The European Journal of International Law Vol. 28 no. 4
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Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach: A Rejoinder – Fears and Anxieties

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Abstract

This rejoinder clarifies some aspects of my Foreword article, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', that may have been misconceived, such as the connection with the discourse of 'managerialism'. It also expands on the role that international adjudicators, states and litigants must play in preventing chaos as well as highlighting what is now a real challenge, namely the rise of political backlash. Ultimately, we should not forget that the fabric of international courts and tribunals is itself vulnerable.

1 Introduction

It is quite remarkable that the topic of the plurality of international courts and tribunals prompts the use of hyperboles, with expressions like 'chaos'[1] or 'lawlessness that dominates in the many interstitial spaces of international relations in which adjudication remains weak and uncertain'.[2] Are the fears and anxieties produced by the proliferation and diversity of international courts and tribunals on the one hand, and the 'longing for unity'[3] on the other, irreconcilable? There does not seem to be much

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1 Bilkova, 'The Threads (or Threats?) of a Managerial Approach: Afterword to Laurence Boisson de Chazournes' Foreword', 28 *European Journal of International Law* (*EJIL*) (2017), 1259, at 1262.

2 Shany, 'Plurality as a Form of (Mis)management of International Dispute: Afterword to Laurence Boisson de Chazournes' Foreword', 28 *EJIL* (2017) 1241, at 1245.

3 A. Camus, *Le mythe de Sisyphe* (1942), at 34–35.

room left for more measured reactions. This is puzzling. Is it really a topic that calls for such extremes?

2 Waiting for Godot

As I argued in my Foreword,[4] plurality has always been present in the system of international courts and tribunals. The Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have always been confronted with the existence of other judicial mechanisms and have dealt with this.[5] That said, this feature became even more prominent in the 1990s, which raised concerns about forum shopping and the risks of conflicting interpretations.

The fears of chaos, however, have not materialized. A quarter of a century has passed and there is still no sign of it. Multiple studies have been conducted since then and they all attest to the fact that there are no major problems.[6] We can wait for a clash to confirm the earlier assumptions of chaos. Maybe a clash will happen but maybe it won't. In the meantime, it seems appropriate to take stock of the experience gained so far and, in the knowledge that safeguards have been put in place, argue that more of them should be established.

In this regard, international adjudicators, states and litigants have an important role to play. Courts and tribunals must continue to use all available tools and rules to deal with the adverse risks arising from plurality. In addition to those that have already been scrutinized in my Foreword, another deserves to be mentioned. The principle of equivalence, as established by the European Court of Human Rights (ECtHR), provides that in case of comparable protection, there is a presumption that a state has not departed from the requirements of an instrument when it does no more than implement legal obligations flowing from the other regime.[7] It is possible that, with some adjustments, this tool could be used outside the human rights regime, for example, between a free trade agreement (FTA) and the World Trade Organization (WTO) or between two FTAs, particularly in the absence of 'new types of fork-in-the-road provisions'.[8] More importantly, international adjudicators should 'consider themselves as parts of a collective interpretative endeavour' and keep 'in mind the need to ensure

[4] Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', 28 *EJIL* (2017) 13.

[5] See *Case concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland)*, 1927 PCIJ Series A, No. 9, 3, and especially, 25–33; *Ambatielos (Greece v. UK)*, judgment of 15 June 1939, ICJ Reports (1953) 10, 16; Crawford, 'Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture', 1 *Journal of International Dispute Settlement* (2010) 3, at 23.

[6] See, *inter alia*, J. I. Charney, 'Is International Law Threatened by Multiple International Tribunals?', 271 *Recueil des Cours* (1998) 115; Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (*LJIL*) (2002) 553; Simma, 'Universality of International Law from the Perspective of a Practitioner', 20 *EJIL* (2009) 265; P. Webb, *International Judicial Integration and Fragmentation* (2013).

[7] ECtHR, *Bosphorus Hava Yollari Turizm v. Ireland*, Appl. no. 45036/98, Judgment of 30 June 2005, §§ 155–156; *Avotiņš v. Latvia*, Appl. no. 17502/07), Judgment of 23 May 2016, §§ 101–127.

