The role of the new international adjudicator

BOISSON DE CHAZOURNES, Laurence, HEATHCOTE, Sarah

THE ROLE OF THE NEW INTERNATIONAL ADJUDICATOR

by Laurence Boisson de Chazournes* and Sarah Heathcote**

The proliferation of fora for the peaceful settlement of disputes is today the subject of much attention. International jurisdictions of a more or less permanent character are being created, as are ad hoc tribunals to deal with disputes as they arise. Conciliation procedures are being institutionalized, and collective fora for negotiation and mediation are being established on a regular basis. Of particular interest is the emergence of several permanent and universal institutions, such as the World Trade Organization (WTO) Appellate Body and the International Tribunal for the Law of the Sea, which rather than proving to be superfluous are, along with the International Court of Justice (ICJ), active with well-endowed dockets. It is important to note that there is not only a quantitative increase in the number of institutions and mechanisms for the settlement of disputes but also an increase in the number of cases being brought before these institutions. All these developments, which are taking place in a post-Cold War context, favor respect for the rule of law and prevent disputes from arising. It is, in short, a tribute to the will of states to promote and respect the rule of law and, indeed, it reveals increased expectations as to what the international judiciary can provide in securing that respect. These developments are not, however, free of certain perceived difficulties.

Some of these difficulties relate to the fact that the proliferation of dispute settlement institutions is, of course, necessarily accompanied by an increase in the number of international adjudicators. According to the Project on International Courts and Tribunals (PICT), there are today some two hundred international adjudicators sitting permanently on international bodies. It is to this topic, the role of the international adjudicator, that these comments will be addressed. What is the judge’s role in the creation of the law given the new, or at least “renewed,” structure of the international community that has emerged since the end of the Cold War? To what extent has the judicial function changed given this new context? If the judge does “legislate,” what are the parameters, not only of legality but also of legitimacy, for such a legislative function? Is there, or should there be, a redistribution of functions in the international legal order? What are the limits of judicial interpretation and activism in a legal order increasingly concerned with common interests but endowed with a plethora of judicial mechanisms often created to settle the punctual and concrete issues confronting litigants?

THE JUDICIAL FUNCTION

International law is the creation of its subjects, and thus the role of the judge is, strictly speaking, to state the law. Hence Article 38(1) (d) of the ICJ statute refers to the pronouncements of judges (and the most highly qualified publicists) as “subsidiary means for the determination of rules of law.” The Court itself, at least in its rhetoric, is of the same view. Thus in the Nuclear Weapons Advisory Opinion on request from the UN General Assembly, the Court stated:

It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial

* Professor and Director, Department of Public International Law and International Organization, Law Faculty, University of Geneva.

** Ph.D. Candidate and Assistant, Department of Public International Law and International Organization, Law Faculty, University of Geneva.
function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.\(^1\)

More recently in the oral pleadings to the LaGrand case\(^2\), the United States would warn the Court not to overstep this role. It argued that the “the German position would involve this Court in legislation, not interpretation, and would require this Court far to exceed its proper judicial role”\(^3\) or again that the ICJ in accepting one of Germany’s arguments would be engaging in “wholesale legislation.”\(^4\)

There is, however, considerable difficulty in practice in confining the judge’s role to that of the “mere” articulation of the law, of avoiding the progressive development, if not creation, of the law. If interpretation is a legitimate judicial function, the boundary, which distinguishes the articulation of existing rules on the one hand and their progressive development or judicial legislation on the other, is often all the more unclear if the judge adopts a teleological approach. For although international law is a faithful servant of politics, in that to a large extent the law is a dependent variable whose contours are sketched by the subjects of the international order, often that law is only sketched by states: Custom for instance is unwritten, principles may be present but vague. The law is therefore frequently in need of precision. For this reason, the role of the judge in the international order is special: The judge, perhaps more than his or her internal counterpart, is, in determining a dispute between litigants, called upon to articulate or codify the law and, in so doing, gives precision and indeed colors to the sketch designed by states. This role of codification (in the largest sense of the term) has always been a part of the international judicial function. Today, however, the context in which it is performed is new.

