White Paper 21

dispute resolution

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1.

overview

Dispute settlement is a crucial issue in the evolution of international law. Indeed, alongside substantive norms, access to a means of dispute settlement is a decisive issue in terms of the effectiveness of rights and the law. Even more so at the international level, recourse to a means of dispute settlement is a central issue, as it sometimes appears difficult. It is, therefore, necessary to reflect on the evolution of dispute settlement methods both in private law (for disputes between individuals or between companies) and public law (especially concerning disputes between States), without forgetting mixed disputes (such as in international investment law or human rights law). For this report, arbitration is an adjudicatory method of dispute resolution.

The following table summarises the diversity of dispute resolution methods in the international order:

Interstate Dispute Settlement
- ICJ
- ITLOS
- WTO
- arbitration

Private Dispute Settlment (businesses or individuals):
- domestic litigation
- arbitration

Mixed Dispute Settlement:
- investment arbitration
- regional courts of Human Rights (ex. ECtHR)

Criminal Justice:
- domestic justice
- ICC
- special / hybrid courts and tribunals

Non-judicial modes:
- conciliation/ mediation
- *sui generis* modes (ex. ICANN)

A. Private law disputes

For private law litigation, the settlement of international disputes is multiple and polarised. Indeed, in this type of dispute, no international court of a public nature is empowered to decide a substantive dispute of a civil or commercial nature. The determination of the competent court is therefore based on simple alternatives, either to refer the dispute to a national court or to refer it to an arbitral tribunal if the parties have concluded an arbitration agreement; all this in addition to the possibility of resorting to an amicable method of dispute settlement such as mediation.

The difficulties of coordination between national courts

Recourse to state courts implies dealing with two major issues, both of which call into question the degree of trust in the justice of other States, which is very high in the context of the European Union (EU) but less so outside of it.

The first is the determination of the internationally competent court. There are specific rules in this respect which result either from the national law of the court seized, from regional instruments (such as the European Brussels I bis Regulation in civil and commercial matters), or, possibly, from international conventions, which are most often bilateral.

The logic of the system inherited from private international law is to coordinate as much as possible the national courts in determining the competent jurisdiction. At the international level, agreeing on common criteria for direct jurisdiction is particularly difficult, which is why the first draft Hague Convention at the end of the XXth century failed (but work has resumed on a convention on jurisdictional coordination in transnational civil or commercial disputes). The difficulties in reaching an international agreement on this issue are various. There is, of course, the difficulty of finding common rules between common law legal systems (which are familiar, for example, with the doctrine of *forum non conveniens*) and civil law systems. However, the fact that global agreements have been reached on other subjects and in other fora (e.g., international sales) makes it necessary to identify additional difficulties. Amongst these, there is undoubtedly the underlying desire of States to protect the market for justice (and more particularly for their justice). On the other hand, the determination of the competent forum has an impact on the merits of the dispute and, therefore, on the substance of the decision rendered. Finally, States are

reluctant to give up exorbitant jurisdictional grounds, even if evolution is emerging in this area.

In addition, some grounds of jurisdiction are problematic. This is particularly true of the jurisdictional options in contractual and tort matters under the Brussels I bis Regulation. Determining what a matter of contract is and what a matter of tort is problematic. There is significant litigation on this point, which delays the solution to the substance of the dispute. The multiplication of grounds of jurisdiction enabling the plaintiff to bring proceedings before its own courts (*forum actoris*) is also a characteristic feature of current law (which is not a problem when it comes to protecting a weak party such as an employee or a consumer, but which becomes more problematic in other areas, particularly in the case of cyber tort).

The second is the effect of foreign judgments. The idea is to improve their effectiveness. Here again, the issue is dealt with either by national law, regional instruments (such as the Brussels I bis Regulation, which abolished exequatur) or international conventions. We can note in this respect The Hague Convention of 2 July 2019 on the recognition and enforcement of foreign judgments in civil and commercial matters. It was ratified by the European Union on 29 August 2022 and will thus enter into force in the Member States, except for Denmark, on 1er September 2023. The fact that the United Kingdom has left the European Union also creates uncertainty about the conditions for receiving British judgments.

Overall, the circulation of foreign judgments works better than harmonising the criteria for determining the competent court. In the area of the circulation of foreign judgments, it is indeed much easier for States to agree on common rules than on the grounds of direct jurisdiction, which, as we have seen, generate less consensus. One of the difficulties that arise concerns *res judicata*, which should be defined, if only in the context of the European Union.

Another strong trend deserves to be highlighted: the creation of international chambers in national courts (Paris, Singapore, Amsterdam, etc.). The aim is to adapt national justice systems to the handling of international cases, particularly by adjusting procedural rules. The objective is to make national justice attractive (in a globalised justice market where law and justice create value in the economic sense of the term). The process also aims at bringing cases that have turned to arbitration back before state courts, even if it is probably more a question of complementarity between the two dispute resolution methods than of genuine competition with arbitration.

Creation of regional courts in the field of private law

Regional courts with jurisdiction in the field of private law have also emerged. This is the case of the Common Court of Justice and Arbitration (CCJA) of the Organisation for the Harmonisation of Business Law in Africa (OHADA). It has a judicial function whereby it replaces national supreme courts to hear appeals against national decisions calling for the application of OHADA law and a function of organising arbitration (it acts as an institutional arbitration centre governed by the Arbitration Rules of 11 March 1999). This is also the case with the Caribbean Court of Justice (CCJ), a unique court that functions as two courts in one. The CCJ is the Caribbean Regional Court of Justice established on 14 February 2001 by the Agreement Establishing the Caribbean Court of Justice. The CCJ is a hybrid institution: a municipal court of last resort and an international court with original, compulsory and exclusive jurisdiction over the interpretation and application of the Revised Treaty of Chaguaramas. In its appellate jurisdiction, the CCJ hears and determines civil and criminal appeals from *common law* courts located in the jurisdictions of the Member States of the Community (12), which are parties to the agreement establishing the CCJ. As an appellate body, the CCJ is the highest municipal court in the region for those States that join it.

Transnationalisation and privatisation of international justice through arbitration

Arbitration has long become the ordinary justice in international business. 80-90% of international contracts are deemed to contain an arbitration clause. The system for resolving international commercial disputes has been privatised, liberalised, and referred to arbitration with the parties' agreement. In this respect, arbitration provides irreplaceable services for companies but also for States (which are not obliged to take on a publicly funded system of international justice). This form of justice is now accepted by States worldwide, even those that were previously hostile to it (such as Latin American or Arab-Muslim countries). Arbitral justice is thus a globalised form of justice (the UNCITRAL model law on international commercial arbitration having had a strong modelling effect). 170 States have now ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The arbitrability of disputes is now widely accepted, even where public policy ("*ordre public*") is concerned (e.g., in competition law). There is also an expansion of arbitration beyond purely commercial matters, such as in resolving sports disputes (*via* the Court of Arbitration for Sport).

Arbitration is also a recently proposed solution for business and corporate human rights disputes (see *The Hague Rules on Business and Human Rights Arbitration*, December 2019).

Of course, not all States express the same degree of liberalism regarding arbitration, and certain particularities remain. Moreover, the use of anti-suit injunctions to try to block arbitration proceedings reveals that state judges sometimes interfere when petitioned by a party. However, there is no doubt that arbitration in private cases is a method of dispute resolution that is both accepted and promoted globally.

Generally speaking, arbitration for disputes between companies is, in fact, the only genuinely international and neutral method of dispute settlement (in addition to the other advantages attached to arbitration, particularly the confidentiality that it allows in commercial matters). It offers the possibility of being judged according to rules and procedures that consider an international dispute's specificity. Recourse to state courts, subject to the creation of international chambers before national courts as previously discussed, does not allow for an internationalised treatment of the disputed issue, unlike arbitration. This explains the success of this form of justice and the *de facto* need companies feel to resort to it.

However, it should not be forgotten that this form of justice is subject to criticism, notably for its cost and length, institutionalisation, and sophistication. After the States have largely liberalised the arbitration regime, the ball is in the court of the actors of the arbitration world so that it continues to meet the expectations of its users. Moreover, there is a market for arbitration, a corollary of the private and therefore remunerated nature of this form of justice.

Liberalisation of the dispute resolution regime

There is a general tendency to favour agreements designed to choose the mode of dispute resolution in advance, whether choice of court clauses (cf. the 2005 Hague Convention on Choice of Court Agreements) or, of course, arbitration. From this point of view, too, positive law reflects a great deal of liberalism.

This is even evident in the field of criminal justice. There is a progressive opening of all criminal justice systems to a modified role of the judge as an impartial third party under the effect of compliance. This implies an *ex ante* management of identified risks (as in the case of anti-corruption). The criminal handling of a certain number of disputes, often international, is now more

commonly done through "justice deals", which are agreements between the offender and the prosecuting body. The role of the judge is pushed back to the approval stage of the agreement, even in legal systems that were reluctant to do so. Compliance, in general, implies an *ex ante* intervention in the logic of prevention, whereas the traditional role of the judge is in the *ex post* stage, at the stage of sanction and reparation.

In addition to adjudicatory dispute resolution, non-adjudicatory dispute resolution methods are experiencing a certain revival of interest, mainly mediation, though they still prompt mixed reactions. Thus, the conclusion of the Singapore Convention on International Mediation Settlement Agreements of 20 December 2018 is undoubtedly an important step towards ensuring the effectiveness of agreements reached as a result of successful mediation. It has so far been signed by 55 States but ratified by only 10 and the EU and some of its Member States appear reluctant, for reasons that are difficult to grasp.

Amicable means of dispute resolution, in general, are both an autonomous means of dispute resolution and a complementary means to adjudicatory means (a combination of the two is possible and even common in international cases).

The existence of *sui generis* mechanisms

In addition, some processes escape the usual qualifications. What they have in common is that they are private in nature. They are set up by transnational entities, such as ICANN or Facebook. These *ad hoc* bodies are set up voluntarily by each entity that chooses to do so and thus, to a certain extent, internalise the disputes that concern them. This is the case of ICANN, which has adopted a set of rules of procedure for resolving domain name disputes. However, it may be administered by ICANN-accredited dispute resolution service providers such as the WIPO Mediation and Arbitration Center, pending the establishment of the permanent Standing Panel which has been planned for a long time but is not in place yet. The logic of internalisation can be taken even further, as illustrated by the Facebook Supervisory Board. The latter is an entity that, although presented as having some independence, is still established by Facebook to resolve disputes relating to the moderation of content published on the social networks that the company owns.