[8] Boisson de Chazournes, *supra* note 4, at 60.

consistency and coherence'.[9] In this context, the participation of the same judges or arbitrators in various dispute settlement fora may be considered useful. However, there is a need to avoid overly restricting 'the [already] relatively small, highly specialized, and well-connected community of international judges, arbitrators and lawyers.'[10]

Sergio Puig correctly pointed out in his Afterword that '[s]tates also have an important role in this managerial approach'.[11] Their role is actually twofold. First, they must organize and regulate *ex-ante* (during the drafting of a treaty) the rules and relationships between international courts and tribunals. This could be achieved through a better interconnection between the various mechanisms provided for in compromissory clauses, or through the use of competition-regulating clauses, as has been done in the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) or in the EU–Vietnam FTA.[12] This would limit situations where only the goodwill of international adjudicators could prevent the risk of conflicting interpretations. Part XV of the United Nations Convention on the Law of the Sea (UNCLOS), for instance, provides that a dispute related to the interpretation or application of the Convention can be adjudicated by a variety of international courts and tribunals. Without the goodwill of the courts and tribunals called upon to rule on the interpretation and application of the Convention, there is a clear risk of divergent and conflicting interpretations.[13] Secondly, states should undertake *ex-post* evaluations. They would enable them to decide in the event of conflicting interpretations or to correctly refine the limits of jurisdiction of a court following an erroneous decision without prejudicing the independence of the courts and tribunals. In this regard, there is surely a fine line to be drawn to prevent politicization. Under this approach, which might be described as one of 'experimentalism',[14] states would have the opportunity to make adjustments in the light of practice.

Lastly, litigants play a crucial role in ensuring system-wide coherence. As Thomas Streinz has rightly stressed in his Afterword, the existence of 'multiple international courts and tribunals is, on its own, not a practical problem in need of a solution'.[15] Problems may arise when parties have the effective opportunity to initiate proceedings in various fora with respect to claims that are substantively the same.[16] This may create a risk of incoherent jurisprudence or even conflicting decisions. In this context, it becomes apparent that litigants can also contribute to the coordination of the plurality of international courts and tribunals.

[9] ITLOS, *Bangladesh v. Myanmar*, Judgment of 14 March 2012, Declaration of Judge Treves, § 2.

[10] Streinz, 'Winners and Losers of the Plurality of International Courts and Tribunals: Afterword to Laurence Boisson de Chazournes' Foreword', 28 *EJIL* (2017) 1251, at 1253.

[11] Puig, 'Experimentalism, Destabilization, and Control in International Law: Afterword to Laurence Boisson de Chazournes' Foreword', 28 *EJIL* (2017) 1267, at 1272.

[12] CETA, Article 29.3.1-2; EU-Vietnam FTA, Article 24(2); Boisson de Chazournes, *supra* note 5, at 48, 60.

[13] ITLOS, *Bangladesh v. Myanmar*, Judgment of 14 March 2012, Declaration of Judge Treves, § 2.

[14] On the contours of this approach, see de Búrca, 'Human Rights Experimentalism', 111 *American Journal of International Law (AJIL)* (2017) 277; Puig, *supra* note 11.

[15] Streinz, *supra* note 10, at 1255.

[16] *Ibid.;* see also Puig, *supra* note 11.

3 Managerial or Managerialism: What's in a Name?

In her Afterword, Veronika Bilkova first seemed to conflate the managerial approach I set out in my Foreword with the discourse related to 'managerialism'. While she eventually clarified that there was a difference,[17] her first question remained unanswered: namely, is the managerial approach, described in the Foreword, prone to managerialism?[18] This gives me the opportunity to address the question.

At the crossroads between international law and international relations, the expression 'managerialism'[19] as used by Martti Koskenniemi refers to 'the process whereby law retreats solely to the provision of procedures or broadly formulated directives to experts and decision-makers for the purpose of administering international problems by means of functionally effective solutions and "balancing interests"'.[20] Open-ended standards are thus preferred because they offer sufficient flexibility to allow for subsequent adjustments. As a result, the legal status no longer matters. The important thing is to ensure 'optimal effects'[21] by allowing experts to adjust and optimize standards in the light of specific situations. Technical expertise lies therefore at the core of the managerial mind-set.[22]

Combined with 'fragmentation', managerialism leads to a law that 'turns onto rules of thumb or soft standards that refer to the best judgment of the experts in the box – [usually] thoroughly committed to advance the purposes of the appropriate box'.[23] In other words, the combination of managerialism and fragmentation leads to functional regimes that behave in a solipsistic and hegemonic manner.[24] This is particularly so because the experts of each regime have been elected to serve in those regimes at first. Therefore, 'balancing of interests and rights across regimes is not their priority; they are putatively less concerned with how their recommendations impinge upon the public realm; they are allegedly less constrained by "constitutional sensibilities".'[25] To put it simply, 'trade bodies [are] condemned to advance trade, human rights bodies human rights'.[26]

As rightly described by Veronika Bilkova, the managerial approach set forth in my Foreword remains within the framework of the rule of law. The very core of the approach is 'to build consistent and coherent rules as well as encourage respect for

[17] Bilkova, *supra* note 1, at 1265.

[18] *Ibid.*

[19] A term borrowed from M. Weber, 'Typen der Herrschaf', in *Wirtschaft und Gesellschaft – Grundriß der verstehenden Soziologie*, 1st edn (1922), 603–817, and more specifically, 642–678.

