Judicial Activism
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A. Introduction

1 The emergence of multiple international adjudicatory bodies is often described as one of the most remarkable features of international law of the last few decades. This phenomenon arguably played a non-negligible part in pushing the discipline of international law towards its ‘post-ontological era’ (Franck, 1998, 6). Given the natural connection that lawyers tend to see between the adjudicatory function and a legal order, the rise of international adjudication has something to offer to overcome international lawyers’ alleged inferiority complex vis-à-vis their colleagues in domestic law (Simma, 2004, 845). Alongside this quantitative change, however, there is also the sentiment that we have been witnessing an unprecedented transformation of the role and the role perception, as well as the power and influence of international adjudication. Very few concepts transmit this feeling as strongly as the concept of judicial activism as applied to international adjudication. Indeed, in the classic image of international law as a legal system where the existence of third-party adjudication is an exception rather than the rule (South West Africa Cases, Ethiopia v South Africa; Liberia v South Africa, 1966, 46; ICS Inspection and Control Services Limited v Argentine Republic, 2012, para 281), and where any such adjudication against a state requires the latter’s consent, the very notion of judicial activism in international law might seem like an invitation to elaborate ‘a general theory of unicorns’ (Campos, 1998, 104). The fact that judicial activism in international law is not so seen today is thus quite telling as to the extent to which the phenomenon of international adjudication and its perception have evolved.

2 Scholarly discussions of judicial activism almost invariably start with reference to the difficulty of defining the concept in a way that could render it reasonably operational. The original usage of the phrase in Arthur Schlesinger’s 1947 article in Fortune magazine already signalled this difficulty. Schlesinger divided the US Supreme Court Justices into ‘activists’ and proponents of ‘judicial restraint’, referring to the first group as willing to put the power of the Court in the service of ‘their own conception of the social good’ and to the second group as expanding the range of deference-entitled legislative choices (Schlesinger, 1947, 21). It was not clear whether, in this understanding, activism or judicial restraint was co-extensive with any particular interpretive method, or whether the choice between the two philosophies was determined or constrained by legal rules. Combined with the widespread view that activism is simply a partisan epithet used to describe decisions with which one disagrees for reasons that may not have much to do with any particular judicial philosophy per se, such fundamental interrogations—because they rarely receive all the attention they deserve—might explain the impression that debates about activism often look like ‘loosely connected discussion’ (Green, 2009, note 1). It thus seems necessary to provide a working definition of judicial activism before discussing it in the specific context of international law.

1. The Baseline for Assessment of Judicial Activism

3 Most definitions of judicial activism suggest that the latter is a relational concept, which means that it cannot be understood without some comparators that could serve those definitions as baselines. Consider for instance the following ‘core meanings’ of judicial activism offered by Kmiec: ‘(1) invalidation of arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial “legislation”, (4) departures from accepted interpretive methodology, (5) result-oriented judging’ (2004, at 1444). Each of these meanings presupposes that judicial activism presents a departure from a common standard. While judges are normally expected to follow precedents (→ Stare decisis), an activist judge ignores them. Although judges normally refrain from openly engaging in lawmaking, an activist judge feels no such constraint. Whilst judges are expected to be faithful appliers of general legal prescriptions without letting a particular desired result
interfere with their decisions, an activist judge is prepared to let the outcome dictate his or her choices.

4 It could be tempting to see judicial activism as a departure from law. This temptation should, however, be resisted because every adjudicatory decision is ordinarily justifiable under some legally plausible interpretation of law. This is so not simply because law is indeterminate and can be used to justify more than one outcome in every case (see Siegel, 2010, 590). It is also because the constitutive laws of the legal field make it impossible for any legal operator to engage in legally unrecognizable moves. As Bourdieu observed in a different context, '[f]or bold strokes of innovation ... to have some chance of even being conceived ... they must have some chance of being received, meaning accepted and recognized as “reasonable”' (1995, at 235). This explains that ‘a miraculous appearance’ is impossible in law because every decision can be reconstructed as falling within the preexisting legal world (Kahn, 1999, 119).

5 Based on the foregoing, it seems more appropriate to define judicial activism by reference to prevailing standards of adjudicatory conduct (Green, 2009, 1200). Activist adjudicators under this definition are those going beyond the boundaries determined by such standards to do ‘more than they should’ (Green, 2009, note 3), ie more than what they are expected to do in view of the norms of adjudicatory conduct.