Technical developments

New technologies have encouraged the evolution of dispute resolution methods. All of them are now experiencing a degree of dematerialisation, which the Covid-19 pandemic has accelerated, but this is only the first stage. Algorithms or artificial intelligence tools are also beginning to make inroads into dispute resolution, for example, in calculating damages. Moreover, new modes are emerging, linked, for example, to blockchain, and are revolutionising the figure of the impartial third party. For example, the Kleros system provides for a so-called "arbitration" system based on the intervention of "jurors" responsible for voting for the solution to a dispute that they consider to be optimal (a solution based on the application of game theory). Those in the majority receive a reward in the form of tokens, while those in the minority lose out. A so-called "appeal" system is set up. This is not arbitration but a *sui generis* dispute resolution system administered within a blockchain. The technique here radically transforms the figure of the "impartial" third party.

This dispersal of initiatives in private dispute resolution may echo the debate about the fragmentation of international law caused in particular by what has been called the "proliferation" of international courts.

B. Public or "mixed" litigation

Public international law has long been familiar with the distinction between the so-called "diplomatic" and adjudicatory modes of dispute settlement. The figure of the permanent court is very recent, dating back barely a century. And it is only much more recently, in the last quarter of the twentieth century, that adjudicatory modes have undergone an exponential development which increases their diversity in a framework which does not form a unified institutional system and always remains dependent on the consent of States.

Diversity

According to their nature

This diversity is expressed first and foremost in the extremely varied nature of dispute settlement methods in the international order, even more so than in the domestic order. Non-adjudicatory methods, which were historically precursors and themselves varied - conciliation, mediation, good offices - have been joined by adjudicatory methods. The latter have also evolved. Arbitration preceded the model of permanent courts and tri-

bunals. But there is also a diversity of bodies that do not belong to the pure type of judicial bodies because their decisions are not formally binding. Because they have a role and functioning that nevertheless bring them singularly close to it (possibility of referral by States or private actors, decisions based on law by an independent and impartial third party), they are generally described as "quasi-judicial" bodies. They exist both in the economic field (the World Trade Organisation's Dispute Settlement Mechanism - WTO) and in the field of human rights, where they are particularly numerous (nine so-called "main" committees and two sub-committees currently exist within the UN alone).

This diversity is all the more significant in that these new modes do not replace pre-existing modes but are added. Amicable methods, particularly negotiation, remain the ordinary and dominant method of settling international disputes. They are even regularly combined with adjudicatory modes. Access to the latter is often conditional on an obligation to negotiate or consult beforehand, particularly in the economic field (WTO, investment arbitration), and recourse to them after the adjudicatory procedure has been initiated is most often an option offered to the parties (regional human rights courts, arbitration).

It is difficult to quantify the *ad hoc* use of amicable methods, as it is usually secret. Still, the recent mediation by Israel and then Turkey between Russia and Ukraine shows that it is common even when the dispute turns into an armed conflict. On the other hand, attempts to institutionalise these amicable methods are generally unsuccessful, as States do not use them (Court of Conciliation and Arbitration of the Organisation for Security and Cooperation in Europe - OSCE), with the possible exception of the African Union.

In space

The multiplication of international courts and tribunals is occurring in multiple spatial settings. Some have a global vocation, in the sense that States from all over the world are likely to recognise their jurisdiction (International Court of Justice - ICJ, WTO, International Criminal Court - ICC, International Tribunal for the Law of the Sea - ITLOS, International Centre for Settlement of Investment Disputes - ICSID, although in the latter case, the tribunals most often find their jurisdiction in a bilateral treaty). In general, the spatial framework is reflected in the scope of jurisdiction of these courts, with the notable exception of specialised criminal courts, several of which have been created at the global level to exercise more localised jurisdiction (International Criminal Tribunal for the former Yugoslavia - ICTY, International Criminal Tribunal for Rwanda - ICTR, etc.)

Adjudicatory modes have also exploded in regional settings. Permanent courts and tribunals have multiplied at this level for the protection of human rights (European Court of Human Rights - ECtHR, Inter-American Court of Human Rights - IACtHR, African Court of Human and Peoples' Rights - ACHPR) as well as for European economic integration (Court of Justice of the European Union - CJEU, Court of the European Free Trade Association - EFTA), American (Court of Justice of the Andean Community, Court of Justice of the Caribbean) and particularly African (including the Court of Justice of the Economic Community of West African States – ECOWAS, the Judicial Authority of the Arab Maghreb Union - AMU, Court of Justice of The Central African Economic and Monetary Community – CEMAC, the Court of Justice of the Common Market for Eastern and Southern Africa – COMESA, the Court of Justice of the Economic Community of Central African States – ECCAS, the Court of Justice of the West African Monetary and Economic Union – WAEMU, the Southern African Development Community Tribunal – SADC). *Ad hoc* mechanisms are even more numerous (over 100). Despite a few failures (Arab Court of Human Rights) or disappearances (South African Development Community - SADC - Court), the regional framework has thus been a driving force in the development of judicial modes. It is now combined with the institution of interregional dispute settlement methods, as shown by the multiplication in the number of external agreements concluded by the EU that contain them.

With regard to litigants

The diversity of international justice is also reflected in the diversity of its litigants. Some mechanisms are strictly inter-state - at least formally - while others are mixed and involve private, natural or legal, persons (human rights, investment and criminal disputes; administrative disputes within international organisations). These mixed mechanisms are anything but new if we remember that the 39 mixed arbitration tribunals between the two world wars heard nearly 70,000 cases in essentially private law disputes. But they have multiplied in two ways: there are more of them, and most of them deal with a growing, even exponential number of cases (ECtHR; investment).

When settlement methods are mixed, the access of private subjects depends primarily on the choices made by the States (principle of access, modalities of access). This will is not immutable: if a tendency towards openness marked the end of the 20th century, we could sometimes observe a certain tightening (cf. reform of the ECtHR system). This willingness is not the only determining factor. Sometimes access has been allowed or

encouraged by the judicial bodies themselves. Examples include the explosion of ICSID cases in the 1990s following the *AAPL v. Sri Lanka* award and the acceptance of "arbitration without privity" or the IACtHR's choice to include victims in its proceedings, whereas the treaties only grant them access to the Inter-American Commission on Human Rights. Conversely, some courts neutralise the changes made by States to open up the court system and resist pressure from civil society (CJEU and annulment proceedings following the Lisbon Treaty, particularly in environmental matters).

On the substantive level

Lastly, this diversity is characterised by the wide variety of substantive fields of jurisdiction enjoyed by the adjudicatory modes. Most of them are specialised (mainly human rights, investment, criminal liability, international trade law, and the law of the sea) or even hyper-specialised, such as the UN committees, which are divided according to the category of rights protected (Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (CESCR), Committee against Torture (CAT), Committee on the Elimination of Racial Discrimination (CERD), etc.), or even according to the nature of their holders (Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, Committee on Economic, Social and Cultural Rights, etc.), or even according to the nature of their holders (Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, Committee on the Elimination of Discrimination against Women - CEDAW, etc.). Some of them have mixed jurisdiction as the treaties establishing them expand, particularly in the context of regional integration, which sometimes combines jurisdiction over economic and human rights matters (e.g., the Court of Justice of the Economic Community of West African States - ECOWAS) and even more so in the framework of the EU (CJEU). The only permanent court whose substantive jurisdiction is not limited *a priori* remains, to date, the ICJ.

These different diversity factors combine to form an institutional landscape that is all the more complex because it does not form an organised system.

Lack of a system

This multiplication of dispute settlement methods does not form a unified system that would allow one to speak of "international justice" in a systemic sense. The international adjudicatory settlement of disputes remains largely archipelagic.

Not every dispute can, therefore, necessarily be settled by a court. For example, in the international order, there is no right of access to a judge in the sense of domestic law, where it paradoxically often being implemented under the pressure of international standards. Certain geographical areas continue to escape the phenomenon of judicialisation (Asia in particular). Similarly, while certain branches of the international order are subject to multi-level judicialisation (regional/multilateral), others, such as the environment, are deliberately and/or due to a lack of consensus, not or hardly judicialised. This leads to litigation strategies, or even a form of jurisdictional tourism, on the part of actors looking for which existing forum is likely to accommodate these orphan issues. Climate litigation is a significant example. Individuals frequently turn to international human rights courts (ECtHR, Committee on the Rights of the Child, etc.) or even criminal courts (ICC), but also to national courts, which they ask to interpret and apply the commitments made by States in the international order.

This institutional fragmentation can generate situations of conflict. These are sometimes direct, but more rarely than the debate on the fragmentation of international law and the multiplication of international courts and tribunals might have suggested. Conflicts of jurisprudence on the content of the law have thus remained limited. The divergence between the ICTY and the ICJ on the notion of "control" in the law of international responsibility is both topical and isolated in this respect (see also the case of the Argentine economic crisis before investment arbitration tribunals). The courts avoid locking themselves into "clinical isolation" (WTO Appellate Body) and spontaneously engage in an exercise of cross-referencing. This is not systematic and remains contextual or even strategic, but it is attractive in that it helps, among other things, to reinforce the acceptability of the decisions taken.

The lack of unity, therefore, generates competition rather than open conflict. The activity of ITLOS, for example, remains extremely limited and is often confined to emergency disputes (prompt release), while most maritime delimitation disputes are brought before the ICJ. Similarly, a competitive logic in the strict sense, i.e., in terms of economics, has been established between the various arbitration centres. They are modifying their rules of procedure and operation to attract more cases. This logic is one of the avatars of *forum shopping* allowed by the absence of an organised system, similarly to what it is happening with private litigation before domestic courts. The persons or entities involved in a dispute turn to the dispute resolution method perceived to be the most favourable to their interests, either

because of the content of the substantive rules that will be applied or because of the procedure according to which the settlement will be made.