[20] Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 1, at 13.

[21] *Ibid.*

[22] Bianchi, 'The Helsinki School', in *International Law Theories: An Inquiry into Different Ways of Thinking* (2016) 163, at 172.

[23] Koskenniemi, *supra* note 20, at 6.

[24] *Ibid.*, at 2 where solipsism is defined as seeing nothing other than one's own legal system, and hegemonic as seeking to describe the social world through one's own vocabulary so that its structural bias would become the rule (at 5).

[25] van Mulligen, 'Framing Deformalisation in Public International Law', 6 *Transnational Legal Theory* (2015) 635, at 650.

[26] Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education', 1 *European Journal of Legal Studies* (2007) 8, at 14.

the rule of international law'.[27] More fundamentally, both approaches are predicated on a distinct and opposing ethos. Koskenniemi's managerialism seems to be based on the old idea of coexistence.[28] In his own words, '[l]acking an international political society determining the jurisdiction of each regime',[29] the regimes compete with each other and defend their own interests. On the other hand, the managerial approach set out in my Foreword rests upon the idea that international law is more and more based on the premise of cooperation between actors as well as institutions. In this context, 'the courts and tribunals belong to the same legal order, and derive their legitimacy from being a part of that order'.[30] A breakdown in the unity of international law would thus affect their legitimacy and hinder their functioning, as for example in the event of conflicting judgments. In other words, their 'independence depends on their interdependence'.[31] This is best illustrated by the *Bosphorus* principle, whereby the ECtHR adopted a solution reconciling the Convention system with membership of the European Union.[32] Thus, aware of the risks to the stability of the European system, the ECtHR accommodated the protection of the Convention to the importance of international cooperation. In doing so, it gave priority to the latter while retaining the possibility of restoring the primacy of the protection of the Convention if necessary. This also responds to the concern expressed by Yuval Shany in his Afterword regarding 'the ability of courts to coherently promote the normative needs of their specific legal regime'.[33] The cooperative interests underpinning the managerial approach do not replace the self-oriented interests of the various regimes. It simply limits their significance to the benefit of the cooperative interests.

In a system that aims at the unity of the international legal order but contains regimes with heterogeneous interests, procedural law constitutes a bedrock that organizes and regulates the dialogue between the stakeholders. It provides the rules and tools necessary for the 'durability'[34] of a cooperative framework, in stark contrast to the approach of 'managerialism' described earlier. Hence my focus on procedure.

4 The Vulnerability of the Fabric of International Courts and Tribunals

The tools and means for managing the plurality of courts and tribunals may not be sufficient. It is clear that they must be strengthened and anchored in the rule of law.

[27] Boisson de Chazournes, *supra* note 4, at 34.

[28] To borrow the distinction made by W. Friedmann between coexistence and cooperation, in his *General Course in Public International Law,* 127 *Recueil des cours* (1969) 39, 47–224, 91–109; see also L. Le Fur, *Précis de droit international public* (1933), 303.

[29] Koskenniemi, *supra* note 26, at 4.

[30] Boisson de Chazournes, *supra* note 4, at 35.

[31] Radi, 'Standardization: A Dynamic and Procedural Conceptualization of International Law-Making', 25 *LJIL* (2012) 283, at 287.

[32] ECtHR, *Bosphorus Hava Yollari Turizm v. Ireland, supra* note 7, at §§ 155–156; L. Boisson de Chazournes, *Interactions between Regional and Universal Organizations* (2017), at 263–268.

[33] Shany, supra note 2, at 1246.

[34] Radi, *supra* note 31, at 289.

That said, one should not forget that nothing is set in stone. While systemic threads of a managerial approach to the plurality of courts and tribunals have emerged, there are risks of backlashes. Indeed, a number of international courts and tribunals have been hampered in their operations by states that are dissatisfied with their rulings. We are not speaking of an isolated phenomenon. It has occurred in several fora and the pattern remains the same. Following one or more controversial decisions, the losing state embarks on a campaign to send the wandering courts or tribunals back to the doghouse.[35]

A recent example is the so-called 'hostage taking' of the World Trade Organization's dispute settlement system.[36] As a result of WTO cases that have allegedly diminished 'what they bargained for or imposed obligations that they do not believe they agreed to',[37] the USA decided to block the appointment of new Appellate Body members. There is a great risk that if the USA continues to block the appointment process beyond 10 December 2019, the Appellate Body will no longer be able to decide on any current or future dispute. A multilateral dispute settlement system is thus in danger.

