and Tribunals* (London: British Institute of International and Comparative Law, 2015), pp. 223-240; C. Titi, 'International Dispute Settlement in Cultural Heritage Law and in the Protection of Foreign Investment: Is Cross-Fertilization Possible?' (2017) 8 *Journal of International Dispute Settlement* 535-556.

⁷ Brown, *Common Law*, p. 5.

⁸ *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN Doc. No. A/CN.4/L.682, 13 April 2006. Interestingly, the report does not mention 'cross-fertilization'. M. Koskenniemi, P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law*, 3, 553-579.

⁹ T. Broude, 'Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law' (2013) 27 *Temple International and Comparative Law Journal* 280.

¹⁰ See eg A. Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 *International Journal of Constitutional Law* 671; M. Andenas and E. Bjorge (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015); P. Webb, *International Judicial Integration and Fragmentation* (Oxford University Press, 2013).

¹¹ Similarly: Giorgetti, 'Cross-fertilization', p. 224.

¹² See the introduction to this book. For a theoretical discussion of the meaning of cross-fertilization, see U. Linderfalk, 'Cross-Fertilization in International Law' (2015) 84 *Nordic Journal of International Law*, 431-433.

resort to general principles, interpretation, or reliance on the practice of other tribunals). In short, the various possible combinations of these factors result in a multitude of different sites of procedural cross-fertilization, although they all converge on the fact that all courts perform the same broad judicial function.¹³ Cross-fertilization is also a complex phenomenon because the term itself is rather indeterminate. It implies that there is a communication between systems but does not determine the directions of this communication or whether there is some hierarchy or reciprocity in the processes, or established patterns.¹⁴ In addition, cross-fertilization is used to cover a plurality of methods or techniques (eg citation to the decisions or practices of other tribunals (whether in a specific or general way), drawing analogies or distinctions with the decisions or practices of other tribunals, or considering how other tribunals have resolved an issue for the purposes of learning or adaptation).¹⁵ Where there is not an explicit cross-citation or at least an allusion, or a leak by an insider, the observer is left with his or her own interpretative skills to identify cross-fertilization, to weigh coincidences, taking into account some chronology that can make hypotheses more or less plausible. The methodological risk is to build an artificial unity. Last but not least, importing procedural practices into new contexts involves adapting them. Procedural cross-fertilization is hardly ever a pure import and goes hand in hand with adaptation that can also be a distortion.¹⁶ In any event, cross-fertilization implies its share of experimentation and testing. Thus, it is important to see procedural cross-fertilization as an ongoing process and to focus on its dynamic dimension.

As the contributions to this volume show, there are a range of potential explanations as to why international adjudicators and other actors engage (or do not engage) in cross-fertilization.¹⁷ Several of these explanations are particularly relevant from a procedural perspective. First, the statutes and procedural rules of courts and tribunals are often either ambiguous or silent on significant procedural questions, although procedural questions are numerous, arising throughout the proceedings. In this context, reference to solutions developed by other bodies helps adjudicators to resolve procedural questions, which allows the proceedings to continue, and to better support their decisions.¹⁸ Relatedly, for both adjudicators and other actors (eg counsel or administering institutions) it would be inefficient, and often erroneous, to 'reinvent the wheel' on every ambiguous or novel procedural question that arises.¹⁹ As John Crook suggests in his contribution to this volume, all courts and tribunals must find

¹³ See similarly Brown, *Common Law*, pp. 230, 232 (explaining procedural convergence on the basis that courts may perform the same functions or have the same relationship with the disputing parties).

¹⁴ For suggestions that there are established patterns involving a hierarchy, rather than reciprocity, in cross-citation between international courts see eg C.P.R. Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41 *NYU Journal of International Law and Politics* 755; E. Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 *The Journal of Legal Studies* 547.

¹⁵ See also Giorgetti, 'Cross-fertilization', p. 225.

¹⁶ Similarly: F. Fontanelli and P. Busco, 'The Function of Procedural Justice in International Adjudication' (2016) 15 *Law and Practice of International Courts and Tribunals*, 1, 19.

¹⁷ See the literature review in the introductory chapter to this volume.

¹⁸ Similarly: Giorgetti, 'Cross-fertilization', pp. 224, 238. See also Brown, *Common Law*, p. 227.

¹⁹ Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue', 780.

solutions to certain common problems that arise in the process of adjudication (eg fact finding), and there are a finite number of ways to resolve such problems in a manner that is both efficient and just.²⁰

Secondly, demonstrating that a procedural power or approach is supported by other international jurisdictions may make the decision more acceptable to relevant audiences – in particular the disputing parties and the states who sustain an institution.²¹ Cross-citation suggests that the citing court's reasoning is not arbitrary.²² On the contrary, the citing tribunal invokes the persuasive authority of precedents, i.e. established solutions.²³ Thirdly, cross-citation may be an attractive strategy for adjudicators who wish to engage in procedural law-making and expand their authority (including beyond their own regime), because when the same position is adopted by different judicial bodies it becomes difficult to dislodge, even if it is not formally binding.²⁴ Relatedly, engaging in cross-citation and judicial dialogue is an important mechanism for adjudicators who wish to influence other institutions.²⁵ Drawing on the approach of other bodies is also a common tactic for dissenters who disagree with the procedural approaches adopted by their own institution.²⁶ That said, cross-citation, particularly where it involves a tribunal claiming a power that has not been expressly conferred upon it, can lead to a tribunal being seen as exceeding its mandate and provoke state responses.

Whatever the favoured motive or explanation, and they can be multiple, one striking fact is the discretion and freedom that international adjudicators enjoy to engage in procedural cross-fertilization. However, like any freedom, not only it is not without limits but exercising it contributes to framing and shaping it. In addition, a historical perspective shows a growing sensitivity to due process, a tendency which can certainly be related to the bridge that the functioning of international human rights systems builds between domestic systems under pressure of improvement of domestic due process, and an international order where the principle of sovereign equality constituted traditionally a sufficient basis for due process (or a proxy of it). In fact, what happens at the procedural level cannot be understood without taking into account that the concept of international trial takes roots in domestic systems in which the negotiators of statutes and adjudicators themselves have been educated, even if cross-fertilization is considered here only at the international plane and in a horizontal perspective.²⁷ Specifically, this chapter is focused on international tribunals where at least

²⁰ John Crook chapter, this volume, partly drawing on H.W.A. Thirlway, 'Procedure of International Courts and Tribunals', in R. Bernhardt (ed.), *Max Planck Encyclopedia of Public International Law* (North-Holland, 1981) vol. 1, p. 183. See also Brown, *Common Law*, pp. 230, 232 (explaining procedural convergence on the basis that courts may perform the same functions or have the same relationship with the disputing parties).

²¹ Giorgetti, 'Cross-fertilization', p. 238.

²² Voeten, 'Borrowing and Nonborrowing', 553.

²³ On precedent see eg H. Ruiz Fabri and L. Gradoni, 'La hiérarchisation des précédents', in Société française pour le droit international, *Le précédent en droit international* (Pedone, 2016), pp. 191-211; H.G. Cohen, 'Theorizing Precedent in International Law', in A. Bianchi, D. Peat et M. Windsor (ed.), *Interpretation in International Law* (Oxford University Press, 2015), pp. 268-289; N. Miller, 'An International Jurisprudence? The Operation of "Precedent" across International Tribunals' (2002) *Leiden Journal of International Law* 483-526.

²⁴ See Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue', pp. 769-770, 780-781.

²⁵ Voeten, 'Borrowing and Nonborrowing', 551, drawing on A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004), pp. 74-75.

²⁶ See eg Giorgetti, 'Cross-fertilization', p. 225; Voeten, 'Borrowing and Nonborrowing', pp. 567-568.

²⁷ H. Ruiz Fabri (ed.), *Procès équitable et enchevêtrement des espaces normatifs* (Société de législation comparée, series 'UMR de droit comparé', 2003), especially H. Ruiz Fabri, 'Propos introductifs', pp. 7-12, and Charlotte Girard, 'Procès équitable et

one party is a state (in particular, WTO dispute settlement, the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), interstate arbitration, and investor-state arbitration), although international human rights or criminal courts or tribunals are also mentioned from time to time.²⁸ We suggest that cross-fertilization contributes as much as it is framed by the development of a core of due process at the international level, because this emerging model of due process leads to certain common expectations and apparent deviations from model must be explained.²⁹

Both freedom and constraints hold sway over processes of cross-fertilization and this swaying explains how this chapter proceeds. Part 2 reviews the basic conditions that facilitate procedural cross-fertilization and even, once combined, make it a likely, although not inevitable, outcome. Specifically, adjudicators have multiple tools that can operate as potential vectors for cross-fertilization and that allow for a broad degree of discretion that can permit them to develop a rather independent procedural policy.³⁰ This discretion must be appreciated alongside adjudicators' duty to decide, which is inherent in the judicial function, and means that adjudicators are forced to make numerous procedural decisions throughout the proceedings that are often not clearly resolved by applicable legal texts. This increases adjudicators' discretion if only by multiplying opportunities of exercising discretion. In this context, there may be a temptation to reach for 'off the shelf' solutions developed by other international tribunals or law-developing bodies, which allow adjudicators to resolve novel procedural questions and to better support, at least in their view, their decisions. Sociological considerations, such as the relatively small number of individuals involved in international litigation in various capacities and often across multiple fora, also lean towards procedural cross-fertilization. Part 3 addresses two additional wide-ranging considerations that counterbalance the discretion of adjudicators. On the one hand, as pointed out by the theory of legal constraints, despite their freedom, actors in the legal system 'turn toward a limited number of solutions'³¹ due to the legal constraints

enchevêtrement des espaces normatifs (Réflexions sur la problématique générale), pp. 21-52. See also, referring to a model of due process, H. Ruiz Fabri and J.-M. Sorel, 'L'exportation du modèle vers les juridictions internationales', in Serge Guinchard and al., *Droit processuel*, (10th ed., Dalloz, 2019) pp. 1225-1305.

²⁸ There is a substantial amount of literature dealing with cross-fertilization of international criminal procedure by human rights law. See especially, A.A. Cançado Trindade, 'Contemporary International Tribunals: Their Continuing Jurisprudential Cross-fertilization, with Special Attention to the International Safeguard of Human Rights' (2012) 12 *Global Community* 181-188; R. Pati, 'Fair Trial Standards under Human Rights Treaty Law and the ICTY: A Process of Cross-fertilization?' in T. Kruessmann (ed.), *ICTY: Towards a Fair Trial?* (NVW/ Intersentia), pp. 147-184; T. Mariniello and P. Lobba, 'The Cross-fertilization Rhetoric in Question: Use and Abuse of the European Court's Jurisprudence by International Criminal Tribunals' (2015) 84 *Nordic Journal of International Law* 363-370; J. Geneuss, 'Obstacles to Cross-fertilization: The International Criminal Tribunals "Unique Context" and the Flexibility of the European Court of Human Rights' Case Law' (2015) 84 *Nordic Journal of International Law* 404-427; S. Vasiliev, 'International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-fertilization' (2015) 84 *Nordic Journal of International Law* 371-403; K. Braun, 'Self- or Cross-fertilization? Referencing ECtHR Jurisprudence to Justify Victim Participation at the ICC' in Lobba and Mariniello (eds.), *Judicial Dialogue on Human Rights*, pp. 282-297; S. Vasiliev, 'Cross-fertilization under the Looking Glass: Transjudicial Grammar and Reception of Strasbourg Jurisprudence by International Criminal Tribunals' in Lobba and Mariniello (eds.), *Judicial Dialogue on Human Rights*, pp. 13-39.

²⁹ The relationship between cross-fertilization and an emerging core of procedural fairness at the international level is briefly noted in Giorgetti, 'Cross-fertilization', p. 225.

³⁰ For a striking example, H. Ruiz Fabri, 'The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story' (2016) 27 *European Journal of International Law*, 4, 1075-1081.

³¹ V. Champeil-Desplats and M. Troper, 'Proposition pour une théorie des contraintes juridiques', in V. Champeil-Desplats, C. Grzegorzczak, M. Troper, *Théorie des contraintes juridiques* (Bruylant/LGDJ, 2005), p. 14 (our translation).

resulting from the features of this system. Thus, various control mechanisms push adjudicators to remain faithful to their specific mandate (and thus curtail adjudicators' space to engage in cross-fertilization). On the other, procedural cross-fertilization feeds, and is fed by, an emerging model of international due process that is affecting all areas of international adjudication and that, by consolidating, becomes a constraining frame. This model of international due process has many components and influences two cross-cutting issues we focus on: expectations around the independence and impartiality of adjudicators and expectations around the transparency of adjudicatory processes. Part 4 briefly draws together our conclusions and suggests some avenues for further research.

2. The Facilitating Conditions for Procedural Cross-Fertilization

A combination of three main factors facilitates procedural cross-fertilization and indeed makes it somewhat likely. Specifically, adjudicators have multiple tools that can operate as potential vectors for cross-fertilization and that provide for a broad degree of discretion. In addition, adjudicators have a duty to decide, which is inherent in the judicial function, and means that adjudicators are forced to make numerous procedural decisions throughout the proceedings that are often not clearly resolved by applicable legal texts. This increases their discretion if only by multiplying opportunities to exercise discretion. Sociological considerations, such as the relatively small number of individuals involved in international litigation in various capacities and often across multiple fora, reinforce the use of discretion towards procedural cross-fertilization.