The existence of obligations to turn to a particular mode of settlement, in particular clauses conferring exclusive jurisdiction on certain courts, is not enough to compensate for the lack of integration between the modes. The European Union framework is, in this respect, representative of the imperfection of these legal tools. The reluctance of the CJEU towards external mechanisms is evidence of this. The Court consistently reiterates the incompatibility between EU law and the use of external dispute settlement mechanisms for intra-EU disputes (*Mox* plant case; declaration of incompatibility between intra-EU investment arbitration and EU law in the *Achmea* case, a solution extended by the *Komstroy* judgment regarding the Energy Charter and subsequent case law). When an actor has not respected the exclusive jurisdictional clause, it is exposed, in the best case, to *ex post* sanctions, but as the exclusivity clause is not opposable to third parties, it does not prevent external mechanisms from succeeding.

Moreover, this reluctance is part of a logic of competition and power. Even when the Union and the Member States try to organise through treaties the articulation between the various methods of dispute settlement, the Court sometimes rejects the treaty for fear of losing the supreme nature of its decision-making power (see Opinion 2/13 on the protocol of accession to the European Convention on Human Rights ; contra, for example, the opinion on the CETA). These blockages affect the development of dispute settlement methods. The 2/13 Opinion prevented the EU's accession to the European Convention on Human Rights - ECHR, while the *Achmea* decision led States to turn away from certain dispute settlement methods to avoid situations of conflicting obligations (denunciation of intra-European bilateral investment treaties (BITs) because of the incompatibility of arbitration with EU law; the disappearance of the arbitration clause for European states in the draft reform of the Energy Charter Treaty – ECT – or even denunciation of said treaty).

After all, both the use and the effectiveness of international dispute settlement methods still depend on the consent of States.

Consensualism

There is still no compulsory recourse in international law to a method of dispute settlement in the sense that it would be imposed on a State that has not consented to it, even when it

is accused of acts of particular gravity, even constituting violations of *jus cogens* (ICJ, *Congo v. Rwanda*, 2006).

Recourse to a dispute settlement method is qualified as compulsory when consent is given before the dispute arises, either for a given category of disputes (often directly relating to the treaty containing the jurisdictional clause) or unilaterally for all disputes except those subject to a reservation (when possible) as in the context of an "optional compulsory jurisdiction" clause, following the example of the ICJ (where only 73 States maintain such acceptance to date). The other cases of settlement are optional in the sense that consent is given only after the dispute has arisen. The more distant the link between the expression of consent and the exercise of jurisdiction by a court, the greater the risk of challenge. In the particular - and rare - case of the ICC's exercise of jurisdiction based on a UN Security Council resolution, some states have invoked, *inter alia*, the absence of consent to its jurisdiction to refuse to execute decisions (arrest warrant against *Al Bashir*).

Similarly, national courts, which we have seen play a role in the settlement of international disputes, cannot exercise their jurisdiction over a foreign state and come up against the immunity from jurisdiction that it enjoys and which it almost never waives. A few national courts seem inclined to override this lack of consent in cases of infringement of the most fundamental values of the international community (Italian courts in relation to the acts of Nazi Germany, Ukrainian Supreme Court in relation to Russia's aggression against Ukraine), but the ICJ maintains that the principle of consensualism applies even in such situations. There is international justice, but no right to have it set in motion.

Even when a mechanism that results in a binding decision is available, enforcement also depends on state consent. The simplistic observation of the international order being based on justice without police remains valid. In most cases, the monitoring of enforcement is entrusted to bodies of a political nature. Exceptions are rare, such as in the WTO or in integrated systems such as the European Union (and even there, for certain structural disputes such as the rule of law, it was necessary to resort to the budgetary weapon to try to force Poland and Hungary to execute certain judgments of the Court). There is, however, a growing interest and involvement of international courts in monitoring the execution of their own decisions, either through a revision of the treaties establishing them (ECtHR) or through a certain activism on their part (IACtHR and the doctrine of conventionality control, ACHPR and the acceptance of new applications for lack of implementation of a previous decision). Here again, there is a risk of a circular phenomenon: the courts

may find a lack of enforcement without being able to remedy it. In the arbitral context, even the particularly integrated ICSID regime, which imposes the recognition of decisions without exequatur (Article 54), is still likely to come up against immunity from enforcement, which remains invocable (Article 55).

This consensual nature particularly exposes international justice to the phenomenon of backlash against certain courts and tribunals by certain States. Few fields are spared (investment arbitration, ICC, regional integration or human rights protection systems, WTO), and the manifestations are multiple: withdrawal of acceptance of the jurisdiction in question (Russia and the ECtHR; African States and the ICC, the United Kingdom and the EU; multiple denunciations of the ACHPR protocol), threats of withdrawal in an attempt to obtain a change in jurisprudence (the United Kingdom and the EtCHR), increasing occurrences of default/non-appearance at the trial or enforcement stage, budget cuts (ICC), paralysis of the process of appointing members (WTO Appellate Body) or treaty amendments (ECtHR). This phenomenon is not the exclusive product of state action. Investment arbitration, for example, is the target of backlash not only from States but also from civil society, prompting a reform movement (work of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on Reform of Investor-State Dispute Settlement; new ICSID arbitration rules to come into force in 2022) or the proposal to create a Multilateral Investment Court.

This movement of rejection or withdrawal is not the result of all States, but it also includes certain States that have historically contributed strongly to the construction of the current dispute settlement framework (the United States, the United Kingdom in particular).

2.

the challenges

A. Will

Preservation of the existing scenario

Is it not the case that the structural problem that arises is that of safeguarding what exists in a general context of unravelling multilateralism and of frontal attacks on the adjudicatory function in the balance of power within domestic and international society? It should not be forgotten that international courts derive their legitimacy and competence from the act that creates them, most generally an international treaty.

Courts have to consider the resistance of States, which leads them to adapt their functioning. Some courts have strategies that can be described as "judicial diplomacy" and which manifest themselves in different ways. They may seek to increase their attractiveness to demonstrate their social utility. They also seek to ensure the acceptability of their decisions, which can create a feeling of constraint among judges and lead to less-than-daring jurisprudence or even retreat. Finally, they are sometimes forced to seek to obtain or maintain resources corresponding to their workload. Budgets are an instrument of state control, and some courts have to convince States to make additional voluntary contributions, with the risks this entails in terms of independence and impartiality.

In addition to the challenge of avoiding the dismantling of international dispute settlement mechanisms, there is the challenge of enforcing legal decisions. This, of course, concerns the recognition of foreign judgments (see Harmony - coordination of national courts) and the enforcement of arbitral awards, including when they are exempt from exequatur. In this respect, maintaining the current homogeneity of the implementation of the 1958 New York Convention is a challenge.

Downturn scenario

It is possible that States will disengage from multilateral adjudicatory systems and fall back on either regional or national judicial systems. Multilateral systems seem to be in danger overall because of the decline in state participation, as evidenced by the increasing number of defaults/failures of certain States to appear before international courts (inter-state arbitration - *Artic Sunrise*, *South China Sea* - and inter-state judicial settlement - *Ukraine v. Russia* and *Iran v. United States*), and state cooperation with international justice, particularly criminal justice (ICC

and the *Al Bashir* arrest warrant). In the latter case, cooperation is crucial as the ICC cannot try in absentia.

The retreat to national justice is a plausible hypothesis. The national judge is also the judge of international and regional law. The *Achmea* case and its aftermath show that it is now national courts that are responsible for hearing intra-European investor protection disputes under EU law.

In investment arbitration, there are proposals to return to the exhaustion of domestic remedies to limit international remedies whose supposed speed, depoliticisation and equal footing of the parties are the main reasons for their existence.

Breakdown scenario

Investment arbitration is a particularly relevant laboratory for the break-up scenario. This form of arbitration may be experiencing, if not an inexorable decline, at least a lasting transformation. Arbitration is here based on international treaties and thus depends on the goodwill of States. It is, therefore, possible that investment litigation will be extremely diverse in the future. Arbitration is no longer relevant for intra-European disputes, where national courts normally have jurisdiction. At the international level, this litigation would be dealt with by a new international court if a multilateral investment court were to be created. But nothing would prevent States from not accepting the court's jurisdiction and continuing to resort to arbitration *via* BITs. In addition, there are the so-called arbitration procedures in the new free trade and investment protection treaties (e.g., CETA), not to mention the uncertain fate of arbitration under the Energy Charter. We can therefore envisage a system that is even more complex and unpredictable than at present.

De-judicialisation scenario

In this scenario, States turn away from the adjudicatory mode of dispute settlement in favour of amicable/diplomatic modes, which are characterised by their very low binding nature. The recent paralysis of the WTO Appellate Body illustrates this de-judicialisation hypothesis since the reform proposals are moving towards a return to the GATT judicial conciliation. The objectives of protection through the internationalisation of values considered superior or of depoliticising the settlement of disputes are then seriously compromised. The challenge is to raise awareness of

the fact that the judicial settlement of disputes is the corollary of the prohibition of the use of force and contributes to levelling the playing field by distancing power relations.

De-judicialisation also has a prospective side. Nowadays, when States negotiate treaty systems, they tend to insert compliance or monitoring mechanisms rather than adjudicatory dispute settlement mechanisms. This is illustrated by the Paris Agreement on Climate Change, which, following opposition from some States, only creates a "mechanism to facilitate implementation and promote compliance" with the Agreement.

Scenario for the creation of new courts

New international courts and tribunals could be envisaged, provided there is a political will to do so. In this perspective, because of a particularly divided world, only States that share the same convictions and are convinced of the benefits and merits of international law could reach an agreement among themselves. This would favour regional bodies, a level where it is easy to find a certain homogeneity.

It would thus be possible to propose the creation of international courts in the field of private law. Maya Steinitz recently made the proposal in civil matters (*The Case for an International Court of Civil Justice*, Cambridge University Press, 2019). One could also imagine creating an international court or tribunal for commercial cases. However, it would be necessary to agree on the scope of jurisdiction of such courts and give them the material, financial and human means to function. This path seems difficult to explore because arbitration, as it stands, meets these challenges, thus exempting States from embarking on a complex and costly process of creating new international courts and tribunals dedicated to private law.