A second – unfortunately successful – attempt to hamper the functioning of an international tribunal occurred with the Southern African Development Community Tribunal (SADC Tribunal). Following the decision in *Campbell and Others v. Zimbabwe*,[38] in which the SADC Tribunal found that the expropriation of agricultural lands without compensation constituted a *de facto* discrimination in violation of the SADC Treaty, Zimbabwe engaged in a 'frontal assault'[39] on the Tribunal. Taking advantage of the silence of the SADC Tribunal Protocol regarding the failure to reappoint sitting judges, Zimbabwe managed to *de facto* suspend the tribunal. A further step, endorsed by all SADC members, was then taken to restrict the jurisdiction of the SADC Tribunal to inter-state disputes.[40] As a result, the SADC principal organ for dispute settlement was 'truncated'.[41]

Another striking example relates to the Inter-American Commission on Human Rights (IACHR). While it has long been recognized as the strongest human rights system in the Americas, a brief analysis of recent developments reveals that it has been 'on the brink of collapse'.[42] As explained by its then President, the IACHR was facing

[35] See, e.g., the words of the President of Ecuador before the 42nd General Assembly of the Organization of American States where he stated that he would 'exceptionally attend the meeting held in Bolivia in order to put the international bureaucracy [the Inter-American Commission of Human Rights] "back in its place"', available at http://www.elcomercio.com/actualidad/politica/correa-llega-a-bolivia-intervenir.html (translation by the author).

[36] *WTO Reporter*, 'Drop WTO Obstruction, Trade Ministers urge U.S.', 13 October 2017.

[37] *Ibid.*, reporting the statements made by Robert Lighthizer, the US Trade Representative, during a panel discussion in Washington.

[38] *Mike Campbell (Pty) Ltd v. Minister of National Security Responsible for Land, Land Reform and Resettlement*, Case No. SC 49/07 (22 February 2008).

[39] Alter, Gathii and Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', 27 *EJIL* (2016) 293, at 311.

[40] De Wet, 'The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa', 28 *ICSID Review* (2013) 45, at 58.

[41] *Ibid.*, at 58.

[42] J. Cavallaro, 'Al borde del abismo', *El Pais*, 23 May 2016, available at https://elpais.com/internacional/2016/05/23/america/1464011720_921111.html (translation by the author).

the worst financial crisis in its history.[43] This was due, he contended, to the fact that 'some countries feel uncomfortable when the IACHR highlights the region's human rights challenges. … [T]hey strangle us financially, perhaps so that we cannot fulfil our mandate'.[44] The conclusion was therefore simple: 'Either the heads of state of Latin America and the Caribbean take the political decision to give life to the inter-American system for the protection and promotion of human rights, or we will witness its collapse'.[45] Although such a decision appears to have been taken,[46] the IACHR remains in a fragile financial state.[47] Again, this originated at least partly, from the growing discontent of some states over a series of recommendations they deemed controversial.[48]

Plurality is one issue and another is the vulnerability of international courts and tribunals. They are not immune to political pressures and attacks. Although in some cases the plurality of international courts and tribunals may provide alternative dispute settlement mechanisms, this does not eliminate concerns about the ability of these courts and tribunals to deal with the cases for which they were set up, whether or not they are controversial. In other words, this growing archipelago of 'islands of effective adjudication'[49] should not be swallowed up by the rise of political resistance. I consider this to be a real challenge.

At the end of the day, we must not forget that the system of courts and tribunals we have is still in its infancy. Although more unity needs to be instilled, the most important thing is to put in place more safeguards to preserve the institutions and protect their independence.

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

46 See Resolution of the General Assembly of the Organization of American States, AG/RES. 2908 (XLVII-O/17), 'Promotion and Protection of Human Rights', adopted on 21 June 2017, point xvi, paragraph 1: 'To request the CAAP, considering the existing resources, to double the amount of Regular Fund resources earmarked for the organs of the inter-American human rights system – IACHR and Inter-American Court of Human Rights – over a three-year period.'; see also Resolution AG/RES. 2887 (XLVI-O/16), 'Promotion and Protection of Human Rights', adopted on 14 June 2016, in which the Member States expressed their determination to address the problem of insufficient funding.

47 See Press Release no. 121 of 15 August 2017 in which the IACHR states that it 'continues to look for funding so that it can sustain all its current activities'; see also Press Release no. 74 of 12 June 2017 in which the IACHR acknowledges that 'the Commission and the Court are excessively dependent on voluntary financial donations and contributions, which by their very nature are variable and unpredictable'.

48 See, e.g., IACHR, Provisional Measure 382/10, *Indigenous Communities of the Xingu River Basin.* Consequently, Brazil kept its ambassador to the OAS in Brasilia, recalled its candidate to the IACHR and suspended payment of its annual dues; see also, IACHR, *2011 Annual Report on Human Rights*, Ch. IV: Venezuela, wherein it held Venezuela accountable for its systematic violation of judicial independence.

49 Shany, *supra* note 2, at 1245; Helfer, Alter, and Guerzovich, 'Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community', 103 *AJIL* (2009) 1.