2.1 Broad discretion: multiple tools

Procedural tools are multiple and diverse and this contributes to increase adjudicators' discretion regarding procedural matters. Thus, the texts that are relevant to procedural matters range from constitutive instruments and rules of procedure to various soft law instruments, such as practice directions and guidelines. In addition, adjudicators have the power to make these texts evolve through interpretation, or can resort to general principles of law, as well exercise inherent powers and draw upon the practices of other courts or tribunals.

2.1.1 Constitutive instruments

When expressly addressing procedural issues, the constitutive instruments of courts and tribunals are often drafted in similar terms, reflecting that treaty drafters may decide to borrow from provisions that have already been utilized in the statutes of existing courts and tribunals.³² For example, ITLOS' Statute is partly modelled on the ICJ's Statute, although it also 'depart[s] from the latter in significant respects'.³³ The drafters of the ICSID Convention also borrowed from the ICJ Statute in certain respects (for example, provisions concerning the granting of provisional measures and the revision of awards).³⁴

³² Brown, *Common Law*, pp. 226-227.

³³ P.C. Rao and P. Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Edward Elgar, 2018), para. 4.005.

³⁴ Convention on the Settlement of Investment Disputes between States and Nationals of other States, 18 March 1965, entered into force 14 October 1966, 575 UNTS 159, Arts. 47, 51(1)-(2). C. Schreuer et al., *The ICSID Convention: A Commentary* (2nd ed.,

In the realm of arbitration, the parties to the dispute have, as a matter of principle, the choice of procedure and can prescribe the rules of their choice to the tribunal. However, in a context where arbitration tends to be more and more institutionalised, the fact of locating an arbitration in an administering institution favours the use of the pre-existing set of arbitral procedural rules established by this institution, a set that may well have been inspired by the rules of another arbitral institution.³⁵ Including in ad hoc arbitration, parties can decide to refer to a pre-existing set of arbitral procedural rules that the tribunal is to use at least as a basis for its own practices, thus narrowing the tribunal's discretion.³⁶

To a certain extent, the process of cross-fertilization is a rolling ball. Quite logically, drafters tend to look at what already exists before proceeding, be it to copy it or to depart from it, for example because they take the view that the procedures of an existing tribunal have not worked well, or decide that they do not wish the new tribunal to enjoy certain powers such as the power to give advisory opinions. In any event, cross-fertilization is never a pure copy, if only because lessons are drawn from experience. However, to the extent that certain provisions are borrowed, this practice facilitates further procedural cross-fertilization because where a body's statute or procedural rules are based on those of another body, it is arguably appropriate for adjudicators to take account of the jurisprudence of the other body when exercising the same power.³⁷

2.1.2 Direct law-making powers conferred on tribunals with respect to procedure

The statutes of international courts and tribunals frequently only scarcely address procedural matters, and most courts and tribunals are expressly given the power to elaborate their own rules of procedure.³⁸ Furthermore, such rules of procedure generally do not require ratification by the states

Cambridge University Press, 2009), pp. 759, 879. *Cemex Caracas Investments B.V. v Venezuela*, ICSID Case No ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, para. 39; *von Pezold v Zimbabwe, Border Timbers Ltd v Zimbabwe*, ICSID Cases No. ARB/10/15 and ARB/10/25, Procedural Order No 5, 3 April 2013, para. 56.

³⁵ For example, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules), first promulgated in 1976 and revised in 2010, were used as a basis for the various procedural rules developed by the Permanent Court of Arbitration (PCA) since 1992, and for the arbitration rules of various commercial arbitration centres: D.D. Caron and L.M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., Oxford University Press, 2013), pp. 6-7; J.J. van Haersolte-van Hof, 'The Revitalization of the Permanent Court of Arbitration' (2007) 54 *Netherlands International Law Review* 395, 401. PCA, Arbitration Rules (2012), Introduction. John Crook's chapter, this volume.

³⁶ The following tribunals all used a version of the PCA's arbitration rules as a basis for their own rules of procedure, having been instructed to do so in the relevant arbitration agreements: Eritrea-Ethiopia Claims Commission, Rules of Procedure, 1 October 2001, Art. 1(1); Eritrea-Ethiopia Boundary Commission, Rules of Procedure, 11 April 2002, Art. 1(1); *Iron Rhine Arbitration (Belgium v Netherlands)*, Arbitration Agreement, 22 July 2003, and Rules of Procedure, 23 July 2003; *The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Arbitration Agreement, 7 July 2009, Art. 1(1)-(2). For a tribunal that directly used a set of PCA arbitration rules see *Republic of Croatia v Republic of Slovenia*, Arbitration Agreement, 4 November 2009, Art. 6(2). These documents are all available via <https://pca-cpa.org/en/home/>. The Iran-United States Claims Tribunal was instructed, in its constitutive instrument, to use the UNCITRAL arbitration rules, although they can be adapted. See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, 75(2) AJIL 422, Art. III(2). Iran-US Clams Tribunal Rules of Procedure (3 May 1983).

³⁷ See eg the ICSID jurisprudence concerning provisional measures cited above note 34.

³⁸ See eg Statute of the International Court of Justice, 26 June 1945, in force 24 October 1945, 3 Bevens 1179, Art. 30(1); Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh, 15 April 1994, in force 1 January

parties to the relevant statute,³⁹ although there are some notable exceptions like the International Criminal Court (ICC) and the Court of Justice of the European Union (CJEU).⁴⁰ For the ICC, this reflects a deliberate choice not to let judges dispose of the rules of procedure, be it because it was found that the ICTY abused its leeway by modifying its procedural rules too often, thus rendering them unstable and unpredictable and maybe too common law-oriented, or that keeping the delicate balance that made a permanent international criminal court possible could not be left to the court itself knowing that a creature tends to escape its creators.⁴¹ For the CJEU, it corresponds to an approach shaped more by the logic of domestic civil law systems where procedural rules are adopted by the legislator.

Already, at the stage of adopting and refining a set of procedural rules, there can be substantial imitation and borrowing from the procedural rules of other courts and tribunals. For example, ITLOS in drafting its rules of procedure used the ICJ Rules as a basis but then innovated in significant respects.⁴² Thus, ITLOS departed from the ICJ Rules in a range of ways with regard to the time limits for various steps in the proceedings, the organization of oral hearings, and the procedure followed for internal deliberations.⁴³ These departures from the ICJ's practices reflect that by the time ITLOS drafted its procedural rules, Resolution on Internal Judicial Practice, and Guidelines Concerning the Preparation and Presentation of Cases, there was an active debate over whether various aspects of the ICJ's procedural practices made proceedings before the Court too slow.⁴⁴

Sometimes, the line between borrowing and adapting can be blurred. Thus, it is acknowledged by insiders that the Working Procedures of the WTO Appellate Body were drafted in light of procedural rules of established international courts and tribunals, although adapted for the specific context.⁴⁵ Whereas it is rather clear that Rule 15, which allows an Appellate Body member to go on sitting in a

1995, 1869 UNTS 401, Arts. 12.1 and 17.9; Statute of the International Tribunal for the Law of the Sea, 10 December 1982, in force 16 November 1994, 1833 UNTS 561, Art. 16, and formerly, Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, 25 May 1993, Art. 15.

³⁹ Brown, *Common Law*, p. 39.

⁴⁰ In the International Criminal Court, the Rules of Procedure and Evidence (and amendments thereto) must be adopted by the Assembly of the States Parties at a two-thirds majority: Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 90, Art. 51 (1)-(3); The Rules of Procedure of both the European Court of Justice and the General Court of the European Union (both constituting the Court of Justice of the European Union) require the approval of the Council of the European Union: Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/01, 26 October 2012, p. 47-390, Arts. 253-254.

⁴¹ Ruiz Fabri and Sorel, 'L'exportation du modèle vers les juridictions internationales', p. 1284.

⁴² See generally T. Treves, 'The Procedure before the International Tribunal for the Law of the Sea: The Rules of the Tribunal and Related Documents' (1998) 11 *Leiden Journal of International Law* 565.

⁴³ *Ibid.*, 565-573.

⁴⁴ *Ibid.*, 566-567, 569-570. For another discussion, also highlighting that ITLOS' departures from the ICJ's practices were due to such criticisms see ILA Committee on Rules of Procedure of International Courts and Tribunals Preliminary Report (revised version of 31 August 2017), 101-104, 110-113, 115-117, available at: <<https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=4827&StorageFileGuid=0ea5b379-1087-457d-9da5-cebbc6499d16>>. See also D. Bowett, J. Crawford, I. Sinclair and A. Watts, 'The International Court of Justice, Efficiency of Procedures and Working Methods', Report of the Study Group, Supplement to 45(1) *International and Comparative Law Quarterly* (1996), 1-35.

⁴⁵ See D.P. Steger, 'The Founding of the Appellate Body' in G. Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press, 2015), pp. 447, 451, fn 13.

case after the end of his or her term, is inspired from the most common practice in international tribunals, it is more difficult to analyse the genealogy of the rule of collegiality (Rule 4). This provision goes beyond Article 17.1 of the DSU, which refers to adjudication of each case by a division of three members, by providing for an exchange of views between all the Appellate Body members in order 'ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members' (Rule 4(1)). On the one hand, this fits well with the logic of an appeal but, for lack of double degree of jurisdiction of the same kind at the international level, this approach could be seen as better inspired by domestic systems.⁴⁶ On the other hand, beyond the concern for continuity and consistency in the case law, the Appellate Body might have learnt from other courts and been mindful that the intervention of the full body gives more authority to the decisions. The relative failure of chambers at the ICJ as well as the fact that some regional courts have various formations, among which is a solemn one (Grand Chamber at the European Court of Justice and the European Court of Human Rights) dealing with cases calling for a principled solution, might have been inspiring.⁴⁷

Cross-fertilization through the adoption of procedural rules has at times seen international tribunals assume powers that the relevant tribunal was not expressly granted, but that are inspired by experience with other tribunals. For example, ITLOS in its procedural rules has made provision for the full Tribunal to receive requests for advisory opinions, despite neither its statute nor any other part of the text of the UN Convention on the Law of the Sea (UNCLOS) envisaging such jurisdiction,⁴⁸ and has drawn heavily on ICJ jurisprudence in exercising such jurisdiction.⁴⁹ Likewise, ITLOS has in its procedural rules made provision for requests for revision of judgments, in terms borrowed from the ICJ Statute, although this power does not appear in ITLOS' Statute.⁵⁰ Notably, the European Court of Human Rights (ECtHR) also introduced into its rules of procedure the power to grant provisional measures, a power that is not found in the Convention. Later, the ECtHR drew upon the case law of

⁴⁶ G. Sacerdoti, 'Appeal and judicial review in international arbitration and adjudication: the case of the WTO appellate review', in E.-U. Petersmann, *International trade law and the GATT/WTO dispute settlement system* (Kluwer, 1997), pp. 245-280; H. Ruiz Fabri, 'Le Juge de l'OMC : ombres et lumières d'une figure judiciaire singulière' (2006) 110 *Revue Générale de Droit International Public*, 39-83.

⁴⁷ On the issues discussed here regarding the provision for an exchange of views see also C.-D. Ehlermann, 'Six Years on the Bench of the "World Trade Court" Some Personal Experiences as Member of the Appellate Body of the World Trade Organization' (2002) 36 *Journal of World Trade* 612-613; P. Van den Bossche, 'From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System' in G. Sacerdoti, A. Yanovich and J. Bohanes, *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, 2006), pp. 303-304; D. Unterhalter, 'The authority of an institution', in G. Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015), pp. 466-75; J. Lacarte-Muro, 'Launching the Appellate Body', in G. Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO*, pp. 476-481.

⁴⁸ ITLOS, Rules of the Tribunal, ITLOS/8, 25 September 2018, Art. 138. In contrast, the Sea-Bed Disputes Chamber is explicitly granted power to give advisory opinions: UNCLOS, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3, Art. 191.

⁴⁹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, 2 April 2015), ITLOS Reports 2015, 4, paras. 70-78.

⁵⁰ ITLOS, Rules of the Tribunal, Arts. 127-129. Rao and Gautier suggest that this reflects that 'revision is seen as reflecting a principle of good administration of justice applicable to international proceedings': Rao and Gautier, *The International Tribunal for the Law of the Sea*, para. 4.301. Note that in contrast, the power to interpret judgments, which is provided for in ITLOS' procedural rules, has some basis in the Tribunal's Statute: ITLOS Statute, Art. 33(3). For analysis of the power of revision as an inherent power, with reference to a range of relevant jurisprudence see Brown, *Common Law*, pp. 166-171.

other courts and tribunals, especially the ICJ's reasoning in the *LaGrand* case, in upholding the binding force of such measures.⁵¹

2.1.3 Development of Procedural Law through Soft Law Instruments: Multiple Sites

Most of the international courts and tribunals have added other types of texts, like practice directions, guidelines or manuals.⁵² These instruments give more flexibility to adjudicators than formal amendments to procedural rules or statutes. They are ways of testing procedural innovation or of framing the implementation of procedural powers. Despite their soft law character, they often take the form of a regulation and have significant practical influence because they are used as a reference point by adjudicators and above all by the disputing parties who can wonder whether deviating from these texts might not play against them.⁵³ This is not the only stake and some stakes appear even more clearly when considering the example of the International Criminal Court that, as mentioned above, does not control its Rules on Procedure and Evidence that are its basic regulation on procedure. In addition to the Regulations of the Court, which are adopted by the judges and are provided for in the Rome Statute,⁵⁴ the judges have in recent years developed a 'Chambers Practice Manual'. This instrument is explicitly non-binding and based on best practices identified through collective reflection among the bench.⁵⁵ Nevertheless, commentators have suggested that in practice the Manual represents a significant instance of judicial law-making, and is being used as an alternative to suggesting amendments to the Rules on Procedure and Evidence, which require approval by a two-thirds majority of members of the Assembly of States Parties.⁵⁶

Importantly, adjudicators are not the only authors of soft law instruments relevant to procedural issues. For example, in the context of investment arbitration, professional bodies (eg the IBA), diplomatic bodies (eg UNCITRAL), and various arbitral institutions have developed a range of soft law documents or guidelines. Such documents may become binding if they are adopted by the parties or

⁵¹ *Mamatkulov & Askarov v Turkey*, App. Nos. 46827/99 & 46951/99, Grand Chamber Judgment of 4 February 2005, paras. 40-53, 103-29, ECHR 2005-I. Contrast the Joint Partly Dissenting Opinion of Judges Caflisch, Türmen and Kovler, paras. 140-164. *LaGrand (Germany v United States of America)*, Judgment, ICJ Reports (2001) 466.

