
The Threads (or Threats?) of a Managerial Approach: Afterword to Laurence Boisson de Chazournes' Foreword

Veronika Bílková*

Abstract

In her EJIL Foreword article, Boisson de Chazournes gives an optimistic account of the proliferation of international courts and tribunals. She argues that the proliferation has been a constant and desired feature of international dispute settlement and that problems arising from it can be resolved through 'internal communication' among judicial bodies and through various procedural rules preventing jurisdictional overlaps. These tools, richly illustrated by numerous examples primarily from the area of international economic law, attest, in the author's view, to the emergence of a new, managerial approach. In my Afterword, I consider what this managerial approach consists of and how it relates to the other 'managerial theories' known in international law – the managerial model of Abram Chayes and Antonia Handler Chayes and managerialism described by Martti Koskenniemi. I argue that the managerial approach is close to the former theory and, as such, is also vulnerable to the reservations raised against it (formalism, excessive optimism). I further argue that the managerial approach is not identical to managerialism but that the article, placing so much emphasis on formal, procedural rules, might not do enough to prevent the confusion between the two.

The proliferation of international courts and tribunals is often portrayed as a dangerous phenomenon threatening the coherence of the international legal system and contributing to the fragmentation of international law. In his 2000 speech to the UN General Assembly, the then president of the International Court of Justice, Gilbert Guillaume, warned against 'the risks to the cohesiveness of international law raised by the proliferation of courts'.¹ In the 2006 Report on Fragmentation of

* Institute of International Relations and the Faculty of Law, Charles University, Prague, Czech Republic; EJIL Scientific Advisory Board. Email: bilkova@prf.cuni.cz.

¹ Address to the General Assembly Plenary Session, UN Doc. A/55/PV.41, 26 October 2000.

International Law, the study group of the UN International Law Commission, led by Martti Koskenniemi, noted that ‘the proliferation of implementation organs – often courts and tribunals – for specific treaty-regimes has given rise to a concern over deviating jurisprudence and forum-shopping’.² This view, which was rather influential at the turn of the century, has been gradually replaced by a more optimistic outlook. In this outlook, the proliferation is featured as a path to a healthy plurality that is not only intentionally construed but also well coordinated and well managed.

Laurence Boisson de Chazournes’ *EJIL* Foreword article offers a good example of this new approach.³ The article is an impressive piece of scholarship – impressive in terms of its length (60 pages, though this is not unusual for *EJIL* Forewords) and also, and especially, in terms of the depth of its theoretical analysis and the amount of empirical evidence on which it relies. The rich evidential basis merits particular mention and particular praise. The author goes far beyond the ‘usual suspects’ – that is, the cases that are virtually always invoked in this context (such as the *MOX Plant* case or the *Bosphorus* case).⁴ She cites many examples, including some very recent ones, of relevant legal instruments and case law, mostly, albeit not exclusively, from the area of international economic law. The message that the article seeks to impart is meant to be a reassuring one. Fragmentation in international dispute settlement goes on, but its risks ‘are more perceived than they are real. The practice of international courts and tribunals reveals that proliferation has not caused many problems’.⁵

The article makes three arguments. It argues that (i) plurality has always characterized international dispute settlement and has been intended; (ii) ‘internal communication’ occurs between different actors involved in the world of international dispute settlement, and (iii) the coordination of the system of international courts and tribunals by judicial and state actors is evident. The first argument, backed up by a concise overview of the historical evolution of international dispute settlement, is qualified in its first part. While demonstrating that ‘plurality has always been present in the fabric of international dispute settlement’, the author acknowledges that this plurality has become much augmented in the recent past.⁶ The argument could, and probably should, be qualified in its second part as well. That ‘it has been a deliberate choice to allow for a variety of means of dispute settlement’, does not necessarily imply that those making such a choice have had a clear idea as to how to deal with its consequences or that they have been able to foresee these consequences in the first place.⁷

² Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, para. 489.

³ Boisson de Chazournes, ‘Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach’, 28(1) *European Journal of International Law (EJIL)* (2017) 13. For an earlier example of such an optimistic outlook, see Charney, ‘Is International Law Threatened with Multiple International Tribunals?’, 271 *Recueils des Cours de l’Académie de Droit International de la Haye* (1998) 101.

