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Introduction

A Comparative Analysis of Procedure in Interstate Litigation

ERIC DE BRABANDERE

As has been widely acknowledged and documented, there has been an impressive increase in interstate litigation over the past decade. More than ever, international courts and tribunals are being regularly seized by a wide array of states, from north and south, seeking peaceful and authoritative resolution of their disputes. These disputes include disparate subject matters including but not limited to armed conflict, land and maritime border disputes, territorial sovereignty, global trade, human rights, diplomatic relations, and consular affairs.

The International Court of Justice (ICJ) has (almost) never been as active as it is now. The ICJ's docket currently has 17 pending cases.[1] A high number[2] of four decisions were rendered in 2018 and one judgment was rendered in 2019.[3] The International Tribunal for the Law of the Sea (ITLOS) has, since it heard its first case in 1997, decided 25 disputes. The World Trade Organization Dispute Settlement System (WTO DSU) has decided over 500 disputes since 1995, despite the deadlocked situation in which it finds itself at the moment. The total number of arbitrations in which the PCA acted as a registry amounted to 199 in 2019, of which 49 were initiated in that year.[4] Of the total number of Permanent Court of Arbitration (PCA) administered cases in 2019, four were purely arbitrations (an additional 125 were treaty-based investor–state arbitrations). When one adds to these large numbers the disputes heard by other bodies with jurisdiction over interstate disputes, including the growing body of regional courts and tribunals, one starts to grasp the prominent role that

1 See <www.icj-cij.org/en/pending-cases>.
2 If one disregards the eight judgments rendered in 2004 in the similar 'Legality of the Use of Force' cases initiated by Serbia and Montenegro.
3 See <www.icj-cij.org/en/contentious-cases>.
4 Permanent Court of Arbitration (PCA), Annual Report 2019, 10 <https://docs.pca-cpa.org/2020/03/7726c41e-online-pca-annual-report-2019-final.pdf>.

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international courts and tribunals currently play in the resolution of interstate disputes.

Indeed, the 'proliferation' of legal dispute settlement mechanisms itself accounts for the increased activity in interstate litigation. It has been termed 'the single most important development of the post-Cold War age'.[5] Next to the ITLOS hearing its first case in 1997 and the creation of the WTO DSU by the 1994 Marrakesh Agreement, a whole range of regional international courts and tribunals has also started functioning over the past two decades.[6] The use of interstate arbitration has similarly risen substantially.

In particular, the last several years have witnessed several high-profile and politically sensitive cases being settled through recourse to international courts and tribunals and international arbitration. Clear examples are the *South China Sea Arbitration* between the Philippines and China,[7] and the *Arctic Sunrise Arbitration* between the Netherlands and Russia.[8] The ICJ recently issued an advisory opinion regarding the Chagos Archipelago after proceedings that included written and/or oral submissions by 31 different states plus the African Union. Guatemala and Belize recently agreed to submit their decades-long territorial dispute to proceedings at the ICJ.

The surge of interstate litigation needs to coincide with an increase in academic attention to the field.[9] Questions such as how the courts and tribunals function, who the arbitrators and judges that decide cases are and which rules of independence and impartiality apply to them, and why a certain method of dispute settlement is preferred, have now become more relevant than ever. An ample collection of rules and decisions now exists to permit such comparative studies.

Surprisingly, however, little attention has so far been given to the procedure before the various courts and tribunals dealing with interstate disputes from a comparative perspective. While important works have

[5] CPR Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 NYU J Intl L & Polit 709.

[6] See for an overview R Mackenzie et al, *The Manual on International Courts and Tribunals* (Oxford: OUP 2010) and Project on International Courts and Tribunals, Synoptic Chart, 2004 <www.pict-pcti.org/publications/synoptic_chart.html>.

[7] *The South China Sea Arbitration* (*The Republic of Philippines v The People's Republic of China*), PCA Case No 2013-19.

[8] *Arctic Sunrise Arbitration* (*Netherlands v Russia*), PCA Case No 2014-02.

[9] See also E De Brabandere, 'International Dispute Settlement – from Practice to Legal Discipline' (2018) 31(3) LJIL 459–68.