2. The Relativity of the Epithet ‘Judicial Activism’

6 The foregoing definition of judicial activism has a number of implications, one of the most important of which is the fundamental relativity of the epithet of ‘judicial activism’. The relativity of judicial activism explains the oft-repeated comment that the label of ‘activist’ is used to describe a decision one dislikes for other reasons, and that, like beauty, judicial activism is in the eye of the beholder (Lindquist and Cross, 2009, 1). But the broader conceptual point is that the adjudicatory office has no natural or inherent feature, which means that how far adjudicators can go cannot receive a context-independent response. For instance, the afore-quoted definition of judicial activism lists ‘judicial legislation’ as an instance of judicial activism. But there is a widespread consensus in the international legal community that law-making is a normal part of the adjudicatory function (Ginsburg, 2005, 632; von Bogdandy and Venzke, 2013, 56; Helfer and Alter, 2013, 484).

7 Other features of international law make the relativity of judicial activism even more apparent. Unlike domestic courts, international adjudicatory bodies do not form parts of an integrated system and have different constituencies and different geographic and subject-matter reaches. What might pass for unacceptable judicial activism if practiced by one international adjudicatory body may be seen as regular adjudicatory business when practiced by another.

8 The relativity of judicial activism also has a temporal dimension in that what could be seen as judicial activism at one point in time might not be viewed in the same way at another. This is particularly true of international law; the question of how far an international adjudicatory body can go could not receive the same response when the presence of third-party adjudication was exceptional on the international scene and today when third-party adjudication is much more firmly established and is seen as a ‘normal’ part of the machinery of international law.

B. Variables of Judicial Activism
The prevailing norms of adjudicatory conduct are largely informed by dominant conceptions of the adjudicatory function. Such conception should not be seen as a set of abstract ideas about adjudication, but as representations with a material existence in the sense that they are consecrated by practice and shape and inform the attitudes of agents in practice (Althusser, 2014, 258–61). The content of the norms of adjudicatory conduct is also informed by prudential doctrines prevailing within a given community about the relationship between adjudicatory bodies and their political interlocutors. Also relevant for the assessment of judicial activism is whether or not the norms of adjudicatory conduct have teeth, which, among other things, is a function of the existence and effectiveness of mechanisms designed to give effect to those norms (→ Sociological approaches to international adjudication).

1. Conceptions of the Adjudicatory Function

The functions of an adjudicatory body within a given community are not something that can be determined in the abstract for the simple reason that there is nothing natural about any particular function that can be associated with adjudication. What has been called ‘courtness’ is thus bound to remain context-specific (Shapiro, 1981, 1). It is true that ‘the conflict resolution role’ is normally seen as being inherent in the very idea of adjudication (Shapiro, 1981, 1–17). But that does not mean that every adjudicatory body is, by necessity, or simply, a dispute settler.

Adjudicatory bodies can develop and make public their own conceptions of the adjudicatory function. Given the political significance of adjudication, the political interlocutors of adjudicatory bodies often have their own views about the functions that such bodies can legitimately carry out. Also worthy of notice is the role of legal scholars in conceptualizing the adjudicatory function, not least because judges and arbitrators themselves may be socialized into particular scholarly representations of the adjudicatory function during their law school training and afterwards.

2. Prudential Doctrines about the Boundaries of Adjudicatory Power

The interplay between third-party adjudication and political power structures is often subject to prudential doctrines the primary function of which is to create a space of discretion or uninterferable appreciation for political branches. However labelled—political questions, margin of appreciation, act of state, actes de gouvernement, etc—and whether formalized or not, they impose limits on adjudicatory power that can take the form of an outright nonjusticiability of some politically sensitive matters or deference granted to the assessments of political branches (→ Political disputes).

3. Mechanisms of Enforcement of the Norms of Adjudicatory Conduct

If going beyond the boundaries determined by the norms of adjudicatory conduct were to have no consequences, judicial activism would be deprived of much of its operational content. However, legal systems rarely remain indifferent to breaches of those norms; in fact, many legal systems possess mechanisms for the enforcement of such norms. Some of such mechanisms are institutionalized, such as a hierarchically structured judicial system in which judicial decisions are subject to appeals or other types of reviews. Others are informal, such as the reputational cost of a decision ignoring norms of adjudicatory conduct. Political interlocutors of adjudicatory bodies can also react to breaches of the norms that determine the limits of the adjudicatory power. Various ‘exit’ and ‘voice’ mechanisms are ordinarily available to them, since ‘[n]o regime is likely to allow significant
political power to be wielded by an isolated judicial corps free of political restraints’ (Shapiro, 1981, 34).

C. Assessment of Judicial Activism in International Law

14 The relativity of the determinants of judicial activism explains that judicial activism in international law has little in common with the phenomenon of judicial activism in domestic legal orders. For instance, the conceptions of the adjudicatory function in international law are certainly informed by domestic laws, but they are also largely shaped by experiences specific to the international legal order and the intellectual history of the discipline of international law (→ History of International Law, Basic Questions and Principles). Similarly, while prudential doctrines operating in international law bear a family resemblance to their domestic equivalents, they have emerged in the specific environment of international law and are therefore largely unique. The same obviously goes for the mechanisms of enforcement of the norms of adjudicatory conduct. Thus, no proper assessment of judicial activism in international law can be carried out without examining the determinants of judicial activism in the specific context of international law.

