
International Adjudication as a Global Public Good?

Joshua Paine*

Abstract

This article explores whether international adjudication might constitute a global public good or a mechanism that produces such goods. The article's key contribution is to differentiate between the functions that are served by international adjudicatory processes and to demonstrate that these produce distinct costs and benefits, some of which are privately held and others that are much more diffusely held and involve public goods problems. Even within the one adjudicatory function, such as dispute settlement or compliance monitoring, there is often a complex mix of privately held costs and benefits and far more diffusely felt effects. The global public goods framework sheds light on how these varied costs and benefits are generated by different sets of actors, ranging from all states that create and maintain a tribunal, and broader compliance-supporting constituencies, through to outputs that largely depend on the efforts of individual litigants. The functions served by adjudication, whose relationship to global public goods are analysed, are the peaceful settlement of disputes; the development of international law; and the monitoring of compliance with, and enforcement of, international norms. I also consider the potential of international adjudication to ensure accountability and due process within attempts to provide global public goods.

1 Introduction

Within existing international legal literature, it has occasionally been suggested that international courts and tribunals, and some of the outputs they produce, such as judgments or awards that develop international law, may constitute global public

* Senior Research Fellow, Max Planck Institute Luxembourg for Procedural Law, Luxembourg. Email: josh.paine1@gmail.com. For comments on earlier versions I am indebted to two anonymous reviewers, Aravind Ganesh, Moshe Hirsch, Machiko Kanetake, Ralph Michaels, Margaret Young and participants in seminars at the Max Planck Institute Luxembourg and the University of Reading School of Law. An initial version of this article was written for a panel with the same title organized by the European Society of International Law (ESIL) Interest Group on International Courts and Tribunals, at the 2017 ESIL Annual Conference. The initial version of this article was awarded the 2017 ESIL Young Scholar Prize.

goods.¹ However, no thorough analysis of this question has been undertaken. Similarly, the interdisciplinary literature on global public goods that has emerged in the last 20 years, while often referring to international regimes and institutions to explain how global public goods are provided, has paid little attention to international courts and tribunals.² This article seeks to fill this gap and to provide a more comprehensive framework for analysing whether, and in which circumstances, international adjudication might be classified as a global public good. For global public goods scholarship, this article will be of interest because it applies existing theoretical frameworks to an area of international relations that such scholarship has not treated in the detail it deserves. This article also contributes to recent literature on the functions of international adjudication by drawing on the public goods framework to provide an alternative, complementary account of the multiple distinct roles served by international courts and tribunals.³

¹ See especially Romano, 'Litigating International Law Disputes: Where To?', in N. Klein (ed.), *Litigating International Law Disputes* (2014) 460, at 469–470; Romano, 'The United States and International Courts: Getting the Cost-Benefit Analysis Right', in C.P.R. Romano (ed.), *The Sword and the Scales: The United States and International Courts and Tribunals* (2009) 419, at 433–434; Romano, 'International Courts and Tribunals: Price, Financing and Output', in S. Voigt, M. Albert and D. Schmidtchen, *International Conflict Resolution* (2006) 189, at 190–191, 229–230; Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure', 23 *European Journal of International Law (EJIL)* (2012) 769, at 771, 783; Mavroidis, 'Free Lunches? WTO as Public Good, and the WTO's View of Public Goods', 23 *EJIL* (2012) 731, at 739, 741 (World Trade Organization [WTO] adjudicating bodies provide a public good by clarifying incomplete agreements). Perhaps the most systematic existing treatment of this topic focuses on international commercial and investment arbitration. See Michaels, 'International Arbitration as Private and Public Good', in F. Ortino and T. Schultz (eds), *The Oxford Handbook of International Arbitration* (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3019557.

² Similarly Nollkaemper, *supra* note 1, at 771; for an overview of global public goods literature, see note 9 below. One exception is an interdisciplinary volume on the topic of public goods and intellectual property, which contains several chapters focusing on dispute settlement in the World Trade Organization. K.E. Maskus and J.H. Reichman (eds), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (2005), chs 31–35. During the 1970s and 1980s, international relations literature on regimes considered whether international regimes could be considered public goods, without focusing on international adjudication specifically. A good overview of this literature is provided in Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale Journal of International Law (YJIL)* (1989) 335, at 377–388.

³ See, e.g., Y. Shany, *Assessing the Effectiveness of International Courts* (2014); K.J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014); Lowe, 'The Function of Litigation in International Society', 61 *International and Comparative Law Quarterly* (2012) 209; A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014); J.E. Alvarez, *The Impact of International Organizations on International Law* (2017), ch. 5, 'The Main Functions of International Adjudication'; Ronen, 'Functions and Access', in W.A. Schabas and S. Murphy (eds), *Research Handbook on International Courts and Tribunals* (2017) 463; Shelton, 'Form, Function, and the Powers of International Courts', 9 *Chicago Journal of International Law* (2008) 537. Where this article refers to the 'functions' of international adjudication, I understand this to mean the role played by international adjudication within wider legal and social processes. Implicitly, the identification of such functions relies upon hypotheses about the likely consequences of utilizing international courts and tribunals and, thus, why certain actors may have an incentive to create and utilize such institutions. For similar understandings of the term 'functions' in the context of international courts or international regimes, see, e.g., von Bogdandy and Venzke, *ibid.*, at 5–7; Lowe, *ibid.*, at 211; Keohane, 'The Demand for International Regimes', 36 *International Organization (IO)* (1982) 325, at 333 n. 22.

Specifically, much of what would often be referred to as the public functions of international adjudication can be understood as involving the production of public goods, which generate costs or benefits for virtually all actors, irrespective of whether they have contributed to the costs of engaging in a particular instance of litigation or of creating and sustaining the relevant international tribunal. Conversely, for those aspects of international adjudication that would typically be classified as private, or *inter partes*, the analysis in this article helps explain why it may make sense to conceive of these as private – for example, because it is possible to exclude other actors from enjoying the benefits in question.⁴ A core claim developed by this article is that whether international adjudication constitutes a public good, and what kind of collective action problem is involved, differs markedly depending on the particular aspect of international adjudication that is being considered. Even within the one adjudicatory function (such as dispute settlement or compliance monitoring), there is often a complex mix of highly concentrated, privately held costs and benefits, and much more diffuse effects that sometimes have public goods characteristics. The global public goods framework also helps us see that the varied costs and benefits arising from international adjudication are produced by very different sets of actors, ranging from all states that sustain a tribunal, as well as broader non-state constituencies, through to outputs that largely depend upon the efforts of individual litigants.

This article adopts a comparative perspective, rather than focusing on a particular court or tribunal, because this avoids treating the design features of a particular institution as a given and enables some consideration of how the different features and contexts of international tribunals may affect how they relate to global public goods. Nevertheless, the examples drawn on by this article come from a limited number of contexts, and it is important to acknowledge several aspects in which its focus could be supplemented by different inquiries. First, this article focuses on international adjudication in a non-criminal context. International criminal tribunals serve a range of distinctive functions, such as ending impunity, deterring future crimes, promoting national reconciliation, and establishing a historical record,⁵ and, thus, analysing the relationship of such tribunals to global public goods would warrant a separate inquiry, which others have begun to undertake.⁶ Second, this article mostly draws on examples from tribunals of global reach and, in particular, dispute resolution in the World Trade Organization (WTO), the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and arbitration under the

⁴ The point that the public goods framework provides additional resources that can enrich existing debates in legal literature concerning whether something is public or private is noted in Michaels, *supra* note 1. Nevertheless, it must be remembered that most goods are not intrinsically private or public, as these characteristics can be altered by political and legal choices. See note 16 below and accompanying text.

⁵ See, e.g., Shany, *supra* note 3, at 226–237; Alvarez *supra* note 3, at 313–316; Keenan, ‘The Problem of Purpose in International Criminal Law’, 37 *Michigan Journal of International Law* (2016) 421; Damaska, ‘What Is the Point of International Criminal Justice?’, 83 *Chicago-Kent Law Review* (2008) 329.

⁶ Galand, ‘A Global Public Goods Perspective on the Legitimacy of the International Criminal Court’, 41 *Loyola of Los Angeles International and Comparative Law Review (LLAICLR)* (2018) 125 (suggesting that countering impunity is a weakest-link global public good and the International Criminal Court (ICC) is an intermediate, aggregate-efforts public good designed to pursue this end, but this needs to be balanced against other public goods, such as peace and avoiding selective enforcement).

United Nations Convention on the Law of the Sea (UNCLOS) and in the quasi-multilateral investment treaty network.⁷ Where relevant, I highlight the differences between permanent and ad hoc tribunals. Regional adjudicatory bodies are only drawn on briefly, as a matter of contrast, reflecting that such tribunals, to the extent they generate public goods, are likely to involve regional public goods rather than giving rise to costs and benefits at a global scale. Third, this article does not consider alternative forms of international dispute resolution, such as mediation, conciliation, or treaty-based compliance bodies that are not empowered to take binding decisions. Finally, this article is focused on whether certain adjudicatory functions, common to many international courts and tribunals,⁸ might themselves constitute global public goods, irrespective of whether the underlying substantive law involves public goods problems. Nevertheless, the adjudicatory functions analysed cannot be entirely separated from the substantive law involved in the examples discussed and the kinds of problems that that law attempts to address.

This article proceeds as follows. Section 2 reviews the concept of global public goods and addresses some initial doubts that might be raised about whether international adjudication can qualify as such a good. Section 3 suggests that the dispute resolution function of adjudication primarily has private benefits for the parties to proceedings by resolving their dispute. However, this aspect of adjudication incidentally produces certain public goods, in particular, by making a range of information about disputes publicly available and by providing one forum for debate over social values. Section 4 argues that the law-developing role of some international courts and tribunals generates global public goods through the production of publicly available judgments that clarify or develop international law in a manner that gives rise to costs and benefits on an essentially universal scale. Section 5 turns to the compliance-monitoring and enforcement role of international adjudicators and shows that, while this function is involved in the production of private goods, such as the awarding of compensation to a particular claimant, it also generates certain public goods – for example, by ordering remedies that involve diffusely held benefits or by strengthening the authority of the relevant court or tribunal. Section 6 suggests that international adjudication can play a role, alongside other mechanisms, in ensuring accountability and due process in relation to efforts to provide global public goods, particularly where these occur on a unilateral basis. Section 7 concludes.

2 Defining Global Public Goods

Global public goods is a concept that has been utilized for some time in wider interdisciplinary scholarship on international governance⁹ and, more recently, has been

⁷ UN Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3.

⁸ Regarding the idea that there are certain common functions served by most international courts, despite an institution-specific analysis always being required, see Shany, *supra* note 3, at 37–38.