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been published on the rules and procedure of specific courts and tribunals, notably the ICJ,[10] the ITLOS[11] and the WTO DSU,[12] engagement with the rules and procedure applicable in interstate litigation from a comparative perspective has received less attention.[13]

This book engages in a transversal and comparative analysis of the procedural aspects of the settlement of interstate disputes in international law. The book and its chapters are based on two overarching ideas: the specificity of the involvement of states as litigants in the procedure, and the importance of a comparative approach to interstate litigation.

First, states in many ways act just like other litigants, but the political nature of the disputes and the sovereignty of the litigants often requires specific attention in procedure. The specificity of the interstate nature of the proceedings forms the backbone of this volume. It has been used first to identify the topics covered in this volume. At the same time, in their analysis, the contributions aim to precisely identify how the interstate nature of the proceedings influences the proceedings. In doing so, the chapters engage in a comparative analysis of the various procedural rules and practices across interstate litigation, both before international courts and tribunals and international arbitral tribunals.

Second, aside from detecting the specificity of the involvement of states as litigants in the procedure, a comparative view at and analysis of the procedure – in theory and practice – aims at a better understanding of the strengths and weaknesses of the various procedural rules and regulations and practical operation of international litigation, and in the end, aims to foment cross-fertilisation between interstate dispute settlement bodies – something Iain Scobbie and Makoto Seta, amongst others, explicitly discuss in their chapters. Comparative studies will assist courts and tribunals in revising their own procedures, will assist states in determining which existing courts and tribunals are best equipped to

[10] See eg H Thirlway, *The Law and Procedure of the International Court of Justice* (Oxford: OUP 2013).

[11] See eg P Chandrasekhara Rao and P Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Northampton, MA: Edward Elgar 2018).

[12] See eg D Palmeter and PC Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge: CUP 2004).

[13] See however C Brown, *A Common Law of International Adjudication* (Oxford: OUP 2009); C Giorgetti (ed), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Leiden: Brill 2012); and pt IV of C Romano, K Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: OUP 2014).

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handle their particular disputes, and most importantly will assist states in the design of future courts and tribunals.

The book takes stock of the procedure applicable in various interstate dispute settlement bodies, including international courts and tribunals of so-called general jurisdiction[14] and arbitration, but also regional or specialised international courts and tribunals. This book deliberately focuses on interstate litigation, and hence excludes, in principle, other forms of litigation in which only one state is a party, such as investor–state arbitration. While there is certainly overlap between some of the issues raised in the present volume and in investor–state arbitration or other forms of litigation in which a state participates, this book is based on the conviction that the interstate character of the procedure does bring with it some specific features which are exclusive to that interstate character. Questions relating to the selection of judges and arbitrators, the role of ad hoc judges, costs and trust funds, and compliance with decisions, are just a few examples of specific interstate issues covered in this volume.

At the same time, and as already alluded to, there are certainly issues which are of significance for other dispute settlement methods or for international criminal courts and tribunals, which are technically not interstate dispute settlement bodies, but nonetheless international courts and tribunals. While this book does not focus on these bodies, I acknowledge the relevance of questions covered in this volume for these bodies. As a consequence, this book has not adopted an overly strict prohibition on adding, where relevant, experiences from, for example, investor–state arbitration or international criminal courts and tribunals. This is the case, for example, for issues such as the transparency of procedure, interim measures, or the use of precedents in international adjudication.

The book brings together academics and practitioners, thereby aiming to further enhance the dialogue between the various communities engaged in the law and practice of interstate litigation and bridging theory and practice.

While not aiming to be exhaustive, that is to cover every possible procedural question that arises, an attempt was made to identify some of the most salient issues of procedure in interstate litigation, guided by the specific nature of the interstate character of the procedure.

[14] SD Murphy, 'Courts and Tribunals of General Jurisdiction: The International Court of Justice' in C Giorgetti (ed), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Leiden: Brill 2012) 9–35.

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The book is divided into four parts based on substantive procedural issues rather than on specific courts and tribunals, to reflect the comparative approach to the topic. The division into parts is based on chronological considerations, starting with pre-hearing questions and ending with post-hearing matters.

