
Winners and Losers of the Plurality of International Courts and Tribunals: Afterword to Laurence Boisson de Chazournes' Foreword

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Abstract

By asking about 'winners and losers', this reply questions the preference of states for a plurality of international courts and tribunals, challenges the coherence of the international legal order as a dominant rationale for judicial actors to coordinate, and raises doubts about their overall success in managing plurality. It argues that their coordinating efforts have to be understood as reactive rather than proactive steps in a complex decision-making environment in which litigants, their lawyers, and domestic courts play a significant but underappreciated role. While it is true that some coordination between judicial actors exists, it remains to be seen whether the 'threads of a managerial approach' amount to more than thin, singular, and often random strings that will develop into dense, resilient, and predictable webs of international jurisprudence.

Who benefits from the plurality of international courts and tribunals? What motivates their efforts to coordinate? And how do other actors – potential litigants, their lawyers and domestic courts – influence the effective management of the plurality of international courts and tribunals? These three questions are meant to critically engage Laurence Boisson de Chazournes' magisterial EJIL Foreword, according to which states have a preference for plurality in international dispute settlement that is being managed primarily by judicial actors who aim to ensure coherence through coordination by way of judicial dialogue, cross-referencing, and various procedural mechanisms.¹ While her account emphasizes the 'winners', this reply stresses the

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¹ Boisson de Chazournes, 'The EJIL Foreword: Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', 28 *European Journal of International Law* (2017) 13.

need for a normative assessment of the judicialized international legal order that also takes account of the ‘losers’: most acutely those who do not even have the option to pursue their interests via international courts or tribunals and those who are negatively affected when judicial actors fail to coordinate. In the end, domestic courts might emerge as unexpected ‘winners’ in competition with international courts and tribunals to the extent to which they are able to remedy these shortcomings.

1 Plurality for Whom?

Boisson de Chazournes treats as quasi sacrosanct the preference of states for a plurality of international courts and tribunals.² This creates an inherent tension as the need for judicial coordination would decrease if states agreed to a more centralized or less judicialized system of international dispute settlement.³ Would the coherence of the international legal system not be better served by refraining from creating more and more international courts and tribunals? Why do some trade agreements actively cancel prior bilateral investment treaties (BITs),⁴ while others layer one agreement onto the other?⁵ Why are states not using exclusively the established World Trade Organization (WTO) dispute settlement system to solve disputes that arise under bilateral and regional trade agreements instead of creating separate state–state dispute settlement structures (avoiding controversies as in the *Mexico – Soft Drinks* case)?⁶

At the same time, states’ preference for plurality does not translate into a universal and balanced judicialization of the international legal order.⁷ It is hardly surprising that international economic law serves as a laboratory for the development of coordination mechanisms, since much of international dispute settlement is concerned with trade and investment, while international legal conflicts on environmental, health, labour and data issues lack distinctive international dispute settlement mechanisms outside the trade context. This is not necessarily a disadvantage as international

² *Ibid.*, at 30 (plurality ‘is the result of a consistent choice’, a ‘deliberate choice’ by states, because they ‘are now and always have been’ in favour of it).

³ The European Union’s (EU) proposal for a multilateral investment court moves in this direction. See Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes, Doc. COM/2017/0493 final, 13 September 2017.

⁴ EU–Canada Comprehensive Economic and Trade Agreement (signed 30 October 2016, not yet in force), Art. 30.8, available at <https://perma.cc/5RQ7-S6JJ> cancels the existing bilateral investment treaties between Canada and EU member states listed in Annex 30-A.

⁵ Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam (TPP) 2016, [2006] ATNIF 2, ch. 9, would co-exist with the North American Free Trade Agreement 1992, 32 *ILM* 289, 605 (1993), ch. 11.

⁶ WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308; see also Boisson de Chazournes, *supra* note 1, at 49.

⁷ See Kingsbury, ‘International Courts: Uneven Judicialization in Global Order’, in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (2015) 203.

dispute settlement by courts or tribunals is not always the best solution and international law can exert its influence also via non-judicial routes (and does so with mixed results).⁸ But it reinforces the dominance of international economic law in international legal practice, which is problematic to the extent to which the system lends itself to frivolous litigation.⁹

Who, then, benefits from the plurality of international courts and tribunals? Answering this question in a comprehensive manner is complicated and beyond the scope of this reply, but one group can be easily identified: the relatively small, highly specialized and well-connected community of international judges, arbitrators and lawyers. They benefit from increased judicialization and complex litigation as long as the system remains in function. In light of this insight, one can read Boisson de Chazournes' account as describing an attempt to preserve a system in the self-interest of its main protagonists. Yet Boisson de Chazournes presents a different, less cynical motivation: maintaining the coherence of the international legal order.