⁹ See, e.g., I. Kaul, I. Grunberg and M. Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (1999); I. Kaul *et al.* (eds), *Providing Global Public Goods: Managing Globalization* (2003); S. Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (2007); T. Sandler, *Global Collective Action* (2004); M. Ferroni and A. Mody (eds), *International Public Goods: Incentives, Measurement, and Financing* (2002). For a survey of global public goods scholarship, see Kaul, Blondin and Nahtigal, 'Introduction: Understanding Global Public Goods: Where We Are and Where to Next', in I. Kaul (ed.), *Global Public Goods* (2016) xiii.

applied to international law.¹⁰ This section unpacks the concept of global public goods as a clear definition is crucial for evaluating whether international adjudication may sometimes constitute such a good. The concept of public goods was developed in the field of economics, where it is understood to refer to goods that are non-rivalrous in consumption, in that one person's consumption of the good does not diminish its availability for others, and non-excludable in terms of benefits, meaning it is difficult to exclude others from enjoying the good's benefits.¹¹ Commonly cited examples that fit this definition are lighthouses or traffic lights.¹² Most goods have benefits that are not purely public or private, within the above definition, but exist somewhere on a spectrum in between and are known as impure public goods.¹³ Impure public goods are said to come in two ideal types. Goods that are largely non-rivalrous in consumption but whose benefits are excludable are known as club goods.¹⁴ A typical example is a toll road. Goods that are non-excludable but rivalrous in consumption, and thus liable to being depleted, are known as common pool resources.¹⁵ An example would be a high seas fishery. The public or private characteristics of any good are typically constructed through legal and political processes, rather than arising from inherent properties of the underlying problem.¹⁶

¹⁰ See, e.g., 'Global Public Goods amidst a Plurality of Legal Orders: A Symposium', 23 *EJIL* (2012) 643; 'Mini-Symposium on Multilevel Governance of Interdependent Public Goods', 15 *Journal of International Economic Law (JIEL)* (2012) 709; E.-U. Petersmann (ed.), *Multilevel Governance of Interdependent Public Goods Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century* (2012), available at <http://cadmus.eui.eu/handle/1814/22275>; Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', 108 *American Journal of International Law (AJIL)* (2014) 1; E.-U. Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (2017); J.P. Trachtman, *The Future of International Law: Global Government* (2013); Barkin and Rashchupkina, 'Public Goods, Common Pool Resources, and International Law', 111 *AJIL* (2017) 376; Cogolati, Hamid and Vanstappen, 'Global Public Goods and Democracy in International Legal Scholarship', 5 *Cambridge Journal of International and Comparative Law* (2016) 4, at 16, n. 69 (citing further literature).

¹¹ Kaul, Grunberg and Stern, 'Defining Global Public Goods', in I. Kaul, I. Grunberg and M. Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (1999) 3, at 3–4; Kaul and Mendoza, 'Advancing the Concept of Public Goods', in I. Kaul et al. (eds), *Providing Global Public Goods: Managing Globalization* (2003) 78, at 79–80. For an overview of the seminal, mostly economic, literature on public goods, see Desai, 'Public Goods: A Historical Perspective', in Kaul, Grunberg and Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (1999) 63. For an accessible discussion, from an economic point of view, of public goods and other types of collective goods, see Sandler, *supra* note 9, at 17–18, 49–60.

¹² Kaul, Grunberg and Stern, *supra* note 11, at 3–4.

¹³ *Ibid.*, at 4.

¹⁴ *Ibid.*, at 5.

¹⁵ *Ibid.*, at 5; for the suggestion that much of international law addresses common pool resources, see Barkin and Rashchupkina, *supra* note 10.

¹⁶ See, e.g., Cogolati, Hamid and Vanstappen, *supra* note 10, at 13–14; Augenstein, 'To Whom It May Concern: International Human Rights Law and Global Public Goods', 23 *Indiana Journal of Global Legal Studies* (2016) 225, at 229–232; Kaul and Mendoza, *supra* note 11, at 86–87. The technical characteristics of an underlying problem may nevertheless be relevant, for example if they make it unfeasible to exclude others.

It is important to note that the established economic definition of public goods does not use the term ‘good’ in the sense of being normatively desirable.¹⁷ This reflects that the public goods discourse has been developed from an economic perspective that understands the term ‘good’ as providing utility or satisfying preferences for relevant actors¹⁸ and that does not claim to know the preferences of others.¹⁹ ‘Goods’ within this literature can be either tangible or intangible.²⁰ A distinction is typically drawn between ultimate public goods, which are the ultimate outcomes desired by actors, and intermediate public goods, such as international norms and institutions, which are used instrumentally to provide ultimate public goods.²¹ Both international tribunals as institutions, and the specific outputs they produce, such as judgments or decisions, are most likely intermediate public goods, in that they are not created for their own sake but, rather, as part of attempts to provide ultimate public goods, such as an international system that is peaceful or predictable.²² The distinction between intermediate and ultimate public goods is important because classifying an international tribunal (or another international institution) as an intermediate public good relies upon hypotheses as to the likely effects of the institution’s existence and operation, which may remain contested.²³ This reflects that the ‘causal connections’ between the activities of international courts and tribunals, and the achievement of ultimate public goods, such as an international system that is relatively peaceful or predictable, are far from straightforward.²⁴

Public goods are a subset of the broader economic concept of externalities, which are situations where an actor does not bear all of the costs or benefits of its actions, thus creating spillovers that affect other actors.²⁵ A key problem that the global public goods literature focuses on is ‘free-riding’ or the idea that, where the benefits of a good are non-excludable, many actors will choose not to contribute to its production, since

¹⁷ See, e.g., Kaul, Blondin and Nahtigal, *supra* note 9, at xvii; Morrissey, Velde and Hewitt, ‘Defining International Public Goods: Conceptual Issues’, in M. Ferroni and A. Mody (eds), *International Public Goods: Incentives, Measurement, and Financing* (2002) 31, at 35; Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’, 23 *EJIL* (2012) 669, at 673.

¹⁸ Kaul, Grunberg and Stern, *supra* note 11, at 6; Morrissey, Velde and Hewitt, *supra* note 17, at 35.

¹⁹ J.P. Trachtman, *The Economic Structure of International Law* (2008), at 1, 3, 9; Dunoff and Trachtman, ‘Economic Analysis of International Law’, 24 *YJIL* (1999) 1, at 11.

²⁰ See, e.g., Kaul, Grunberg and Stern, *supra* note 11, at 13.

²¹ See, e.g., Kaul, Grunberg and Stern, *supra* note 11, at 13; Ferroni and Mody, ‘Global Incentives for International Public Goods: Introduction and Overview’, in M. Ferroni and A. Mody (eds), *International Public Goods: Incentives, Measurement, and Financing* (2002) 1, at 6.

²² Romano, ‘United States’, *supra* note 1, at 419–421; Nollkaemper, *supra* note 1, at 783.

²³ Coussy, ‘The Adventures of a Concept: Is Neo-Classical Theory Suitable for Defining Global Public Goods?’, 12 *Review of International Political Economy* (2005) 177, at 187.

²⁴ On the challenge of ‘causal connections’ in evaluating the performance of international courts and tribunals, see 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* (2018) 3, at 17, 25.

²⁵ Sandler, *supra* note 9, at 69–71; Kaul, Grunberg and Stern, *supra* note 11, at 5–6; Coussy, *supra* note 23, at 184.

its benefits can be enjoyed for free (irrespective of whether one contributes).²⁶ This literature has developed various hypotheses regarding the likelihood that different types of global public goods will be provided.²⁷ 'Aggregate-effort' global public goods refer to situations where the provision of a public good depends upon the aggregate efforts of all actors.²⁸ Such goods raise problems of collective action at the international level because, from the perspective of an individual state, the private benefits that it secures by providing the public good may not be sufficient to justify the costs of provision.²⁹ In contrast, 'single-best-effort' public goods can be supplied by the single best efforts of a single actor, or a small number of actors, and will tend to be provided where the private benefits of providing the public good are sufficiently high. Frequently cited examples include scientific or medical discoveries or the deflection of an incoming asteroid.³⁰ Finally, 'weakest-link' public goods are situations where the provision of a global public good depends upon the efforts of the weakest link in the international community. A standard example is the eradication of an infectious disease.³¹

In this context, it is useful to distinguish between the decision to create or maintain an international tribunal and the decision to utilize it in particular instances.³² Creating and maintaining an international tribunal, at least in a multilateral context, is most analogous to an 'aggregate-effort' good. It typically depends upon the contribution of a large number of states, both in funding the tribunal and in accepting the sovereignty costs involved, such as possibly being exposed to litigation if there is some degree of compulsory jurisdiction.³³ In contrast, the decision to use an international tribunal is closest to a 'single-best-effort' good, in that it will frequently be provided by a single actor, who will bear financial and other costs of litigation (such as legal fees or the risk of losing the case).³⁴ That decision, however, may produce costs and benefits

²⁶ Put in more general terms, the manner in which a good can be consumed (e.g., whether it can be enjoyed for free) affects the incentives to contribute to producing the good and, thus, the likelihood that it will be provided; see e.g. Sandler, *supra* note 9, at 17–18, 47; Kaul, Blondin and Nahtigal, *supra* note 9, at xxv; Barrett 'Critical Factors for Providing Transnational Public Goods', in Secretariat of the International Task Force on Global Public Goods, *Expert Paper Seven: Cross-Cutting Issues* (2006) 1, at 5.

²⁷ For a detailed review of the (mostly economic) literature that has focused on this issue, known as the 'aggregation technology', see Sandler, *supra* note 9, at 60–68; see also Barrett, *supra* note 9, at 22–102.

²⁸ Put differently, a unit contributed to the public good by one actor is perfectly substitutable for a unit contributed by another actor. Sandler, *supra* note 9, at 61.

²⁹ See, e.g., Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy', 23 *EJIL* (2012) 651, at 658–659; Barrett, *supra* note 26, at 16–17.

³⁰ See, e.g., Bodansky, *supra* note 29, at 663–664; Sandler, *supra* note 9, at 66.

³¹ Bodansky, *supra* note 29, at 660–661; Barrett, *supra* note 26, at 14–15; Shaffer, *supra* note 17, at 677–678.

³² This distinction is suggested in relation to the WTO generally in Staiger, 'Contribution on the International Trade Regime', in Secretariat of the International Task Force on Global Public Goods (ed.), *Expert Paper Series Four: International Trade* (2006) 1, at 10. It is also employed in Mavroidis, *supra* note 1, at 739, 741.