The creation of an international court responsible for reviewing arbitration awards in commercial matters could also be envisaged. This court would have jurisdiction to assess setting aside proceedings against awards and could issue an exequatur with international effect. The advantage would be to standardise control, making it no longer dependent on national particularities. Apart from the question of resources (material and human), however, it would be necessary to agree on common heads of control and standardised control procedures.

The creation of an international human rights court is an old idea. For the time being, only regional courts are operating in this area. A judicial system for the protection of human rights

on an international scale would thus be a step towards the effectiveness of human rights. However, here again, a strong political agreement is needed at a time when democracy is tending to decline in certain geographical areas and when the regional courts themselves are criticised by some of the States that have agreed to submit to their jurisdiction.

The creation of an international court for environmental litigation has also been considered. Here again, an agreement would have to be reached on the scope of such a court. The challenge would then be to overcome the reluctance of States, as shown by the lack of use of the special chamber for environmental issues at the ICJ (created in 1993 and put on hold in 2006) and the very low recourse to ITLOS, despite its explicit jurisdiction in this area. In any case, environmental issues are cross-cutting and, as such, do not necessarily merit a specialised court. On the contrary, as the environment is now present in almost all legal disciplines, it is perhaps more a matter of integration into existing litigation that should be favoured.

The creation of a multilateral investment court is a serious possibility, as it is supported in particular by the European Union. If such a court were to be created, a problem would arise in terms of articulation with other adjudicatory systems for the protection of investments (see *above*, the break-up scenario).

The decline of multilateral regimes may lead to a reduction of adjudication to *ad hoc* bodies in the form of special courts. At the same time, creating *ad hoc* tribunals (regularly used in criminal matters) is probably a more feasible route than creating permanent courts.

Scenario of impoverished national justice

Coordination between domestic judicial systems and the degree of confidence in the judicial system of others depend on the well-functioning of the judicial system itself. Domestic judiciaries may become impoverished, both in developed and developing States. In developed States, their budgets are constrained, and there is a form of creeping privatisation through non-judicial modes to relieve court congestion and de-judicialisation in some areas. In developing States, the capacity of States to establish judicial systems, both in the civil and criminal spheres, capable of inspiring legitimate confidence, the basis for judicial cooperation, is open to question. It is true that judicial development programmes exist to date and that a UN Special Rapporteur on the independence of judges and lawyers has been appointed. Despite the efforts made, there is a risk of marginalising certain domestic courts in the context of globalised justice.

Generally speaking, confidence in foreign judicial systems can only be assured by a reliable, independent and corruption-free judicial system. Therefore, to strengthen international judicial cooperation worthy of the name, it seems necessary to invest massively in training programmes for magistrates and programmes to improve or even redesign domestic judicial systems. Otherwise, the counter-scenario would be a disintegration of domestic justice, left on the cheap and neglected, unable to face the challenges of the good administration of justice, especially in international matters.

Scenario of increased litigation

International proceedings are likely to become increasingly contentious and bitter. There is an increase in the number of defaults by defendant States in inter-state litigation (e.g., Russia in the ICJ case against Ukraine or China in the South China Sea arbitration initiated by the Philippines). In arbitration, "guerrilla" tactics have also multiplied. The difficulties of enforcing a court decision at the international level are serious and likely to worsen. This is a problem for the effectiveness of the judicial system.

B. Machine

Scenario of the digitalisation of dispute resolution

The use of digital technology will continue to develop in all areas of international litigation. The future is certainly one of dematerialisation, at least partly, of procedures. The Covid-19 pandemic has shown that it is possible to switch to digital solutions, which have ensured the continuity of dispute resolution (with the emergence of new service providers specialising in online hearing techniques). There are advantages, especially in international matters (the process simplifies exchanges and eliminates the need for lengthy and expensive travel). Digital technology also facilitates the production of documents. Some international courts have decided from the outset to be "paperless courts", such as the CCJ or the ICC.

Nevertheless, there are risks (in addition to the practical disadvantages linked, for example, to time differences). First, the physical meeting of the participants in a trial seems irreplaceable, especially at the time of the hearing (particularly during the examination of witnesses). Dematerialisation undermines the symbolic dimension of justice and the need for it to be seen to

be done. Secondly, the use of digital technology to produce documents encourages the parties and their counsel to produce a massive amount of documents. The use of digital technology could therefore be regulated and, for example, be the subject of a protocol at the beginning of the proceedings. Hybrid procedures (half virtual, half face-to-face) are perhaps conceivable, provided that the equality of the parties is strictly ensured, as well as the equality between judges or arbitrators.

As digital technology develops in international dispute resolution, thought should be given to establishing cybersecurity protocols, as the "paperless" international courts have had to do (which have also had to equip their judges and staff with the appropriate IT tools). From this perspective, the 2019 ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration is an interesting initiative. It would also be desirable to increase the awareness of the actors in international proceedings of the risks associated with digital communication.

Scenario of the robot adjudicator

Artificial intelligence tools will continue to develop in the field of international adjudication. In this context, the "robot adjudicator" has two facets. On the one hand, are we moving towards the replacement of the human being by the machine? In the future, there will be robot adjudicators (judges or arbitrators), with artificial intelligence replacing the human being and deciding in his/her place, particularly in mass and/or repetitive disputes. Apart from the practical feasibility, which is highly questionable, the risk is dehumanising justice with rigid solutions that endlessly reproduce previous biases. The other possibility is a combination of human beings and machines, with artificial intelligence being designed as a decision-making aid. In any case, it is necessary to produce knowledge and expertise on this subject, especially by inviting lawyers and computer scientists (more broadly, all the professions linked to artificial intelligence) to work together. The new figure of the impartial third party replaced or assisted by the machine transforms, in all cases, the traditional frameworks of the trial, particularly by the attenuation, or even the disappearance, of orality.

However, action may be moving faster than reflection. Online dispute resolution (ODR) mechanisms, which respond to the ubiquitous nature of the web and are primarily concerned with e-commerce for low-value transactions and geographically remote parties, have developed very rapidly. They include processes as diverse as ombudsman schemes, conflict management, assisted negotiation, automated negotiation, arbitration exper-

tise and simple third-party evaluation, mediation, mediation-arbitration, arbitration, cyber tribunals, and consumer schemes, many of which involve computer assistance and some degree of automation.

The other side of the robot adjudicator is more indirect. It stems from the development of databases that can already be used for profiling in the selection of arbitrators (to help the parties to select the "best" arbitrator or adapt their pleadings to the appointed arbitrators considering their previous decisions) and, more generally, for accessing case law and other legal data. These practices are likely to become more widespread in other modes of dispute resolution. As things stand, these databases are set up by private companies (legaltechs, which are like justice start-ups), which creates an additional risk of privatisation of justice.

At the same time, research is being conducted on human intelligence. Indeed, cognitive sciences are interested in the function of adjudicating and try to reveal the cognitive biases that can affect the freedom of judgement of a judge or an arbitrator. A better understanding of the brain's functioning (conscious and unconscious) would undoubtedly make it possible to improve the adjudicating function.

C. Morals

Diversity scenario

International law, in general, and dispute settlement, in particular, are largely Western constructs. This history still weighs heavily, particularly with regard to the challenges in terms of diversity. Given the sociological observation that there is a lack of diversity among the actors of international justice (judges, arbitrators, counsel, etc.), the way is open to policies aimed at increasing this diversity. The aim is to combat the model of the 'white old Western men's club' (or the 'pale, male and stale' arbitrator) and the endogamy of circles that ultimately prove to be quite small and difficult to penetrate. In this respect, diversity can be understood in a number of ways: according to gender, geographical origin, age, handicap, etc.

The question of geographical origin is a key issue. It arises differently depending on whether one considers permanent courts whose statutes include a requirement of representativeness, or arbitration, provided that education, culture, competence and experience are also taken into account (which implies, in parallel, the possibility of training programmes).

The question of age is delicate, as it is subject to conflicting imperatives. There is an interest in appointing relatively senior judges whose term of office will mark the end of their professional activity, which is considered to favour greater independence. This raises the question of a possible age limit - following the example of the 70-year limit set at the ECtHR by Article 21 of the Convention introduced by Protocol 11, replaced by a 65-year limit for candidates (Protocol 14). This specific regime, however, remains isolated. Conversely, there is a tendency to appoint young judges, which is supposed to promote a certain pluralism, but may raise the problem of their retiring or next position, particularly in the event of a non-renewable mandate.

More generally, it is thus possible to provide for commitments by the players on the ground, for example, arbitration centres, with a view to diversifying the profiles of judges and arbitrators. The arbitration pledge *to* increase the number of women in arbitration (http://www.arbitrationpledge.com) is an example of an initiative that will develop in the future. The most radical form would be the introduction of quotas, including gender quotas. It is possible to set a 50% gender parity target among international judges and arbitrators as advocated by the GQUAL campaign. Arbitration institutions are making real efforts to appoint women, managing on average to appoint between 15 and 20%, but the parties are much more conservative - around 5%.

Apart from the ICC, whose statute includes a gender balance rule in the composition and the ACHPR, which is subject to a strictly enforced gender equality rule, increasing diversity is a challenge for all permanent international courts (number of women in relation to the number of judges (as of September 2022): ECtHR: 14/46; CJEU: 6/27 judges and 3/10 advocates general; ICJ: 4/15; IACtHR: 1/7). Even in courts where there is an international phase in the appointment procedure, such as the ECtHR, there is a constant struggle to have States nominate female candidates, few of whom become judges. The findings are even more striking when looking at the offices and presidencies of the courts (e.g., all males at the ICC, although the Court is at parity after the 2021 election). An additional challenge will be to consider gender identities beyond the binary distinction between men and women.

Finally, the challenge of diversity is also a matter of language. The languages of international litigation are English, which is dominant, French, which is declining, and Spanish. Many actors in international justice do not work in their mother tongue, which gives an implicit advantage to those whose mother tongue

is a working language. It is also difficult to reason in all languages with the same legal concepts. Through language, meanings are conveyed in relation to specific legal systems, some of which have an overdeveloped influence despite any rules on representativeness. This largely forces parties to choose counsel who are proficient in the working languages of the courts and arbitral tribunals.