1. Conceptions of the International Adjudicatory Function

15 Understandably, one’s conception of what → adjudication is for largely shapes one’s assessment of the conduct of adjudicatory bodies. There is a widespread consensus in international law that dispute settlement is the main function of most international adjudicatory bodies. This is unsurprising given the fact that dispute settlement is part of the official mission statement of most international adjudicatory bodies (see eg Article 38 (1) Statute of the International Court of Justice). But the adjudicatory function cannot be reduced to dispute settlement only; in fact, international adjudicatory bodies often assume other functions, and their various constituencies can also expect from them more than dispute settlement (→ Agency of international adjudicatory bodies). Among such functions are lawmaking, stabilization of ‘normative expectations’, ‘controlling and legitimating public authority’, fact-finding, and governance (von Bogdandy and Venzke, 2013, 52–59; Alvarez, 2014, 166–76).

16 While functions other than dispute settlement are not as widely representative as dispute settlement, some broader mission than dispute settlement can be conceived for each international adjudicatory body. International adjudicatory bodies themselves and their various constituencies can have a narrow or a broad view of the adjudicatory function. According to the narrow view, having been set up to carry out a specific mission—ordinarily, dispute settlement—an international adjudicatory body has no mandate for, and should not do, anything else. In contrast, the broad view is premised on the assumption that an international adjudicatory body should do or already always does something more than dispute settlement.

17 Practical examples are not hard to find to illustrate how such general conceptions about the adjudicatory function can impact adjudicatory conduct. Consider, for instance, the issue of whether an international adjudicatory body should limit itself to what is strictly necessary for the resolution of the case brought before it. Advocates of the narrow view of the adjudicatory function would argue that an international adjudicatory body should be guided by the principle of judicial (or arbitral) economy and avoid dealing with issues that are not strictly necessary to the legal resolution of the specific case. That would mean, for instance, that if several alternative grounds are available to decide a case, preference should be given to the least controversial grounds. The International Court of Justice (‘ICJ’) put this philosophy to practice in the → Arrest Warrant Case (Democratic Republic of the Congo v Belgium) where it avoided the controversial issue of universal jurisdiction and decided the case on the ground of immunity even though the issue of immunity cannot arise in the
absence of jurisdiction (Arrest Warrant Case, Democratic Republic of the Congo v Belgium, 2002, 3). Similarly, in its Advisory Opinion on Kosovo (Kosovo (Advisory Opinion), the ICJ steered clear of controversial questions about the effect of Kosovo’s unilateral secession and recognition (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010, 403). For anyone sharing this narrow view of the judicial function, the expectation that judges should seize every opportunity to state the law in controversial areas even when this implies going beyond what is strictly necessary for the resolution of the case would be an invitation for judicial activism.

18 It is sometimes suggested that what conception an international adjudicatory body is likely to have of its function partly depends on the extent to which it is distant from the parties before it. In this regard, dispute-specific, ‘party-originated’ arbitral tribunals are often contrasted with permanent courts, with the assumption that ‘[m]embers of a party-originated tribunal believe themselves to be working for the parties’ (Caron, 2006, 403–4). This assumption would mean that a party-originated tribunal is relatively unlikely to feel entitled to engage in anything other than the strict mission entrusted to it. While plausible in theory, this assumption is not always confirmed in practice. For instance, the arbitral tribunal in Romak v Uzbekistan was indeed clear that it did not see any larger goal than the resolution of the dispute between the investor and the host country as part of its mission:

the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of ‘arbitral jurisprudence.’ The Arbitral Tribunal’s mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal’s analysis might have on future disputes in general (Romak v Uzbekistan, 2009, para 171).

But the opposite philosophy is also at work in investment arbitration as exemplified by the arbitral tribunal in Saipem SpA v Bangladesh, which saw contribution to ‘the harmonious development of investment law’ and the meeting of ‘the legitimate expectations of the community of States and investors towards certainty of the rule of law’ as part of its ‘duty’ (Saipem SpA v Bangladesh, 2009, para 90). What this means is that while the establishment of the adjudicatory body by the parties in dispute is a relevant determinant of judicial (arbitral) conduct, even members of such an adjudicatory body may feel accountable to broader constituencies and purposes (Accountability).