³³ Romano, 'Litigating', *supra* note 1, at 470–471; Galand, *supra* note 6, at 168, 173 (characterizing the ICC as an aggregate-efforts public good); Kaul and Le Goulven, 'Institutional Options for Producing Global Public Goods', in I. Kaul et al. (eds), *Providing Global Public Goods: Managing Globalization* (2003) 371, at 398 (suggesting in relation to the ICC that no state acting alone would have the legitimacy to provide such a good).

³⁴ Romano, 'Litigating', *supra* note 1, at 470–471. Further distinctions can be drawn here depending on whether the disputing parties have consented to jurisdiction prior to the dispute arising and whether centralized enforcement mechanisms, such as prosecutors, have been created. See notes 86 and 112 below.

for a much wider range of actors, for example, in clarifying an uncertain point of international law or enforcing an obligation that is owed to a large number of states. A concept from the public goods literature that assists here is that of ‘joint products’, which is the idea that an activity can produce multiple outputs, some of which are public goods (for example, the part of a judgment that clarifies a point of international law) and some of which involve private, excludable benefits (for example, another part of the same judgment that orders compensation to be paid to the claimant).³⁵

Within the literature on global public goods, the modifier ‘global’ is used to refer to the idea that a good must have costs or benefits that extend well beyond a particular region and, thus, generate spillovers that ‘tend towards universality’.³⁶ In this regard, contrasts are often drawn with regional public goods, which only have spillovers within a particular region,³⁷ and transnational public goods, whose spillovers need only reach beyond a single country.³⁸ A seminal early contribution to the literature on global public goods defined the qualifier ‘global’ as the requirement that a good benefits all countries, socio-economic groups, and generations, or at least ‘benefit[s] more than one group of countries, and ... [does] not discriminate against any population segment or set of generations’.³⁹ This article does not adopt this maximalist understanding of the term ‘global’ because parts of it, such as the requirement of non-discrimination among socio-economic groups, do not have settled meanings that could easily be applied to international courts and tribunals. Furthermore, this aspect of being a ‘global’ public good has been dropped by theorists of this concept in more recent contributions.⁴⁰ Accordingly, this article understands the threshold of ‘global’ primarily in spatial terms – namely, that the costs or benefits of a good must be felt in several geographic regions or even on a worldwide scale.⁴¹ For this reason, regional courts and tribunals would seem unlikely to qualify as global public goods. However, as we will see later, a case can be made that some regional courts have at times produced costs or benefits far beyond their particular region and, thus, have been involved in the production of global public goods.

For several reasons, it could be questioned at the outset whether international adjudication meets the definition of being a public good. Chief among these reasons is that some of the costs or benefits of international adjudication are excludable. For instance,

³⁵ On joint products, see Sandler, *supra* note 9, at 53–54. The concept of joint products has been applied to the international investment regime in Choudhury, ‘International Investment Law as a Global Public Good’, 17 *Lewis & Clark Law Review* (2013) 481, at 503–504.

³⁶ Kaul, Grunberg and Stern, *supra* note 11, at 11; Kaul, Blondin and Nahtigal, *supra* note 9, at xxii; Morrissey, Velde and Hewitt, *supra* note 17, at 34; Sandler, *supra* note 9, at 76.

³⁷ See, e.g., Ferroni, ‘Regional Public Goods in Official Development Assistance’, in M. Ferroni and A. Mody (eds), *International Public Goods: Incentives, Measurement, and Financing* (2002) 157, at 158.

³⁸ Sandler, *supra* note 9, at 76.

³⁹ Kaul, Grunberg and Stern, *supra* note 11, at 11.

⁴⁰ See Kaul, ‘Global Public Goods: Explaining Their Under Provision’, 15 *JIEL* (2012) 729, at 731–732 (defining ‘global’ as having costs or benefits of ‘nearly universal reach’); Kaul, Blondin and Nahtigal, *supra* note 9, at xxii (defining ‘global’ in terms of being of worldwide span or at least spanning several geographic regions and possibly also penetrating into countries and having long-term effects).

⁴¹ Kaul, Blondin and Nahtigal, *supra* note 9, at xxii.

it is common for the states that create an international tribunal to exclude states that are not members of a treaty or wider regime from having recourse to the tribunal⁴² or to provide that non-members can only access the tribunal on specified terms, including contributing to the institution's expenses.⁴³ Furthermore, the consumption of international adjudication is rivalrous, in that the use of a dispute settlement mechanism by one party will diminish its availability for other parties in a resource-constrained environment.⁴⁴ However, these arguments do not distinguish sufficiently between the variety of functions that are served by international adjudication and the costs and benefits that may arise for a wide range of actors beyond those who have access to a tribunal as parties or who have participated in the decision to create or maintain a tribunal. For example, a judgment of the ICJ that clarifies the international law governing due diligence in the context of potential transboundary harm might create costs and benefits for a range of actors who lack standing before the Court, including corporations, local communities, and international financial institutions.⁴⁵ Such a judgment would be non-excludable once it was published and non-rivalrous since the use of it by one of these actors would not affect its availability for other actors. The law-developing aspects of such a judgment would also likely be global in reach, rather than being confined to the particular region from which the underlying dispute arose.

3 The Dispute Resolution Function and Global Public Goods

This section suggests that while the dispute resolution function of international adjudication is involved in the production of private goods, it also contributes incidentally to the production of certain global public goods. To the extent that international adjudicatory mechanisms resolve the disputes submitted to them and allow the disputing parties to move on from their disagreement, this aspect of adjudication primarily produces costs or benefits for the disputing parties and, thus, constitutes a private

⁴² E.g., only WTO members can access the WTO dispute settlement system. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994, 1869 UNTS 401, Art. 1.

⁴³ See, e.g., Statute of the International Court of Justice (ICJ Statute) 1945, 33 UNTS 993, Art. 35 (2)–(3); for discussion, see Zimmermann, 'Article 35', in A. Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (2012) 606, paras 61–99. Similarly, Statute of the International Tribunal for the Law of the Sea 1982, 1833 UNTS 561, Annex VI, UNCLOS, *supra* note 7, Art. 19 (2).

⁴⁴ As Michaels highlights, this point is also true of arbitration where there is theoretically an unlimited number of adjudicators, as the time an arbitrator spends resolving one dispute cannot be spent on other disputes. Michaels, *supra* note 1. One example of the point under discussion is the well-known challenges facing the WTO dispute settlement system in dealing with the membership's case load. See, e.g., Ehlermann, 'The Workload of the WTO Appellate Body: Problems and Remedies', 20 *JIEL* (2017) 705.

⁴⁵ Grossman, 'The Normative Legitimacy of International Courts', 86 *Temple Law Review* (2013) 61, at 73. Examples of such judgments are *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 16 December 2015, ICJ Reports (2015) 665, para. 104; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports (2010) 14, paras 204–205. While international financial institutions, as public international organizations, cannot be parties to proceedings, they could be requested by the Court to provide information where relevant to a case and also have a right to present such information on their own initiative. ICJ Statute, *supra* note 43, Art. 34 (1)–(2).

good.⁴⁶ This aspect of adjudication is excludable in that, if an actor wishes to enjoy the immediate benefits of the dispute resolution function of adjudication, it will need to be willing to incur the costs of being a party to proceedings (such as legal fees or the risks of losing the case),⁴⁷ and, as noted above, those who have not contributed to the costs of establishing or maintaining a tribunal are typically excluded from involvement.⁴⁸ Furthermore, rules around intervention and joinder of proceedings often limit the ability of third parties to benefit from the immediate dispute resolution function of an existing set of proceedings.⁴⁹ The dispute resolution aspect of adjudication is also rivalrous because the time an adjudicator spends resolving one dispute cannot be spent deciding other disputes.⁵⁰ Yet the dispute resolution function of international adjudication can also be argued to produce incidentally spillover effects that are felt by a wider range of actors, beyond the disputing parties or the actors that can access a tribunal.

One of these spillover effects is the suggestion that adjudication may contribute to maintaining a peaceful international system by preventing international disputes festering and leading to broader international tensions and perhaps even violent conflict.⁵¹ One variant of this idea is the contested claim that the shift to resolving investor–state disputes through international arbitration has reduced the incidence of home states exercising diplomatic pressure in response to the treatment of their investors abroad.⁵² In the trade context, it is also sometimes argued that legalized dispute

⁴⁶ For the argument in relation to domestic legal systems that the dispute resolution function of adjudication is a private good, which can be provided by private means, such as arbitration, see Landes and Posner, 'Adjudication as a Private Good', 8 *Journal of Legal Studies* (1979) 235, at 236–240.

⁴⁷ Romano, 'Litigating', *supra* note 1, at 470–471.

⁴⁸ See note 43 above and accompanying text.

⁴⁹ For a discussion of rules and practices on intervention across different international courts and tribunals, see e.g., Ronen and Naggan, 'Third Parties', in C.P.R. Romano, K.J. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2014) 807, at 808–816; H. Thirlway, *The International Court of Justice* (2016), at 177–186; see also Wood, 'Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases', 32 *ICSID Review – Foreign Investment Law Journal (ICSIDR)* (2017) 1, at 7 (noting that it is often thought that intervention is not possible in inter-state arbitration but questioning this assumption). For a discussion of rules and practices around joinder of proceedings and hearings in parallel, see, e.g., Thirlway, *ibid.*, 77–80; Arend, 'Article 9 DSU', in R. Wolfrum and P.-T. Stoll (eds), *WTO: Institutions and Dispute Settlement* (2006) 365, at 365–372.

⁵⁰ Michaels, *supra* note 1.

⁵¹ Wittich, 'The Judicial Functions of the International Court of Justice', in I. Buffard *et al.* (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2008) 981, at 990; Shany, *supra* note 3, at 41–42; M.O. Hudson, *International Tribunals: Past and Future* (1944), at 237–239.

⁵² See, e.g., Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes', 33 *ICSIDR* (2018) 14; Johnson and Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law', in K.P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2010–2011* (2011) 649. Contrast Gertz, Jandhyala and Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?', 107 *World Development* (2018) 239 (empirical study focused on the USA, suggesting that home states continue to make use of limited diplomatic pressure on behalf of their nationals, and the existence of an investment treaty does not reduce this). Pohl, 'Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence', OECD Working Papers on International Investment 2018/01 (2018), at 50–55, available at <https://doi.org/10.1787/18151957>.

resolution mechanisms can have desirable spillover effects by insulating trade disputes from broader diplomatic relationships and thus reducing political tensions.⁵³ Even where adjudication does not fully resolve a dispute, the ‘conflict management role’ that international adjudicators often perform, in containing disputes within a legal framework, arguably makes an incremental contribution to maintaining a peaceful international system.⁵⁴ In this perspective, international adjudication is an intermediate public good as it is a mechanism that arguably contributes, however incrementally, to securing the ultimate public good of international peace.