Even when courts offer the possibility of pleading in several languages, or even one's mother tongue, as is the case with the CJEU, this generates considerable costs and practical difficulties (recruitment of translators or interpreters who also have the necessary legal knowledge). In practice, certain working languages are therefore avoided in favour of others (ICC, ACHPR), except for the CJEU, but at the cost of a considerable financial investment. Certain types of litigation, such as criminal cases, multiply the number of languages involved in the same proceedings (witnesses, defendants, working languages of the Court), making permanent linguistic diversity an illusion.

Scenario of the strengthening of ethics

The fight against conflicts of interest has become a major issue in the status of international adjudicators (to preserve the figure of the "impartial and disinterested" third party in the sense given by Kojève). In investment arbitration, this issue is at the very heart of the concerns of the actors, as shown by the draft Code of Conduct prepared under the joint auspices of ICSID and UNCITRAL. Practices such as "revolving doors" and "double-hatting" are the subject of considerable debate, as are "issue conflicts". Academics engaged in practice tend to neutralise their scientific writing to avoid exposure to recusal demands. This results in a loss to research when they do so and, conversely, generates intellectual conflicts of interest when they do not.

In arbitration, as well as before the permanent courts, the question of ethical standards also arises for counsel, who are not subject to any rules if they do not belong to a national bar association (except for the International Criminal Court).

Questions of ethical standards also arise for members of permanent courts. Some courts have ethical codes that correspond to what can be considered contemporary standards. A number of them impose exclusivity on their judges and subject their secondary activities, such as publishing articles or attending conferences, to authorisation, but such obligations are difficult to impose on judges who do not have a full-time mandate but simply have to remain

at the disposal of the court (ITLOS). Some permanent courts, such as the ICJ, and interstate arbitration remain with old rules on deferral or disqualification and practices that are no longer appropriate (although the ICJ in 2018 intended to end the investment arbitration practice of some of its judges). For example, progress could be made on *ex parte* communications and respect for the secrecy of deliberations. All these problems are echoed in the endogamy issue already mentioned.

Are we moving towards a strengthening of ethical concerns? If so, how can the existing rules be improved? One way would be to provide adjudicators with ethical rules, or even with a real statute (several international courts and tribunals have codes of conduct: Rules of Conduct for the Dispute Settlement Understanding of the World Trade Organization (WTO) - 1996, ICC Code of Judicial Ethics - 2005, Code of Conduct for Members and former Members of the CJEU - 2016, ECtHR Resolution on Judicial Ethics - 2008, Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal - 2011, Caribbean Court of Justice Code of Judicial Conduct - 2013, International Residual Mechanism for International Criminal Tribunals Code - 2015, amended in 2018). At the same time, the disclosure requirement may have gone too far regarding the scope of information to be disclosed to prevent and manage conflicts of interest. Greater precision in ethical standards should be accompanied by a better definition, or even a reform, of the mechanisms for monitoring compliance with them and clarifying possible sanctions, given the obvious limits of peer review, which is not always sufficiently demanding. A satisfactory medium need to be found, which is all the more difficult in the context of an internationalised practice.

The challenge of writing court decisions and arbitral awards is on the edge of ethical issues. The role of the invisible actors of justice - clerks, court secretaries, and secretariats, judges' assistants and *référendaires* - should be better defined and more transparent. The issue has recently been publicised in relation to arbitration awards (see, for instance, the question of the secretary who was allegedly the "fourth arbitrator" in the *Yukos* case), but it extends to other disputes. The explosion in the number of cases facing certain courts or bodies structurally leads judges or arbitrators to delegate the drafting of decisions to these actors, who thus acquire an unanticipated influence of which the parties are not necessarily aware. Here again, there is a problem with

the figure of the impartial third party, of trust in justice, and a risk of conservatism that is all the greater when judges or arbitrators are not impartial by profession or on a permanent basis or when they are overloaded. The problem is pushed to the extreme with algorithms, this third party becoming a machine. All drafting aids, whether human or artificial, should, of course, not be rejected, but the challenge is to find the balance that preserves the integrity of the neutral.

Scenario of a greening of practice

Stakeholders in international litigation are considering the environmental impact of their activity. An initiative has been launched, Greener Arbitrations, to reduce the negative impact of arbitration activity on the environment (notably by favouring digital solutions instead of paper production). The societal concerns of those involved in international dispute resolution (judges, arbitrators, lawyers, arbitration centres, etc.) will increase. The same developments will undoubtedly affect the permanent courts. The challenge will then be to avoid that the greening of procedures is, in fact, greenwashing. While digitalisation is often cited as an example of ecological progress and does indeed save paper and reduce the environmental footprint of transport, it is still very energy intensive and a source of pollution (because, for example, of the impossible recycling of batteries or the overexploitation of rare earths, which are essential for the manufacture of digital tools).

Scenario of a social responsibility of actors in dispute resolution

The previous scenarios (diversity, ethics, greening) relate to the common idea of a form of social responsibility for the different actors in international dispute resolution. These actors, mainly judges, arbitrators and counsel, will thus become more aware of the social role they play in a particular kind of human activity: dispensing justice. This implies changes in practices and, therefore, in habits and mentalities. It is a global awareness of the social role played and the responsibility that comes with it that should animate the actors. It must be balanced, to some extent, with the requirements of independence and impartiality.

Beyond that, should this awareness not lead to a transformation of the role of adjudicators, especially arbitrators? Wouldn't they thus become "regulators" beyond the mere role of judges of the parties? The tasks of regulation refer to societal issues, such

as respect for the environment or human rights (particularly sensitive in disputes concerning the extractive industry). It is in the substance of decisions, and not only in the practices followed, that this transformation could be achieved. It could be achieved by taking greater account of societal issues in the solution given on the merits (for example, by using transnational public policy). It could also involve opening the courtroom more to the intervention of interested third parties (NGOs, local communities, third countries, etc.).

This challenge is met with resistance, including the criticism that adjudicators would implicitly become agents of state policy implementation. In the context of investment arbitration, in particular, the failure to take into account the cross-cutting nature of environmental and human rights issues could lead to reverse discrimination for investors subject to national law and courts.

To the extent that adjudicators have a social responsibility, they may need to be more than just lawyers, as illustrated by the appointment of a water specialist in *the Indus Waters Kishenganga Arbitration* (Pakistan/India) case.

D. Money

Scenario of cost containment of procedures

International procedures are expensive. It might be possible to leave arbitration to a market logic that allows for a balance between supply and demand. But it is precisely this market logic that, according to some views, vitiates investment arbitration. Arbitration is being criticised for its cost, and the assumption that users will turn away from it on this basis is plausible. The financial stakes are notably reflected in the exaggerated production of documents and submissions and the artificial complexity of the proceedings by the parties' counsel, which the arbitrators do not curb. This seems less of a problem for commercial arbitration, as it does not directly involve the public interest as much since it normally only involves private interests and parties. However, the increasing action of States through state-owned entities contributes to blurring the distinctions. Ultimately, these phenomena are a factor for reflection on the appropriateness of increased judicialization of the settlement of this type of dispute, for which the EU is developing an incremental method through its external agreements.

Moreover, efforts are already being made to reduce the costs of arbitration (e.g., by appointing a sole arbitrator, mainly in commercial arbitration), but further efforts could be envisaged (e.g., capping of arbitrators' fees, introduction of a flat fee, etc.). At the same time, the main costs of an arbitration procedure are mainly counsel fees. A study conducted under the aegis of the International Chamber of Commerce showed that 83% of the overall costs of an arbitration were accounted for by the costs directly incurred by the parties (including the costs of counsel, but also those of experts, etc.), with arbitrators' fees accounting for 15% and the administrative costs of arbitration centres for 2% (ICC Arbitration and ADR Commission Report on Decisions on Costs in International Arbitration, 2015). Is it possible to find a solution from this perspective without calling into question the logic of the market? In any case, this market logic does not mean that a trial before the domestic courts would be less costly, especially when it involves familiarising oneself with a foreign judicial system, in addition to the costs of access to certain national courts, which can be very high.

Permanent courts are all forced to control their costs because of the limits placed on their budgets by the States. The challenge is for them to maintain the quality of justice rendered while at the same time adjusting procedures to make them more economical, as litigation explodes due to the "right" of access to justice. The constraint is so strong for human rights courts that it leads to a reduction, or even a virtual disappearance of hearings, with the paradoxical effect of a lesser presence of human beings in proceedings that are nevertheless dedicated to their protection.

Scenario of improved conditions of access to international justice

Situations of impecuniosity of the parties are no longer academic hypotheses. They affect the right of access to justice, a fundamental right. It would be possible to do nothing and to consider the situation as not problematic (for example, in arbitration, by considering that the parties remain bound by the arbitration agreement they have concluded in the name of its binding force). The other possibility would be to increase the concrete possibilities of access to international justice. The creation of assistance funds (which exist before the CAS or the PCA, but also before the ICJ - the Secretary-General's Trust Fund to assist States in submitting their disputes to the International Court of Justice - or ITLOS - the ITLOS Trust Fund - and in the WTO context, through a separate international organisation

such as the Advisory Centre on WTO Law) is one possible development. In commercial arbitration, arbitration centres could give serious thought to the creation of such funds.

The issue of costs associated with third party access to proceedings is also important. While the rule in interstate justice is that each party bears its costs, this remains a challenge in mixed disputes and is particularly acute in investment arbitration, especially in cases involving the interests of local populations. One possibility is to equally share the costs of such interventions between the investor and the State.

The phenomenon of third-party funding generates a certain number of difficulties, in particular predatory practices on the part of certain third-party funders who seek to maximise their "investment" in the dispute to the detriment of the parties they are funding. This leads some actors to wish to introduce a framework of mandatory rules (Voss Report, approved by the European Parliament, which provides for a ceiling on the remuneration of third-party funders) while other States continue a policy of liberalisation (e.g., Singapore). Transparency obligations are also appearing to reveal the intervention of a third-party funder (e.g., the latest version of the ICC Rules of Arbitration and the ICSID Rules of Arbitration). The generalisation of such transparency could lead to procedural savings, particularly when one party requests such disclosure and the other refuses.