⁵² The ICJ adopted practice directions in 2001, although this was based on earlier 'recommendations' that were provided to parties at the institution of a case since 1998. For analysis of the status of practice directions in the ICJ context eg Puzhin, 'Procedural Normative System of the International Court of Justice', 668-676. ITLOS, the ECtHR, CJEU, and General Court of EU have also adopted practice directions, although for these bodies the power to adopt practice directions is expressly mentioned in the rules of procedure: see for overview M. Knust Rassekh Afshar, 'International Courts and Tribunals, Rules and Practice Directions (ECJ, CFI, ECtHR, IACtHR, ICSID, ITLOS, WTO Panels and Appellate Body)', *Max Planck Encyclopedia of Public International Law* (OUP, 2008), paras. 32-34. See further the Notes for the guidance of Counsel in written and oral proceedings before the EFTA Court at: <https://eftacourt.int/the-court/guidance-for-counsel/>.

⁵³ See eg A. Keene (ed.) 'Outcome Paper for the Seminar on the International Court of Justice at 70: In Retrospect and in Prospect' (2016) 7 *Journal of International Dispute Settlement* 252 (comments of Alain Pellet).

⁵⁴ See Rome Statute, Art. 52 (such regulations are those necessary the Court's routine functioning and are adopted by a majority of the bench. They can be disallowed through an objection by a majority of states parties within six months of their adoption. It is pursuant to this power that the Court adopted a Code of Judicial Ethics).

⁵⁵ ICC, Chambers Practice Manual (3rd ed., 2017), Introduction to the Third Edition of the Manual.

⁵⁶ See generally Y. McDermott, 'The International Criminal Court's Chambers Practice Manual: Towards a Return to Judicial Law Making in International Criminal Procedure?' (2017) 15 *Journal of International Criminal Justice* 885ff. Rome Statute, Art. 51(2)-(3).

the tribunal in an initial procedural order, but they also often serve as non-binding guidance when a particular procedural question arises.⁵⁷ For example, the IBA's Rules on Taking of Evidence in International Arbitration (2010) and Guidelines on Conflict of Interest in International Arbitration (2014), although originally developed in the commercial arbitration context, have been frequently cited in investment arbitration.⁵⁸ Likewise, UNCITRAL and the various arbitral institutions have developed soft law guidance on the conduct of arbitral proceedings, as well as more specific guidelines on particular issues.⁵⁹

2.1.4 Power of international courts and tribunals to interpret their own constitutive instruments and procedural rules

Various (and familiar) techniques of treaty interpretation may be drawn upon by international courts and tribunals in interpreting their statutes and procedural rules in a manner that makes them evolve, including to justify powers that were not explicitly conferred on a tribunal. The most relevant techniques include the principle of effectiveness, the principle of evolutive interpretation, and the principle of systemic integration.⁶⁰ An example is the decisions of the ICJ, ECtHR and numerous ICSID tribunals interpreting their constitutive instruments or procedural rules to encompass a power to order binding provisional measures, with heavy emphasis on the principles of effectiveness and systemic integration.⁶¹ These instances of treaty interpretation are significant because the text of the relevant constitutive instruments either are ambiguous regarding whether provisional measures are binding (as in the case of the ICJ and ICSID tribunals),⁶² or do not provide for a power to grant provisional measures at all (as in the case of the ECtHR where, as mentioned, the power was introduced through procedural rules elaborated by the Court, and subsequently interpreted in light

⁵⁷ J. Commission and R. Moloo, *Procedural Issues in International Investment Arbitration* (Oxford University Press, 2018), para. 1.23-126.

⁵⁸ See eg IBA Arbitration Guidelines and Rules Subcommittee, 'Report on the Reception of the IBA Arbitration Soft Law Products' (2016), available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=105d29a3-6261-4437-84e2-1c8637844beb>.

⁵⁹ See eg UNCITRAL Notes on Organizing Arbitral Proceedings (first adopted 1996, second edition adopted 2016). Arbitration Institute of the Stockholm Chamber of Commerce (SCC), *Arbitrator's Guidelines* (2019). International Chamber of Commerce, *Notes to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration* (2019).

⁶⁰ See generally Brown, *Common Law*, pp. 43-52. See also Philippe Sands who relates cross-fertilization to systemic integration and Article 31(3)(c) of the VCLT, in 'Sustainable Development: Treaty, Custom and the Cross-fertilization of International Law', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999), pp. 39-60.

⁶¹ *LaGrand* paras. 102, 109; *Mamatkulov v Turkey*, paras. 122-126. From many ICSID tribunals see especially *Perenco Ecuador Ltd v The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, paras. 66-76; *Quiborax S.A. and Non Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, paras. 578-582.

⁶² See the detailed analysis of debates over this issue in C.A. Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge University Press, 2017), pp. 276-285 (concerning Article 41 of the ICJ Statute), 285-287 (concerning Article 47 of the ICSID Convention). See also Brown, *Common Law*, pp. 149-150 (suggesting that ICSID jurisprudence upholding the binding nature of provisional measures is incorrect in light of Article 47 of the ICSID Convention).

of the practice of other courts).⁶³ Again, these examples suggest that adjudicators who wish to consolidate and expand their procedural powers may engage in cross-citation because referring to the decisions of other bodies adds support to their decisions and helps legitimise the assertion of a new procedural power, especially if potentially controversial. The example concerning the binding nature of provisional measures is striking because within just a few years of the ICJ holding that provisional measures were binding under its own Statute, several other courts and tribunals made similar findings, with frequent citation of the ICJ's ruling, which in hindsight established 'a new *status quo*'.⁶⁴

2.1.5 Reliance on general principles of law, or practice of other courts and tribunals

General principles are a well-established source of international procedural law.⁶⁵ It is not hard to find examples of international courts referring to various procedural maxims as general principles.⁶⁶ By their very nature, as principles common to a majority of domestic legal systems and transposed to the international plane (eg as reflected in Article 38(1)(c) of the ICJ Statute) general principles of law are contact points between various legal orders and therefore cross-fertilisers.⁶⁷ At the same time, stating the existence of a general principle is a loaded statement and the level of generality makes it necessary to justify further any more specific solution supposed to be flowing from the principle.⁶⁸ General

⁶³ See above note 51. See also H. Ruiz Fabri, 'The Use of International Judicial Precedents by the European Court of Human Rights: On the Trail of a Judicial Policy' (2017) 3 *European Journal of Human Rights* 231-248.

⁶⁴ Miles, *Provisional Measures before International Courts and Tribunals*, pp. 296-298. Considerations of competition likely partly explain the ICJ's initial decision to hold that provisional measures were binding, as under UNCLOS, both ITLOS and arbitral tribunals constituted under the Convention clearly enjoy the power to grant binding provisional measures: UNCLOS, Arts. 290(1), (5), (6); Brown, *Common Law*, pp. 147-148.

⁶⁵ Brown, *Common Law*, p. 53. H. Ascensio, 'Principes généraux du droit', *Répertoire Dalloz de Droit international* (Dalloz, 2004), Tome III, 2004.

⁶⁶ See eg ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports (2016) 100, para. 58 (*res judicata* is 'a general principle of law'); *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Case No. ARB[AF]/12/1, Award, 25 August 2014, para. 7.11 (same); ICJ, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, ICJ Reports (2008) 12, para. 45 ('It is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact'); IACtHR, *Genie-Lacayo v Nicaragua*, Order of 13 September 1997, Application for Judicial Review of the Judgment of Merits, Reparations and Costs, IACHR Series C No 45, para. 9 (supporting a power to revise judgments partly by reference to 'general principles of both domestic and international procedural law'). See also the repeated assertion by the WTO adjudicatory bodies that "the principle of good faith ... is, at once, a general principle of law and a principle of general international law" (for the most recent example, see Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, adopted 26 April 2019, para. 7.132), a principle that also applies to procedural obligations. For further examples see eg Kolb, 'General Principles of Procedural Law', paras. 8-56. Bin Cheng, *General Principles Of Law as Applied by International Courts and Tribunals* (1953, reprinted Cambridge University Press, 2006), pp. 257-386; ILC, 'First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur', UN Doc A/CN.4/732, 5 April 2019, paras. 127-134.

⁶⁷ Here we put to one side the debate over whether general principles can also be formed on the international plane, without having their origins in domestic legal systems. See generally First report by Marcelo Vázquez-Bermúdez, Special Rapporteur, *ibid.*, paras. 188-253.

⁶⁸ Fontanelli and Busco, 'The Function of Procedural Justice in International Adjudication', 6; R. Baker and A. Sarvarian, 'Conclusion', in A. Sarvarian et al. (eds.), *Procedural Fairness in International Courts and Tribunals*, pp. 390-392.

principles are to a certain extent a default solution because nothing else is at hand. Adjudicators might find more practical and efficient to use other ways of reasoning. Accordingly, some have suggested that the power of international tribunals to regulate their own procedures, combined with the ability of international tribunals to draw on their own prior decisions and the decisions of other international tribunals, provides a better justification for many procedural developments than general principles of law.⁶⁹ Within jurisprudence, it is quite common to find international courts and tribunals refer to the 'practice' of international tribunals to justify a particular procedural decision.⁷⁰ In short, this may be best characterised as an instance of judicial decisions operating as a source of law.⁷¹

2.1.6 Exercise of inherent powers

A plenary power to decide procedural questions not explicitly regulated elsewhere is sometimes given to adjudicators in a constitutive instrument.⁷² However, irrespective of whether such a plenary power is conferred, such a power would arguably fall within the inherent powers of adjudicators to regulate their own procedures. As is well known, the precise legal basis of the inherent powers of international courts and tribunals is debated. Nevertheless, the functional approach provides the satisfactory explanation that inherent powers include those powers necessary to carry out the functions that have been expressly conferred upon a court or tribunal, for example a grant of jurisdiction over a particular category of disputes.⁷³ The basic rationale here is that procedural issues that arise must be resolved, otherwise the proceedings could not continue, which would amount to a failure to carry out the task(s) conferred on an adjudicatory body.⁷⁴ Procedural issues are most of the time raised by one of the parties and adjudicators, facing a novel question, obviously cannot answer that they cannot proceed for lack of an explicit procedural rule governing the issue. Inherent powers to decide go hand in hand with good administration of justice, which is the most common justification provided, and the prohibition of denial of justice. As others have demonstrated, various procedural issues have been

⁶⁹ Mathias Forteau, 'General principles of international procedural law', *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, 2019).

⁷⁰ See eg *MOX Plant Case (Ireland v United Kingdom)*, Order No 3, 24 June 2003, 126 ILR 310, para. 58 ('International judicial practice confirms that a general requirement for the prescription of provisional measures to protect the rights of the Parties is that there needs to be a showing both of urgency and of irreparable harm to the claimed rights'); Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997 adopted 23 May 1997, p. 14 ('various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof').

⁷¹ Puzhin, 'Procedural Normative System of the International Court of Justice', 682.

⁷² Eg ICSID Convention, Art. 44. UNCITRAL Arbitration Rules 2010, Art. 17(1).

⁷³ See eg Brown, *Common Law*, p. 71. Andrew D Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function' (2010), 31 *Michigan Journal of International Law* 563-564 ('Inherent jurisdiction is the source of such incidental powers as an international court or tribunal requires in order to maintain and exercise its subject-matter jurisdiction in a judicial manner'). Similarly: Paola Gaeta, 'The Inherent Powers of International Courts and Tribunals', in L. Chand Vohrar et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer, 2003), pp. 368-369. Note that as Brown highlights, the inherent powers of a tribunal will be limited by the particular functions conferred on a tribunal as well as the express provisions in a constitutive instrument: Brown, *Common Law*, pp. 79-80.

⁷⁴ See below note 76.

resolved by international courts and tribunals exercising their inherent powers, including the power to determine the extent to which jurisdiction exists (competence-competence principle), deciding on the procedure to be followed in determining preliminary objections, the power to reformulate the submissions of the parties, and the power to interpret or revise judgments, or to correct errors in judgments.⁷⁵

2.2 Duty to decide and the growing complexity of adjudicatory work

Part of the explanation for procedural cross-fertilization is that international courts and tribunals have a duty to decide the issues presented to them,⁷⁶ and in almost all cases must provide reasons for their decisions.⁷⁷ Even if it seems paradoxical at first glance, such a duty increases the discretion of adjudicators. Procedural issues can arise at all stages of the proceedings, ranging from initial issues of jurisdiction and admissibility, challenges to adjudicators, issues of evidence, the merits, and any subsequent reparation stage.⁷⁸ The ultimate decisions at all these stages (eg whether jurisdiction exists, or the claim on the merits succeeds) cannot be made without procedure, meaning there is an obligation to rule on procedure every time it is necessary. Many procedural decisions are made that are not referred to in the final outcome of a case but have a strong shaping effect on the proceedings, such as decisions on the calendar of the case, whether to bifurcate proceedings, document production, and the use of witnesses. Furthermore, many of these procedural decisions are at most partly regulated by the relevant legal texts, meaning that adjudicators enjoy substantial discretion. Where adjudicators are faced with procedural issues that are not clearly resolved by relevant legal texts, their first move will be to consult with the parties but, except if an explicit rule gives a veto to either of the parties, adjudicators will have the last word. When faced with a novel procedural question, it is arguably appropriate that adjudicators consider how other international courts and tribunals have resolved the issue, even if contextual differences mean that a solution developed elsewhere is not entirely transposable. It might also very well be that one of the parties or both suggest such avenue.