**HISTORICAL PERSPECTIVE**

It is no easy task to trace the history of judicial creation. Was it judicial legislation when, in the Caroline case, it was asserted that action in self-defense (but which really constituted necessity\(^5\)) needs to be “instant, overwhelming, leaving no choice of means and no moment for deliberation”? Was it judicial creation when, in the Eastern Greenland case, the Permanent Court of International Justice gave an arguably overstretched interpretation of the Ihlen declaration (namely that the statement by Norwegian Foreign Minister Ihlen that Norway “wouldn’t make difficulties in the settlement of the question” of sovereignty, was binding upon Norway)?\(^6\) It could well be that in the past, as in legal systems that suffer from a dearth of written norms or simply fewer norms, written or otherwise, the judge’s role was all the more important in creating the law.

---

6 Legal Status over Eastern Greenland (Den. v. Nor.), 1933 PCIJ (ser. A/B), No. 53, at 71 (Apr. 5).
One is on more certain ground when searching for examples of judicial legislation in the decisions of the ICJ. Thus, the famous *Barcelona Traction obiter dictum* in which the Court asserted that:

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection, they are obligations erga omnes.\(^7\)

This statement followed closely on the same Court's (but different bench's) conclusions in the *South West Africa* cases of 1966 that there are preliminary or antecedent issues of jurisdiction to be decided on the merits,\(^8\) a hitherto unknown concept (although one could argue that as a (purported) procedural rule, it is merely an exercise of the competence de la compétence.\(^9\) One can also recall that in the *Nuclear Weapons* advisory opinion, although the Court may have been categorical in affirming that it "states the existing law and does not legislate,"\(^10\) this did not preclude the very same judicial organ in the very same opinion from introducing hitherto unknown concepts—concepts pregnant, if unclear, with legal meaning—such as "intransgressible principles"\(^11\) and "the fundamental right of every State to survival."\(^12\)

Thus, judicial legislation is not new, nor is it likely to cease. Indeed judges play an important role in the consolidation of the normative order by capturing its flavor, but also, when their pronouncements seem confused (as is the case with "State survival" and "intransgressible principles"), in capturing the political interests, tensions, and uncertainties of the international relations that surround them and from which the law is issue. In other words, these judicial pronouncements do articulate latent feelings among international actors that "this point is controversial," "is in contention," or is "undergoing mutation," etc. Thus the adjudicator resembles, to some extent, Monsieur Jourdain in Molière's play *Le Bourgeois Gentilhomme*, who exclaimed "that for forty years I have uttered prose despite myself," or without realizing it: "je dis de la prose sans que j'en susse rien." But in fact the judge knows that he or she creates the law—he or she simply does not want to admit it.

If a brief observation of practice confirms that judicial creation is perhaps a small but nonetheless present part of the judicial function, with the proliferation of dispute settlement fora today, it presents a heightened challenge. In part, this may be due to a quasi-conscious element of emulation and competition between tribunals. There are, however, other reasons, all of which contribute to a complexified system.

This complexification stems not only from the proliferation of dispute settlement bodies alone, which entails magnified problems of coordination and, notably in this context, the need to avoid fragmentation, but is perhaps more a function of the emergence of a new international system, one that comprises multiple actors with increasing expectations. In other words, the current challenges facing this expanded international

---

\(^{7}\) *Barcelona Traction, Light and Power Co., Ltd.* (Second Phase) (Belg. v. Spain), 1970 *ICJ Rep.* 3, 32, para. 33 (Feb. 5).


\(^{10}\) Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1966 *ICJ Rep.* 4, 349, para. 18 (July 8). See also the comments of Judge Koroma in his dissenting opinion at 571.

\(^{11}\) *Id.* para. 79.

\(^{12}\) *Id.* para. 96.
judiciary system more from the new international context and demands now being placed on the international legal system as a whole, rather than from the problem of self-regulation and coordination of the various dispute settlement institutions.

THE RENEWED STRUCTURE OF THE INTERNATIONAL COMMUNITY AND THE RATIONALE FOR THE PROLIFERATION OF DISPUTE SETTLEMENT FORA

The current proliferation of dispute settlement bodies has taken place against a background of a renewed international scene. Thus, one feature of the post-Cold War era has been the growth in production of international legislation. The large number of new international agreements is increasingly covering new areas of international relations. Resolutions and decisions of international organizations are multiplying and occupy an important place in the normative fabric of international relations. The growing number of international organizations, which may themselves be parties to international disputes, tend to make provision, within their constitutive sphere, for procedures for the settlement of a panoply of disputes susceptible of emerging within their respective areas of competence. Today's disputes may be bilateral, multilateral, or indeed global, requiring the international community as a whole to bring about a solution. They are inter-state but they may also be transnational, giving individuals and private-sector representatives the possibility of settling their disputes before international bodies.