A further aspect of the dispute resolution function of international tribunals that arguably generates public goods relates to the transparency of the processes through which international disputes are resolved. While there is significant variation across international tribunals with regard to the types of information that are made publicly available and the point in time at which such materials are published, there are broad commonalities – for example, that judgments or awards are published and publicly available through the Internet,⁵⁵ with the exception of investor–state arbitration where such publication is common but not uniform.⁵⁶ Likewise, despite significant

⁵³ Broude, ‘Between Pax Mercatoria and Pax Europea: How Trade Dispute Procedures Serve the EC’s Regional Hegemony’, 37 *Studies in Transnational Legal Policy* (2005) 47, at 50–52. Again, this claim is contestable. For example, there is evidence that WTO members see a cost of filing disputes as the damage caused to the broader diplomatic relationship with the respondent, and WTO disputes are sometimes linked to other issues. See, e.g., Johns and Pelc, ‘Free-Riding on Enforcement in the World Trade Organization’, 80 *Journal of Politics* (2018) 873, at 874.

⁵⁴ Regarding the ‘conflict management role’ of adjudication, see, e.g., Churchill, ‘Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea during its First Decade’, in D. Freestone, R. Barnes and D. Ong (eds), *The Law of the Sea: Progress and Prospects* (2006) 388, at 411–413 (highlighting the prominence of this role in several provisional measures decisions of the International Tribunal for the Law of the Sea [ITLOS]); Alter, *supra* note 3, at 196; Wittich, *supra* note 51, at 990; Spain, ‘Examining the International Judicial Function: International Courts as Dispute Resolvers’, 34 *LLAICLR* (2011) 5; Ginsburg and McAdams, ‘Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution’, 45 *William & Mary Law Review* (2004) 1229.

⁵⁵ For an overview, see Neumann and Simma, ‘Transparency in International Adjudication’, in A. Bianchi and A. Peters (eds), *Transparency in International Law* (2013) 436, at 436–444, 463–464, 476; Kuyper and Squatrito, ‘International Courts and Global Democratic Values: Participation, Accountability, and Justification’, 43 *Review of International Studies* (2017) 152, at 170.

⁵⁶ See, e.g., Hafner-Burton, Puig and Victor, ‘Against Secrecy: The Social Cost of International Dispute Settlement’, 42 *YJIL* (2017) 279, at 304–306 (finding a significant minority of International Centre for Settlement of Investment Disputes’ (ICSID) awards are not published due to the disputing parties withholding consent). In ICSID arbitrations, awards cannot be entirely secret. A 2006 amendment to the arbitral rules requires that where the parties do not consent to publication of the award, the Centre must publish excerpts of the legal reasoning. ICSID Rules of Procedure for Arbitration Proceedings (2006), rule 48(4); ICSID Additional Facility Rules (2006), rule 53(3). Currently, ICSID is in the process of amending its rules. The ICSID Secretariat has proposed amendments whereby the parties would be deemed to have consented to publication of an award unless they object within 60 days. Furthermore, where a party objects to publication, a specific time frame would be established for the publication of excerpts. Additionally, interlocutory orders and decisions, and also awards in arbitrations under the ICSID Additional Facility Rules, would always be published, subject to redactions. See ICSID, ‘Proposals for Amendment of the ICSID Rules’, Working Paper vol. 3, 2 August 2018, at 871–880. Regarding the position in other procedural frameworks, and important developments favouring transparency in investor–state arbitration, see, e.g., Shirlow, ‘Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration’, 31 *ICSIDR* (2016) 622, at 625–630.

differences in procedural rules, oral hearings in many international tribunals are open to the public and increasingly available on the Internet, with the major exceptions being WTO dispute settlement⁵⁷ and many investment treaty arbitrations.⁵⁸ Transparent dispute settlement, through publicly accessible adjudication, can generate costs and benefits for a wider set of actors, beyond the disputing parties, by providing a forum for ‘public debate about ideas, public norms, and societal values’.⁵⁹ As Philippe Sands puts it, international courts and tribunals constitute one element of ‘the large space in which global public consciousness is formed’.⁶⁰ The rise of substantial *amicus curiae* participation in many international courts and tribunals is at least partly explained by the fact that many third parties value the opening that adjudication provides for debating relevant norms and values.⁶¹ The adjudicatory process can also bring to light information that is valued by a range of actors not involved in the proceedings.⁶² Such information has public goods characteristics because once it is rendered public through the adjudicatory process it is both non-excludable and non-rivalrous.⁶³ In short, international adjudication is operating as an intermediate public good that makes possible the provision of ultimate public goods, such as freely available information concerning international disputes or a forum for debating social norms and values.

The above public goods arguably produced by the dispute resolution role of international tribunals can be analysed in relation to the kinds of public goods problems

⁵⁷ See generally Neumann and Simma, *supra* note 55, at 447–455; Kuyper and Squatrito, *supra* note 55, at 163.

⁵⁸ In recent years, there have been significant moves in investment arbitration towards greater use of public hearings. See, e.g., Alexander, ‘Article 6. Hearings’, in D. Euler, M. Gehring and M. Scherer (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015) 227, at 227–235.

⁵⁹ Hafner-Burton, Puig and Victor, *supra* note 56, at 288; Benvenisti and Downs, ‘Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance’, 46 *New York University Journal of International Law and Politics* (2014) 741, at 773–774; Kuyper and Squatrito, *supra* note 55, at 171. In a domestic context, the idea that adjudication has an inherent value in providing a reasoned, public articulation of social values has often been advanced as an argument against settlements. See, e.g., Luban, ‘Settlements and the Erosion of the Public Realm’, 83 *Georgetown Law Journal* (1995) 2619, at 2626, 2634; Fiss, ‘Against Settlement’, 93 *Yale Law Journal* (1984) 1073, at 1084, 1089.

⁶⁰ Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’, 28 *Journal of Environmental Law* (2016) 19, at 26; see also Voeten, ‘Public Opinion and the Legitimacy of International Courts’, 14 *Theoretical Inquiries in Law* (2013) 411 (finding significant levels of information seeking by the public in relation to international courts and tribunals).

⁶¹ For critical review of *amicus curiae* participation across a range of contexts, see especially A. Wiik, *Amicus Curiae before International Courts and Tribunals* (2018), at 27, 47–53 (noting that *amicus* participation is often seen as valuable for enabling a broader range of interests to be heard); see also Ronen and Naggan, *supra* note 49, at 821–825; Crema, ‘Testing *Amici Curiae* in International Law: Rules and Practice’, 22 *Italian Yearbook of International Law* (2013) 91. Of course, *amicus* participation is also focused on the law-developing effects of adjudication. This related aspect of adjudication is addressed in the next section.

⁶² Michaels, *supra* note 1; Benvenisti and Downs, *supra* note 59, at 770–777 (emphasizing the role of national and international courts in generating reliable information as crucial to enabling greater democratic deliberation); Luban, *supra* note 59, at 2625.

⁶³ Similarly Michaels, *supra* note 1.

involved. The public goods of provision of freely available information about international disputes and a forum for debating social values lie somewhere between ‘single-best-effort’ problems and ‘aggregate-effort’ problems. The provision of these public goods partly depends upon the choices that are made by multiple states in creating an international tribunal in relation to rules around transparency and *amicus* participation and their subsequent interpretation by adjudicators. However, in some settings, the degree of transparency that applies to proceedings can also be altered significantly by the choices of the particular disputing parties.⁶⁴ Thus, these public goods are not provided by a single actor, but they are also not aggregate-efforts problems that depend on the contribution of all states. To the extent that international adjudication helps produce the global public good of peace, the issue could potentially be classified as an aggregate-efforts problem because the overall degree to which adjudication makes such a contribution depends upon how widely it is utilized and supported as a dispute resolution mechanism by a wide range of actors in international relations.⁶⁵ On the other hand, within a particular dispute, the incremental contribution that adjudication can make to furthering international peace often turns on the decisions of a small number of disputants – for example, regarding whether to recognize jurisdiction or comply with a judgment.⁶⁶

4 The Global Public Good of Law Clarification and Adaptation

This section argues that the role of international tribunals in clarifying and adapting international law provides strong grounds for classifying this aspect of international adjudication as sometimes producing global public goods. Today, there is little doubt that by deciding cases international tribunals contribute to the development of principles that prospectively shape the rights and obligations of a wide range of actors beyond the disputing parties.⁶⁷ International adjudicators’ decisions both clarify the content of abstract international norms and adapt them to changed circumstances.⁶⁸

⁶⁴ E.g., in both the International Court of Justice (ICJ) and ITLOS the disputing parties can agree to have a closed hearing, although this has rarely occurred, because one party typically has an interest in public proceedings. In WTO adjudication, although the default rule is that hearings are not publicly accessible, sometimes the disputing parties choose to alter this rule. Neumann and Simma, *supra* note 55, at 448–449. In investor–state arbitration there has traditionally been wide scope for the disputing parties to limit the degree of transparency applicable to the case, although this is now changing somewhat given recent reforms. See *supra* notes 56, 58.

⁶⁵ In section 5, I suggest that the authority of international tribunals is closest to an aggregate-efforts problem, which depends upon the contributions made by a wide range of actors.

⁶⁶ A good example is the recent *South China Sea* arbitration, where, because China refused to recognize the Tribunal’s jurisdiction or participate in the proceedings, the potential for adjudication to reduce international tensions was greatly curtailed. PCA, *South China Sea Arbitration (Philippines v. China) – Award*, 12 July 2016, PCA Case no. 2013–19.

⁶⁷ Grossman, *supra* note 45, at 68; Lowe, *supra* note 3, at 212–214; von Bogdandy and Venzke, *supra* note 3, at 106, 207.

⁶⁸ Shany, *supra* note 3, at 38–39; Shelton, *supra* note 3, at 553; von Bogdandy and Venzke, *supra* note 3, at 7, 108.

The context in which this contribution of adjudication should be seen is that contemporary international law is expected to be responsive to a wide range of social demands,⁶⁹ however, in many areas of international law, there is little new treaty law being agreed,⁷⁰ as opposed to a large number of cases being adjudicated.⁷¹ Contemporary international adjudication frequently operates ‘as an alternative to, or substitute for, law reform and treaty-making’.⁷²

The costs and benefits that are generated by international tribunals clarifying and incrementally adapting international law are non-excludable.⁷³ This reflects that most international adjudicatory decisions are publicly available through the Internet,⁷⁴ and in order for adjudication to play a role in clarifying and developing international law, beyond the case at hand, judgments or awards need to be widely available. Accordingly, an attempt to exclude others from consuming this aspect of adjudication, by keeping decisions confidential, would very likely fail since secret decisions would not have law-developing effects and, thus, would not generate wide-ranging spillovers. The law-clarifying aspect of international adjudication should not be seen as a club good because, as mentioned above, although it is possible to exclude actors from accessing an international tribunal, it is not possible to prevent them from consuming publicly available decisions that clarify the law.⁷⁵ By publishing decisions,

⁶⁹ See, e.g., McLachlan, ‘The Evolution of Treaty Obligations in International Law’ in G. Nolte (ed.), *Treaties and Subsequent Practice* (2013) 69, at 72; C. Djeflal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (2015), at 210–211; I. Buga, *Modification of Treaties by Subsequent Practice* (2018), at 2–3.