The duty to decide should be understood alongside the growing complexity of adjudicatory work, both qualitatively and quantitatively. First, across all contexts, cases have become more complex, for internal and external reasons. It may be that the nature of the issues raised has evolved and has

⁷⁵ See eg Brown, *Common Law*, pp. 61-66, 165-171; Gaeta, 'The Inherent Powers of International Courts and Tribunals', pp. 356-358. See also F. Ferrari, F. Rosenfeld (eds.), *Inherent Powers of Arbitrators* (Huntington, NY: Juris 2019).

⁷⁶ For some tribunals this is explicitly stated in their constitutive instruments: eg ICSID Convention, Art. 42(2). Elsewhere, the situation is for all practical purposes the same: see eg Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para. 53 (WTO panels may not decline to exercise validly established jurisdiction). Note that the duty to decide is distinct from debates over *non liquet* in substantive law. At least in contentious proceedings, the duty to decide follows from the mandate that has been conferred on a tribunal to resolve a particular dispute: F.G. Sourgens, K. Duggal and I.A. Laird, *Evidence in International Investment Arbitration* (Oxford University Press, 2018), pp. 144–147; P. Weil, "The Court Cannot Conclude Definitively..." *Non Liquet Revisited*' (1998) 36 *Columbia Journal of Transnational Law* 115–116.

⁷⁷ H. Ruiz Fabri and J.-M. Sorel (eds.), *La motivation des décisions des juridictions internationales* (Pedone, 2008).

⁷⁸ Similarly Kolb, 'General Principles of Procedural Law', para. 4.

become more contentious, as has arguably happened to the ICJ over the last three decades.⁷⁹ The more contentious a case is, the more sensitive procedure becomes inasmuch as, whatever the outcome, the parties should be convinced that the process has been fair. In addition, it has become obvious that international courts and tribunals have several audiences, not only the disputing parties, and have to deal with the will of other interested parties who expect to be heard, and for the tribunal's decisions to speak to their concerns.

Second, together with a tendency of an increased number of issues being raised, cases have become more fact intensive, with parties bringing more evidence and technology also providing new evidentiary tools.⁸⁰ Although constitutive instruments and procedural rules can provide international courts and tribunals with investigative powers, procedures around fact-finding, such as the use of experts (whether party or tribunal appointed), are only partly regulated, and have been to a significant degree been developed through adjudicatory practices.⁸¹ For example, at the ICJ ad hoc procedures were laid down for the examination and cross-examination of expert witnesses in the 2013 hearing in *Whaling in the Antarctic (Australia v Japan, New Zealand intervening)*, and the 2015 hearing in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*.⁸² Site visits, although still not common in international adjudication, appear to have become more frequent in recent years, both in investor-state and interstate proceedings, consistent with the suggestion that adjudicators are increasingly faced with fact-intensive disputes.⁸³ The provisions of constitutive instruments or procedural rules concerning site visits are vague and the details of such of practices have been developed by tribunals, in consultation with the parties, through procedural orders.⁸⁴ As Fedelma Smith notes in her chapter,

⁷⁹ The 'operating area' (to translate the words of Michel Virally, 'Le champ opératoire du règlement judiciaire international' (1983) 87 *Revue générale de droit international public* 281-314) of international judicial settlement is no longer limited to territorial disputes or small-scale disputes.

⁸⁰ See eg J.G. Devaney, *Fact-Finding Before the International Court of Justice* (Cambridge University Press, 2016), pp. 1–6. More generally, H. Ruiz Fabri and J.-M. Sorel (eds.), *La preuve devant les juridictions internationales* (Pedone, 2007).

⁸¹ See eg J.L. Dunoff and M.A. Pollack, 'International Judicial Performances and the Performance of International Courts', in T. Squatrito et al, *The Performance of International Courts and Tribunals* (Cambridge University Press, 2018) pp. 265-268 (regarding fact-finding generally); M.M. Mbengue and R. Das, 'Rules Governing the Use of Experts in International Disputes' (2018) 17 *Law and Practice of International Courts and Tribunals* 416 (making this point in relation to the use of experts).

⁸² ICJ, Public Sitting held in *Whaling in the Antarctic (Australia v Japan, New Zealand intervening)* on 27 June 2013 at 10 am, Verbatim Record, CR 2013/9, p. 38. ICJ, Public Sitting held in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* on 14 April 2015 at 3pm, Verbatim Record, CR 2015/3, pp. 20-21. ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* ICJ Reports (2015) 665, paras. 32, 34, 37. The procedure differed in certain respects between the two cases: see Makane and Das, 'Rules Governing the Use of Experts', 448-449.

⁸³ M. Benatar, 'Site visit', *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, 2019), also available at: <https://www.mpi.lu/research/working-paper-series/2017/wp-2017-9/>. On site visits in investor-state arbitration see eg Commission and Moloo, *Procedural Issues*, paras. 9.35-9.36; On site visits in interstate proceedings see eg J. Levine and G.S. Schofield, 'Navigating Uncharted Procedural Waters in a Rising Sea of Cases at the Permanent Court of Arbitration', in S. Minas and H.J. Diamond (eds.), *Stress Testing the Law of the Sea: Dispute Resolution, Disasters & Emerging Challenges* (Brill Nijhoff, 2018), pp. 129-136.

⁸⁴ For the relevant procedural rules see eg ICJ Statute, Art. 44(2). ICJ, Rules of Court, Art. 66. ICSID Convention, Art. 43(b). ICSID, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 2006, Rules 34(2)(b), 37(1). UNCLOS, Annex VII, Art. 6(b). For examples of tribunals that have enunciated procedural regimes to govern site visits see eg *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)*, PCA Case No 2010-16, Procedural Order No 1, 28 August 2013. *Indus Waters Kishenganga*

in designing the procedures for a site visit tribunals have drawn upon earlier precedents from other institutions.⁸⁵ Indeed, the issues raised by a site visit, or the use of expert witnesses, may not differ drastically between an interstate and a mixed adjudication context.

Fact-intensive cases involving scientific or technical evidence can trigger competition between different courts and tribunals to demonstrate that they are capable of effectively dealing with such cases.⁸⁶ A good example of this is dispute settlement under Part XV of the UN Convention on the Law of the Sea, where the ICJ, ITLOS and ad hoc arbitration, administered by the PCA, are in direct competition.⁸⁷ As John Crook notes in his chapter, arbitral institutions, including ICSID, the PCA and commercial arbitration institutions, are also in active competition with each other to secure cases and this sometimes leads to the rapid adoption of procedural innovations by multiple institutions – for example, the development of emergency arbitrator procedures in recent years.⁸⁸

Document production and the related question of evidentiary privileges is another increasingly prominent issue that requires procedural decisions but it is at most briefly addressed in tribunals' statutes and procedural rules. Therefore, it has largely been regulated through adjudicators' practices. International tribunals typically have a general power to call upon the parties to produce documents to the tribunal and the parties have a duty to cooperate.⁸⁹ However, this does not squarely regulate the issue of whether a party can compel production of documents from another party, nor provide a specific standard that should be applied to such requests.⁹⁰ The last word goes to adjudicators through procedural orders.⁹¹ In international arbitration this issue is frequently dealt with through

Arbitration (Pakistan v India), Partial Award (2013) 154 ILR 1, paras. 23, 33-40, 77-88; *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017, paras. 18-30. The following examples saw a site visit being delegated to an independent expert: *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)*, Order of 31 May 2016, ICJ Reports (2016) 235, para. 10. *Guyana/Suriname*, Award, 17 September 2017, 139 ILR 566, paras. 120-126, 309.

⁸⁵ F. Smith chapter in this volume.

⁸⁶ On competition between international tribunals see J. Katz Cogan, 'Competition and Control in International Adjudication', (2008) 48 *Virginia Journal of International Law*, 439-449; Introduction to this volume.

⁸⁷ Katz Cogan, 'Competition and Control in International Adjudication', 442-443.

⁸⁸ John Crook chapter this volume. The element of competition with other institutions in relation to all aspects of the PCA's caseload (ie interstate, mixed and private contractual disputes) is also noted in van Haersolte-van Hof, 'The Revitalization', 410-412.

⁸⁹ Eg ICJ Statute, Art. 49. ICSID Convention, Art. 43(a); ITLOS Rules of the Tribunal, Art. 77(1); Iran-US Claims Tribunal Rules of Procedure, Art. 24(3). For further discussion of this power see eg Brown, *Common Law*, pp. 104-110. Citing earlier arbitral precedents: C. Santulli, *Droit du contentieux international* (2nd ed., Paris: Librairie Générale de Droit et de Jurisprudence, 2015), pp. 557-558.

⁹⁰ A.Z. Marossi, 'The Necessity for Discovery of Evidence in the Fact-Finding Process of International Tribunals' (2009) 26 *Journal of International Arbitration* 516; Sourgens, Duggal and Laird, *Evidence in International Investment Arbitration*, paras 9.27-9.30.

⁹¹ At the Iran-US Claims Tribunal, the specific standards regulating a request for documents in the possession of the other party have been elaborated through procedural orders of the Tribunal. See Caron and Caplan, *The UNCITRAL Arbitration Rules*, 567-569. Similarly, the UNCLOS Annex VII Tribunal in *Guyana v Suriname* issued several procedural orders to regulate disagreements between the parties regarding document production and eventually appointed an independent expert to decide on applications not to disclose (parts of) documents. See Devaney, *Fact-Finding Before the International Court of Justice*, pp. 160-165. See also Devaney's discussion of the regulation of document production processes in the *Abyei* and *Kishenganga* arbitrations: Devaney, *ibid.*, pp. 166-168, 172-175.

practices originating in international commercial arbitration, and loosely codified in the IBA's Rules on the Taking of Evidence in International Arbitration.⁹² However, the IBA Rules only slightly address the growing issue of privileges that may be claimed to resist producing evidence in certain circumstances,⁹³ meaning arbitrators enjoy a large degree of discretion in determining the standard that should apply.⁹⁴

As the above discussion indicates, with the growing complexity of cases international adjudicators are faced with a large number of procedural decisions throughout the proceedings, many of which are barely regulated by a court's constitutive instrument or procedural rules. In this context, drawing on the practices of other tribunals (or practices developed by other law-developing bodies) both provides an 'off the shelf' solution, which may have been subject to greater reflection and testing elsewhere, and helps legitimize the citing body's assertion of the relevant procedural power.

2.3 Sociological considerations related to a small world⁹⁵

As well as the multiple legal tools whose use can contribute to procedural cross-fertilization, and the duty to decide, procedural cross-fertilization is partly explained by the individuals who are increasingly gaining experience in more than one international jurisdiction, whether as adjudicators, counsel, registry/secretariat officials or experts. As John Crook emphasises in his chapter with reference to the recent history of international mass claims procedures, individuals can be a major force in driving legal institutions and procedures, and thus processes of cross-fertilization.⁹⁶ As others have shown, 'the international bar' is populated by many repeat players, many of whom have appeared in more than one fora.⁹⁷ Although to some degree the profile of international counsel is changing with the push of large law firms into proceedings partly or entirely governed by international law, overall the picture is

⁹² IBA Rules on the Taking of Evidence in International Arbitration, 2010, Art. 3 J. Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) pp. 841-842. Caron and Caplan, *The UNCITRAL Arbitration Rules*, p. 569. For overview of key issues within document production see eg Sourgens, Duggal and Laird, *Evidence in International Investment Arbitration*, paras 9.31-9.55.

⁹³ Art. 9(2)(b) of the Rules on the Taking of Evidence in International Arbitration, recognizes that a tribunal can exclude a document from production because of 'legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable'. Michele Grando, 'An International Law of Privileges' (2014) 3 *Cambridge Journal of International and Comparative Law* 670-671 notes that the IBA rules do not provide specific rules governing privilege claims nor detailed guidance regarding how arbitrators should determine the applicable rules for privileges.

⁹⁴ See also Grando, 'An International Law of Privileges', 679-695 (suggesting for proceedings under public international law, in light of the lack of well-established rules on privileges, international tribunal should engage in developing international law rules of privileges, and it is inappropriate to apply particular domestic rules based on a choice of law analysis). For an overview of the wide variety of issues that investor-state tribunals have had to resolve in deciding upon claims for privilege see Sourgens, Duggal and Laird, *Evidence in International Investment Arbitration*, paras. 11.09-11.42.

⁹⁵ For a broad view, see S. Caserta and M.R. Madsen, 'Sociology of international adjudication', *iCourts Working Paper Series* No. 160, 2019; and 'Sociological approaches to international adjudication', *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, 2019).

⁹⁶ John Crook chapter, this volume.