Scenario of an improvement in the effectiveness of court decisions

When a judge or arbitrator orders the payment of a sum of money, the enforcement and effective payment of this sum is problematic at the international level. It is, therefore, possible to think about ways to improve money orders' effectiveness. Arbitrators, for example, could use the technique of "securities for claims", at least when the obligation is not seriously disputable. New technologies, such as blockchain, could also be used to implement automated payment. But at the same time, should we not limit the effectiveness of a court decision if it proves to be unjust? The issue of the effectiveness of legal decisions must be related to the issue of possible ways of contesting them.

Concerning permanent courts, the question of the effectiveness of decisions arises in several ways. Some courts have victim compensation funds, such as the ICC Trust Fund for Victims. This fund takes the place of defendants who have generally become indigent, often deliberately too. The objective of reparation is then only achieved through purely voluntary state contributions.

Moreover, even when States are directly ordered to repair the damage caused, international justice comes up against the problem of their willingness and ability to fulfil their obligations (in addition to the well-known obstacle of immunity from execution). The recent awareness of the problem of compensation that is disproportionate to the means of the States concerned ("crippling compensation") has even called into question the principle of full reparation on which international responsibility is based.

Scenario of mastering the sophistication of procedures

The sophistication of procedures is both quantitative and qualitative. From the qualitative point of view, it leads to an increasing emphasis on procedural battles. From a quantitative point of view, this leads to inflationary drifts. It remains a challenge to think of measures that would make it possible to contain them. One option would be to reduce written pleadings, considering that the second round generally has little added value in relation to its volume. If retained, it should be limited to essential clarifications or additions. Another option would be to limit the hearings to questions that the arbitrators or judges still wish to ask (the ICJ recently decided to limit the hearing to the answer to two questions in the *Nicaragua v. Colombia* maritime delimitation case). It is also difficult to get the parties to reduce the volume of documents produced because of conflicting financial interests, especially for counsel, or the susceptibility of the parties (especially in interstate litigation). This quantitative aspect overlaps with the issue of cost control.

Arbitration is being criticised by its users. In addition to being costly, it has also become long and complex, with arbitration proceedings being overcome by a process of "sophistication". The future of arbitration necessarily involves rethinking the methods of conducting the procedure, returning to a logic of flexibility. Arbitrators and counsel would find it advantageous to work not on standardised methods but as close as possible to the specificities of the case. The objective would be to "free" the procedures from previously established habits and personalise them more. The link with amicable procedures is also an issue that should be emphasised. Finally, this sophistication in all its aspects is unfavourable to the access of weak parties (such as small and medium-sized enterprises in arbitration). As

a counterpoint, the development of ODR is well explained in terms of accessibility, simplicity, and speed.

Finally, there is the question of complex litigation, raising technical issues that lead to increased use of experts (which would probably be even more necessary in climate litigation). While experts all commit to impartiality, there are doubts about experts brought in by the parties, whose role is logically to support the viewpoint of the party that hired them. Arbitral courts and tribunals may use experts of their choosing. But these choices usually must be justified at length (WTO dispute settlement provides many examples, particularly in the area of health) and are easily challenged by either party. Easier and more well-regulated use of experts by adjudicators could be considered, although the example of WTO dispute settlement, which has a sophisticated protocol, shows that this does not prevent challenges by the parties.

Quantum experts in arbitration are also worthy of reflection, as they are seen to make already complex issues even more complex. The debates on calculation methods confirm the unease.

More generally, this raises the issue of a more active behaviour of judges and arbitrators who tend not to use the investigative powers with which they are endowed. The lack or inadequacy of fact-finding procedures in several international courts and tribunals is widely debated. Yet the development of such powers could arguably be justified by the theory of inherent powers.

Scenario of increased professionalisation

The professionalisation of arbitration is a reality, with more and more arbitrators making it a real profession. This trend will certainly increase in the future and presents both positive and negative aspects. On the positive side, there is the competence of arbitrators in conducting proceedings, usually with high financial stakes. On the other hand, there is a tendency to reproduce standardised patterns. The counterpart of professionalisation is probably professional ethics.

The rise in intolerance of certain practices, such as double hatting, encourages this professionalisation, which leads to positioning strategies on the part of adjudicators. Moreover, the diversification of litigation, including the emergence of cross-cutting issues, requires adjudicators to acquire a variety of skills.

Being an international judge or arbitrator is not a (pre-)established career. For arbitrators, professionalisation implies attracting appointments, sometimes at the cost of profiling - for example, "pro-State" or "pro-investor" in investment arbitration. The situation is not fundamentally different for members of permanent courts, who must have strategies for re-election when their mandate is renewable or for positioning themselves for their future career when it is not. Reflecting on these challenges means considering the debates on longer but non-renewable terms of office.

E. Strategy

Scenario of control of forum shopping

The issue of forum shopping may now seem old. It is nevertheless still relevant today given the strategies for selecting the forum that are still at work. This has been particularly true in the case of class actions, which have been brought before welcoming forums, particularly the American forum. The same is true of litigation concerning respect for human rights by companies, where referral to the courts is particularly strategic. Here, we nonetheless note a trend towards the withdrawal of the American courts, who now refuse to accept actions that have no link with the United States (*Morrison* ruling of 2010 for foreign-cubed actions and *Kiobel* ruling of 2013 for the implementation of the Alien Tort Statute). Procedural strategy is the essence of litigation and tends to be accentuated in transnational cases (by levelling the playing field). It is not necessarily bad when it is the implementation of simple jurisdictional options. It is impossible to imagine its disappearance. It is nevertheless possible to work on regulatory instruments (fraud, abuse, *lis pendens*, connexity, dialogue of judges, etc.).

The issue of forum shopping is also being revived by climate litigation in search of an international forum, even though a fair number of national courts have also been seized of it. Climate litigation is used by civil society to put pressure on States and companies. However, while there have been nearly 1,500 climate-related lawsuits filed worldwide since the early 2000s, fewer than 100 have been decided in favour of the plaintiffs, but the 6th report of the Intergovernmental Panel on Climate Change (IPCC) refers to a "gradual momentum" (last published in April 2022). In addition, national actions are also a means of

accessing international procedures after domestic remedies have been exhausted (ECtHR, Committee on the Rights of the Child, etc.) or by direct action (CJEU).

In a rather different spirit, corporate restructurings designed to benefit from Bilateral Investment Treaties protection are nevertheless also aimed at selecting the forum most favourable to the interests of a potential claimant (treaty shopping), so much so that arbitral tribunals have had to develop a body of case law aimed at neutralising restructuring that is clearly too opportunistic. There has also been an increase in parallel proceedings in different fora (e.g., investment arbitration and the ECtHR, as in the *Yukos* case), which raises the problem of *lis pendens* and *res judicata*.

It is also worth mentioning the choices States make between WTO dispute settlement and the ones contained in bilateral or regional free trade agreements. A number of disputes have thus been submitted, alternatively or cumulatively, by one party or the other according to its interests, to the WTO and the procedures of the North American Free Trade Agreement (NAFTA).

Urgency scenario

Requests for urgent measures have become increasingly common in most litigation. While their main purpose is to avoid the aggravation of the dispute and irreparable damage, they are, in principle, only incidental proceedings. Nevertheless, in a number of cases, one may wonder whether the main application is not also intended to be able to request provisional measures which, while not intended to prejudge the dispute, already give solid and rapid indications as to the jurisdiction of the judge or arbitrator.

However, one issue that remains controversial is the binding nature of emergency/provisional measures. As most statutes or rules of procedure of the courts are silent on this issue, it is the courts themselves which, in reaction to non-compliance with the provisional measures enacted or to give them importance, have affirmed the mandatory nature of provisional measures, starting with the ICJ (*LaGrand* case, 2001), followed by the ECtHR (*Mamatkulov* case, 2005). However, such a mandatory character remains debated concerning arbitration. The question arises as to what form the decision ordering provisional and protective measures should take. The qualification of an award is controversial, as practice generally follows the route

of procedural orders. It could nevertheless be explored with a view to making the decision more effective (in particular by granting an exequatur).

It should be remembered that emergency measures may be all the more justified where litigation is long and complex.

Time scenario

Time is an essential component of court proceedings, and the fair trial model incorporates a reasonable time requirement. However, this requirement does not seem to be respected very much, including by human rights courts, even though they are responsible for ensuring that it is respected by national courts or by the WTO, whose Dispute Settlement Memorandum sets out a binding timetable. This may be due, particularly in the case of human rights courts but also in arbitration, to their congestion (massification of appeals, acceptance of too many appointments by arbitrators), but it also owes a great deal to the strategies of the parties, some of whom are not necessarily in a hurry and may even have an interest in delaying the settlement of the case as much as possible. They may thus multiply the number of incidental proceedings that may lead to a bifurcation (requests for urgent measures, challenges to jurisdiction and/or admissibility, counterclaims, etc.). Defendants' lawyers also tend to multiply procedural objections before international criminal courts. It is, therefore, not uncommon for criminal trials, including their investigation, to last more than ten years, contributing to the debate on deterritorialised justice, which it is argued should really remain exceptional.

International courts, including arbitration courts, do not interfere much with these strategies of the parties, in which they themselves may have an interest, but also because they do not wish to be accused of not having respected the equality of arms (what has been called "due process paranoia" in arbitration).

They may also contribute to the lengthening of proceedings, for example, by opting for trifurcation in arbitration. Nevertheless, arbitral institutions counteract increasing delays by setting binding time limits, possibly accompanied by financial sanctions against arbitrators (by a reduction in their fees). On the other hand, delays in permanent courts are not directly sanctionable. Although slowness gives an additional chance for an amicable settlement, it is difficult to establish a statistical correlation. It might nevertheless be worth considering the imposition of timetables by adjudicators, which would also provide a means of pressure to reduce the volume of proceedings.

At the same time, efforts have been made to deal with emergency litigation. Particularly in arbitration, there is now an emergency arbitrator (see, for example, the ICC Rules). One of the avenues of development is the generalisation of the solution of the emergency arbitrator and, thus, the perpetuation of a dual procedure: one relating to measures based on urgency and the other to the resolution of the dispute on merits.

Scenario of the instrumentalisation of the procedure

The instrumentalisation of court proceedings can take many forms. A fairly recent phenomenon in national courts is 'SLAPPs', or 'strategic litigation against public participation', i.e., legal actions (or threats of legal action) designed to intimidate and/or silence journalists or whistle blowers or to inhibit political participation and activism, most often a civil suit for defamation, brought against a person or organisation that has taken sides in a public matter. The real objective is not so much a victory in court as to intimidate and/or financially exhaust the defendant (the one being attacked) into silence.