In addition, the number of actors on the international stage is growing, and the procedures and mechanisms for the settlement of disputes are trying to adapt to their varying needs. Dispute settlement fora are solicited by these different actors, either directly as parties or, indeed, when standing is not conferred, through intervention and, increasingly, via the unsolicited submission of amicus curiae briefs. Judgments and opinions are being rendered to an ever-increasing diversity of public, all of whom place different and heightened expectations on the judge.

Thus the post-Cold War era is one marked by the multiplication of variables and by increased norms and actors, all of which place various claims on the international adjudicator's attention in the resolution of a dispute. Furthermore, the expectations placed upon the judge are arguably greater than they were during the Cold War: As rules of law themselves proliferate, this in turn gives rise to a sense of an increase in the rule of law in the international system. This is accompanied by a "legalization" of international discourse and also goes hand in hand with a trend toward the "juridiciarization" of the conduct of diplomacy.

The heightened consciousness of the existence of a rule of law can be partially explained by the fact that the dispute settlement bodies and mechanisms put in place offer the parties a degree of parity thereby circumscribing at least in theory, situations in which discretion and economic weight are used to settle the dispute. It also enables diplomacy to be consolidated, and perhaps overconsolidated, as the judge is pushed to achieve that which the negotiators failed to realize.

CHALLENGES FOR THE NEW INTERNATIONAL ADJUDICATOR

Coordination

In such a context, the judge faces a number of challenges. The first and most obvious is the challenge of coordination of these multiple variables, or to state the problem in other terms, the avoidance or at least mitigation of fragmentation of the law.

Coordination is to some extent ensured by the fact that, in some circumstances, rules exist that establish a priority between the decisions of one body over that of another, as well as provisions for the referral of cases from one forum to another. Examples of
“horizontal” coordination exist, as in the framework of the Organization for Security and Co-operation in Europe (OSCE) in matters of arbitration and conciliation, or “vertical” coordination, such as the relationship between the panels and the Appellate Body of the WTO or the relations between the tribunal of first instance of the European Communities and the European Court of Justice. These examples bear witness to the links that may in some circumstances exist between the various bodies, so that their multiplication is not the source of conflicts of interpretation and application of international law. If, formally speaking, there is no hierarchy of international dispute settlement fora, it is generally assumed that the ICJ, as principal judicial organ of the United Nations, retains a place of honor. It is often looked upon as “the constitutional court.”

Coordination across tribunals does nonetheless remain a problem, even if for each example given, one can no doubt find a counterexample. One example where one can query whether there is not more of a fragmentation rather than a consolidation of the law is to be found in the different attribution tests for de facto organs laid down on the one hand by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the Tadić case, and on the other hand that asserted by the ICJ in the Nicaragua case. Tadić is a later decision, and because the judge “states the law,” should one therefore apply the maxim, lex posterior derogat priori? Or should one adhere to the ICJ’s pronouncement in the light of the World Court’s de facto supremacy? To offer another example, sometimes judicial pronouncements of different dispute settlement bodies work to reinforce one another’s positions and thus to consolidate the law. Thus, in the M/V Saiga case, the Law of the Sea Tribunal refers with apparent approval to the ICJ’s pronouncement in the Gabčíkovo-Nagymaros case on the customary law status of the state of necessity as then provided for in Article 33 of the 1996 Draft Articles on State Responsibility. That status had, until the Gabčíkovo case, been highly controversial.

This aspect of consolidation can be taken further in that, in an increasing number of areas, rules and norms are now susceptible of being the (actual) object of a judicial interpretation and application on an international level. For example, international humanitarian law was, until recently, only exceptionally the object of judicial interpretation and application. The decisions handed down by the international criminal tribunals established to judge crimes committed in the former Yugoslavia and Rwanda testify to the contribution of these bodies regarding the characterization of violations of international humanitarian law and the consequences that flow therefrom. Similar tendencies are emerging in the field of international trade law subsequent to the establishment of the WTO Appellate Body.

A Necessary Judicial Legislation?