⁹⁷ See especially S. Dezalay with Y. Dezalay, 'Professionals of International Justice: From the Shadow of State Diplomacy to the Pull of the Market for Commercial Arbitration' in A. Nollkaemper, J. d'Aspremont, W. Werner, and T. Gazzini (eds.), *International Law as a Profession* (Cambridge University Press, 2017), pp. 311-337. Emphasizing this factor in explaining cross-fertilization: Brown, *Common Law*, p. 230; Webb, *International Judicial Integration and Fragmentation*, p. 201.

still one of a relatively small number of elite players as counsel.⁹⁸ Additionally, counsels in international adjudication, especially investment arbitration, constitute a reservoir for appointment as arbitrators.

Similarly, international adjudicators are increasingly gaining experience in more than one jurisdiction, secretariats playing on some occasions a role in their appointment in institutions like the WTO or ICSID. For example, current or former ICJ and ITLOS judges have frequently been appointed in interstate arbitration, whether under Annex VII of UNCLOS or in ad hoc arbitrations (both typically administered by the PCA). Beyond those who hold permanent appointments at any particular time, a small number of repeat players dominate appointments as ad hoc judges at the ICJ or ITLOS, and as arbitrators in interstate proceedings. The fact that commercial arbitrators have received the majority of appointments in investment arbitration has favoured cross-fertilization of the latter by rules and practices of commercial arbitration,⁹⁹ to the point of triggering a degree of contestation. Specifically, investment arbitration is a site of competition between arbitrators originating from the so-called 'transnational arbitral community' and drawing on commercial arbitration analogies, and public international lawyers drawing on the practices of other international courts and tribunals.¹⁰⁰ Within the latter group, it is noteworthy that current or former ICJ judges received a significant number of appointments in investment arbitration with this system's dramatic expansion beginning in early 2000s.¹⁰¹ Double hatting and the use of revolving doors, although open to criticism, favours a mix of practices.¹⁰² International courts and tribunals have also followed the debate on the role they might play in the fragmentation of international law, and have responded by developing specific channels that enable communication on cross-cutting issues with other international courts and tribunals, such as informal annual or regular meetings between the judges of different bodies.¹⁰³

Alongside adjudicators and counsels, the individuals who serve in registries or secretariats, as well as law clerks, *référéndaires* and secretaries of arbitral tribunals, deserve consideration. Essentially, with the rising caseloads of the last twenty years, registries and secretariats have expanded exponentially, and it is now far more viable to forge a career within a secretariat or registry – including by moving between institutions, such as commercial arbitration institutions and the PCA, or between secretariats or registries and practice as counsel and/or as an arbitrator. Certain institutions also appear to operate as informal gatekeepers that to some degree facilitate entry into the world of international litigation, including experience in the International Law Commission, the *Institut de Droit International*, and the

⁹⁸ See generally Dezalay, 'Professionals of International Justice', discussing at pp. 330-332 the growing influence of elite law firms.

⁹⁹ B.G. Garth, 'Transnational arbitral community', *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, 2019); F. Grisel, 'Competition and Cooperation in International Commercial Arbitration: The Birth of Transnational Legal Profession' (2017) 51 *Law and Society Review* 790–824.

¹⁰⁰ A similar point is made in Dezalay, 'Professionals of International Justice', pp. 330-31.

¹⁰¹ This phenomenon will end given the given the ICJ's 2018 decision to prevent sitting judges accepting investor-state or commercial arbitration appointments, which we discuss below note 166.

¹⁰² In the context of investor-state arbitration, empirical studies have demonstrated that a small number of elite players dominate the field, both as arbitrators and as counsel: S. Puig, 'Social Capital in the Arbitration Market' (2014) 25 *European Journal of International Law* 387; M. Langford, D. Behn and R.H. Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 *Journal of International Economic Law* 301-332.

¹⁰³ See for overview Webb, *International Judicial Integration and Fragmentation*, p. 200; J.L. Dunoff and M.A. Pollack, 'International Judicial Practices: Opening the "Black Box" of International Courts' (2018) 40 *Michigan Journal of International Law* 70. NGOs also play a role here. An example is the regular meetings of the Brandeis Institute for International Judges, which have involved members from various ICTs: <https://www.brandeis.edu/ethics/internationaljustice/biij/index.html>

Hague Academy of International Law, all of which have hosted in-depth reflections on procedural matters in international adjudication.¹⁰⁴

In terms of procedural cross-fertilization, the significance of this circulation of personnel, often across multiple international fora and in different capacities, is that, at a minimum, individuals will be aware of the practices of other institutions. Obviously, such awareness means that, particularly where an issue is under-regulated, the practices of other institutions will often be considered, even if they are not explicitly cited.¹⁰⁵ Furthermore, individuals may carry a favoured approach to certain procedural issues from one institution to another (eg interstate arbitration to mixed arbitration). Importantly, cross-fertilization as an ultimate result does not necessarily require that individuals are committed to acting as agents for unity. Some individuals may have strategies in this regard. Others may not be conscious of their potential role in processes of cross-fertilization. Cross-fertilization may arise partly as a by-product of certain processes, such as counsel representing their clients to the best of their ability (and accordingly drawing on relevant precedents from other fora), or arbitral institutions attempting to match the latest procedural innovation of their competitors.¹⁰⁶ Of course, notwithstanding these sociological forces, in some instances individuals may favour departing from the practices of other institutions, for example because to differentiate their own product.¹⁰⁷

The ultimate result of adjudicators' broad discretion on procedural issues and the duty to decide, is that there is an opportunity, and often also certain incentives, to look to solutions developed elsewhere, which can provide solutions to novel procedural questions and help adjudicators better support their decisions. The sociological factors reviewed above, principally the circulation of a small number of individuals actors across various settings, also help explain why we observe a substantial amount of procedural cross-fertilization. However, one cannot ignore how much these processes are context-dependent. They do not develop in isolation, nor are they irreversible. That adjudicators benefit to a great extent from the discretion that facilitates cross-fertilization does not mean that they can do whatever they wish.

3. Constraints on judicial freedom to engage in cross-fertilization

Two wide-ranging considerations counterbalance the discretion of adjudicators just described. On the one hand, as pointed out by the theory of legal constraints, despite their freedom, actors in the legal system 'turn toward a limited number of solutions'¹⁰⁸ due to the legal constraints resulting from the features of this system. Thus, various control mechanisms push adjudicators to remain faithful to their specific mandate and curtail adjudicators' space to engage in cross-fertilization. On the other, procedural cross-fertilization feeds, and is fed by, an emerging model of international due process that is affecting all areas of international adjudication and which, by consolidating, becomes a constraining frame. This model of international due process has many components and influences

¹⁰⁴ Dezalay, 'Professionals of International Justice', p. 318.

¹⁰⁵ Similarly Brown, *Common Law*, p. 233.

¹⁰⁶ See Kate Parlett chapter, this volume, drawing on Paul Reichler's suggestion that cross-pollination is an incidental result of counsel's work.

¹⁰⁷ Referred to in the introduction to this volume as the 'product differentiation hypothesis'.

¹⁰⁸ Champeil-Desplats and Troper, 'Proposition pour une théorie des contraintes juridiques', p. 14 (our translation).

notably two cross-cutting issues: expectations around the independence and impartiality of adjudicators and expectations around the transparency of adjudicatory processes.

These considerations constitute a legitimacy challenge because on the one hand faithfulness to mandate is a core aspect of how international courts generate internal legitimacy in the eyes of state principals. On the other, the international model of due process is a source of legitimacy, and it often drives the expectations of external constituencies.¹⁰⁹ Accordingly, deviations from the broad model of international due process increasingly must be justified.

3.1 Control mechanisms as internal constraints

The constitutive instrument of an adjudicative body, which defines its mandate, is for it the equivalent of a constitution and such a body is bound by the prohibition on acting or deciding *ultra vires*.¹¹⁰ Thus, the scope of the mandate conferred on an adjudicatory body is an important limitation on the ability of adjudicators to engage in procedural cross-fertilization. The terms of the mandate include both the broad functions or goals and the specific powers that are conferred on a tribunal, as well as those functions and powers that are explicitly or impliedly excluded.¹¹¹

If we turn from broad mandates to specific powers, no amount of creative interpretation can alter certain features of a tribunal that are determined by the mandate providers – for example, whether private parties have standing to bring cases,¹¹² or to provide *amicus* briefs.¹¹³ For example, while Article 34(2) of the ICJ Statute empowers the Court to ‘request of public international organizations information relevant to cases before it’ and states that it ‘shall receive such information presented by such organizations on their own initiative’ in contentious proceedings, the Statute’s restrictive terms would require its amendment to enable other non-State actors to participate as *amicus curiae*.¹¹⁴ Were

¹⁰⁹ On the distinction between internal and external legitimacy see eg J.H.H. Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’ (2001) 35 *Journal of World Trade* 193. For discussion of this issue, and other issues concerning the various forms of legitimacy and their application to international courts see eg H.G. Cohen et al., ‘Introduction: Legitimacy and International Courts’, in N. Grossman et al., *Legitimacy and International Courts* (Cambridge University Press, 2018), pp. 4-34.

¹¹⁰ On the relationship between *ultra vires*, or in French *excès de pouvoir*, and control mechanisms in international adjudication see eg Katz Cogan, ‘Competition and Control in International Adjudication’, 413. W.M. Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press, 1992), pp. 5-7. See also Sourgens, Duggal and Laird, Evidence in International Investment Arbitration, para. 1.35 (arguing investor-state tribunals are ‘authorized to function exclusively within’ terms of reference that are set by the disputing parties).

¹¹¹ Brown, Common Law, pp. 235, 79-80.

¹¹² Making a similar point regarding standing in WTO adjudication: K.J. Alter, L.R. Helfer and M.R. Madsen, ‘How Context Shapes the Authority of International Courts’ (2016) 79 *Law and Contemporary Problems* 30. For a comparison, H. Ruiz Fabri and J.-M. Sorel (eds.), *La saisine des juridictions internationales* (Pedone, 2006).

¹¹³ For a comparison, H. Ruiz Fabri and J.-M. Sorel (eds.), *Le tiers à l’instance devant les juridictions internationales*, (Pedone, 2005).

¹¹⁴ ICJ Statute, Art. 34(2). Regarding participation of international organizations in advisory proceedings see Art. 66(2). For a detailed discussion of the legal issues concerning *amicus* participation in the ICJ, with analysis of how the issue has been dealt with in prior cases, see eg A. Wiik, *Amicus Curiae before International Courts and Tribunals* (Nomos, 2018). ICJ Practice Direction XII explicitly addresses unsolicited *amicus* submissions by ‘international non-governmental organizations’ in advisory proceedings, clarifying that written statements or documents submitted from such organizations are ‘not to be considered as part of the case file’, and are placed in a designated location where states or intergovernmental organizations presenting written or oral statements in the case may access them.

the Court willing to engage on the same path as the WTO Appellate Body, and enable *amicus* participation through exercise of its general power to manage the procedure or its more specific power to seek information, which is in any event not sure, it would be difficult to circumvent the Statute. The ITLOS does not face the same limitation and could amend its Rules but might hesitate due to its competing position with the ICJ as it is not a given that many states would appreciate such an initiative.¹¹⁵

In addition to the *ex ante* controls that states can exercise in setting the mandate of a tribunal, states can exercise various *ex post* control mechanisms once the institution begins operating. These include options such as reinterpreting the constitutive instrument of a tribunal, decisions over judicial (re)appointments, control over the institution's budget, decisions over whether to continue to consent to the jurisdiction of a tribunal, decisions over to whether to bring future cases to a tribunal or an alternative fora, and engaging in criticism of specific rulings or even non-compliance.¹¹⁶ Such control mechanisms can be – and are – used by states to discourage procedural law-making by tribunals,¹¹⁷ or to force a tribunal in a certain direction, including by reforming the basic rules. This is what was done for the European Court of Human Rights, especially to solve the issue of backlog. The Brighton Declaration of 2012 adopted by the 47 member states of the Council of Europe,¹¹⁸ which included a strong (re)statement of the subsidiarity principle and was followed by 'two additional Protocols (Protocols 15 and 16) and a follow-up Declaration, the Brussels Declaration (2015) focusing on the implementation of judgments by the ECtHR', succeeded in inducing 'change in the balance between European and national institutions in the protection of human rights'.¹¹⁹ The existence of such control mechanisms reflects judicial independence – understood as adjudicators' freedom to decide independent of the preferences of other actors – is not absolute and exists alongside control by, and accountability to, mandate providers.¹²⁰ The idea of judicial accountability can be debated, be it regarding the collective accountability of a tribunal to member states, which may involve a wide range of control mechanisms, and the accountability of individual judges, which principally depends upon

¹¹⁵ Where ITLOS has made provision for non-state actors to furnish information in proceedings, it is explicitly restricted to intergovernmental organizations: see ITLOS Rules of the Tribunal, Arts. 84, 133(2)-(4). For detailed analysis see Wiik, *Amicus Curiae*, pp. 190-195.

¹¹⁶ For discussion of such control mechanisms see eg Katz Cogan, 'Competition and Control in International Adjudication', 420-426. L.R. Helfer and A.-M. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *California Law Review* 945-953; T. Ginsburg, 'Bounded Discretion in International Judicial Lawmaking' (2005) 45 *Virginia Journal of International Law* 657-668.

¹¹⁷ Voeten, 'Borrowing and Nonborrowing', 572 (noting that the potential for adverse responses by member states may act as a deterrent to cross-fertilization).

¹¹⁸ Brighton Declaration, adopted at the High-Level Conference on the Future of the European Court of Human Rights, 19 April 2012, www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

¹¹⁹ M.R. Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' 9 (2018) *Journal of International Dispute Settlement* 199-222.