⁴ Case C-459/03, *Commission of the European Communities v. Ireland (MOX Plant)*, [2006] ECR I-4635; ECtHR, *Bosphorus Hava Yollari Turizm v. Ireland*, Appl. no. 45036/98, Judgment of 30 June 2005.

⁵ Boisson de Chazournes, *supra* note 3, at 34.

⁶ *Ibid.*, at 29.

⁷ *Ibid.*, at 16.

The second argument relates to 'internal communication' among courts and tribunals, which, as is illustrated by concrete examples, takes place, *inter alia*, through judicial dialogue and cross-referencing. The picture of the international dispute settlement system that the text presents is one of a friendly, almost bucolic, environment in which actors, driven by a shared desire to avoid discrepancies and achieve coherence, respectfully listen to each other. Instances of dissonance are readily, maybe too readily, discarded on the account that they are either legitimate or too isolated to harm the system. Optimism is at its highest here, though the final conclusion gets somewhat more cautious, with communication merely designed as one of the threads, albeit a critical one, in the fabric of dispute settlement. Another thread, to which the third argument pertains, is the coordination of the activities of international courts and tribunals through procedural rules that aim at resolving or, more exactly, preventing cases of competing jurisdiction. These rules are either enshrined in treaties or applied directly by judicial bodies. They include, but are not limited to, *lis pendens*, *connexité* and its variations, fork-in-the-road clauses, elections and waiver provisions, *res judicata* and comity. The author aptly shows what the use and limits of these different rules have been in international practice.

The article, despite its comprehensive nature, does not deal with all aspects of the topic. There are at least three paths of research that could be taken to complement, and possibly challenge, the conclusions that the author reaches. First, following on the invitation formulated at the end of the text, the practice in other areas of international law could be studied. This would reveal to what extent the findings made mostly in the 'laboratory' of international economic law reflect the reality of international law more broadly.⁸ Second, the way in which cases of overlapping jurisdiction are resolved not only within, but also across, several areas of international law, would merit consideration. These cases have given rise to particular concerns in the doctrine, and they may be more difficult to overcome by means of procedural rules and/or judicial dialogue.⁹ Third, the article presents internal communication among courts and tribunals and the coordination of their activities as signs of 'an emerging managerial approach'.¹⁰ What this approach implies and whether it offers an appropriate way to address the risks stemming from the plurality of international courts and tribunals would deserve closer scrutiny. In the remainder of this short text, I will seek to provide some elements of such a scrutiny, opting thus, solely, for the third path.

The article refers to the emerging managerial approach at several instances. However, it does not give much detail as to what this approach consists of. We learn nonetheless that the managerial approach is 'ultimately concerned with solving problems and challenges through cooperation with other actors'.¹¹ The text also suggests that the managerial approach brings about harmonization of the rules of the

⁸ *Ibid.*, at 15.

⁹ For a comprehensive overview of various types of jurisdictional overlaps, see Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2004). See also Lavranos, 'Regulating Competing Jurisdictions Among International Courts and Tribunals', 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008) 575; Brown, 'The Proliferation of International Courts and Tribunals: Finding Your Way through the Maze', 3 *Melbourne Journal of International Law* (2002) 453.

¹⁰ Boisson de Chazournes, *supra* note 3, at 45.

¹¹ *Ibid.*, at 15.

game and that, although informal in nature, it is deliberate, reflecting the desire of actors – both states and international courts and tribunals – to make the international legal system internally coherent. The primary motivation behind the approach is the realization that ‘this internal coherence is relevant to the external legitimacy and, ultimately, the compliance pull of the overall system’.¹² To sum up, the managerial approach consists of an intentional, albeit decentralized, collective endeavour to discipline the ‘chaos’ produced by the proliferation of international courts and tribunals, prevent jurisdictional and normative clashes and ensure internal coherence of the international legal (and international dispute settlement) system.

Boisson de Chazournes is certainly not the only, or the first, author to speak about a managerial approach, a managerial model or managerialism. These terms are conventionally associated with at least two strands of thought in international legal scholarship. The first is the legal process theory, as promoted by Abram Chayes and Antonia Handler Chayes. In their book *The New Sovereignty*, the two authors propose a new model that should explain why states comply, or fail to comply, with international law.¹³ This model, labelled as a managerial one, postulates that the main factor accounting for compliance is not the fear of sanctions, as under the coercive or enforcement model, but, rather, an interactive process of persuasion, justification and discourse: ‘[T]he dominant atmosphere is one of actors engaged in a cooperative venture, in which performance that seems for some reasons unsatisfactory represents a problem to be solved by mutual consultation and analysis, rather than an offence to be punished.’¹⁴ The actors play an active role, but they are not the only ones. The system (regime) in which they operate exercises its own compliance pull.