19 Likewise, there is no necessary correlation between the permanence of an international adjudicatory body and activist judicial philosophy. While sitting on the European Court of Human Rights (‘ECHR’), Sir Gerald Fitzmaurice promoted an interpretive methodology that was in sharp contrast with the expansive readings of the European Convention on Human Rights (‘ECHR’) offered by the Court (eg Golder v United Kingdom, Separate Opinion of Judge Sir Gerald Fitzmaurice, 1975). More recently, some judges of the same court criticized the Court’s ruling that its provisional measures were binding, accusing the Court of writing ‘new rules into the Convention’ by exercising ‘a legislative function’ rather than ‘the matter … is one of legislation rather than of judicial action’ (Mamatkulov and Askarov v Turkey, Joint partly dissenting opinion of Mr Caflisch, Mr Türmen and Mr Kovler, 2005, paras 7, 12, 25 [emphasis in original]). What these examples show is that a judge’s conception of her or his function is not simply a matter of whether the adjudicatory body on which she or he sits is ‘party-originated’ or permanent.
Not every international adjudicatory body necessarily spells out the broad conception that it has of its function. However, because adjudicatory bodies care about their external image, relevant indications as to their conception of the adjudicatory function can be found relatively frequently in the case law. For instance, the ICJ denies that it has the power to revise treaties (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, ICJ Reports 1950, 229). The ECtHR has clarified that it cannot derive from the ECHR and its additional protocols ‘a right that was not included therein at the outset’, in particular, ‘where the omission was deliberate’ (Johnston and Others v Ireland, 1986, para 53). While these statements are often part of an ‘appearance management’ strategy, they exercise a non-negligible constraint on the adjudicatory bodies authoring them, since the latter cannot plausibly make such statements and engage in conduct that openly contradicts them. As the sociologist Erving Goffman pointed out, ‘an individual who implicitly or explicitly signifies that he has certain social characteristics ought in fact to be what he claims he is’ (Goffman, 1959, 13).

When they develop their own conception of the judicial function, adjudicatory bodies are constrained by the traditional baseline in this regard. But they can also shift that baseline. The concept of ‘arbitrary coherence’ used in behavioural economics is helpful to understand the dynamic at play here. This concept explains that market prices of newly introduced products are not exclusively governed by economic laws based on rational behavioural patterns that characterize *homo economicus*. Indeed, buyers tend to become ‘anchored’ to the initial prices of such products even when they are radically different from the prices of similarly situated products. As highlighted by Dan Ariely, ‘although initial prices ... are “arbitrary”, once those prices are established in our minds they will shape not only present prices but also future prices’ (2009, at 26). It is interesting to note that international courts that are usually singled out for their activist judicial philosophy have taken care to distinguish themselves from the more traditional ICJ. The ECtHR has, for instance, pointed out that the context in which it operates makes it incomparable to the ICJ (Loizidou v Turkey, 1995, para 84). The Inter-American Court of Human Rights distinguished itself from the ICJ on similar grounds (Ivcher-Bronstein v Peru, 1999, para 48). One effect of such discursive strategies is to make it more difficult to use the experience of the ICJ as an anchor.

The ‘new anchoring’ strategy developed by these courts is often backed by a discourse about the special nature of the instruments the application of which they are in charge of monitoring. For instance, the ECtHR has characterized the European Convention of Human Rights as ‘a constitutional instrument of European public order’ (Loizidou v Turkey, 1995, para 75; Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland, 2005, para 156). Likewise, the Court of Justice of the European Union (‘CJEU’) has stressed the difference between ‘ordinary international treaties’ and the treaties founding the European Union (‘EU’), pointing out that the latter had established ‘a new legal order’ (Costa v ENEL, ECR 1964, 593; Commission v Luxembourg and Belgium, ECR 1964, 631). Such discourses make it easier for these courts to justify their departure from traditional conceptions of the judicial function. Illustrative examples are the position of the ECtHR that its judgments serve ‘to elucidate, safeguard and develop the rules instituted by the Convention’ or its more recent version according to which the Court’s ‘mission is … to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States’.
One peculiarity of judicial activism in international law is the relatively favourable disposition of international legal academics towards it. For instance, despite the fact that the CJEU is often presented as an activist court, it has been observed that ‘in virtually all books about the [CJEU] published to date, the underlying ethos is one of praise and admiration’ (Weiler, 1987, 555). More generally, it has been pointed out that ‘many international lawyers’ have a preference for ‘a world of expanded judicial lawmaking’ (Ginsburg, 2005, 663). In this sense, the discipline of international law often disproves the widespread contention that ‘[a]ctivism is one of those “-isms” hurled in anger, in frustration, in condemnation’ and that ‘[l]ike any other slur it is intended to sting, to discredit’ (Brown, 2002, 1257; see also, Steinberg, 2004, 248). Not infrequently, international legal scholars actually celebrate expansionist judicial policies. At least part of the explanation for this state of affairs may have to do with the intellectual history of the discipline of international law. First, independent adjudicatory mechanisms with widely available jurisdiction and considerable power can go a long way toward responding to sceptical challenges against the very existence of international law which have long accompanied the history of the discipline. Second, because expansion of judicial power comes at the expense of state sovereignty, it has rarely been resisted by international legal scholars and is even encouraged given the bad reputation of sovereignty within the discipline of international law. State sovereignty has often been seen as a challenge to international law: how could there be such a thing as international law if sovereignty means the absence of higher power above the state and implies that every state has the power to determine the content of its own rights and obligations? (Lake Lanoux, 12 Report of International Arbitral Awards, 310; Air Service Agreement of 27 March 1946, 18 Report of International Arbitral Awards, 483) Sovereignty is also associated with the darkest pages of the history. As pointed out by Jan Klabbers:

for us internationalists, the state was, until recently, the root of all evil, so it follows that anything that attempts to reach beyond the state is laudable and praiseworthy, regardless of its precise contents ... State sovereignty needs to be overcome if life will ever get better (2002, at 340).

Obviously, how the states see the adjudicatory function is also an important determinant of judicial activism in international law. But whether states have a uniform and consistent conception in this regard is doubtful. The expansion of adjudicatory power in a particular case may well benefit a state in a particular case and consequently enjoy its blessing. However, such an expanded adjudicatory power can be turned against the same state in another case for the simple reason that every expansion of the adjudicatory power comes at the price of a restricted freedom of action for states (Lacharrière, 1983, 173). An acute observer of state practice once pointed out that states generally disliked the idea of international actors other than themselves having policies, and that this was particularly the case with respect to judges (Lacharrière, 1983, 174). This would suggest that states have a preference for a narrow view of the adjudicatory function. The United States (‘US’) opposition to the reappointment of the South Korean member of the World Trade Organization (‘WTO’) Appellate Body in 2016 confirms this conclusion. According to the document that the US submitted to substantiate its concerns, WTO adjudicators should not ‘overstep the boundaries agreed by WTO Members in the [Dispute Settlement Understanding] and the WTO Agreement’, which means in the view of the US, among other things, that the Appellate Body (→ Appellate Body: Dispute Settlement of the World Trade Organization (WTO)) should not offer ‘obiter dicta on issues not necessary to resolve the dispute’ or engage ‘in abstract interpretation and raise concerns on matters not under appeal’ (Statement by the United States at the Meeting of the WTO Dispute Settlement Body [‘DSB’], Geneva, May 23, 2016). But this does not mean that states are necessarily against the lawmaking dimension of the international adjudicatory function. Commitments
to international adjudication may at least partly originate from the desire of states to reduce the transaction costs of formal treaty commitments when agreement on precise details of such commitments is practically unachievable. In such situations, treaties reflect ‘a disagreement reduced to writing’ (Allott, 1999, 43), and delegating such disagreements to third-party adjudication is often seen as a pragmatic solution for overcoming negotiation deadlocks.

2. Prudential Doctrines about the Boundaries of Adjudicatory Power in International Law

25 Most prudential doctrines operating in domestic legal systems ultimately rest on the separation of powers: their raison d’être is to prevent courts from interfering with what is thought to fall within the jurisdiction of other branches of power. Because power is less clearly delineated in international law, prudential doctrines are less developed in international law. The political question doctrine is an apt example. While its international equivalent has been invoked numerous times, it has never been upheld as such. The position of the ICJ in this regard is relatively representative; to the extent that a matter is governed by international law, the fact that it might be highly political cannot, in and of itself, prevent the Court from dealing with it on legal grounds (United States Diplomatic and Consular Staff in Tehran Case, United States v Iran, 1980, 20; Case concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States, 1984, 435).

26 One reason why international law lacks elaborate prudential doctrines may have to do with the fact that international adjudicatory bodies often deal with ‘technical or low-politics’ cases (Alter, Helfer and Madsen, 2016, 21; see also, Shany, 2009, 90–91). This does not mean that ‘high-politics’ cases never end up before international adjudicatory bodies. Such cases submitted to adjudication show that the fact that elaborate prudential doctrines are lacking in international law does not mean that international adjudicators are insensitive to political considerations lurking behind cases brought before them. The ICJ’s advisory opinions in the → Nuclear Weapons Advisory Opinions (1996, 226) and the Kosovo Advisory Opinion (2010, 403) cases, or its judgments in the Marshall Islands Cases (Marshall Islands v United Kingdom; Marshall Islands v India; Marshall Islands v Pakistan, 2016, 255) show that the Court is unwilling to interfere with ‘high politics’ (Odermatt, 2018; Bianchi, 2017). But the fact that such cases are decided on technical legal grounds rather than by reference to any prudential doctrine is telling as to the place of prudential doctrines in international law.