⁷⁰ Pauwelyn, Wessel and Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’, 25 *EJIL* (2014) 733, at 734–737 (providing evidence of a significant slowdown in the conclusion of multilateral and bilateral treaties in the first decade of the 2000s, as compared to the 1990s and every decade since the 1950s); McLachlan, *supra* note 69, at 70–72.

⁷¹ See, e.g., Alter, *supra* note 3, at 104–105 (charting binding rulings issued by permanent international tribunals by year until 2011, excluding the exceptionally active European Court of Human Rights and Court of Justice of the European Union. This shows that more rulings were issued in each year from 2003 than had been issued between 1945 and 1989).

⁷² Lowe, *supra* note 3, at 214. This is particularly true for so-called ‘trustee’ international courts characterized by a significant grant of compulsory jurisdiction as well as institutional rules, such as a unanimity requirement, which make override of judicial decisions by a diverse range of state principals unlikely. Stone Sweet and Brunell, ‘Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization’, 1 *Journal of Law and Courts* (2013) 61. Rational choice scholars typically explain this function of adjudication in terms of a decision by states to delegate discretion to an international tribunal to complete their contracts. See, e.g., Trachtman, *Economic Structure*, *supra* note 19, at 169–174, 210–216.

⁷³ For similar claims that the law-developing aspects of international adjudicatory decisions are non-excludable and non-rivalrous, see, e.g., Romano, ‘Litigating’, *supra* note 1, at 469–470. For the argument in a domestic context that the rule-producing and rule-clarifying function of adjudication is a public good, which would be under-provided by private mechanisms such as arbitration, see, e.g., Landes and Posner, *supra* note 46, at 238–240; Coleman and Silver, ‘Justice in Settlements’, 4 *Social Philosophy and Policy* (1986) 102, at 114–117.

⁷⁴ See notes 55–56 above.

⁷⁵ Of course, some cases will be decided on fact-specific grounds and will provide little precedential guidance (and, thus, utility) to third parties. For this argument in a domestic context, see Ware, ‘Is Adjudication a Public Good? Overcrowded Courts and the Private Sector Alternative of Arbitration’, 14 *Cardozo Journal of Conflict Resolution* (2013) 899, at 912–913.

international adjudicators, and the states that create and sustain a tribunal, lose control over how such pronouncements may be utilized by other actors, such as private actors, national judges, non-governmental organizations (NGOs) and scholars. The costs or benefits of the law-developing aspect of adjudication are also non-rivalrous because, once a decision is published, one actor's consumption of it does not reduce its availability to other actors. These characteristics of the law-developing aspect of international judgments are also shared by other forms of freely available knowledge, which have been recognized as constituting global public goods.⁷⁶

An important question is whether the law-developing role of international adjudication constitutes a 'global' public good, in that it has spillover effects that are felt in multiple regions and tend towards having global reach. The law-developing contributions of some international courts and tribunals are felt on this kind of global scale because they are couched in terms that plainly have implications for multiple classes of international actors in multiple places.⁷⁷ One obvious example of this would be the contribution of international courts and tribunals to the development of generally applicable secondary rules concerning issues such as the sources of international law or international responsibility.⁷⁸ Some contributions to specific primary rules also generate costs and benefits on a sufficiently wide scale to warrant being classified as global public goods. One example, mentioned above, would be ICJ judgments that have developed generally framed obligations around due diligence and risk assessment in relation to activities that may generate transboundary harm.⁷⁹ Whether the law-developing contributions of regional courts and tribunals may satisfy this criterion of being 'global' public goods would depend upon an assessment of whether there are spillover effects that extend well beyond their member states. This article can only provide some tentative indications in this regard. A strong case could be made that the law-developing contributions of regional human rights courts have sometimes had spillover effects for human rights issues generally in various global, regional and national fora.⁸⁰ On the other hand, the law-developing effects of courts of regional integration have, on the whole, often been confined to the relevant region and, thus, would generally be more likely to constitute regional public goods.⁸¹

⁷⁶ See, e.g., Stiglitz, 'Knowledge as a Global Public Good', in I. Kaul, I. Grunberg and M. Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (1999) 308, at 308–311; see note 130 below and accompanying text (regarding international standards as global public goods).

⁷⁷ Romano, 'Litigating', *supra* note 1, at 470.

⁷⁸ Benvenisti, 'Community Interests in International Adjudication', in E. Benvenisti and G. Nolte (eds), *Community Interests across International Law* (2018) 70 (arguing that international adjudicators promote community interests, including because of their prominent role in developing international law and, specifically, generally applicable rules of recognition).

⁷⁹ See also Mavroidis, *supra* note 1, at 739 (WTO adjudicating bodies provide a public good by clarifying incomplete agreements).

⁸⁰ See, e.g., Romano, 'Price, Financing', *supra* note 1, at 190–191; Shelton, 'Performance of Regional Human Rights Courts', in T. Squatrito *et al.* (eds), *The Performance of International Courts and Tribunals* (2018) 114, at 144–145.

⁸¹ Romano, 'Price, Financing', *supra* note 1, at 191.

It is sometimes suggested that international arbitration is better analogized to a club good, on the basis that its effects are largely confined to the disputing parties,⁸² or that the goods produced have to be paid for in order to be enjoyed (in the form of tribunal fees).⁸³ This article disagrees with this characterization because today, at least as far as public international law is concerned, arbitration, through developing the law, can generate costs and benefits that are felt on something close to a universal scale and run far beyond the actors who pay for a tribunal or have access to the relevant jurisdiction. The reason for this is that arbitration often involves both the publication of awards and the repeated adjudication of issues that potentially affect the rights and obligations of a wide range of actors. Key examples in this regard are arbitration in the multilateral context of UNCLOS and arbitration in the *de facto* multilateral investment treaty network.⁸⁴ For instance, as others have noted, investment treaty arbitration, through developing generalizable principles regarding the permissibility of host state regulatory measures, can create costs and benefits for wide categories of potential claimant investors, host states and other actors affected by the regulation of an issue (for example, local communities).⁸⁵

The above remarks suggest that international adjudication, through clarifying and developing international law, should be seen in some instances as producing global public goods. Again, international adjudication seems best characterized as an intermediate public good since the ultimate public good (which provides utility to a range of actors) is clarification and adaptation of international law, and international adjudication is a means of providing that good through the production of publicly available judgments. Regarding the type of public goods problem that is at issue, it is necessary, as noted above, to distinguish between the creation and maintenance of a tribunal, which requires the inputs of multiple actors, and the use of a tribunal in a particular instance. Once a standing international tribunal or arbitral framework exists, the decision to use it, which may result in a law-developing judgment or award that generates wide-ranging costs and benefits, is closest to a single-best-efforts

⁸² Romano, 'Litigating', *supra* note 1, at 470–471.

⁸³ C.A. Rogers, *Ethics in International Arbitration* (2014), at 359–363 (focusing on international commercial arbitration and suggesting that arbitration is best characterized as a club good because it must be paid for, however, recognizing that the law-producing function of international arbitration may constitute a public good).

⁸⁴ On the quasi-multilateral nature of the investment treaty regime, see, e.g., S.W. Schill, *The Multilateralization of International Investment Law* (2009). It is true that in terms of regime design, compared to the option of creating a permanent tribunal, the decision to utilize ad hoc tribunals reduces the relative influence of any one tribunal over law development. S. Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (2009), at 157–159.

⁸⁵ Michaels, *supra* note 1 (noting that investment arbitration can produce negative externalities where it deters states from enacting regulation). The point that investment arbitration, by developing generalizable legal principles, generates public goods is also noted in Schill, 'The Jurisprudence of Investment Treaty Tribunals: Between Public Good and Common Concern', in T. Treves, F. Seatzu and S. Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (2014) 9, at 10–22. The many procedural principles developed by international arbitration would also have public goods characteristics (being non-excludable and non-rival). See Rogers, *supra* note 83, at 359–361.

problem.⁸⁶ In this regard, it should be noted that, as other studies have highlighted, the use of litigation as a strategic means of developing international law is highly uneven, with states (and other actors) with high legal capacity most likely to advance their interests through shaping rulings that will serve as future precedents.⁸⁷ Applying the definition of global public goods developed above, this point would not prevent the law-developing aspect of international adjudication from qualifying as a global public good, since all that is required is that costs and benefits are consumed on something approaching a universal scale and are difficult to escape. Specifically, the global public goods framework does not require that a good has the same utility, or produces the same costs and benefits, for all actors.⁸⁸ However, the global public goods literature does not suggest that such distributional issues are unimportant, just that they are a distinct question.⁸⁹ Another inquiry would be to consider whether the relevant public good (clarification and adaptation of international law) could be provided through an alternative means with different distributional implications.⁹⁰

It should also be acknowledged that the public good of development and clarification of international law can potentially be provided through adjudication before national courts. Delegating the interpretation of international norms to national courts has the potential to produce a greater number of diverging interpretations compared to utilizing international tribunals, but this point should not be exaggerated.⁹¹ In some areas of international law, such as treaties addressing air transport, cross-border child abduction, sale of goods and taxation or the law on state immunity, national courts play a crucial role in clarifying and developing the content of the relevant norms.⁹² In these areas, national court decisions are utilized by, and can

⁸⁶ One can distinguish between instances where the disputing parties have consented to jurisdiction prior to a dispute arising – for example, through a standing grant of compulsory jurisdiction, where the decision to litigate is truly a single-best-efforts problem, and situations where the disputing parties must agree to submit a dispute to a tribunal. Furthermore, whether and to what extent a judgment has law-developing effects obviously depends not only upon the actors who utilize a tribunal but also on how adjudicators decide to frame their judgment.

⁸⁷ Several contributions have highlighted this point in relation to WTO adjudication. See especially Pelc, 'The Politics of Precedent in International Law: A Social Network Application', 108 *American Political Science Review (APSR)* (2014) 2; Pelc, 'The Welfare Implications of Precedent in International Law', in J. Jemielniak, L. Nielsen and H.P. Olsen (eds), *Establishing Judicial Authority in International Economic Law* (2016) 173; Pauwelyn, 'Minority Rules: Precedent and Participation before the WTO Appellate Body', in Jemielniak, Nielsen and Olsen, *ibid.*, 141.