Boisson de Chazournes, of course, does not discuss compliance with international law. Yet her managerial approach is very close to the managerial model of Chayes and Chayes, whom she cites explicitly.¹⁵ It is not all that surprising, provided that she shares the crucial premises formulated by the two authors – the emphasis placed on communication and cooperation and the conviction that actors and the system both matter and, in fact, interact. The affinity of views, however, also entails that at least some of the reservations that have been raised with respect to Chayes and Chayes can be addressed to the current author as well. I will give just two examples of such reservations. In his review of the book by Chayes and Chayes, Harold Koh notes that the narrow focus on the process makes the authors largely ignore the substance of the rules that actors are to comply with. Yet, the substance is important, not least because ‘securing compliance may not be so desirable if the treaties themselves are unfair or enshrine disingenuous or coercive bargains’.¹⁶ By the same token, we may wonder whether the fact that international courts and tribunals reach their decisions

¹² *Ibid.*, at 71.

¹³ A. Chayes and A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

¹⁴ *Ibid.*, at 26.

¹⁵ Boisson de Chazournes, *supra* note 3, at 15.

¹⁶ Koh, ‘Book Review of *The New Sovereignty*’, 91 *American Journal of International Law* (1997) 390.

while engaging in a dialogue is of itself a virtue, regardless of what the substance of such decisions and the rules/inclusiveness of the dialogue actually are. We may also wonder whether the procedural rules, apart from making it possible to prevent jurisdictional clashes, can also help ensure that the judicial body that 'gets' the case takes account of the plurality of interests at stake.

Another reservation, formulated this time mostly by international relations critiques of the book by Chayes and Chayes,¹⁷ relates to the over-optimistic tone of the managerial model. Not only does this model sketch the prospects of international law in very bright colours, it also postulates that there is some natural propensity among states and other actors to comply with law. If the actors disobey legal rules, it is simply because the rules are not clear enough, have become obsolete or the actors are unable, though certainly not unwilling, to meet their obligations. Disobedience, thus, virtually always results from misunderstanding or negligence, not from the effect of competing interests or bad will. Boisson de Chazournes, in her respective area, draws a similarly positive picture. Her actors – both states and international courts and tribunals – display deliberate and purposeful efforts aimed at ordering the fabric of international dispute settlement. They do so, to a large extent, because 'there is perhaps a natural tendency towards coherence', which resonates with, and stems from, 'a basic human desire for intelligibility'.¹⁸

It may indeed be so, especially in the epistemic community of international lawyers. Yet, is the tendency so strong as to trump all counterweighting factors? And, on a more heretical note, is internal coherency and the lack of institutional and normative clashes always desirable? Or could it be that sometimes these clashes might have positive effects (for instance, by making it possible for non-hegemonic voices to be heard)? These questions, of course, are not new. They have already been pondered by various authors writing about the proliferation of international courts and tribunals. Yuval Shany, for instance, suggested that there should be 'a refutable presumption ... that jurisprudential divergence ought to be tolerated only when justified by good reasons'.¹⁹ What these reasons are, and whether the procedural rules pre-empting clashes are designed in such a way as to leave some space for them, would merit further consideration. The absence of such consideration in the current article might, albeit unjustly, create the impression that the author considers internal coherence not just as one of the values of the international legal system but, rather, as its supreme value.

That brings us to the second strand of the international legal scholarship that has delved into the managerial approach or, more exactly, into managerialism²⁰ – the critical approach of Koskenniemi. At the first, superficial sight, Koskenniemi's account,

¹⁷ See, e.g., Downs, Rocke and Barsboom, 'Is the Good News about Compliance Good News about Cooperation?', 50 *International Organization* (1996) 376.

¹⁸ Boisson de Chazournes, *supra* note 3, at 36.

¹⁹ Shany, *supra* note 9, at 125.