27 The margin of appreciation doctrine developed by the ECtHR comes very close to an elaborate prudential doctrine even though it largely remains limited to international human rights law. The gist of the doctrine is that national authorities’ views about the necessity of a particular state measure interfering with human rights are in general entitled to deference due to those authorities’ proximity to the life of their respective societies (see eg Handyside v United Kingdom, 1976, para 48; Müller and Others v Switzerland, 1988, para 35). The ECtHR has made clear that the margin of appreciation granted to national authorities does not prevent the Court from exercising its supervisory power over disputed state measures (Ireland v United Kingdom, 1978, para 207). The Court has also clarified that there is no such thing as an unlimited margin of appreciation (Goodwin v United Kingdom, 2002, para 103). But even with these limitations, the margin of appreciation doctrine has given rise to some standards as to the scope of a proper international adjudicatory supervision of human rights. That an international human rights body cannot ‘substitute its own assessment for that of the national authorities’ (James and others v United Kingdom, 1986, para 46) and that the degree of deference granted to national
authorities varies according to how subjective and context-specific the relevant notion is ([Sunday Times v United Kingdom, 1979], para 59) are among such standards.

28 → **Standard of review** is another prudential mechanism governing the level of scrutiny used by an international adjudicatory body with respect to determinations made by national authorities in the exercise of their regulatory powers. Applicable legal instruments are rarely explicit about the appropriate standard of review to be adopted in international adjudication. Article 17 (6) WTO Anti-Dumping Agreement is an exception, as it contains specific instructions regarding the standard of review that a panel must apply with respect to the establishment of the facts by national authorities as well as the latter’s interpretation of the relevant provision of the Anti-Dumping Agreement (Art 17 (6) Agreement on Implementation of Article IV General Agreement on Tariffs and Trade, 1994). While the matter is obviously not one of bright-line rules, international adjudicatory bodies ordinarily avoid an intrusive review of the assessments of national authorities in matters involving judgment and discretion or scientific expertise (→ Standard of Review: investment arbitration; Guzman, 2009).

### 3. Mechanisms of Enforcement of the Norms of Adjudicatory Conduct in International Law

29 An important mechanism for the enforcement of the norms governing adjudicatory conduct is the existence of a hierarchically organized system of adjudication. The default setting of international law is, however; the opposite: ‘each [international] tribunal constitutes a self-contained unit’ and ‘[t]here is neither a horizontal link between the various tribunals, nor, a fortiori, a vertical hierarchy’ ([Prosecutor v El Sayed, 2010], para 41). This means that decisions issued by international adjudicatory bodies are in principle not subject to any potential review by higher judicial authorities. The exceptions, such as the appeal mechanisms within international criminal tribunals and the WTO or the annulment remedy within the International Centre for Settlement of Investment Disputes (ICSID), are limited (→ International Courts and Tribunals, Appeals). The practical consequence of this state of affairs is that the potential for expansion of adjudicatory power is less restrained in international law than in domestic legal systems. But this does not mean that international adjudicatory bodies do not feel otherwise restrained.

30 Other important mechanisms for the enforcement of the norms governing adjudicatory conduct are resistance or exit and voice mechanisms available to actors dissatisfied with particular decisions or adjudicatory philosophy (Madsen, Cebulak, and Wiebusch, 2018). Because it ordinarily requires collective action, the option of terminating an international adjudicatory body is not open to a single state, and the cost of political mobilization that it calls for is normally high (Madsen, Cebulak, and Wiebusch, 2018, 204). When the jurisdiction of an international adjudicatory body is subject to optional recognition that can be withdrawn at a relatively low cost, the individual exit option can be easier to use. France’s reaction after the → Nuclear Tests Cases and the United States’ reaction in connection with the Nicaragua (→ Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)), LaGrand (→ LaGrand Case (Germany v United States of America)), and Avena (→ Avena and Other Mexican Nationals Case (Mexico v United States of America)) cases constitute textbook examples in this regard. Other relevant examples are: the withdrawal of Bolivia, Ecuador, and Venezuela from the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (’ICSID Convention’); the termination of many bilateral investment treaties by Ecuador, Bolivia, India, Indonesia, and South Africa; and the denunciation of the → American Convention on Human Rights (1969) by Trinidad and Tobago and Venezuela. How effective such exit mechanisms can be in causing a change in adjudicatory conduct cannot receive a straightforward response. While international courts...
and tribunals are interested in gaining the trust of the states, the latter are not their only constituencies, and the image of an impartial trustee is something that they are also interested in promoting (Alter, 2008).

31 Individual exit mechanisms are more difficult to use in international courts with compulsory jurisdiction such as the CJEU, the ECtHR, or the panels or the Appellate Body of the WTO. It is true that such adjudicatory bodies are also treaty-based, and that a state can deprive them of jurisdiction by exiting the treaties concerned. But international courts with compulsory jurisdiction tend to be part of regimes promoting broader integration such as the EU and the Council of Europe, making the exit option costly. Also relevant in this regard is the fact that access to the CJEU or the ECtHR is open to individuals, which means ‘loss of state control’ over the docket of these courts (Keohane, Moravcsik, and Slaughter, 2000, 458). One consequence of this loss of state control is that the risk that states may refrain from submitting cases to these courts is unlikely to be as serious a concern as is the risk for the ICJ.