2 Beyond Coherence

On Boisson de Chazournes' account, judicial actors coordinate the plurality of international courts and tribunals in the interest of the coherence of the international legal order on which their legitimacy allegedly depends.¹⁰ Arguably, this overstates the need to derive legitimacy from being part of the international legal system and underestimates other sources of legitimacy on which international courts and tribunals increasingly rely.¹¹ In fact, the apparent need to employ procedural mechanisms to maintain coherence inadvertently reveals the lack of coherence across and within different substantive areas of international law and exposes statements about international law as a 'single, unified system of law' as prescriptive rather than descriptive.¹²

In any case, there is no 'abstract' interest being served by invoking the 'coherence of international law'. An investor that loses a BIT claim because the tribunal decided to 'cross-fertilize' established investment law doctrine with recent regional human rights jurisprudence emphasizing the 'margin of appreciation' of states will hardly derive comfort from the allegedly enhanced 'coherence of international law'. Indeed, parties who do not like their odds under a judicial body's own case law are likely to refer to other regimes under the pretext that such outreach was required to maintain the coherence of the international legal order (as a whole). Conversely, the opposing

⁸ Cf. L. Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (2015).

⁹ See empirical evidence by Pelc, 'Does the International Investment Regime Induce Frivolous Litigation?', 10 May 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778056.

¹⁰ See Boisson de Chazournes, *supra* note 1, at 35: 'While the courts and tribunals may be diverse in nature, they belong to the same legal order, and they derive their legitimacy from being a part of that order.'

¹¹ Cf. A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014).

¹² Judge Greenwood in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 30 November 2010, ICJ Reports (2010) 639, quoted by Boisson de Chazournes, *supra* note 1, at 38.

parties, favoured by precedent, will emphasize the need to maintain coherence within the relevant international legal subsystem by rejecting outside influence.¹³ Ultimately, some version of ‘coherence’ will prevail, but one of the parties is bound to lose the argument.

Complementary (if not contrary) to Boisson de Chazournes’ account, maintaining coherence is but one consideration that might lead an international court or tribunal to coordinate its legal proceedings with another judicial body – or not. Institutional considerations of self-preservation such as the desire to attract litigation and to limit competition by other international courts and tribunals may play a role. The carefully worded reasoning that led the International Tribunal on the Law of the Sea (ITLOS) to accept jurisdiction for advisory opinions requested of the tribunal are illustrative of this kind of institutional competition as the case could as well have been referred to the International Court of Justice (ICJ) or to an arbitral tribunal.¹⁴ Case-specific circumstances such as factual context, historical backdrop, political ramifications and emotional reverberations unrelated to the plurality of international courts and tribunals may also factor into their decisions to coordinate (or not) since the resolution of the case is inseparable from the coordinative efforts.

In every case, international courts and tribunals are faced with a set of choices, but, importantly, they cannot escape making a decision that will create *de facto*, if not *de jure*, winners and losers. Even declining their own jurisdiction settles the case in a certain way and has repercussions for the institutional standing of judicial actors.¹⁵ So how are they deciding when and how to coordinate?

3 Coordination in a Multi-Institutional Environment

Boisson de Chazournes’ account reveals little about the circumstances and conditions under which an international court or tribunal will coordinate with another judicial body. Her core claim is that such coordination exists in *some* cases. However, the effective management of the plurality of international courts and tribunals arguably requires a sufficient degree of legal certainty as to when an international court or tribunal will actually refer or defer to another judicial actor. I would argue that other actors, namely the (potential) litigants, their lawyers and domestic courts contribute significantly to the complex decision-making environment, generation of information

¹³ This dynamic also explains the recourse to self-contained regimes. See Simma and Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, 17 *European Journal of International Law* (*EJIL*) (2006) 483.

¹⁴ See ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, paras 37ff.

¹⁵ See Proulx, ‘The World Court’s Jurisdictional Formalism and Its Lost Market Share: The *Marshall Islands* Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes’, 30(4) *Leiden Journal of International Law* (2017) 925.

and repertoire of ideas affecting judicial actor's choice to coordinate with other international courts and tribunals – or not.

Litigants' strategic choices about when, against whom, where, on what basis and with what posture to initiate international legal proceedings are constitutive for the practical reality of the plurality of international courts and tribunals. States' creation of multiple international courts and tribunals is, on its own, not a practical problem in need of a solution. Only when there is effective choice between international dispute settlement options is there a risk of parallel proceedings and conflicting decisions. A large number of theoretically available dispute settlement fora never get used in practice. Some are outliers, like the European Nuclear Energy Tribunal with jurisdiction over liability for nuclear accidents, which has never heard a case. But, even in international economic law, which is heavily litigated, there is a large variation across regional trade agreements and BITs in terms of which litigation options are actually pursued in practice. When there are indeed parallel proceedings, it is often due to a deliberate strategy that seeks to maximize the respective party interest by initiating litigation in different fora. The ability of multinationals to incorporate investments in several favourable jurisdictions is a central feature of this system.