It is to be noted that in the context of these last mentioned dispute settlement bodies (ICTY and WTO), one can even talk of a necessity for the adjudicator to engage in a legislative function. Taking as an example of “necessary” judicial legislation the field of

14 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep., at para. 109 (June 27). In that case the Court required a (stricter) “situation of dependence and control.”
17 It is also interesting to note the role of the International Law Commission and the cross-fertilization between it and tribunals and the development of international law. One can note this cross-fertilization not only at the level of the institutions themselves but also by reference to the individuals who makes up the ILC and who sits on the benches of the tribunals or plead before them. . . . This is by no means a new phenomenon (for example, Roberto Ago was both ILC member and ICJ judge).
international humanitarian law, one can note that in creating the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, the Security Council "jurisdictionalized" international humanitarian law. In other words, the Security Council called upon specialized judges to state the law in an area that to date had been the subject of but few judicial pronouncements. The creation of these tribunals thus "unlocked" this area of law.

Indeed a brief perusal of the cases of the ICTY reveals that that body has been particularly progressive and creative in developing international humanitarian law *lato sensu*. This has not gone unnoticed in the literature. One area in particular in which the cases have made significant inroads is the field of war crimes in internal conflicts. This is readily understandable in the light of the deplorably poorly developed status of the law in this type of conflict when the ICTY first began functioning and the fact that the crimes falling to the ICTY's jurisdiction are all issue of a conflict that saw the disintegration and progressive fragmentation of a single state, the former Yugoslavia. To meet the needs that gave rise to its creation, the ICTY found itself to some extent forced to play a creative role to fill the gaps in the applicable law.

Another area in which the international adjudicator may find himself or herself confronted with the necessity of engaging in a legislative function in order to resolve a dispute is with respect to the coordination of different corpuses of norms such as trade, the environment, human rights and labor law. In these areas, negotiators have often failed to bridge the various disparities between the different types of law for want of political will. Nonetheless, if confronted with a dispute as to the priority of application of one or other of these bodies of law, it will be difficult for the adjudicator, in good faith, simply to interpret away one body in favor of the other. Instead he or she may be forced to harmonize the law and hence to perform the task that states refused to do. After all, Article 31 (3) (c) of the Vienna Convention requires interpretation to take into account "any relevant rules of international law applicable in the relations between the parties," and as the ICJ stated in 1971, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."18 This provides a legal basis on which the judge may rely to justify what essentially amounts to legislation. Nonetheless, questions of legitimacy may arise in this context depending on the dispute settlement body that has been forced to engage in this legislative function.

It is important to ask why the adjudicator in these above cases is called upon to perform a "necessary legislative function." In the first place, it reveals a failure by the international "legislature" (namely states) to exercise its role in the creation of the law and, indeed, "the executive" (also states) to exercise its role in the enforcement of the law. Also, it is because of the emergence of an international community, or perhaps several: sometimes the international community of states, sometimes of individuals, sometimes of civil society, sometimes perhaps the international community as represented by the United Nations, which, hopeful of securing its aspirations via the rule of law, has increased expectations of the law and consequently, of the judge. Here questions of redistribution and of legitimacy may be raised, and those in the light of the increased expectations and demands of the international community for a "rule of law" to prevail in international relations.

*Living Up to Expectations: How Far Can the Judge Go?*

Another challenge facing the new international adjudicator is to satisfy the increased and diverse expectations of actors without compromising the judicial function, namely

---

the identification of the law, with a minimum content of judicial legislation. As noted, the new international scenery is one made up of numerous actors (not all of them subjects), all with different interests and all claiming to be concerned with international law. In this context, and recalling the competition provided by the presence of multiple dispute settlement fora, the judge is to some extent called upon to cater to these different audiences. How does one avoid compromising the law, yet maintain the relevance of international judicial settlement?

The relevance of this question is highlighted by the fact that it arises in the context of a legal order in which one is increasingly seeing the emergence of discrete areas of the law, each requiring reconciliation. As seen above, international courts and tribunals are called upon to perform this task. One may note similar trends in domestic arenas in which constitutional courts are created and consolidated and called upon to decide various policy issues.

The case of the WTO Appellate Body, examples of trade and the environment, and of the role and place of amicus briefs, all suggest the need for a forum to solve public policy issues. The Appellate Body goes as far as it can, but is it the Appellate Body’s role to develop public policy? This question should be put against a political background in which the political organ is not ensuring its role.

If one wants to maintain the relevance of the judge, to avoid compromising his or her function, and to mitigate the need for judicial legislation, then the experience of the ICTY clearly indicates that the relevant political institutions, states, and the political organs of international institutions cannot abdicate their own functions. The ad hoc international criminal tribunals are not the appropriate organs to assume the primary role for the maintenance and restoration of international peace and security. The WTO Appellate Body is not the appropriate organ for the development of norms for the harmonization of trade, environment, and social standards. Political decisions and organs remain the most appropriate actors. To satisfy community expectations and the prevalence of the rule of law and to minimize judicial creation, it is to the states themselves and the political organs of international organizations that one must turn. Were this to happen, we could then believe the judge when he or she expresses the views of Molière’s Monsieur Jourdain.