⁸⁸ See Kaul, Blondin and Nahtigal, *supra* note 9, at xvii.

⁸⁹ *Ibid.*; Kaul, *supra* note 40, at 733.

⁹⁰ One way of approaching this question would be comparative institutional analysis, which would compare potential alternatives, taking account of the impact that the selection of a decision-making process has on the ability of different actors to participate. See, e.g., Shaffer and Trachtman, 'Interpretation and Institutional Choice at the WTO', 52 *Virginia Journal of International Law* (2011) 103, at 105–109.

⁹¹ A. Nollkaemper, *National Courts and the International Rule of Law* (2011), at 221–229.

⁹² Kingsbury, 'International Courts: Uneven Judicialisation in Global Order', in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (2012) 203, at 222; Waibel, 'Interpretive Communities in International Law', in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (2015) 147, at 164; Sloss, 'Domestic Application of Treaties', in D.B. Hollis (ed.), *The Oxford Guide to Treaties* (2012) 367, at 367–368, 389–390 (noting the role of domestic courts is particularly prominent in relation to 'transnational' treaty provisions that regulate cross-border activities of private parties).

generate costs and benefits for, a range of actors outside the relevant national legal system.⁹³ Regarding the ‘global’ qualifier, the individual decisions of national courts are generally less likely to generate costs and benefits in multiple regions, as compared to a decision of an international court or tribunal of wide, multilateral reach. That said, if one focuses on the collective contribution of various national courts to developing the law on some of the above issues, it is likely that the ‘global’ qualifier would be satisfied, as the costs and benefits of the resulting body of jurisprudence would be felt on something approaching a universal scale, including by states whose courts did not contribute to developing the law.

5 The Compliance-Monitoring and Enforcement Function and Global Public Goods

A third function performed by many international adjudicators whose relationship to global public goods must be considered is the compliance-monitoring role, which involves assessing compliance with applicable norms and ordering remedies in cases of non-compliance.⁹⁴ From a system-design perspective, the use of international tribunals with some degree of compulsory jurisdiction can be seen as a tool used by treaty-makers to ‘advance substantive outcomes by way of improved norm-enforcement’.⁹⁵ Specifically, providing for compulsory adjudication is said to strengthen the credibility of the parties’ undertakings and reduce the incentive for defections from an agreed bargain by increasing both the likelihood that non-compliance will be detected, and the costs of non-compliance.⁹⁶ Following this logic, rational choice perspectives see the primary purpose of international tribunals as enhancing compliance with a regime’s substantive norms in the context of collective action problems,⁹⁷ where states have

⁹³ See, e.g., United Nations Commission on International Trade Law (UNCITRAL), *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2016); INCADAT: *Leading Legal Database on International Child Abduction Law*, available at <https://www.incadat.com/en> Nollkaemper, *supra* note 91, at 239–242; Tzanakopoulos, ‘Judicial Dialogue as a Means of Interpretation’, in H.P. Aust and G. Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016) 72 (suggesting that international law requires domestic courts to have regard to relevant decisions of other domestic courts when interpreting treaties).

⁹⁴ See, e.g., Shany, ‘One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?’, in O.K. Fauchald and A. Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2012) 15, at 19–20; Alter, *supra* note 3, at 15; Shany, ‘No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary’, 20 *EJIL* (2009) 73, at 82.

⁹⁵ Shany, ‘No Longer’, *supra* note 94, at 81; Nollkaemper, *supra* note 1, at 786.

⁹⁶ Helfer and Slaughter, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’, 93 *California Law Review* (2005) 899, at 932–934; Shany, ‘No Longer’, *supra* note 94, at 81–82; C.J. Carrubba and M.J. Gabbel, *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union* (2014), at 31–32 (suggesting that courts act as a ‘fire alarm’ and as an ‘information clearinghouse’ by providing an institutionalized venue that brings to light possible instances of non-compliance and enables regime members to ‘credibly exchange information’ over such instances).

⁹⁷ Guzman, ‘International Tribunals: A Rational Choice Analysis’, 157 *University of Pennsylvania Law Review* (2008) 171, at 188.

an incentive to shirk their obligations despite mutual adherence to the regime being beneficial for all members.⁹⁸ Writing from a more traditional legal perspective, Alan Boyle has noted in relation to UNCLOS that '[c]ompulsory dispute settlement clauses may ... have a certain antiseptic quality' in 'detering states from making unilateral claims'.⁹⁹ Similarly, WTO scholars highlight that one of the most important aims of the compulsory dispute settlement system created within that regime is to curb unilateral actions that could harm the security of the multilateral trading system and, in particular, to prevent unilateral determinations of illegality or unilaterally imposed sanctions.¹⁰⁰

To what extent can the compliance-monitoring and enforcement role of international adjudicators be seen as a global public good? The information produced by this aspect of international adjudication may have public goods characteristics, in that once a finding of compliance or non-compliance is made public, this information will be non-rivalrous and non-excludable.¹⁰¹ However, information regarding compliance is not the only benefit produced by the enforcement aspect of adjudication. As Leslie Johns has argued, the benefits produced through the enforcement function vary greatly in terms of how widely shared they are. For example, in the investment context, where successful claims typically result in substantial monetary awards for a particular investor, the pecuniary benefits of enforcement constitute a private good.¹⁰² In contrast, as others have highlighted, in the WTO context, the enforcement aspect of adjudication can have public goods characteristics in disputes where the challenged policy affects a wide range of WTO members because the benefits of litigation, in the form of trade concessions, must be extended, in principle, to all members under the most-favoured-nation principle.

Accordingly, in such disputes, there is an incentive for members adversely affected by a policy to wait for another affected member to bear the substantial costs of challenging it and then participate as a third party and free-ride off such enforcement efforts.¹⁰³ It is possible to point to other examples where the enforcement function of adjudication generates diffuse costs and benefits that run far beyond the particular claimant that bears the costs of litigating a case. Consider disputes over resources in the global commons that have resulted in decisions regulating the exploitation of

⁹⁸ Carrubba and Gabel, *supra* note 96, at 29, 31, 191; B. Koremenos, *The Continent of International Law: Explaining Agreement Design* (2016), at 202–203, 208–211, 220–221.

⁹⁹ Boyle, 'UNCLOS Dispute Settlement and the Uses and Abuses of Part XV', 47 *Revue Belge de Droit International* (2014) 182, at 185–186.

¹⁰⁰ See, e.g., Mavroidis, 'Dispute Settlement in the WTO: Mind over Matter', EUI Working Paper RSCAS 2016/04 (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727131; Shlomo Agon, 'Is Compliance the Name of the Effectiveness Game? Goal-Shifting and the Dynamics of Judicial Effectiveness at the WTO', 15 *World Trade Review* (2016) 671, at 681; see also DSU, *supra* note 42, Arts. 3.2, 23.

¹⁰¹ Barkin and Rashchupkina, *supra* note 10, at 386.

¹⁰² Johns, 'The Design of Enforcement: Collective Action and the Enforcement of International Law', 21 April 2017, at 5, available at www.lesliejohns.me/Design-Enforcement.pdf.

¹⁰³ Johns and Pelc, *supra* note 53; Bechtel and Sattler, 'What Is Litigation in the World Trade Organization Worth?', 69 *IO* (2015) 375, at 382–384. However, WTO disputes are sometimes resolved in ways that are not consistent with the most-favoured-nation principle, which undermines this possibility.

the resource concerned (even if temporarily and in a limited manner), such as the *Southern Bluefin Tuna Cases*¹⁰⁴ before ITLOS or *Whaling in the Antarctic*¹⁰⁵ before the ICJ. In such examples, the litigation, by producing some degree of regulation of a resource in the global commons, results in costs and benefits for a much wider group of actors than the disputing parties.¹⁰⁶ Furthermore, such situations could clearly involve a collective action problem, with no state being sufficiently interested in protecting the relevant resource in order to be willing to bear the costs of litigation, or a scenario where other states choose to free-ride off the state that brings a case.

Besides the remedies that an international tribunal orders, there are more diffuse effects of the compliance-monitoring role that have public goods characteristics and are related to the above-mentioned idea of compulsory adjudication as deterring unilateralism. Specifically, where an international tribunal is relied on as the ‘authoritative resolver of controversies’, the authority of the tribunal is strengthened, and this generates costs and benefits for actors far beyond those who litigate the particular case.¹⁰⁷ While the ‘authority’ of international courts could be conceptualized in multiple ways, one possible framework focuses on whether the various audiences of a court or tribunal recognize an obligation to comply with its rulings and engage in some form of meaningful action towards giving effect to rulings.¹⁰⁸ The challenge for international courts and tribunals of establishing and maintaining authority is an ongoing one, and ‘authority once gained may be later lost’.¹⁰⁹ My point here, from

¹⁰⁴ ITLOS, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures Order, 27 August 1999, ITLOS Reports 1999, 280, para. 90; In this example, the regulation, in the form of a provisional measures order, was subsequently revoked when the arbitral tribunal charged with hearing the dispute held that it lacked jurisdiction. *Southern Bluefin Tuna Cases (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, 119 ILR 508, paras 66–72.

¹⁰⁵ *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening)*, Judgment, 31 March 2014, ICJ Reports (2014) 226, paras 245–247. Regarding developments since the ICJ’s judgment within the International Whaling Commission, see, e.g., Shibata, ‘Conclusion: The Judgment, Its Implications and Prospects’, in M. Fitzmaurice and D. Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (2016) 387, at 395–407.

¹⁰⁶ See Barkin and Rashchupkina, *supra* note 10, at 386 (noting that the monitoring and enforcement of law to protect the global commons is a public goods problem that can often be provided unilaterally). Bodansky, *supra* note 29, at 663 (noting that enforcement of international law can be understood as a single-best-efforts problem). The suggestion that the *Whaling* litigation could help produce the global public good of protecting whales is made in Nollkaemper, *supra* note 1, at 770. Note that if some actors value whales for consumption purposes, the underlying problem of conservation of whales may be better characterized as a common pool resource. Barkin and Rashchupkina, *supra* note 10, at 379. Such cases are also significant for the contribution they have made to elaborating states’ duty to cooperate, given that cooperation is a key issue in the context of shared resources and collective action problems: see, e.g., Young and Sullivan, ‘Evolution through the Duty to Cooperate: Implications of the *Whaling* Case at the International Court of Justice’, 16 *Melbourne Journal of International Law* (2015) 311, at 328–340.