¹²⁰ E. Voeten, 'International Judicial Independence' in J.L. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012), p. 422. Katz Cogan, 'Competition and Control in International Adjudication', 414; Helfer and Slaughter, 'Why States Create International Tribunals', 942-943. Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014), pp. 109-10. The discussion in this and the following sentence of judicial independence and accountability draws on J. Paine, 'The WTO's Dispute Settlement Body as a Voice Mechanism', forthcoming, *Journal of World Investment & Trade*.

rules regarding adjudicators' term of office and processes for reappointment.¹²¹ We use the term to signify that states have many means available to retaliate if they are not happy with what courts or tribunals or judges or arbitrators do. None of these means is specific to procedural issues, nor to occurrences of cross-fertilization but they contribute to frame adjudicators' margin of manoeuvre.

To give a striking example of control mechanisms in action, in the WTO context, members have been very willing to criticise particular procedural decisions in the WTO's Dispute Settlement Body or General Council (the plenary diplomatic bodies that oversee WTO adjudication). For example, the Appellate Body's decisions regarding its own, and panels, power to accept unsolicited *amicus curiae* briefs, an issue that is not clearly resolved by the Dispute Settlement Understanding, triggered widespread criticism by numerous WTO members.¹²² No doubt this has been taken into account by other bodies facing the same issue. More recently, the United States' blocking of Appellate Body members' (re)appointments since 2016 – which, at the time of writing, looks set to prevent the body from operating after 10 December 2019 – is partly based on objections to specific procedural practices employed by the Appellate Body. Specifically, the United States objects to Appellate Body members whose terms expire continuing to serve on pending appeals (as the Appellate Body has itself provided for in Rule 15 of its working procedures), or the Appellate Body exceeding the time limit for appeals in the DSU without the approval of WTO members or the disputing parties in a case.¹²³ The core of the US argument is that the Appellate Body cannot exceed the mandate conferred by members in the DSU and, accordingly, analogies that the Appellate Body has drawn with the powers of other international tribunals, for example regarding the power of previous members to continue serving on pending cases, are irrelevant.¹²⁴ From the United States' perspective, it is also irrelevant that Rule 15, which provides that the Appellate Body may authorise former members to serve on pending appeals, was relied on with minimal controversy for over 20 years, with only one WTO member (India) having objected to the rule at the time of its adoption.¹²⁵ This example suggests that procedural cross-fertilization remains a fragile process whose outcomes may be objected to by stakeholders at any moment.

However, the internal constraints are not the only factors that frame the space left open for procedural cross-fertilization.

¹²¹ J.L. Dunoff and M.A. Pollack, 'The Judicial Trilemma' (2017) 111 *American Journal of International Law* 233-6.

¹²² For an account of this episode and its interactions with the value of judicial independence see S. Charnovitz, 'Judicial Independence in the World Trade Organization', in L. Boisson de Chazournes, C.P.R. Romano and R. Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, 2002), p. 219. The various occasions when members criticized the Appellate Body's decisions regarding amicus briefs are also recounted in detail in Paine, 'Voice Mechanism'.

¹²³ For the US objection regarding the Appellate Body exceeding the time limit in the DSU without authorisation see DSB, Minutes of Meeting Held on 22 June 2018, WT/DSB/M/414, paras. 5.2-5.22. Regarding the US objections over former members continuing to serve see the next footnote.

¹²⁴ See eg DSB, Minutes of Meeting Held on 28 February 2018, WT/DSB/M/409, paras. 7.4, 7.7-7.8.

¹²⁵ Ibid para. 7.6. India's objection to rule 15 at the time of its adoption can be found in DSB, Minutes of Meeting Held on 21 February 1996, WT/DSB/11, 19 March 1996, para. 5.

3.2 The emerging model of international due process

Due process is certainly not a new idea. It already appeared in the Magna Carta, with the King's promise to his noblemen that he would act only in accordance with law (legality) and that all would receive the ordinary processes (procedures) of law. The procedural understanding of due process in a judicial context aims to put all the parties on an equal footing, especially by submitting them to the same procedural rules and offering them the same guarantees. In other words, due process levels the procedural playing field for the parties. In this sense, it protects the weak from the strong. As a matter of principle, it adapts easily at the international level, to start with inter-state litigation if only because its requirements coincide with those of the principle of sovereignty as requiring formal equality.¹²⁶ But the development of international litigation involving private individuals or legal persons has renewed the issue in two ways. First, this development is related to the supposed insufficiencies of the domestic judicial systems. Although this might not mean that the deficiencies are procedural, it means that private parties should receive, at the international level, a level of due process at least equivalent to that demanded of domestic systems, and active steps may need to be taken for this purpose, for example through measures that protect weaker parties.¹²⁷ Second, international human rights litigation deals abundantly with the right to due process in domestic systems and the related case law provides a rich repository of information concerning the specific requirements of due process.¹²⁸

Combined with the multiplication of international courts and tribunals, and the increased case load mentioned above, these developments have contributed to due process becoming a systemic issue in international litigation. Specifically, we suggest that there is an increasing degree of convergence regarding the expectations of parties and wider stakeholders in relation to adjudicatory processes and that there is an emerging model of international due process that feeds, and is fed by, the practice of judicial borrowing or learning on procedural matters. Quite logically, much of this emerging model of international due process has been developed by transposing expectations about procedural fairness and the rule of law from domestic systems,¹²⁹ but as mentioned, important international sources for this model of due process also exist, in particular with the growth of human rights law. Nevertheless, rather than being system-specific (and thus confined to international human rights or criminal

¹²⁶ S. Forlati 'Fair Trial in International Non-Criminal Tribunals', in A. Sarvarian et al. (eds.), *Procedural Fairness in International Courts and Tribunals*, p. 109. For judicial emphasis on the sovereign equality of the disputing parties in resolving procedural issues see eg *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Provisional Measures, Order of 3 March 2014, ICJ Reports (2014) 147, paras. 27-28 (upholding Timor-Leste's right to have its communications with its legal advisers protected from interference by Australia while the two states were litigating a dispute).

¹²⁷ Eg international human rights bodies often take measures to protect individual claimants who are in a position of vulnerability vis-à-vis states: see eg Forlati, 'Fair Trial in International Non-Criminal Tribunals', pp. 110-111; L. Linxinski, 'Procedural Fairness in Human Rights Systems', in A. Sarvarian et al. (eds.), *Procedural Fairness in International Courts and Tribunals*, pp. 326-327, 336; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment, Diss. Op. Judge Cançado Trindade, ICJ Reports (2015) 3, 202, paras. 96-124 (summarizing the approach of international human rights courts to issues of proof).

¹²⁸ Similarly: Forlati 'Fair Trial in International Non-Criminal Tribunals', p. 102; C.T. Kotuby and L.A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press, 2017), pp. 61, 69, 168.

¹²⁹ T Squatrito et al., 'A Framework for Evaluating the Performance of International Courts and Tribunals', in T. Squatrito et al. (eds.), *The Performance of International Courts and Tribunals* (Cambridge University Press, 2018), p. 14; But see Fontanelli and Busco, 'The Function of Procedural Justice in International Adjudication', 20 (noting that caution is required in transplanting domestic procedural principles to the international plane).

tribunals), norms of international due process follow from the nature of impartial and reasoned third-party adjudication.¹³⁰ The idea of a model of international due process is consistent with our argument that cross-fertilization does not imply identical reproduction. While the model of due process give rises to common expectations at the level of broad principles, these are inevitably adapted to the specific context of a tribunal.¹³¹

One important factor that helps explain the rise of this model of procedural fairness is the widely acknowledged point that the perception that the procedures followed by an international tribunal are fair is crucial to securing the legitimacy of the adjudicatory process, whatever the outcome on the merits,¹³² and be it regarding internal legitimacy (as perceived by the users of a tribunal) or external legitimacy (in the eyes of broader constituencies). As touched on above, international courts and tribunals often seem aware that they have several audiences, that there might be heightened expectations of public opinion in particular cases,¹³³ and that the internal and external audiences may have different and even conflicting expectations about procedural fairness.¹³⁴

Examples of the content of the model of international due process includes broad principles such as ensuring equality of arms between the parties, *principe du contradictoire*,¹³⁵ and expectations around the independence and impartiality of adjudicators and the transparency of proceedings.¹³⁶ Requirements around the equality of parties and the right to be heard have an express basis in the constitutive instruments or procedural rules of some international tribunals.¹³⁷ There is also a

¹³⁰ R.T. Treves, 'Equality of Arms and Inequality of Resources', in A. Sarvarian et al. (eds.), *Procedural Fairness in International Courts and Tribunals*, pp. 155-156; C.F. Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers, 2005) pp. 13-16.

¹³¹ Fontanelli and Busco, 'The Function of Procedural Justice in International Adjudication', 6-7; Baker and Sarvarian, 'Conclusion', pp. 383-387.

¹³² See eg Cohen et al., 'Introduction: Legitimacy', p. 6; E. Brems and L. Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 178-185 (discussing relevant studies in the domestic context on this point); Fontanelli and Busco, 'The Function of Procedural Justice in International Adjudication', 4-5; T.M. Franck, 'Fairness in the International Legal and Institutional System', (1993) 240 *Collected courses of The Hague Academy of International Law*, pp. 151, 303.

¹³³ H. Ruiz Fabri, 'Drawing a line of equilibrium in a complex world', in G. Sacerdoti, A. Yanovich and J. Bohanes, *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, 2006), pp. 137, 140-41.

¹³⁴ See above note 122 and accompanying text.

¹³⁵ H. Ruiz Fabri and J.-M. Sorel (eds.), *Le principe du contradictoire devant les juridictions internationales* (Pedone, 2004).

¹³⁶ We do not purport to consider all elements of emerging model of international due process here. For additional perspectives see eg Ruiz Fabri and Sorel, 'L'exportation du modèle vers les juridictions internationales', pp. 1225-1246 (public international law perspective which covers the ICJ, the ITLOS, the WTO dispute settlement system, investor-state arbitration and international criminal courts and tribunals); Kotuby and Sobota, *General Principles*, pp. 54-86, 157-202 (private international law perspective covering international due process standards that apply to municipal legal systems and arbitral tribunals); M.S. Kurkela and S. Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press, 2010); Campbell McLachlan, Rapporteur of 18th Commission of the *Institut de Droit International*, Report and Draft Resolution on 'Equality of Parties before International Investment Tribunals', 2018, 419-533, available via www.idi-iiil.org/en/ (study on the principle of equality of the parties in investment arbitration, which considers this principle's relationship to other aspects of the right to a fair trial and makes extensive reference to the jurisprudence of other international tribunals).

¹³⁷ See eg UNCLOS, Annex VII Art. 5 ('Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case'); UNCITRAL Arbitration Rules 2010, Art. 17 ('the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate Stage of the proceedings each party is given a reasonable opportunity of

significant body of case law that affirms these broad principles across a range of international jurisdictions, often with resort to cross-citation. For example, ICSID annulment committees, in the context of applications to annul awards due to a 'serious departure from a fundamental rule of procedure',¹³⁸ have repeatedly examined the requirements of principles such as the right to be heard and the right to equality of treatment.¹³⁹ In this regard, the Annulment Committee in *Fraport v Philippines* held that the right to be heard was 'a fundamental rule of procedure applicable to international arbitral proceedings generally', that 'also applies in proceedings before Public International Law courts and tribunals', as well as being 'an essential element' of the right to a fair trial under human rights law.¹⁴⁰ Similarly, the Annulment Committee in *Tulip Real Estate v Turkey* drew on relevant human rights jurisprudence, quoting with approval the European Court of Human Rights' statement that: "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.¹⁴¹

The ICJ, faced in its advisory jurisdiction with hearing appeals from international administrative tribunals, has repeatedly addressed concerns about the principle of equality of the parties before the Court.¹⁴² For example, in 2012, the Court, drawing on a General Comment of the UN Human Rights Committee, noted that the 'right to equality guarantees equal access and equality of arms. ... if procedural rights are accorded they must be provided to all the parties unless distinctions can be

presenting its case'). ICJ Statute, Art. 35(3) (Security Council may lay down conditions for non-parties to ICJ Statute to access Court 'but in no case shall the conditions place the parties in a situation of inequality before the Court'); Within the ongoing process of amending its Arbitration Rules, ICSID has proposed introducing a new provision stating: 'The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case': *ICSID Working Paper 2*, Vol. 2, 83, Art. 2(2).

¹³⁸ ICSID Convention, Art. 52(1)(d).

¹³⁹ In addition to the cases cited in the following footnotes see *Wena Hotels Ltd v Egypt*, ICSID Case No ARB/98/4, Decision on Annulment, 5 February 2002, para. 57; *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No ARB/12/14 and ARB/12/40, Decision on Annulment, 18 March 2019, paras. 178-180. Beyond the annulment context, investor-state tribunals have emphasised these principles in deciding a wide range of procedural questions. See eg *Global Trading Resource Corp. and Globex International, Inc. v Ukraine*, ICSID Case No ARB/09/11, Award, 1 December 2010, paras. 32-3 (emphasising the right to be heard when deciding claims for summary dismissal under Rule 41(5) of the ICSID Arbitration Rules); *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 108 ('duty to ensure that both parties receive a full and fair opportunity to present their cases' must be observed when deciding on timeliness of jurisdictional objections). *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 2, 24 May 2006, p. 9 ('It is indeed one of the most fundamental principles of international arbitration that the parties should be treated with equality'). For discussion of further relevant jurisprudence see O. Sands, 'Procedural Fairness in Investor-State Arbitration', in A. Sarvarian et al. (eds.), *Procedural Fairness in International Courts and Tribunals*, pp. 300-310. McLachlan, *Report and Draft Resolution*.

¹⁴⁰ *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, 23 December 2010, paras. 197-202.