²⁰ The concept is taken over from critical social sciences, where it is often summed up in the formula: management + ideology + expansion = managerialism. See Klikauer, 'What Is Managerialism?', 41 *Critical Sociology* (2015) 1103; Doran, 'Managerialism: An Ideology and Its Evolution', 5 *International Journal of Management, Knowledge and Learning* (2016) 81.

and assessment, of the recent evolution of international law might seem quite similar to those of Chayes and Chayes and Boisson de Chazournes. ‘The new global configuration’, he writes, ‘builds on informal relationships between different types of units and actors.’²¹ The proliferation of international courts and tribunals is a natural characteristic of this new global configuration. It is not to be feared. Yet, and here Koskenniemi starts to depart from the other authors, it is not to be managed either.²² It simply cannot be managed, if doing so means being subject to a consensual, value-neutral process that is administered by objective experts and that aims at promoting common goods. This description does not, in Koskenniemi’s view, reflect reality. It is an illusion embraced by those who have succumbed to the catchy gloss of managerialism.

Managerialism suggests that global problems can be solved by experts resorting to the specific knowledge and instruments within their sphere of expertise: ‘[T]he objectives of institutional action are given and the only remaining questions concern their manner of optimal realization.’²³ The determination of this manner and the implementation of the relevant instruments are technical operations devoid of any normative content. International law is but one of such instruments. When a legal problem arises, an expert – a lawyer – is called to fix it as a plumber would be to fix a leaking tap. It is just necessary to decide which lawyer (a trade law one, a human rights one) is competent to help, but this is again a technical question. And if the case goes to international courts or tribunals, the same logic applies. All that is needed are value-free rules to tell us which organ has jurisdiction and unbiased judges or arbitrators to settle the case. But is it really so? For Koskenniemi, it is not. Managerialism, while pretending to be value free, has ‘its concealed normativity that privileges values and actors occupying dominant positions in international institutions’.²⁴

The proliferation of international courts and tribunals is not, or not merely, a result of growing technical specialization in international law. It reflects deeper normative tensions in this area, where distinct regimes and sub-regimes struggle to promote their own objectives, agenda and ethos. While the dominant atmosphere may be one of a cooperation venture, as Chayes and Chayes put it, it is also one of a competitive exercise. Actors operating in this system – whether they are states or international courts and tribunals – do not have the internal coherence of the international legal system as their only concern. They also strive to promote their own perspective and to have a say in an issue that they see as their own: ‘The jurisdictional tensions express deviating preferences held by influential players in the international arena.’²⁵ Due to that, they cannot be easily overcome by procedural rules and courts and tribunals talking to each other. And there is, in fact, no reason why they should be, at least as long as

²¹ Koskenniemi and Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden Journal of International Law* (2002) 557.

²² See Koskenniemi, ‘International Law, Constitutionalism, Managerialism and the Ethos of Legal Education’, 1 *European Journal of Legal Studies* (2007) 8; Koskenniemi, ‘The Politics of International Law – 20 Years After’, 20 *EJIL* (2009) 7.

²³ Koskenniemi, ‘The Politics’, *supra* note 22, at 15.

²⁴ *Ibid.*, at 16.

²⁵ Koskenniemi and Leino, *supra* note 21, at 578.

international lawyers, including judges and arbitrators, are 'people with projects' and not merely technicians fixing problems.²⁶

Is the managerial approach, described in the article, prone to managerialism? Or is it even identical to it? To the latter question, the answer is clearly negative. For Boisson de Chazournes, a managerial approach is not an approach devoid of normative considerations but, rather, one that is marked by 'a responsibility for the development of the system'²⁷ and one that encourages 'respect for the rule of international law'.²⁸ As such, the approach has a normative dimension, and international judges and arbitrators are among those who partake in defining its concrete content. This dimension, while mentioned at several instances, is however largely left aside in the account of the international dispute settlement practice that the article presents. By paying so much attention to the formal aspects of the communication and cooperation among international judicial bodies, this account could, albeit unintentionally, give the impression that all problems stemming from the proliferation of international courts and tribunals are just technical in nature and can be easily handled by means of relatively simple, procedural rules. While successful in identifying the threads of an emerging managerial approach, the article may therefore be somewhat less so in warding off the threats of managerialism which seem to always lurk in the background.

²⁶ See Lang and Marks, 'People with Projects: Writing the Lives of International Lawyers', 27 *Temple International and Comparative Law Journal* (2013) 437.

²⁷ Boisson de Chazournes, *supra* note 3, at 44.

²⁸ *Ibid.*, at 34.