¹⁰⁷ Luban, *supra* note 59, at 2625, makes this observation in a domestic context. The idea that ‘[t]he maintenance of an international court, as a trusted institution’ may be a public good is briefly noted in Nollkaemper, *supra* note 1, at 771; see also Lowe, *supra* note 3, at 213–214 (‘international litigation always has the effect of reasserting and reinforcing the institutions of international law through which the dispute is pursued’).

¹⁰⁸ Alter, Helfer and Madsen, ‘How Context Shapes the Authority of International Courts’, 79 *Law and Contemporary Problems (LCP)* (2016) 1, at 6–7.

¹⁰⁹ Alter, Helfer and Madsen, ‘International Court Authority in a Complex World’, in Alter, Helfer and Madsen (eds), *International Court Authority* (2018) 3, at 5, 13.

the global public goods perspective, is that whether, and to what extent, the authority of an international tribunal is established and maintained has costs and benefits at least for all potential litigants who might make future use of the institution.¹¹⁰ The relevant spillover effects are broader than this, however, because there are likely to be actors who do not have access to a tribunal but who care about the fate of the institution's authority. For example, a wide range of non-state actors, including many international organizations, NGOs, scholars, and even the general public are likely to hold preferences in relation to the ongoing authority of the ICJ or the WTO Appellate Body.¹¹¹

As the above discussion suggests, the compliance-monitoring function of international adjudication has certain public goods characteristics, such as where the remedy ordered involves diffusely held benefits or where the authority of the tribunal is strengthened or undermined. However, the way in which these two public goods are provided needs to be differentiated. Activating the enforcement aspect of international adjudication is a single-best-efforts problem, which only requires a single claimant to be willing to bear the costs of litigation.¹¹² In contrast, maintaining (or undermining) the authority of an international tribunal typically depends upon the conduct of a wide range of actors, including all of the states who are parties to the relevant tribunal, but also an array of other actors who might exercise political pressure in support of (or against) the authority of a tribunal.¹¹³ Accordingly, the authority of an international tribunal is closer to an 'aggregate-efforts' public good that depends upon the cumulative contribution of all relevant actors and whose provision can be undermined where 'big players', whose contributions would have major effects, choose not to contribute.¹¹⁴

Finally, a distinction can be drawn between the regional and global level, as the costs and benefits generated by the compliance-monitoring activities of regional courts and tribunals are primarily felt in the particular region – for example, in influencing the conduct of member states – and, thus, would involve regional public goods. However, as we will see in the next section, the compliance-monitoring activities of regional courts have generated effects on occasion that are felt far beyond the particular region and, thus, were arguably involved in the production of global public goods.

¹¹⁰ Luban, *supra* note 59, at 2625. As Lowe notes, the 'reinforcing effect [of adjudication] is itself a factor that may be counted by repeat players as a significant advantage resulting from litigation'. Lowe, *supra* note 3, at 214.

¹¹¹ One example of this point is the widespread concerns that have been expressed over the fate of the WTO Appellate Body in recent years, in the context of the USA blocking the (re)appointment of Appellate Body members. See also Voeten, *supra* note 60. Such non-state actors could be conceptualized within Alter's terminology of 'compliance supporters' who hold preferences about states' compliance with international court rulings but do not themselves have the power to determine compliance. Alter, *supra* note 3, at 53. Of course, certain international organizations may have limited access to a tribunal, for example, in the ICJ context to seek advisory opinions or furnish information to the Court.

¹¹² This will differ in international tribunals that include centralized enforcement mechanisms, such as prosecutors in criminal tribunals rather than leaving enforcement to individual litigants. See Johns, *supra* note 102.

¹¹³ Alter, *supra* note 3, at 53; Alter, Helfer and Madsen, *supra* note 108, at 22–26.

¹¹⁴ Bodansky, *supra* note 29, at 659.

6 International Adjudication as a Mechanism for Ensuring Accountability and Due Process in the Provision of Global Public Goods

This section suggests that international adjudication has a role to play, alongside other mechanisms, in ensuring some degree of accountability and due process in relation to efforts to provide global public goods, particularly where such efforts occur on a unilateral basis.¹¹⁵ Strictly, this is less an example of international adjudication as a global public good than an instance of adjudication operating as an mechanism for ensuring accountability and due process within the wider processes through which other global public goods are provided. Nevertheless, this issue warrants discussion as it is an important aspect of the relationship between international adjudication and global public goods. It is widely recognized that international adjudicators frequently perform something resembling administrative review through checking the legality of the conduct of national and international-level actors and, in doing so, both controlling and legitimizing that conduct.¹¹⁶ This adjudicatory function overlaps to some degree with the compliance-monitoring role considered in the last section. International courts and tribunals are one relatively formal mechanism for realizing accountability in the international sphere, through the way in which they enable scrutiny of whether those who exercise authority have complied with legally relevant standards of behaviour.¹¹⁷ However, the reviewing and accountability role of international adjudicators is not confined to assessing compliance in a specific dispute because

¹¹⁵ Accountability can be defined as the idea that one set of actors have the right to hold other actors, who wield power, to a set of accepted standards of behaviour and to impose sanctions if they have not acted in accordance with such standards. Grant and Keohane, 'Accountability and Abuses of Power in World Politics', 99 *APSR* (2005) 29, at 29–30; see also Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law', in G. Anthony *et al.* (eds), *Values in Global Administrative Law* (2011) 173 (reviewing different understandings of accountability and noting that it is associated with institutional arrangements but also includes certain normative ideals). 'Due process' relates to a set of procedurally focused expectations that fall within the standards of behaviour utilized either in imposing prospective checks and balances or in retrospectively assessing accountability. Grant and Keohane, *ibid.* For attempts to review the varied content of due process at the international level, see, e.g., Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *LCP* (2005) 15, at 37–40; Correia, 'Administrative Due of Fair Process: Different Paths in the Evolutionary Formation of a Global Principle and a Global Right', in G. Anthony *et al.* (eds), *Values in Global Administrative Law* (2011) 313; G. Della Cananea, *Due Process of Law beyond the State: Requirements of Administrative Procedure* (2016).

¹¹⁶ Alter, *supra* note 3, at 13–15 (referring to the 'administrative review' role); von Bogdandy and Venzke, *supra* note 3, at 14–16; Shany, *supra* note 3, at 45–46; Kuyper and Squatrito, *supra* note 55, at 166–169; Zwart, 'Would International Courts Be Able to Fill the Accountability Gap at the Global Level?' in G. Anthony *et al.* (eds), *Values in Global Administrative Law* (2011) 193 (conceptualizing WTO adjudication in light of theories of domestic judicial review). For criticism of the tendency to conceive of international adjudication in terms of domestic public law review, see, e.g., Foster, 'Diminished Ambitions? Public International Legal Authority in the Transnational Economic Era', 17 *JIEL* (2014) 355, at 357, 374, 395–396.

¹¹⁷ Grant and Keohane, *supra* note 115, at 29–30, 36–37; Kuyper and Squatrito, *supra* note 55, at 169 (emphasizing the potential for compliance monitoring by international courts to bolster accountability); Kingsbury, Krisch and Stewart, *supra* note 115, at 17.

it also frequently involves the development of relevant standards, such as guarantees of due process for affected parties, including in an attempt to guide the future conduct of actors (such as national-level administrators) beyond the case at hand.¹¹⁸

Potentially, the spaces that are created for pursuing accountability through the reviewing function of international courts and tribunals could be conceptualized as a public good – for example, if those who utilize judicial review do not bear all of the costs of provision. However, this would be unlikely to constitute a global public good because the availability of international adjudication as an accountability mechanism is highly uneven and is not enjoyed on anything close to a universal scale. In contrast, a stronger case can be made that international courts and tribunals, through their role as an accountability mechanism, constitute one part of the process through which certain global public goods are provided. For example, for those global public goods that can be provided through ‘single best efforts’, it is foreseeable that international courts and tribunals might be one mechanism used to check the unilateral conduct of states or other actors who step forward to provide such goods.¹¹⁹ Consistent with this perspective, the existing literature on global public goods emphasizes the importance of international law in structuring the decision-making processes through which such goods are pursued.¹²⁰

An oft-cited example of a ‘single-best-effort’ global public good is so-called geoen-gineering, which may, in some of its forms, be available to individual states or a small number of states and, while it could possibly help address the problem of global warming, also raises major questions of due process because of its potential negative side

¹¹⁸ On the distinction between compliance monitoring and the regulatory character of the reviewing role, see D’Alterio, ‘Judicial Regulation in the Global Space’, in S. Cassese (ed.), *Research Handbook on Global Administrative Law* (2016) 303, at 315–317; Stewart, ‘Global Standards for National Societies’, in S. Cassese (ed.), *Research Handbook on Global Administrative Law* (2016) 175, at 177–178; see also Benvenuti, ‘The Interplay between Actors as a Determinant of the Evolution of Administrative Law in International Institutions’, 68 *LCP* (2005) 319, at 339–340 (noting that adjudicatory bodies may develop administrative law-like norms where none previously existed through interpreting treaties or ascertaining custom); Squatrito *et al.*, *supra* note 24, at 7 (suggesting that beyond assessing compliance international courts also ‘help sort out tensions or conflicts between individual regimes’ and ensure ‘that the operations of international regimes or governance systems conform to overarching principles, norms, and values’).

¹¹⁹ Ganesh suggests that states who attempt to provide global public goods unilaterally should submit to an international tribunal to enable independent determination of challenges to their measures. Ganesh, ‘Unilateral Jurisdiction to Provide Public Goods’, 42 *Brooklyn Journal of International Law* (2017) 566, at 648–649. This claim is made within a Kantian account of global public goods, which, interestingly for present purposes, sees the judicial settlement of disputes as an institutional condition necessary to remedy the defect of ‘the indeterminacy of rights’ inherent in the ‘international state of nature’. Ganesh, *ibid.*, at 622, 648–649.