32 Voice mechanisms are likewise not subject to a uniform regime. One such mechanism consists in overruling the particular statement of law with which a state or a group of states disagree. Since this option is not open to a state acting unilaterally, its effectiveness is a function of whether the dissatisfied state or a group of dissatisfied states can secure enough support to carry out the necessary legislative change. If the decision is based on a bilateral treaty, the winning state would normally have no reason to lend support to such a change. If the basis is a multilateral treaty or customary international law, other states may not see themselves as sufficiently affected to be willing to engage in a legislative reform. As Alter explains, due to their ‘short-term focus’, politicians ‘often fail to act decisively when doctrine that is counter to their long-term interest is first established’ (1998, at 130–31). This is all the more so when expansive readings of law are built incrementally over a long period of time, rendering the mobilization of political opposition difficult (Werner, 2016, 1454–57). Politicians may not even realize the long-term effects of legal doctrines (Pauwelyn and Elsig, 2012, 462–63), which explains why the CJEU was, for long, ‘blessed ... with benign neglect’ (Stein, 1981, 1). A former judge of the CJEU once pointed out that the highly creative case law developed by the Court in its early days had something to do with the fact that the Member States were busy working out the foundations of the common agricultural policy and the customs union within the Council and that they did not know that the Court could play an important role in the institutional machinery of the Communities (Pescatore, 1992, 570).

33 When a particular judicial philosophy becomes an integral part of the identity of an international adjudicatory body, the prospect that it can be ‘corrected’ through political action is likely to be commensurately difficult. A good example is the long-standing position of the ECtHR that the ECHR is ‘a living instrument’ to be interpreted in light of present day conditions. While the Danish government was critical of the dynamic interpretation of the ECHR by the Court and wanted this well-established interpretive approach of the Court to be revisited as part of its proposal for the reform of the European human rights system during its chairmanship of the Committee of Ministers of the Council of Europe, the High Level Conference convened by the Danish government ended up formally supporting the principle of dynamic interpretation by emphasizing that ‘[t]he Court ... authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions’ (Copenhagen Declaration, 2018, para 26).
If an adjudicatory decision causes general dissatisfaction and the cost of mobilization is not high, the option of overruling can be employed effectively. This is what happened after a series of arbitral decisions under NAFTA offered what was perceived by the NAFTA states as an extensive interpretation of the fair and equitable standard of NAFTA (Metalclad Corporation v United Mexican States, 2000, paras 70, 76; Pope & Talbot Inc v Government of Canada, 2001, paras 105-18). In response to these decisions, the Free Trade Commission, an intergovernmental body under NAFTA, issued an interpretive note ‘to clarify and reaffirm the meaning of certain of [the] provisions’ of Chapter 11 NAFTA (Notes of Interpretation of Certain Chapter 11 Provisions, 2001). All subsequent NAFTA tribunals followed the interpretive note, with one tribunal characterizing the interpretations of the Free Trade Commission as ‘a mechanism for correcting … interpretative errors’ (ADF Group Inc v United States of America, 2003, para 177).

Short of ‘formal corrections’, states can influence the behaviour of an international adjudicatory body simply by voicing their concerns. For example, the strong criticism at the DSB of the WTO Appellate Body’s position that panels had discretion to allow amicus curiae submissions caused the Appellate Body to reconsider its position (Pauwelyn and Elsig, 2012, 464). Likewise, an empirical study shows that investment tribunals have been sensitive to the discontent with investment arbitration that a significant number of states have expressed since the mid-2000s (Langford and Behn, 2016).

Non-compliance is another theoretically available voice mechanism. However, because it would translate into a breach of an international legal commitment, not every state can get away with it, and even those that can may have to face the reputational costs of such conduct. The culture of commitment to the ideal of the rule of law promoted by liberal democracies can also discourage the use of non-compliance, since the latter is inconsistent with the rule of law (Hassan & Tchaouch v Bulgaria, 2000, para 87; see more generally Keohane, Moravcsik and Slaughter, 2000, 478–79). Moreover, the enforcement of decisions of some international adjudicatory bodies is not a matter subject to the will of national governments (Keohane, Moravcsik, and Slaughter, 2000, 466–68). A good example is the CJEU, whose primary ‘compliance partners’ are national judges and lawyers who have historically accepted and used the rulings of the Court in the context of domestic proceedings (Helfer and Alter, 2013, 491; for some recent exceptions, see Hofmann, 2018, 263–67). As Helfer and Alter explain, ‘[w]ith European rules woven into the fabric of national judicial rulings, governments could not defy the CJEU without also calling into question the independence and authority of their own courts’ (2013, at 491).