¹⁴¹ *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 146, citing *Dombo Beheer B.V. v The Netherlands*, Application No. 14448/88, Judgment (Merits and Just Satisfaction), 27 October 1993, para. 33, Series A no 274. See generally *Tulip*, paras. 80-92, 146, 152-153.

¹⁴² See eg *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, ICJ Reports (2012) 10, paras. 35-39, citing at para. 35 the earlier advisory opinions that raised this issue. *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports (1956) 77, pp. 85-86.

justified on objective and reasonable grounds'.¹⁴³ More generally, in contentious proceedings, the ICJ, (and the PCIJ before it), has noted that the principle of equality of arms requires that each party has an equal opportunity to present its case and to comment on its opponent's case.¹⁴⁴ Beyond the ICJ, in other recent interstate proceedings tribunals have also emphasised the need to safeguard the procedural rights of both parties in relation to issues such as non-appearance of a respondent,¹⁴⁵ or disagreement between the parties regarding arrangements for cross-examination of witnesses.¹⁴⁶

Two components of the emerging model of due process capture particularly well the stakes of cross-fertilization: expectations around the independence and impartiality of adjudicators and expectations concerning the transparency of the adjudicatory process.

3.2.1 Convergence of expectations regarding the independence and impartiality of adjudicators

The past two decades have seen an increasing convergence of expectations around the independence and impartiality of international adjudicators,¹⁴⁷ which turns out to be a key component of the broader concept of due process and procedural fairness.¹⁴⁸ This tendency is partly a recognition of the fact that what international courts do matters, as their judgments often have effects that reach far beyond the disputing parties.¹⁴⁹ Two dimensions attract particular attention, recruitment of adjudicators and ethics.

States have shown increasingly active interest both in the process by which international adjudicators are selected and who is (re)appointed in specific appointment decisions. Appointment processes in

¹⁴³ IFAD Advisory Opinion, para. 39, citing Human Rights Committee, General Comment No 32 (2007). See also *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 12 July 1973, ICJ Reports (1973) 166, para. 92 (identifying various 'well recognized' elements of a right to a fair hearing in reviewing a judgment of the UN Administrative Tribunal).

¹⁴⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits, Judgement, ICJ Reports (1986) 14, para. 31 ('The provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions'), see also para. 59; PCIJ, *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*, Order of 15 August 1929, PCIJ Series A No 23, p. 45. See also Shaw, *Rosenne's Law and Practice of the International Court 1920-2015*, pp. 1079-1080 (citing further case law).

¹⁴⁵ *South China Sea Arbitration (Philippines v China)*, Award, (2016) 170 ILR 180, paras. 119-27, drawing on ITLOS, "*Arctic Sunrise*" (*Kingdom of the Netherlands v Russian Federation*), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230, paras. 51-57, earlier ICJ jurisprudence, and a resolution of the *Institut de Droit International*.

¹⁴⁶ *Indus Waters*, Partial Award, paras. 111, 117.

¹⁴⁷ H. Ruiz Fabri and J.-M. Sorel (eds.), *Indépendance et impartialité des juges internationaux* (Pedone, 2010).

¹⁴⁸ On independence and impartiality as an element of due process see eg H.A. Meighen and B. Daly, 'Procedural Fairness in Arbitration Involving States', in A. Sarvarian et al. (eds.), *Procedural Fairness in International Courts and Tribunals*, pp. 260-261; *Klöckner v Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, (1986) 1 ICSID Review-FILJ 89, para. 95. ICCPR, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171, Art. 14(1). ECHR, Rome, 4 November 1950, in force 3 September 1953, ETS 5, Art. 6(1). ACHR, San José, 22 November 1969, in force 18 July 1978, OAS Treaty Series No. 36, Art. 8(1).

¹⁴⁹ A. Seibert-Fohr, 'International Judicial Ethics' in C.P.R. Romano, K.J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013), p. 775 (making a similar observation regarding the growing expectations of independence and impartiality in international arbitration).

several international tribunals have been reformed and formalised in recent years, with multi-step processes (involving different stakeholders) increasingly common, along with greater scrutiny of candidates' expertise and attention to ensuring various forms of diversity.¹⁵⁰ Whereas the statutes of the youngest courts like the ICC include provisions in this regard, it results for older courts (like the European Court of Justice or the European Court of Human Rights) from reforms or evolution of practices. The temporal coincidence of these developments across various courts and tribunals is striking and shows that cross-fertilization can also be triggered by the need to answer to a common concern. Although representativeness of the composition of international courts and tribunals is an old idea (mostly translated in geographic distribution), the way it is understood and implemented has evolved with a strong procedural impact.¹⁵¹ This requirement of representativeness, translated into an expectation of increased diversity, has also had an impact on arbitration where at least the arbitral institutions make their practices evolve in order to increase diversity, be it based on gender or on other factors.¹⁵² This is not to say that there is no resistance and that states do not retain close control over who they nominate to be a candidate but they face an increasing demand for transparency and, in some contexts, justification of their nominations.

Just like regarding composition and sometimes intertwined with it, expectations regarding ethics as a precondition for independence and impartiality have also become more visible, although responses remain approximate.¹⁵³ Among the various attempts to regulate this matter, several international courts and tribunals have adopted rules or codes of conduct that codify standards applicable to adjudicators while in office,¹⁵⁴ as well as standards that apply to former members, such as a cooling

¹⁵⁰ See eg R. Mackenzie et al, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press, 2010); M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, 2015); H. Ruiz Fabri, 'Le choix des juges', in *L'exigence de Justice. Mélanges en l'honneur de Robert Badinter* (Daloz, 2016), pp. 635-651; G. Kaufmann-Kohler and M. Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' (CIDS Supplemental Report, 2017) www.cids.ch/images/Documents/CIDS_Supplemental_Report_ISDS_2016.pdf.

¹⁵¹ S. Henneke-Vauchez, 'Gender balance in international adjudicatory bodies', *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, 2019); N. Grossman, 'Achieving Sex-Representation International Court Benches' [note and comment] (2016) 110 *American Journal of International Law* 82-95.

¹⁵² For example, in 2017, for the first time, ICSID's designation of ten individuals to the Panel of Arbitrators included an equal number of men and women. For commentary see C. Giorgetti, 'Latest Chairman Designations to the ICSID Panels Substantially Increase Diversity', *Kluwer Arbitration Blog*, 5 November 2017 <http://arbitrationblog.kluwerarbitration.com/2017/11/05/latest-chairman-designations-icsid-panels-substantially-increases-diversity/>. The London Court of International Arbitration (LCIA) reports that in 2018 the percentage of appointments made by it as an appointing authority included 43% women (up from 9% in 2017), compared to 6% women among arbitrators selected by the parties in 2018: LCIA, 2018 Annual Casework Report, p. 14, available via www.lcia.org/News/2018-annual-casework-report.aspx. Several arbitration centres have also signed 'the Pledge', which was developed in 2015 by stakeholders in the arbitration community to increase the number of appointments of women arbitrators, with the aim of full parity see www.arbitrationpledge.com.

¹⁵³ See the *AJIL Unbound* symposium on *Professional and Judicial Ethics in International Tribunals*, forthcoming early September 2019 (113 *AJIL Unbound* (2019)); Panel 'Assessing Professional and Judicial Integrity in International Tribunals: Problems and Solutions', Proceedings of the 113th ASIL Annual Meeting, forthcoming.

¹⁵⁴ WTO, 'Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes', WT/DSB/RC/1, 11 December 1996; ICC, Code of Judicial Ethics, ICC-BD/02-01-05, 9 March 2005; ECtHR, Resolution on Judicial Ethics, 23 June 2008; Caribbean Court of Justice, Code of Judicial Conduct, 25 July 2013; CJEU, Code of Conduct for Members and former Members of the Court of Justice of the European Union, OJ C 483/01, 23 December 2016.

off-period before former adjudicators may act as counsel before the same body.¹⁵⁵ Professional bodies have also attempted to distil general principles and disseminate these in soft law documents, such as the Burgh House Principles on the Independence of the International Judiciary, developed through an International Law Association study group, and the IBA's Guidelines on Conflicts of Interest in International Arbitration.¹⁵⁶

Ethical concerns have given rise to significant examples of cross-fertilization by tribunals in specific disputes. For example, the Appeals Chamber of the ICTY, in interpreting the standard of impartiality to be applied under its Statute, referred to the jurisprudence of the European Court of Human Rights, as well as the approaches across various national systems, in deciding that the standard to be applied extended to an unacceptable appearance of bias.¹⁵⁷ That decision was in turn drawn on by the Appeals Chamber of the Special Court for Sierra Leone in arriving at a similar standard of reasonable apprehension of bias.¹⁵⁸ However, the state of affairs is not always so straightforward. For example, the UNCLOS Annex VII Tribunal in the *Chagos* case, in deciding on a challenge to an arbitrator, was presented by the parties with a wide range of materials from across the spectrum of international courts and tribunals, as well as various investor-state and commercial arbitration frameworks and soft law documents.¹⁵⁹ Although accepting that the “‘fairness, competence and integrity” ... may undoubtedly be regarded as deriving from general principles of international law and from the practice of international courts and tribunals’, the *Chagos* tribunal emphasised the distinction between the ethical standards applied in interstate fora and those applied by other courts and tribunals.¹⁶⁰ Specifically, the *Chagos* tribunal favoured a standard of ‘justifiable grounds for doubting the independence and impartiality’ of an arbitrator – including because this was consistent with the rules and prior practice of the ICJ and ITLOS, the alternative fora for UNCLOS disputes.¹⁶¹ The stricter standard advocated by Mauritius, based on the IBA guidelines, of an ‘appearance of bias’, was rejected.¹⁶²

Even if one can doubt that there is a real justification for applying a lesser standard of impartiality in an interstate setting, as compared to other types of international adjudicatory bodies,¹⁶³ what is of

¹⁵⁵ Ibid. ICJ Practice Directions VII and VIII (2002). WTO, ‘Post-Employment Guidelines: Communication from the Appellate Body’, WT/AB/22, 16 April 2014.

¹⁵⁶ ILA, ‘The Burgh House Principles on the Independence of the International Judiciary’ www.ila-hq.org/index.php/study-groups?study-groupsID=31. IBA Guidelines, cited above; *Institut de Droit International*, Resolution on ‘The Position of the International Judge’ (2011) http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_06_en.pdf.

¹⁵⁷ *Prosecutor v Furundžija*, ICTY Case No IT-95-17/1-A, Judgement, 21 July 2000, paras. 181-191.

¹⁵⁸ *Prosecutor v Sesay (Issa)*, Case No SCSL-2004-15-PT-058, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, paras. 4, 5-16.

¹⁵⁹ See generally *Chagos Marine Protected Area (Republic of Mauritius v United Kingdom)*, PCA Case No 2011-03, Reasoned Decision on Challenge, 30 November 2011, paras. 40-111.

¹⁶⁰ Ibid., paras. 135, 156, 165.

¹⁶¹ *Chagos*, Reasoned Decision on Challenge, paras. 166-168, see also paras. 144-145 (citing previous decisions of the ICJ interpreting the relevant provisions).

¹⁶² *Chagos*, Reasoned Decision on Challenge, paras. 165, 169.

¹⁶³ Seibert-Fohr, ‘International Judicial Ethics’, p. 771. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order, 30 January 2004, Dissenting Opinion of Judge Buergenthal, ICJ Reports (2004) 7, paras. 10-14

interest here is that the particular features of an international court or tribunal may be interpreted as justifying some adjustment in the implementation of broad ethical principles. In the same vein, those fora that utilise party-appointed adjudicators give rise to particular conflict of interest questions that will not be relevant in all settings. Incompatibility rules also vary depending on whether adjudicators are appointed on a full-time or part time basis.¹⁶⁴

Part of the explanation for cross-fertilization in the area of ethics appears to be that once guarantees around ethics are adopted in one court or tribunal, there can be pressure for other institutions to follow suit. An example of this are the concerns that have arisen around independence and impartiality in relation to investor-state arbitration in recent years. Significantly, proposals to remedy these problems, for example through the development of standing tribunals or codes of conduct, draw heavily on features of other courts or tribunals (such as a prohibition on adjudicators acting as counsel or more generally on double-hatting, and the provision for adjudicators to receive fixed salaries, unrelated to the number of cases heard).¹⁶⁵ The ICJ has not been immune from this debate: in 2018 it adopted a decision that prevents judges accepting appointments in investor-state arbitration, and severely limits potential appointments in interstate arbitration, amid an active debate over how the practice of accepting arbitral appointments could affect the independence and impartiality of ICJ judges.¹⁶⁶

3.2.2 *Convergence of expectations regarding transparency and openness*

International courts and tribunals are expected not only to settle disputes, but also to administer justice. As perceived by public opinion, this is justice that extends beyond the limits of each system and must be capable of having a broader effect, with the growing perception of judicial proceedings as a forum for public debate.¹⁶⁷ Justice is no longer solely a question of deciding between two opposing arguments. A fair hearing is considered necessary because the best possible decision should be found and because there is a tendency to identify this best possible decision with a decision that has been best deliberated. From this standpoint, the proceedings should be open not only to those with a direct interest to defend, but also to interested third parties who wish to have their points of view taken into account. A key mechanism through which international adjudicators enable other interested parties

(suggesting that the ICJ in that case should have applied an appearance of bias standard and had construed the relevant provisions in a 'formalistic and narrow' manner).

¹⁶⁴ Siebert-Fohr, 'International Judicial Ethics', p. 774.