Instrumentalisation can take less overtly aggressive but no less costly forms, such as the multiplication of incidental proceedings before international courts.

There are also "torpedo" actions which make it more difficult to resolve a dispute by seizing a forum appropriate to the purpose. For example, a party may take the initiative of bringing a declaratory action first before national courts known for their slowness (for example, to obtain a declaration that it is not liable for damage) in order, in reality, to slow down the process of settling the dispute. A better articulation of procedures is needed in this respect.

F. Harmony

Coherence scenario

Coherence refers to the challenge of ensuring a better dialogue among judges.

This means, firstly, ensuring the internal consistency of case law for courts with several panels that issue several hundred or thousands of decisions per year. This challenge is accentuated

by the question of the articulation of competences. The expansion of the field of litigation generates a problem of training for judges (this gave rise to the practice, criticised and then abandoned, of "ghost experts" at the ICJ). Likewise, linguistic plurality sometimes leads to the separation of judging formations by linguistic competence, with a risk of deviation of the case law according to the language used. This is the case, for example, at the ECtHR. The divergences between the French and English-speaking chambers have made it necessary to introduce harmonisation methods.

It is also necessary to ensure horizontal and vertical external coherence, with a common challenge to refine the methods of judicial dialogue. In terms of vertical coherence, it is a question of ensuring that case law is taken up by national courts when the system is based on cooperation between national and international courts and tribunals (human rights, CJEU).

An evolution of the criteria and the degree of control by international courts increasingly leads to a shift of the object of this control from substance to procedure. This contributes to redefining the relationship between national bodies and international dispute settlement methods. In a number of cases, there is a "proceduralisation" of the review of national decisions by international adjudicators. This review focuses more on the domestic decision-making process than on the adopted decision content. The decision in question is considered valid if the former is deemed satisfactory. This phenomenon of proceduralisation contributes to accentuating the subsidiary character of certain international courts and tribunals (human rights). The challenge is to ensure that this search for coherence does not result in a transfer of competences.

Horizontal coherence concerns harmonising the jurisprudence of the various international dispute settlement mechanisms. The ECtHR, which deals with a very large number of disputes between investors and States, particularly from the point of view of the right to respect for property, provides a good example. A judicial dialogue, even if informal, should allow for the consideration of international jurisprudence that deals with the same issues from a different perspective. Cross-cutting issues, such as environmental protection, make a certain level of harmony all the more necessary. A greater number of cross-references can achieve this, but it, of course, presupposes that the courts are aware of the case law of their counterparts.

Adjudicatory modes have an adversarial character which produces ambivalent effects. States that accept this mode of settlement must assume the risk of losing, which may explain some of the defaults, as it then becomes even easier to criticise the

decision. This risk is only imperfectly remedied by amicable modes since States, especially democratic ones, will have to assume the political choices of the concessions made in this context. In some cases, it may even be in a State's interest to accept a judicial settlement that leads it to lose on the international plane to gain leverage and obtain internally what it could not impose of its own volition (ICJ, *Djibouti v. France*, 2008).

Scenario of development of amicable modes

Dispute resolution must be seen as a continuum. In this respect, amicable means of dispute resolution should be actively promoted. The Asian culture of "peaceful harmony" is a model in this respect. This promotion requires, above all, the training of lawyers and, more generally, those involved in the field. Training is, therefore, a crucial issue (not only training in the law but also in the techniques for conducting these amicable methods, especially mediation). In particular, arbitrators could be trained.

The combination of amicable methods and adjudicatory settlement must be worked on carefully. A widely shared idea is to develop the complementarity of amicable and adjudicatory dispute settlement methods by giving the former a window of opportunity within the adjudicatory procedures. In this respect, interlocking, which leaves a window of opportunity for amicable means within court proceedings, seems preferable to the succession, which leads from amicable means to court proceedings. Indeed, in practice, tiered clauses (first an amicable mode and, in case of failure, an adjudicatory settlement) have limited effectiveness. In particular, the combination of mediation and arbitration should be considered by offering windows of opportunity during arbitration to allow the parties to seek an amicable settlement. This practice is favoured by the rules of certain international courts (ACHPR) or even systematically proposed as at the European Court of Human Rights. From this perspective, the CEDR Rules for the Facilitation of Settlement in International Arbitration are an interesting basis for reflection.

In addition, amicable processes are of particular interest in business and human rights litigation. In the OECD context, there are National Contact Points (NCPs), which are akin to mediation bodies (although practices in different countries vary widely). In addition, mediation could be used extensively to complement the 2019 Hague Rules on Business and Human Rights Arbitration.

Scenario of increased competition between different dispute resolution methods

Competition between arbitration centres is a contemporary reality that will continue to be present. Arbitration is now multi-polarised in the sense that it has partly left its original home of Europe and North America. It is now actively present in Asia, the Middle East, Africa, and South America. This phenomenon is bound to increase. The existence of 70 arbitration centres in Africa also shows the reality of the risk of establishing centres without cases.

The multiplication of international courts and tribunals can be beneficial for settling disputes when it leads to a certain alignment from above. This is illustrated by the question of the mandatory nature of provisional measures in that they are intended to prevent the dispute from escalating. Similarly, it encourages the judicial settlement of cases that would not otherwise have been brought before a court, such as the dispute between the Maldives and Mauritius that was brought before ITLOS when an application to the ICJ seemed doomed to failure because of its third state jurisprudence.

Competition may nevertheless have an effect on the very existence of some courts, with, for example, maritime delimitation litigation never really leaving the ICJ despite the creation of ITLOS.

Scenario of better coordination of national judiciaries

Concerning state justice, the challenges at the international level are both to agree on common criteria for direct jurisdiction and to enhance the effectiveness of foreign judgments.

As regards the possibility of reaching a general agreement on the criteria for direct jurisdiction, hope must be placed in the current work of the Hague Conference on Private International Law (project on jurisdiction in civil and commercial matters). Either the project will have a positive outcome through the conclusion of a convention or protocol or, as with the previous project, it will fail. The latter is, of course, to be hoped for, subject to the number of countries that subsequently intend to ratify the convention.

Regarding the effectiveness of foreign judgments, the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters should

be reasonably trusted, as it is impossible to predict its fate. In the European context, judicial cooperation is a basic principle. It will be further strengthened in the future (the adoption of a Brussels I ter Regulation is planned).

Judicial cooperation in criminal matters is also a major challenge to effectively fight internationalised crime (e.g., terrorism, organised crime, etc.). Cooperation should also be considered with actors such as Interpol. At the international level, recognising the *ne bis in idem* principle is a possible way forward.

Scenario of internationalisation of national justice

The multiplication of international chambers in state courts is a major trend that will undoubtedly develop in the future. Flagship jurisdictions have already and will keep emerging in the future ("justice spots"). They are chosen for their competence and suitability for the needs of private actors. The possibility of concluding and pleading in English could become widespread. The possibility of choosing any law applicable to the merits, at least in contractual matters, would thus enable the parties to choose the courts of State X (through the international chambers) while requesting the application of the law of State Y.

This scenario entails risks. One is creating a two-tier justice system, with these international chambers having a more efficient procedure than the justice system dedicated to domestic cases, mainly for reasons of attractiveness. Another challenge is the transplantation of foreign law into a procedural and judicial framework that is not its own, particularly with regard to its mastery and proper understanding by national judges. There remains the possibility of using experts, who must, however, be subject to adversarial proceedings and may generate costs that alter the economic model of these chambers.

This phenomenon also goes beyond commercial litigation. One of the formulas explored to ensure the prosecution of particularly serious international crimes that the ICC cannot try has been the creation of international or special chambers within national courts or national courts with international participation. This scheme has also been used for constitutional or supreme courts with international participation, such as the one in Bosnia, generally to support a peace process in society.

Scenario of increased transnationalisation of arbitration

The practice of arbitration is sometimes overcome by idiosyncratic reactions that tend to give precedence to the law of the seat (as in the determination of the law applicable to the arbitration agreement or the effect to be given to anti-suit injunctions). For arbitration to be and remain an inter-national and trans-national justice, the transnationalisation scenario invites arbitrators to project themselves into the application and elaboration of an authentic transnational law, free from national particularities, notably using comparative law. It is both a transnational law of arbitration and a substantive transnational law, allowing for a solution to the dispute. Arbitration is the place where different legal systems merge and must remain so.

Scenario of the transnationalisation of procedural rules

In 2004, the American Law Institute (ALI) and UNIDROIT presented the Principles of Transnational Civil Procedure. In 2020, the European Law Institute (ELI) and UNIDROIT adopted the European Model Rules of Civil Procedure. There is thus a movement to model civil procedure rules to bring about common rules both regionally and internationally. These efforts tend to show that it is possible to overcome national particularities in civil procedure with the aim of establishing a body of common rules. Beyond this, there is also the strong momentum of the fair trial standard, which has emerged as a model to follow to ensure good justice. The scenario of the transnationalisation of procedural rules bets that the modelling process will continue and that national rules will gradually become more similar or even merge.

Scenario of collectivisation of remedies

With a view to increasing the effectiveness of recourse to the courts, it is possible to consider ways of collectivising recourse in international matters. Referral to a national court is often problematic because it gives rise to debates on its competence and the effects to be given to its decision. It would therefore be possible to create a new type of class action capable of dealing with international disputes. Arbitration could be explored. Class arbitrations already exist, particularly in the United States. Similarly, certain investment arbitration procedures have made it possible to deal with class actions. Finally, it would be an

appropriate way to deal with litigation concerning companies' respect for human rights (see The Hague Rules on Business and Human Rights Arbitration, December 2019).

Scenario of participation

There are two opposing procedural visions of the dispute: the bilateral or closed one, in which it is considered as the property of the parties, and the one in which it is of wider interest to the social group in whose name justice is being done. This is reflected in particular in the question of access by interested third parties, whether they be interventions, *amici curiae*, or the participation of victims or civil parties in the criminal trial.