Control over the composition of the international adjudicatory body can also be used as a voice mechanism. The judicial philosophy of the candidates for positions on international adjudicatory bodies is among the parameters that governments consider during the → election of adjudicators (Steinberg, 2004, 264; Voeten, 2014, 555). Since the members of international adjudicatory bodies are never appointed for a life term, reappointment can also be used as a control mechanism. However, international adjudicatory bodies tend to have a limited composition, which means that not every government ultimately gets to appoint or re-appoint a member. There is one judge with respect to each party to the ECHR on the ECtHR, but the governments are not in a position to fully control the appointment process, since the judges are elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates nominated by each party (Article 22 ECHR). Even when every government has the right to appoint a member, a single government would in principle not be in a position to control the composition of an entire court. However, in a system such as the WTO where every member of the DSB can block the appointment to the
Appellate Body, an individual member can secure more influence over the composition of the adjudicatory body.

38 When a voice mechanism is used by the entire community of the states that has created a particular international court, it is likely to be more effective in bringing about a change in adjudicatory behaviour. The declarations issued by the High Level Conference on the Future of the European Court of Human Rights are good examples in this regard, since one of their primary goals has been to redefine the respective places of national authorities and the Court in the European human rights protection system. The Izmir Declaration of 2011 invited the Court ‘to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional circumstances’ in asylum and immigration cases (Izmir Declaration, 2011, Follow-Up Plan, A, para 3). The 2012 Brighton Declaration stressed the subsidiary nature of the European supervisory mechanism and invited the Court to have ‘due regard to the State’s margin of appreciation’ (Brighton Declaration, 2012, para 11). The 2018 Copenhagen Declaration further emphasized the importance of the principle of subsidiarity and the doctrine of the margin of appreciation, and welcomed ‘the Court’s continued strict and consistent application of the criteria concerning admissibility and jurisdiction, including by requiring applicants to be more diligent in raising their Convention complaints domestically, and making full use of the opportunity to declare applications inadmissible where applicants have not suffered a significant disadvantage’ (Copenhagen Declaration, 2018, paras 31–32). Although the then president of the ECtHR pointed out at the Brighton Conference that the Court was ‘uncomfortable with the idea that Governments can in some way dictate to the Court how its case-law should evolve or how it should carry out the judicial functions conferred on it’ (High Level Conference on the Future of the European Court of Human Rights, Brighton, 18–20 April 2012, Sir Nicolas Bratza, Draft speaking notes, https://www.echr.coe.int/Documents/Speech_20120420_Bratza_Brighton_ENG.pdf [accessed 25 November 2018], at 2), empirical studies of the post-Brighton decisions of ECtHR show that the Court has started making greater use of the doctrines of subsidiarity and margin of appreciation (Madsen, 2018; Arnardóttir, 2018).

39 States can also use *ex ante* control mechanisms to limit the amount of discretion left to international adjudicators. One important mechanism in this regard is control over the drafting of applicable texts. By varying the level of precision of treaty provisions, the drafters can control the level of discretion enjoyed by treaty interpreters. Past experience can guide new lawmaking enterprises in this regard. For instance, due to the tendency of arbitral tribunals to interpret the fair and equitable treatment standard expansively, new generation investment treaties often clarify the operational content of the standard in great detail (Art 8.10 (2) EU-Canada Comprehensive Economic and Trade Agreement, 2016).

40 Likewise, it has been suggested that the past experience of the CJEU was one of the reasons why the competence of the Court was significantly limited in politically sensitive areas of intergovernmental cooperation (Alter, 1998, 141). The injunction of the WTO Dispute Settlement Understanding that ‘recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’ has similarly been linked to the determination of the contracting parties to avoid expansive lawmaking *à la* the CJEU (Bastid-Burdeau, 2006, 295). The creative jurisprudence of the *ad hoc* international criminal tribunals seems to have had the same effect, since the Rome Statute of the International Criminal Court (‘Rome Statute’) has reserved the power to adopt the elements of crimes and the rules of procedure and evidence for the parties to the

D. Conclusion

In an article investigating the relationship between legitimacy and judicial lawmaking, Laurence Helfer and Karen Alter point out that ‘copying the design features of an [international court] that engages in expansive lawmaking does not necessarily copy that court’s penchant for finding new legal obligations or narrowing state discretion’ (2013, at 490). This is so because the power that adjudicatory bodies end up having in any legal system is never simply a matter of formal legal entitlements, as it is largely dependent upon a series of context-specific parameters.

Since it is a function of norms that determine what appropriate conduct for an adjudicatory body is, judicial activism is likewise a highly variable concept. This is a fortiori the case for international adjudicatory bodies, since they operate in an environment where the distribution of power is rarely clearly delineated. Therefore, the broader lesson of the concept of judicial activism is that legalism has considerable limits (Shapiro, 1980).

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