¹²⁰ See, e.g., Bodansky, *supra* note 29, at 664–667 (highlighting the relevance of international law in relation to unilateral efforts to provide global public goods that produce negative externalities); Shaffer, *supra* note 17, at 692; Cogolati, Hamid and Vanstappen, *supra* note 10, at 5.

effects.¹²¹ In this kind of situation, there may be a significant role for international adjudication in ensuring that the interests of those affected by unilateral efforts to provide global public goods are taken into account.¹²² Indeed, many have suggested that international adjudicators are relatively well suited to engaging in procedural forms of review that can push domestic regulators to consider affected foreign interests.¹²³ The WTO case law that has inspired much of this literature – in particular, *US – Shrimp* – provides a strong example of international adjudication acting as a check on unilateral domestic regulation aimed at furthering global public goods (in that case, the conservation of endangered sea turtles).¹²⁴

Where global public goods are pursued on a more multilateral basis – for example, by acting through international organizations – international adjudication is less likely to play a prominent role in holding such actors to account and ensuring they observe due process norms. One striking example of such a function being performed by international adjudicators is the role played in the last decade by the courts of the European Union, and the European Court of Human Rights, in reviewing

¹²¹ See, e.g., Bodansky, *supra* note 29, at 665; Shaffer, *supra* note 17, at 676–677; Morrow, ‘Why Geoengineering Is a Public Good, Even If It Is Bad’, 123 *Climatic Change* (2014) 95, at 99–100. Within geoengineering, a distinction is drawn between ‘carbon dioxide reduction’ technologies, which involve capturing and storing greenhouse gases, and ‘solar-radiation management’ technologies, which aim to reduce the amount of solar radiation absorbed by the earth. Because of their technical characteristics, solar radiation management technologies give rise to a greater problem of unilateral action with negative spillovers. For an introduction to the developments in this area and the governance issues arising, see, e.g., Craik, ‘International EIA Law and Geoengineering: Do Emerging Technologies Require Special Rules?’, 5 *Climate Law* (2015) 111; Morrow, ‘International Governance of Climate Engineering: A Survey of Reports on Climate Engineering, 2009–2015’, FCEA Working Paper Series 001 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982392; Sandler, ‘Collective Action and Geoengineering’, 13 *The Review of International Organizations* (2018) 105.

¹²² Shaffer, *supra* note 17, at 692.

¹²³ See, e.g., Trachtman, ‘International Legal Control of Domestic Administrative Action’, 17 *JIEL* (2014) 753, at 754–756; Ioannidis, ‘A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law’, 12 *German Law Journal* (2011) 1175, at 1195–1199; Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, 107 *AJIL* (2013) 295, at 318–319; Benvenisti, *supra* note 78, at 80–82; Stewart and Sanchez Badin, ‘The World Trade Organization: Multiple Dimensions of Global Administrative Law’, 9 *International Journal of Constitutional Law* (2011) 556, at 571; von Bogdandy and Venzke, *supra* note 3, at 206; see also the contribution of Benvenisti and Shlomo Agon cited in the next footnote.

¹²⁴ Sea turtles located beyond national jurisdiction are non-excludable. They may either be non-rivalrous if they are valued for conservation purposes, and, thus, a pure public good, or rivalrous if they are valued for consumption purposes, and, thus, a common pool resource. See Barkin and Rashchupkina, *supra* note 10, at 379; WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 12 October 1998, WT/DS58/AB/R, paras 163–176, 180–184; WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body (Art 21.5)*, 22 October 2001, WT/DS58/AB/RW, paras 122–124, 143–149. As Eyal Benvenisti and Sivan Shlomo Agon have highlighted, numerous others aspects of WTO jurisprudence can be read as developing the obligations of regulating states to take affected foreign interests into account and to treat them in an even-handed manner. Benvenisti and Shlomo Agon, ‘The Law of Strangers: The Form and Substance of Other-Regarding International Adjudication’, University of Cambridge Faculty of Law Research Paper Paper no. 14/2018 (2018), at 9–21, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013014.

measures adopted at a regional or national level in implementing UN Security Council (UNSC) sanctions.¹²⁵ In this instance, the UNSC was acting to secure the global public good of international security by countering terrorism and, specifically, the financing of terrorism.¹²⁶ Despite the regional nature of the courts involved, their involvement had spillover effects that were felt far beyond their member states, by pushing the UNSC to observe due process standards on the threat of invalidating regional or national implementing measures and, thus, undermining the wider, global sanctions regime.¹²⁷ Hence, in this instance, the regional courts involved were an important mechanism for ensuring accountability, and the observance of due process norms, within the multi-faceted process through which the relevant global public good (combating terrorism financing) has been pursued.¹²⁸

Another example of international adjudication ensuring due process in relation to cooperative efforts to provide global public goods is the openness and transparency requirements that have been imposed on international standard-setting bodies by the WTO Appellate Body, as a condition of the outputs of such bodies being given force under the Agreement on Technical Barriers to Trade.¹²⁹ As others have highlighted, such international standards fit the definition of being global public goods, taking the form of freely accessible knowledge, and the processes through which they are produced raise acute questions of accountability and due process.¹³⁰ Yet, overall, beyond the context of European integration, international courts and tribunals have a limited track record of performing a reviewing and accountability function in relation to

¹²⁵ See especially Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council of the European Union* (EU:C:2008:461); Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission v. Kadi* (EU:C:2013:518); ECtHR, *Nada v. Switzerland*, Appl. no. 10593/08, Judgment of 12 September 2012; ECtHR, *Al-Dulimi v. Switzerland*, Appl. no. 5809/08, Judgment of 21 June 2016. All ECtHR decisions are available online at: <http://hudoc.echr.coe.int/>.

¹²⁶ Preventing terrorism financing is a classic weakest-link problem because its provision can be impaired if a small number of states do not implement such sanctions. Krisch, *supra* note 10, at 20.

¹²⁷ See Benvenisti, 'Ensuring Access to Information: International Law's Contribution to Global Justice', GlobalTrust Working Paper 09/2017 (2017), at 16, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3106885 (suggesting that in this and other instances the Court of Justice of the European Union and European Court of Human Rights have indirectly generated spillover effects that are felt beyond their member states); Hovell, 'Kadi: King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power between the UN Security Council and Courts', 79 *Modern Law Review* (2016) 147, at 148 (noting the *Kadi* litigation before the EU courts was decisive in forcing the United Nations Security Council (UNSC) to adopt due process guarantees).

¹²⁸ In this example, national courts also played a significant role in reviewing national implementing measures and pushing the UNSC to observe due process requirements. See, e.g., Fikfak, 'Judicial Strategies and Their Impact on the Development of the International Rule of Law', in M. Kanetake and A. Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (2016) 45, at 52–65; Benvenisti and Downs, *supra* note 59, at 763–765.

¹²⁹ See WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body*, 16 May 2012, WT/DS381/AB/R, paras 363–379, drawing on Committee on Technical Barriers to Trade, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, WTO Doc. G/TBT/9, 13 November 2000, at 24–26. Agreement on Technical Barriers to Trade 1994, 1868 UNTS 120.

¹³⁰ Du and Deng, 'International Standards as Global Public Goods in the World Trading System', 43 *Legal Issues of Economic Integration* (2016) 113, at 119–122.

other forms of international governance.¹³¹ National courts, in contrast, have often proved more able to hold such actors to account, reflecting the crucial ‘gatekeeping’ role they play at the interface of the national and international legal orders as well as their plenary jurisdiction, well-established independence and authority and strong enforcement powers.¹³² Furthermore, in some areas, non-judicial mechanisms, such as ombudsperson institutions, may be better placed to ensure due process guarantees are observed, for example, because they possess subject-specific expertise.¹³³ In short, while international adjudication has a role to play in ensuring accountability and due process within efforts to provide global public goods, particularly where these occur on a unilateral basis, it is only one potential mechanism for this purpose.

7 Conclusion

This article has addressed the question of whether international adjudication might be classified as a global public good or as a mechanism that helps produce certain global public goods. The article fills a gap in international legal literature, which has occasionally raised this topic but not addressed it thoroughly, and in the interdisciplinary literature on global public goods, which often stresses the importance of international regimes and institutions but has not given international courts and tribunals sufficient attention. The framework developed by this article also complements recent literature concerning the distinct functions performed by international courts and tribunals. In particular, the global public goods perspective foregrounds the varied costs and benefits that arise from different aspects of the existence and operation of international courts and tribunals. As we have seen, even within a single adjudicatory function (such as dispute settlement or compliance monitoring), there can be both highly concentrated, private benefits, such as the resolution of a controversy or an award of compensation, and much more diffuse effects with public goods characteristics, such as the provision of publicly available information about a dispute or a contribution to strengthening the authority of the tribunal concerned.

Rather than labelling certain adjudicatory functions as public or private without significant further analysis, the public goods framework provides criteria that shed light on why it may make sense to classify certain aspects of international adjudication as public or private. For example, in relation to the role of adjudicators in developing international law, it was shown that, for judgments or awards to perform this function, they must be made publicly available and, thus, non-excludable. This explains

¹³¹ von Bogdandy and Venzke, *supra* note 3, at 15–16; Benvenisti and Downs, *supra* note 59, at 750–751, 756–758 (suggesting international tribunals largely avoid reviewing the policies of international organizations, reflecting tribunals’ lack of independence from the powerful states who create and sustain them); E. Benvenisti, *The Law of Global Governance* (2014), at 240–242.

¹³² Benvenisti, *supra* note 131, at 244–250; Benvenisti and Downs, *supra* note 59, 752–754, 760, 763–764; see generally A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (2010).

¹³³ See, e.g., Hovell, *supra* note 127, at 161–162.

why once judgments are made publicly available, their law-developing contributions escape the control of the parties who contributed to producing the relevant output – for example, by engaging in the underlying litigation or funding the tribunal in question. The global public goods perspective also helps us see that the various costs and benefits arising from international adjudication are produced in different ways, which depend upon the contributions of different sets of actors. While some of the costs and benefits have been seen to depend upon a diverse range of actors, such as all states who create and maintain an international tribunal as well as broader compliance-supporting constituencies, others have been shown to depend primarily on the efforts of individual litigants.

In applying the global public goods framework to the various functions of international courts and tribunals, this article has highlighted relevant differences between standing international courts and ad hoc tribunals and between tribunals of global and regional reach. Compared to some prior contributions that have characterized arbitration as a private or a club good, this article has suggested that, within contemporary international law, arbitration is producing certain global public goods, in particular, by developing international law. Future inquiries can complement the broad comparative approach of this article in a number of respects. The relationship of regional courts and tribunals to regional, and sometimes even global, public goods, and how this may differ between regional courts (for example, given the spillover effects of their law-developing contributions beyond their member states), deserves further analysis. Focusing on international courts and tribunals where litigation occurs through centralized actors, rather than being left to individual claimants, such as international criminal tribunals, and how this design feature changes the collective action problems involved, would also be useful.¹³⁴ The advisory function of some international tribunals may also have a distinctive relationship with the concept of global public goods, for example, because this function often needs to be triggered through a collective decision (rather than by an individual state willing to litigate) and can be predominantly about providing a forum for public debate or law development. At a time when support for international courts and tribunals is waning, this article has engaged with the global public goods framework to clarify our understanding of the varied costs and benefits arising from different aspects of international adjudicatory processes.

¹³⁴ For an initial treatment of this question, see Johns, *supra* note 102.