Part I of the book concerns 'Pre-hearing and Selection and Appointment of Judges and Arbitrators'. It covers those aspects of interstate litigation which precede the formal procedure. In Chapter 1, Patrick Wasilczyk analyses the role of registries and secretariats in interstate litigation. The chapter compares different 'dispute settlement authorities' in order to detect their working methods and functions. While the roles of registries and secretariats without doubt are not uniform, Wasilczyk argues that registries and secretariats can roughly be divided into two categories in line with two different 'modes of work': an exclusively administrative one, and an administrative and consultative one. Chapter 2 discusses the independence and impartiality of the international judiciary by looking at the ICJ and the WTO Appellate Body. Recognising that an independent and impartial international judiciary is a precondition to the settlement of legal disputes in a fair manner, Rishi Gulati first analyses the concept of judicial independence. He then argues that there is a need to bolster the independence of the ICJ, and that without immediate reforms to the WTO Appellate Body's institutional design, the very existence of that body may be and in fact is under threat. Chapter 3 of this volume critically assesses the law and politics of the requirement of 'recognised competence in international law' in the selection of judges and arbitrators in interstate litigation. Adamantia Rachovitsa argues that 'the recognised competence in international law has evolved from a craft to be learned up to an epistemic and disciplinary category of expertise encapsulating today both the specialisation of international law and the pressing need for the intellectual quality to retain an overall grasp of international law'. In doing so, a comparison is made of several international courts and tribunals, such as the ICJ, the ITLOS, the International Criminal Court (ICC), the WTO Panels and Appellate Body, the European Court of Human Rights (ECtHR), the African Court of Human and Peoples' Rights (ACtHPR), the African Court of Justice and Human Rights, and the Caribbean Court of Justice. She argues that international courts and tribunals should both have international law and specialised expertise on the bench. Part I ends with Chapter 4 by Cecily Rose on the role of judges ad hoc and party-appointed arbitrators. Rose engages in an analysis of the rationale behind

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the role of the judge ad hoc and the inclusion of such an institution in the procedural rules and statutes of several international courts. The chapter compares the usual rationales behind the 'need' for ad hoc judges and party-appointed arbitrators to empirical data about who the ad hoc judges and party-appointed arbitrators are, and what they have done while serving on the bench of the court or on the arbitral tribunal.

Part II of the book is entitled 'Post-commencement Litigation Procedure and Strategy' and focuses on several procedural and strategy questions specific to interstate disputes that may arise after a case is launched. It starts with Chapter 5 by Iain Scobbie on interim measures. Scobbie starts with the work of Eli Lauterpacht who argued that international tribunals themselves are international organisations and advocated interpretative 'cross-fertilisation' of the constitutive instruments of international organisations. Scobbie then applies this organisational approach to the question of interim measures before international tribunals, focusing on two aspects: the binding nature of interim measures orders, and the requirement of plausibility before measures can be indicated. Chapter 6 looks at the challenge of obtaining jurisdiction over states in interstate disputes. Katherine Maddox Davis uses India as the 'reluctant respondent test state', and compares recent jurisdictional issues that have arisen in cases before the ICJ and ITLOS. Chapter 7 addresses the question of costs. Brian McGarry offers a comparative assessment across interstate dispute settlement institutions of the costs of interstate litigation. Starting from the perspective that, especially for disputes involving developing states, costs play an important role in determining the use of litigation or arbitration to settle disputes rather than diplomatic means such as mediation or conciliation, McGarry analyses ways to enhance the cost-efficiency of interstate litigation, to promote the efficiency of interstate proceedings and to assist developing states engaged as litigants in interstate proceedings. Finally, in Chapter 8, José Reis looks at transparency in interstate litigation. The chapter, moving beyond the existing analysis on the normative implications of transparency and on the rules governing transparency, links transparency in interstate litigation to compliance theory, and analyses the existing variations in procedural transparency across interstate dispute settlement bodies.

Part III of the present volume is entitled 'Evidence and Witness', and drills down on that specific aspect of interstate dispute resolution procedure. This part is composed of two chapters. Chapter 9 analyses witnesses and witness examination in interstate litigation, using the practice of the

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WTO dispute settlement bodies as a point of reference. Katherine Connolly and Marie-Astrid Dossche start from the presumption that witness testimony is key to ensure respect for the fundamental procedural principles of due process and fairness. They analyse the role and importance of in-person witness testing in interstate litigation, by describing the (lack of) existing procedures to that effect at the WTO dispute settlement proceedings. They further suggest ways forward to remedy the lack of concrete rules for in-person witness testing. Chapter 10 in turn focuses on the use of experts in interstate litigation. In this chapter, Rukmini Das notes that experts have, in light of the increased technical and extralegal aspects of interstate disputes, gradually gained an important role in interstate proceedings. The chapter contains a comparative study of the use of experts in interstate litigation, looking at the procedures of the ICJ, ITLOS, WTO and international arbitration. The chapter argues that there is a large disparity in the use of experts in interstate litigation, and that a comparative approach can result in an enhancement of the procedural rules governing experts in interstate litigation.