International lawyers will draw attention to prior, parallel and anticipated future legal proceedings and refer to the jurisprudence of other international courts and tribunals to advance their case. Hence, judicial actors are at the receiving end of a plethora of information reflecting the plurality of international courts and tribunals. Their awareness of this institutional decision-making environment is, at least in part, a direct consequence of their constant exposure to the reality of litigation under conditions of plurality rather than the result of a judicial self-reckoning. In a similar vein, judicial actors do not invent on their own the various mechanisms and procedural tools that are used to coordinate the international dispute settlement system since they are confronted with, and inspired by, the submissions they receive, including input by *amicus curiae*. They also rely, crucially, on their clerks, associates and internal research services. All these actors are, in their respective roles, unacclaimed members of the 'laboratory' that Boisson de Chazournes is describing. Their personal interactions in collegial bodies and academic societies are fostering a sense of community that is indispensable for the internal coordination between different international courts and tribunals. Yet, the same meetings also create a network whose central actors are able to leverage their social capital to 'win' in the arbitration market.¹⁶

The possibility (or, as the case may be, even the necessity) to litigate international law in domestic courts is affecting, and arguably complicating, the decision-making environment further. While the need to exhaust domestic remedies is the norm in regional human rights law,¹⁷ international legal practice tends to discourage this route to advance investment protection claims. Indeed, the belief that

¹⁶ See Puig, 'Social Capital in the Arbitration Market', 25 *EJIL* (2014) 387.

¹⁷ Art. 35 ECHR.

domestic remedies are insufficient to provide effective compensation is a key narrative to justify investor–state dispute settlement via international arbitration.¹⁸ But states have recently attempted to push back. India revealed a new Model BIT with a domestic remedies rule requiring investors to initiate domestic legal proceedings before seeking redress via an international arbitral tribunal.¹⁹ Importantly, the New York Convention and, even more so, the ICSID Convention severely limit the possibility to review arbitral awards.²⁰ In other areas of international law – most notably, in international trade law – the route via domestic courts is entirely closed (at least in the most powerful jurisdictions). Much depends on the openness of domestic legal systems towards international law, the willingness of domestic courts to entertain such claims, the existence of effective remedies and legal immunity not being an insurmountable hurdle. If these conditions are met, litigants and their lawyers will seize the opportunity to bring claims under international law in domestic courts.

However, the complex and varying relationships between international courts and tribunals, on the one hand, and domestic courts, on the other hand, may render legal victories in one venue practically worthless. In *Dames & Moore v. Regan*, the US Supreme Court endorsed executive decisions dissolving judgments and suspending pending civil claims against the Iranian government to have these cases resolved by the then newly established US–Iran Claims Tribunal.²¹ In *Medellin v. Texas*, the same court (in different composition) held that an ICJ decision finding violations of the Vienna Convention on Consulate Relations was not binding under US federal law and could not be enforced without authorization by the US Congress, in the absence of which the petitioner was promptly executed.²² In other cases, the strategic use of the international forum may induce subsequent domestic proceedings in the litigating country’s interest. By bringing a successful claim under the Convention against Torture to the ICJ, Belgium forced Senegal to prosecute Chad’s former dictator Hissène Habré.²³ Similarly, albeit in a completely different context, four Asian countries used the WTO’s dispute settlement mechanism in *Shrimp–Turtle* to push the USA to create review mechanisms for denied applications.²⁴

¹⁸ Howse, ‘International Investment Law and Arbitration: A Conceptual Framework’, ILLJ Working Paper no. 2017/1 (MegaReg Series), at 33: ‘[S]ubstitute for domestic rule of law.’

¹⁹ Model Text for the Indian Bilateral Investment Treaty, available at <https://perma.cc/P22Z-V6NR>.

²⁰ Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 UNTS 38; Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, 575 UNTS 159.

²¹ *Dames & Moore v. Regan*, 453 US 654 (1981).

²² *Medellin v. Texas*, 552 US 491 (2008); *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, ICJ Reports (2004) 12. Vienna Convention on Consular Relations 1963, 596 UNTS 261.

²³ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 422. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85.

²⁴ WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 12 October 1998, WT/DS58/AB/R, para. 180.

As domestic courts are increasingly involved in international disputes, they become part of the fabric of international courts and tribunals.²⁵ If they endorse their new role, they might emerge as institutional ‘winners’ of judicial globalization by attracting more and more international litigation, especially in areas in which a judicialized international dispute settlement system does not (yet) exist or whenever international courts and tribunals reach contradictory decisions, because their coordinating efforts fail.

²⁵ See E. Benvenisti and G.W. Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (2017).