**COMMENTARY BY GAVAN GRIFFITH**

In this era of contemporary realism, it is nothing less than quaint for the judges of the ICJ to have cloaked their legislative work in the 1995 Nuclear Weapons Advisory Opinion (cited in the paper) with the disclaimer that the Court’s task was “to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons.” From a common lawyer’s perspective, this chapeau has the same transparency as the fabric covering the emperor with no clothes. Professor Boisson de Chazournes may be right to say that “the judge knows that he or she creates the law—he or she simply does not want to admit it,” but there would be few common law lawyers who would not admit this fact.

In the Nuclear Weapons Advisory Opinion, Judge Higgins was correct to suggest that it would have been better for the Court not to have answered the central question expressed by a 7-7 majority with references to original concepts such as “the fundamental right of every State to survival.” Until this curious majority spoke, there were only

assertions of what the law with respect to the use or threat of use of nuclear weapons should be rather than existing principles of international law to be applied by the Court. (At a personal level, I do not complain about all the issues covered in the opinion, for in answering the seventh and last questions the Court accepted, unanimously, the argument advanced by Australia to declare that whatever the legality of having nuclear weapons, there was an obligation upon each state to retain them for no longer than it took bona fide to negotiate for their elimination.)

A common law background makes it easier to accept the necessary legislative component in contemporary international adjudication, particularly at a level of the ICJ. At this level, it is less usual for the international analogs of legislation, in the form of conventions or treaties or the like, to provide even the skeleton for the legal framework invoked in the determination of disputes. For that reason, Article 38(1)(d) of the ICJ statute, referring to the pronouncements of judges and those learned in international law as “subsidiary means for the determination of rules of law,” plainly understates the importance of external sources for the development of international law by incremental steps through successive judicial decisions.

On a case-by-case basis, advances in the declaration of principle may be supported by an emerging consensus, particularly from drafts or final texts of conventions or from reports of the International Law Commission, such as its current work on state responsibility. Further, Article 38(1)(d) gives all of us who identify with qualification of being learned in the law an opportunity to inform the development of international law with our writings. Indeed, such is the gestation period for ICJ litigations that there are suggestions that, with enough lead time, it is possible to advance extant learning toward a desired position by ensuring the prior publication of writings pointing to that end.

Be that as it may, plainly the peak international adjudicative courts and tribunals ordinarily go beyond the mere articulation of existing rules. So, for example, in its judgment in the Nauru case, the ICJ “rewrote” the Monetary Gold principle to support what fairly may be explained as a result-driven decision that defied, rather than applied, the conventional expression of the principle of necessary parties.

Compounded by the requirement to reach agreement among fifteen disparate judges at the ICJ, and more than a score at the Law of the Sea Tribunal, one civil law input to adjudication at the peak level is that the level of exposition of the reasoning of the Tribunal often is abbreviated to the level of mere assertion. In the ICJ, the majority judgment is prone to represent a negotiated result rather than the product of a completely articulated reasoning process. For example, the operative part of the Nauru judgment is but one paragraph, and the long memorials and countermemorials in the East Timor case were disposed of in some nine paragraphs of the reasons of the Court. To some extent, this necessary brevity of expression of majority opinions works to emphasize the proper characterization of such decisions as lawmaker.

This is not to say that exhaustive exposition of reasoning always is synonymous with clear elucidation or improvement in understanding of the relevant international law principles. For example, on one view, the decision last year of the ad hoc tribunal (under the auspices of the International Centre for Settlement of Investment Disputes (ICSID)) in the Southern Blue Fin Tuna Fishing dispute between Australia and Japan was so destructive of what many see as the spirit and intent of the dispute provisions in the United Nations Convention on the Law of the Sea (UNCLOS) that one may regret its publication.

I entirely agree with Professor Boisson de Chazournes’ comment that, in determining particular disputes, the international adjudicator commonly is called upon to codify
the law. Although the themes of evolving customary law may be invoked, increasingly it requires the sanction of judicial articulation for new principles to be recognized.