The last part of the book covers 'Post-hearing and Effect of Decisions': different issues which occur once the proceedings have ended. The first chapter in this part, Chapter 11, looks at compliance with international decisions. Guillaume Guez starts with the question whether state consent to interstate litigation covers not only the adjudicative phase but also the post-adjudicative phase. Looking at this question from the perspective of the international judicial function and the interpretation of statutory instruments governing international courts and tribunals, Guez argues that while a restrictive interpretation of the statutes of courts and tribunal would result in a limitation of the international judicial function mainly to the adjudicative phase, and an extensive interpretation would on the contrary extend to the post-adjudicative phase, the question needs to be looked at from the perspective of the consent of the states parties to the dispute. In Chapter 12, Niccolò Ridi analyses the effect of decisions more broadly, through the lens of the use of precedents in interstate litigation. After discussing the 'orthodox' or normative approach to the effect of decisions, namely, the view that there is no rule of precedent in international law, Ridi advocates an alternative approach, arguing that it is desirable to move beyond dogmatic reliance on the 'orthodox' view and focus on tangible rules on precedent. The book concludes with Chapter 13 on the interpretation and application of one specific treaty, the United Nations Conference on the Law of the Sea (UNCLOS). As explained by Makoto Seta, UNCLOS offers four different dispute

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settlement methods, all having different characteristics and modes of operation. He explores in his chapter how the 'harmonised operation of UNCLOS' – that is, the application of the treaty by states following the resolution of a dispute – can be reconciled with the disparity or lack of unicity in dispute settlement methods.

I would like to thank Mr. David Bigge for having co-organised with me the conference at Leiden University in 2019 which lead to this book. For editorial assistance, I wish to thank Mr. Rafael Ruschel, Ms. Margrit Trein and Ms. Niamh McCormack.

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PART I

Pre-hearing and Selection and Appointment of Judges and Arbitrators

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Registries and Secretariats of Interstate Dispute Settlement Authorities

Explaining Registries' and Secretariats' Modes of Work in Light of Joint Information Management by Disputing Parties Promoted by Pre-judicial Proceedings

PATRICK WASILCZYK

The rise of international dispute settlement authorities (hereinafter IDSAs[1]) has been accompanied by research on judges, adjudicators or arbitrators. So far, the overarching research question has been: 'Who holds the pen?'. It has highlighted the *individual* responsible for rendering verdicts in these institutions.[2]

Recently, the research perspective on IDSAs has broadened. The overall institutional structure of IDSAs has increasingly become the focus of scholarship. This involves consideration of not only factors related to individuals but to the *collective* of judges, adjudicators or arbitrators (hereinafter the judiciary) within the adjudication process. With this shift, the research question is changing to 'Who *in fact is holding* the pen?': it allows one to question how the judiciary of IDSAs operates and interacts with a specific institutional structure and, vice versa, how a specific institutional structure impacts the IDSA's judiciary. The reformulated research question allows one to critically

[1] For the purpose of this chapter, the term international dispute settlement authority refers to institutionalised dispute resolution mechanisms, ie international courts and tribunals, which provide for, inter alia, state-to-state dispute settlement proceedings, including the ad hoc panels under Mercosur and the WTO. For a comprehensive study of secretariats in international arbitration, see JO Jensen, *Tribunal Secretaries in International Arbitration* (Oxford: OUP 2019).

[2] This strand of research makes inquiries into aspects concerning the appointment of the judiciary, as well as sociocultural factors, that can have an impact on the decision-making process by IDSAs; see eg A-M Slaughter, 'A Global Community of Courts Focus: Emerging Fora for International Litigation (Part 2)' (2003) 44(1) Harvard ILJ 191–220. See also Adamantia Rachovitsa, Chapter 3 in this volume.

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