¹⁶⁵ See UNCITRAL Working Group III, 'Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States', UN Doc. A/CN.9/WG.III/WP.159/Add.1, 24 January 2019, annex paras. 16-24, 47-50, 54.

¹⁶⁶ 'Speech by H.E. Mr. Abdulqawi A. Yusuf, President of The International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly, 25 October 2018, www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf. For the concerns raised prior to this announcement see eg N. Bernasconi-Osterwalder and M.D. Brauch, 'Is "Moonlighting" a Problem? The Role of ICJ Judges in ISDS' (2017, International Institute for Sustainable Development) www.iisd.org/library/moonlighting-problem-role-icj-judges-isds.

¹⁶⁷ On the idea of international tribunals operating as a forum for public debate see especially P. Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law', (2016) 28 *Journal of Environmental Law*, 26. For further discussion and references on this idea, emphasising that for tribunals to provide a forum for public debate, dispute settlement must be transparent see J. Paine, 'International Adjudication as a Global Public Good?' (2018) 29 *European Journal of International Law* 1234.

to provide relevant information, and to feel they have been heard, is by granting *amicus curiae* participation.¹⁶⁸

Expectations of openness of the adjudicatory process to a range of interested actors are also expectations about transparency. The emergence of a common set of questions around transparency in international adjudication reflect broader pressures for open government that originated domestically but have in the last decades had substantial effects at the international level.¹⁶⁹ Due process as understood by human rights law includes a powerful dimension of publicness and the requirement of public hearings. This requirement developed as a reaction against secret justice under suspicion of arbitrariness, but goes beyond this by installing the more general presumption that justice must be public. It goes well with an evolution from a concept of proceedings as belonging to the parties to the dispute toward a concept according to which proceedings should be not only public but also open to all interested parties. Against this background, international courts and tribunals have had to adopt proactive disclosure policies as one means for legitimising their exercise of power.¹⁷⁰ The digital revolution is also an important part of this story as international courts and tribunals have become far more visible through websites, typically featuring document databases that are publicly available, and, in some cases, livestreaming of hearings.¹⁷¹

One consequence of these developments is that international courts and tribunals are increasingly expected to provide reasons for maintaining the confidentiality of proceedings.¹⁷² As with other aspects of procedural cross-fertilization, some courts or tribunals face limits, namely relatively strong default positions of secrecy on significant aspects of the adjudicatory process, as exemplified by WTO dispute settlement and investor-state arbitration under older procedural frameworks. In addition, adjudicators might face conflicting demands between being faithful to the wishes of the disputing parties (who may favour confidentiality and/or resist *amicus* involvement), and responding to the expectations of external constituencies such as NGOs or the general public.¹⁷³ Other considerations that may weigh against imposing complete transparency prior to the proceedings being finalised include that 'trial by media' may undermine equal treatment of the parties or aggravate the dispute, and that the need to redact confidential information can place a heavy burden on the parties while they are litigating the case.¹⁷⁴ Each court or tribunal must strike its own balance. However, the evolution in the WTO, where adjudicatory bodies have found a way of opening hearings to the public

¹⁶⁸ Wiik, *Amicus Curiae*, discussing at pp. 43-62 the functions typically attributed to *amicus curiae*, which are relevant to the themes discussed in this paragraph.

¹⁶⁹ T. Neumann and B. Simma, 'Transparency in International Adjudication', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (Oxford University Press, 2013), pp. 436-437.

¹⁷⁰ See A. Peters, 'Towards Transparency as a Global Norm', in A. Bianchi and A. Peters (eds.), *Transparency in International Law*, pp. 557-558, 556-570.

¹⁷¹ Neumann and Simma, 'Transparency in International Adjudication', pp. 436-437.

¹⁷² Neumann and Simma, 'Transparency in International Adjudication', pp. 473-474. See also Peters, 'Towards Transparency as a Global Norm', pp. 596-597 (international institutions now face a presumption of transparency).

¹⁷³ See eg above text at note 122.

¹⁷⁴ See eg *Cairn Energy PLC and Cairn UK Holdings Ltd v Republic of India*, PCA Case No 2016-7, Procedural Order No 2, 12 August 2016, paras. 50-54 (limiting the degree of transparency prior the rendering of an award on these grounds). *Biwater v Tanzania*, Procedural Order No 3, 29 September 2006, paras. 112-114, 133-142.

despite the DSU stating that panel and Appellate Body hearings shall be confidential,¹⁷⁵ first by calling for the agreements of the parties,¹⁷⁶ and later by finding a discretionary power of panels to permit the partial opening of hearings on request of one party,¹⁷⁷ shows the strength of the trend towards transparency.

As Fedelma Smith points out in her chapter, increased transparency in international adjudication might be expected to lead to greater cross-fertilization, both by increasing access to the decisions of various bodies, and by expanding the range of actors that might become involved in the process of cross-fertilization (eg through *amicus* participation).¹⁷⁸ The evolution of practices around transparency in the context of investor-state arbitration provides one example in this regard. When investor-state tribunals were initially faced with requests for *amicus* participation, or requests to conduct open hearings, at the initiative of interested NGOs, this issue was resolved by applying the tribunal's general power to manage the procedure, and taking account of the prior practices of other international tribunals on such issues.¹⁷⁹ These earlier precedents, concerning the tribunal's plenary power to manage the proceedings, have been drawn upon frequently by tribunals operating under arbitral rules and investment treaties that only provide limited guidance on how the issue of transparency is to be resolved.¹⁸⁰ This has undoubtedly triggered further cross-fertilization occurring within the law-making processes that formulate or revise arbitral rules regarding transparency. For example, UNCITRAL's 2013 Rules on Transparency in Treaty-based Investor-State Arbitration, which are applicable beyond the UNCITRAL context through the 2014 Mauritius Convention, a multilateral opt-in instrument, are partly based on the reforms around transparency that were introduced in the 2006 revision of the ICSID Arbitration Rules.¹⁸¹ In turn, ICSID's ongoing reform of its arbitration rules is clearly taking into account both the practices introduced by the UNCITRAL Transparency Rules and the experience of how issues around transparency and third party involvement have been resolved by tribunals to

¹⁷⁵ DSU, Art. 17.10 (Appellate Body). For panels see DSU, Appendix 3, para. 2, but note Art. 12.1 (panel can decide to depart from working procedures in Appendix 3 after consulting the parties).

¹⁷⁶ *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, Annex IV, paras. 6, 7 and 10.

¹⁷⁷ See eg *China — Domestic Support for Agricultural Producers*, Report of the Panel, WT/DS511/R, adopted 26 April 2019, paras. 7.9-7.29; *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Decision by the Arbitrator, WT/DS381/ARB, 25 April 2017, paras. 2.23-2.31.

¹⁷⁸ Fedelma Smith's chapter, this volume.

¹⁷⁹ See eg *Methanex Corp v USA*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001, paras. 31-34, 47-53 (deciding tribunal had power to accept written *amicus* briefs, drawing on Art. 15(1) of the 1976 UNCITRAL Rules and relevant practice of the Iran-US Claims Tribunal and WTO Appellate Body); *UPS v Canada*, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, paras. 60-73 (same).

¹⁸⁰ See eg *Cairn Energy v India*, Procedural Order No 2, paras. 35-45 (noting the tribunal's substantial discretion to decide upon the appropriate degree of transparency under the 1976 UNCITRAL rules, the relevant investment treaty and the law of the seat, and drawing on numerous earlier arbitral decisions on transparency).

¹⁸¹ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2013. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York, 10 December 2014, in force 18 October 2017. Similarly Fedelma Smith's chapter, this volume. Prior to the 2006 revision of the ICSID rules, certain states had regulated the issue of transparency through particular provisions in investment treaties or authoritative interpretations.

date.¹⁸² Cross-fertilization at the level of formulating procedural rules means that there is potential for arbitral decisions from one context (eg decisions on *amicus* participation under the 2006 ICSID arbitration rules) to inform interpretation of another set of procedural rules (eg the 2013 UNCITRAL rules on transparency).¹⁸³ There is also a growing number of cases where although more recent transparency reforms do not automatically apply, the disputing parties agree on the application of enhanced transparency practices.¹⁸⁴ As noted by one recent tribunal, 'there is a general trend in investment arbitration for more transparency'.¹⁸⁵

Transparency practices in the context of interstate arbitration (typically under UNCLOS Part XV) also provide some support for our argument of an emerging default norm of public justice. As there is no legal requirement of transparency in interstate arbitration, practices are shaped substantially by the preferences of disputing parties, as reflected in the rules of procedure adopted at the outset of an arbitration, and there are accordingly important variations in the degree of transparency adopted across cases. Nevertheless, certain common practices around transparency exist. For example, the parties generally agree to publication of basic information about the existence of the arbitration on the PCA's website, as well as publication of awards and procedural orders, subject to redaction. In many cases hearing transcripts and submissions are available online, although often only at the conclusion of the arbitration.¹⁸⁶ While most hearings are confidential, in some arbitrations the disputing states have agreed either to hearings open at the location of the arbitration,¹⁸⁷ or webcasting of the parties' opening statements.¹⁸⁸ The fact that interstate arbitrations are almost always administered by the PCA suggests that this institution has developed experience in implementing a range of different degrees of transparency, which can be offered to disputing parties, when drafting procedural rules at the beginning of an arbitration, depending on their preferences.¹⁸⁹

Overall, the model of international due process we have sketched does not result in uniformity – as noted above, the model is adapted given the particular features of each tribunal, including limitations in constitutive instruments. Nevertheless, the model gives rise to certain basic expectations across

¹⁸² See generally *ICSID Working Paper 2*, Vol. 2, March 2019, pp. 263-277 (including a new procedural rule addressing the participation of non-disputing treaty parties).

¹⁸³ As noted by Fedelma Smith, this volume.

¹⁸⁴ *Guaracachi America, Inc. and Rurelec PLC v The Plurinational State of Bolivia*, PCA Case No. 2011-17, Terms of Appointment and Procedural Order No 1, 9 December 2011, para. 16 (case under 1976 UNCITRAL rules where the parties agreed to publication of a wide range of documents and open hearings); *BSG Resources Limited v Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No 2, 17 September 2015, paras. 9-10 (case under the 2006 ICSID Arbitration rules where disputing parties agreed to apply the UNCITRAL Rules on Transparency).

¹⁸⁵ *Cairn Energy v India*, Procedural Order No 2, paras. 48-49 (also outlining the rationales for post-award transparency).

¹⁸⁶ Levine and Schofield, 'Navigating Uncharted Procedural Waters', pp. 140-141.

¹⁸⁷ *The 'Enrica Lexie' Incident (Italy v India)*, PCA Case No 2015-28, Rules of Procedure, 18 January 2016, Art. 23(3). *Abyei Arbitration*, Arbitration Agreement, Art. (8)(6) (hearings open to the media).

¹⁸⁸ Eg livestreams of the opening statements were used in *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No 2017-06, Rules of Procedure, 17 May 2017, Art. 27(3) and Procedural Order No 5, 8 April 2019 para. 2. *Conciliation between The Democratic Republic of Timor-Leste and The Commonwealth of Australia*, PCA Case No 2016-10, Rules of Procedure, 22 August 2016, Art. 16(2) and Decision on Australia's Objections to Competence, 19 September 2016, para. 36.

¹⁸⁹ Fedelma Smith's chapter, this volume.

contexts, for example regarding transparency of the adjudicatory process or the independence and impartiality of adjudicators, and departures from this model increasingly must be justified.

4. Conclusion

In this chapter, we have sought to describe in a representative (but not exhaustive) manner the phenomenon of procedural cross-fertilization and to provide a framework for explaining it. A number of factors we have emphasised are likely to hold beyond the specific courts and tribunals we have considered and to persist in future – for example, adjudicators’ duty to decide procedural issues, the increasingly complexity of cases, raising new and only partly regulated procedural questions, and the influence of an emerging model of international due process. In contrast, some of the other considerations are likely to vary across contexts – for example, the degree of discretion that is delegated by states to adjudicators, as well as how actively states utilize control mechanisms to discourage unwanted procedural borrowing and law-making. Certainly, the framework developed here could be extended and tested against additional examples, for example by focusing on international criminal courts, courts of regional integration, international administrative tribunals, or particular families of quasi-judicial bodies, or by focusing on other aspects of the emerging model of international due process we have identified (for example, the right to be heard) and tracking how the relatively abstract principles of the model are incorporated into specific procedural practices. Another important line of future inquiry, only touched on in this chapter, would be to focus specifically on instances where international tribunals have departed from procedural practices developed by other bodies, and to try to explain what motivated decisions not to borrow existing solutions.¹⁹⁰

Our core suggestion has been that procedural cross-fertilization is not just about borrowing by judges, as is visible in procedural orders, judgments or awards that may feature explicit cross-citation. The existing debate on cross-fertilization or the judicial aspect of fragmentation has been overly court- and judgment-focused, whereas attention should also be drawn to the substantial contributions made to processes of procedural cross-fertilization by less visible actors, including administering institutions and secretariats, professional bodies (eg the IBA), states as drafters of constitutive instruments and operators of control mechanisms, and disputing parties who often exercise significant control in shaping the concrete procedural framework that governs a case. These actors collectively wield substantial influence over the space that adjudicators have to draw upon procedural practices developed elsewhere and whether such judicial borrowing will be seen as appropriate.

¹⁹⁰ For a similar suggestion that further study is warranted to better understand the number of instances of jurisprudential divergence in international law, and the reasons for divergence, see Y. Shany, ‘Plurality as a Form of (Mis)management of International Dispute Settlement: Afterward to Laurence Boisson de Chazournes’ Foreword’ (2017) 28 *European Journal of International Law* 1247-1248.



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