In the field of public international law, it is inevitable that the higher level decisions of the standing dispute settlement bodies will move beyond a codifying process and increasingly come to expound the applicable principles beyond what is inchoate. Hence, the ICTY inevitably must play a creative role as it engages over years in the practical application of principles of international humanitarian law. No doubt, as it is established, the International Criminal Court (ICC) will come to build upon the more defined reference points in its Convention, to develop further the content of a working system, with an open jurisdiction over war crimes and crimes against humanity.

It seems inevitable that standing international bodies, such as the ICJ, the ICTY, the Law of the Sea Tribunal, or the WTO Appellate Body, will strive to fill out principles, including those based on considerations of policy. Although it is reasonable for a civil lawyer to be concerned to ensure the retention of the purity of the judicial function, this remains an inherent function of the definition of international law, embraced specifically by Article 38 of the ICJ statute. Indeed, there is a public expectation that peak decision-making bodies will exercise their jurisdiction rather than issue weak declarations that there are no presently recognized principles. So, for example, the Court's 1997 decision in the Gabčíkovo-Nagymaros (Hungary v. Slovakia) judgment gave force to part of the draft ILC articles on state responsibility.

It does not seem possible to fix subjective limits to the scope of "legislative" action by international adjudicators by reference to what is an acceptable scope for judicial activism and what is not. It is inherent in the process that incomplete or insufficient reference points must be enlarged upon by international courts and tribunals to resolve the matters before them. Hence, it may clarify the debate about propriety to follow the lead of plain-speaking common law judges and to admit to the fact that international lawmaking is an integral, if controlled, part of the international judicial process.

PUBLIC INTEREST

There is an emerging realization that there are issues of public interest that may arise in contemporary international dispute resolution mechanisms and procedures. This is exemplified by a New York Times lead article appearing on Sunday, March 11, 2001, entitled “NAFTA's Powerful Little Secret: The Tribunals That Settle Disputes.” The dispute resolution procedures under NAFTA prompted the article complaining that international tribunals such as the ICSID have “led to national laws being revoked, justice systems questioned and environmental regulations challenged.” Similarly, there now is debate as to whether there may be public interest interventions at the level of the WTO Appellate Body.

In his speech to the Sixth Committee of the General Assembly on October 27, 2000, the president of the ICJ noted this evolutionary process.

Further, the growth in cross-frontier transactions has led to the arrival on the international law scene of new categories of player. However, the model for the settlement of inter-state disputes, while it may still be valid in many cases, was not designed with these new players in mind. As a result, there is growing pressure to have those players participate in the judicial process where it involves them. That pressure has not been without consequences in the economic field, as can be seen from the constitution of the Luxembourg Court, or the decisions where the body responsible for settling WTO disputes has recently accepted the intervention of an NGO as amicus curiae. The same has occurred with human rights.
The field is at the intersection of perceptions of public interest, with the conventional philosophy that the essential function for international dispute resolution by commercial arbitration is to resolve particular disputes and not to develop international jurisprudence. In his recent Tenth Annual Goff Arbitration lecture, delivered in Hong Kong on February 17, 2000, entitled “The Spirit of Arbitration,” Fali Nariman pleaded eloquently for arbitration to restore its lightness of touch and to be shorn of its manifestations now regarded as almost indistinguishable from litigation. He asserted that it is not the function of private arbitral awards to develop international jurisprudence.

Certainly there is much to be said for this approach at the level of resolution of essentially private commercial disputes under international arbitral procedures, assisted by the mechanisms of the 1958 New York Convention and the terms of UNCITRAL’s Rules and Model Law of International Commercial Arbitration. However, at the high level of the two hundred international adjudicators sitting permanently on international bodies, the principal subject matter of today’s paper, there is an increasing appreciation that dispute resolution mechanisms under the auspices of institutions such as ICSID or the International Chamber of Commerce, or separately through ad hoc arbitrations by tribunals constituted by agreement between parties, may involve matters of dispute where there is a legitimate public interest in what the parties regard as a private system of dispute determination. For example, issues arising under the new jurisprudence of NAFTA or the WTO procedures have invoked third-party claims for access and the exposure of the decision-making process.

To this extent, there is an emerging tension between the basic philosophy of international commercial dispute resolution predicated upon private procedures, and the realization that decisions of ad hoc tribunals may have a coercive effect that attracts the attention of governments and other interested groups that increasingly express demands for participation in the process. The current debate exposes the absence of sufficient transparency in some of these processes, compounded to some extent by a lack of understanding of the underlying parameters of the jurisdiction and constitution of such tribunals.