Some dispute settlement systems have already had to adapt, such as investment arbitration or WTO dispute settlement, which have opened up to *amici curiae* and intervention. There are still international courts, such as the ICJ, that are not very open in this respect. For a long time, the ICJ has not been confronted with requests, but it is now facing an increase in interventions. The optional or compulsory nature of the jurisdiction seems to explain these varying reactions.

Justice, both international and national, is becoming a receptacle for interests seeking a forum for expression. Today, the challenge is even to find ways of representing interests which would remain purely virtual if they were not, and even if they are proclaimed by law. We can think here of future generations but also of the whole movement in favour of animal rights or other entities such as nature or rivers.

3.

questions

A. Preservation of dispute resolution methods

1. What is the effect of the current deleterious context on adjudicatory dispute resolution mechanisms?

This question aims to consider in particular:

- encouraging deferential or self-restraining behaviour by adjudicators,
- the prospects for investment arbitration, including ongoing or desirable reforms and risks to its sustainability,
- the reform of the WTO dispute settlement system.

2. How and to what extent is the development of non-adjudicatory means of dispute resolution a relevant response to this context?

The aim here is to reflect on the prospects for the development of amicable modes by asking in particular:

- whether it is enough to improve the legal system or whether a culture of amicable settlement should also be developed,
- whether amicable means should be conceived as strict alternatives to, or complementary to, and/or combined with adjudicatory means, and, if so, how,
- what contribution can regional mechanisms make in this regard (such as in the framework of the African Union)?

3. Should the unravelling of multilateralism lead to the promotion of regional integration and dispute settlement?

This is a question of reflecting on the appropriate level of judicialisation.

4. In a context of uniformity driven by a growing utilitarian/economic logic, how can we rethink the contribution and preservation of multilingualism within international dispute resolution?

The issue calls for consideration of qualitative aspects (diversity, representativeness, the fact that law is a language) and quantitative aspects (costs of translation and interpretation).

5. How to ensure the survival of certain dispute settlement mechanisms, either because they are overwhelmed by cases (human rights and investment) or because they are short of business (ITLOS)?

The question calls for consideration of the resources allocated but also of the risk of increasingly formal, external and selective control.

6. Generally speaking, should the logic of subsidiarity be encouraged?

The aim here is to reflect on the alternative between:

- to favour the use of the national judge as the judge of international law and to allow the case to be brought before an international court only if it is impossible to resolve the dispute before a national judge,
- and increase direct access to international adjudicatory dispute resolution.

7. Who will stabilise normative expectations if the figure of the impartial third-party fades away or even disappears?

The stabilisation of normative expectations is a particularly important function of international justice because of the indeterminacy of law and the decentralised nature of the international order. The aim here is to reflect on the consequences of its possible weakening.

8. How can blocking strategies by litigants be effectively countered?

The question here is whether it is feasible to sanction strategies of blocking or obstructing litigants (e.g. the non-appearance of States) and, more broadly, what means might enable judges and arbitrators to be more directive.

B. Renewal of dispute resolution methods

9. Is it possible to find an international agreement on the criteria for direct jurisdiction?

The aim is to examine the process currently underway at the Hague Conference on Private International Law concerning an international convention on jurisdiction. In particular, the question is whether it is possible to find common solutions between the common law systems (e.g., *forum non conveniens*) and the civil law systems.

10. Should the ratification of the 2018 Singapore Convention be encouraged?

The question here is to consider the merits of the Convention and its potential scope for ensuring the effectiveness of mediated agreements.

11. Is it possible to abolish the exequatur of foreign judgments and to give them an enforceable effect by law?

With a view to increasing confidence between national courts and improving the functioning of each court, the aim is to examine the possibilities of eventually abolishing the need for an exequatur (beyond a regional framework).

12. Is it possible to allow a choice of law in procedural matters?

The aim is to examine the possibilities of denationalisation/internationalisation of the rules of procedure before the national judge in charge of an international dispute. Thus, it would be possible to question the principle of applying the *lex fori* in this area. In the same vein, it is worth considering the possibility of introducing before the national courts freedom for the parties to determine the rules applicable to the procedure (e.g., by allowing the introduction, before courts that do not know this, of cross-examination of witnesses).

13. Can civil procedure rules be transnationalised?

The question comes down to the desirability and feasibility of bringing closer or even merging the rules of civil procedure on a regional or international scale.

14. What programmes should be implemented to assist the development of justice systems in poor countries?

With a view to improving judicial cooperation (both in civil and criminal matters), which is much needed in the face of current challenges, the question is how to provide practical support (logistical, financial, etc.) to developing countries to improve their justice systems.

15. How to ensure the diversification of adjudicators in general in terms of gender, cultural/geographical origin and age, and what place should be given to non-lawyers (including experts) in certain disputes?

This includes considering the type of mechanism (e.g. quotas) and standards (soft/hard) that should be used.

16. How to ensure effective regulation of the activity of adjudicators and counsel in terms of ethics and conflicts of interest?

The questions to be addressed here include

- the types of measures and instruments that should be favoured,
- the best methods for managing conflicts of interest, including the persons and bodies responsible for such monitoring,
- the possibility and nature of sanctions,
- the need to make the role of assistants, secretaries, and registrars more transparent or even compulsorily disclosed, particularly in arbitration.

17. What role should artificial intelligence play in dispute resolution?

The aim here is to consider in particular the extent to which:

- Artificial intelligence can assist in decision-making (helping the parties to reach an amicable agreement; helping judges and arbitrators to reach a decision) and by what means,

- such assistance is compatible with the rules of a fair trial, seeking to identify the technical and ethical limits.

18. What benefits and risks does digitalisation pose for the efficiency and legitimacy of dispute resolution?

The aim here is to try to imagine this "new normal" by asking how far dematerialisation should go, including taking into account the challenges in terms of cyber security. The link between arbitration and blockchain must also be considered, to measure whether blockchain is the future of arbitration or, on the contrary, a criticisable or even dangerous tool.

19. How can we ensure greater and better access (and are these two ideas really synonymous, or even compatible?) to international justice, in terms of costs and their distribution, as well as in terms of the creation and supervision of referral and participation mechanisms (*amicus curiae*, intervention)?

The question concerns financial and human resources, procedural means, and political or judicial policy choices.

20. Should the creation of international chambers in state courts be supported?

The aim is to consider, in particular, the risk of creating a two-speed justice system (one, of excellence, for international cases in the name of attractiveness and for litigation that generates value, and the other, more miserly, for domestic cases (in other words, for "cumbersome" litigation), on the advisability of extending the mechanism of international chambers to personal and family matters, and on the potential rivalry of international chambers with arbitration (by focusing on the competition/complementarity pair).

21. How can the training of magistrates/judges be improved?

This includes consideration of

- the need to intensify training - initial and continuing - in international law, but also comparative law to denationalise legal learning,
- the need to consider the system in which they have been trained to avoid, especially for international judges, a hidden homogenisation.

22. Is arbitration suitable for disputes involving weak parties (consumers, employees, small businesses)?

Historically, arbitration has flourished in international commercial cases. It is now practised in disputes involving weak parties. The question here is whether arbitration is suitable for such disputes and whether special rules should be established (if so, which ones).

23. Should the 1958 New York Convention be reformed or left untouched?

Proposals have been made to reform the New York Convention, and a debate has been launched on this issue. The question is whether the text should be reformed.

24. How can the efficiency of court procedures be improved, and their cumbersomeness be reduced?

The questions to be addressed include

- on a more active role for judges/arbitrators in controlling the procedure (in particular, by imposing a limit on the number of pages of pleadings and the number of exhibits produced) and using their investigative powers.
- on the imposition of procedural timetables, no doubt adaptable, but creating a binding framework.

25. How can the costs of arbitration be controlled?

In addition to the measures to control the procedure already mentioned, the question here is to consider, in particular, the methods of financing an arbitration, the advisability of revealing the presence and identity of third-party funders and of capping their remuneration, and the feasibility of creating assistance funds, for example with arbitration institutions.

26. What role does competition between arbitration venues play?

The question here is whether this competition is a factor in invigorating the law and practice of arbitration and encourages new approaches or whether it does not, on the contrary, risk leading to a levelling down.

27. Do stakeholders in international dispute resolution (judges, arbitrators, counsel, arbitration centres, etc.) have a social responsibility in the conduct of their activities, and if so, what forms does it take?

The topic of the social responsibility of dispute resolution actors is new. It is worth considering whether the issue is relevant and, if so, what form such social responsibility might take.

28. How can the functioning of international criminal justice be improved?

The aim here is to consider, among other things

- on the possible ways in which the International Criminal Court could evolve and on the place that the principle of complementarity (subsidiarity) should have in this area,
- on the feasibility/possibility of creating an international police force or, failing that, on the means and methods that would enable States to strengthen their cooperation with the International Criminal Court (arrest, transfer, imprisonment).

29. How can judicial cooperation in criminal matters between national courts be improved, and the *ne bis in idem* principle be accepted internationally?

The issue of judicial cooperation in criminal matters is a major one in the age of globalised crime. It is useful to consider how to improve cooperation (including the role of Interpol). With a view to improving the functioning of a globalised criminal justice system, recognition of the *ne bis in idem* principle could be considered.

C. New Litigation

30. Is it still possible to imagine or hope to create new specialised courts and tribunals or mechanisms?

The aim here is to reflect on the appropriateness of such creations, but also on their possible modalities and the possible contribution of regionalisation, considering more or less advanced proposals to create:

- one or more international courts dedicated to private law (in civil and/or commercial matters),
- an international court responsible for supervising arbitration awards, the alternative being to leave each State in charge of the way it receives awards (whether they are rendered on its territory or presented for exequatur),
- an international court of human rights,
- an international environmental court,
- a special tribunal to try the crime of aggression (Ukrainian conflict),
- mechanisms to address corporate social responsibility issues.

31. Should we push for the creation of *sui generis* dispute resolution mechanisms (such as ICANN)?

Insofar as such mechanisms already exist, the main question is to consider where they could or even should, be developed, considering the possible risk of capture by private powers.

32. Are existing international courts capable of dealing with "new" disputes, particularly environmental and climate-related ones?

This involves considering:

- the questions of jurisdiction, the situation of fragmentation and the possible conflict of the regimes through which these problems are addressed - investment, trade, human rights, criminal - so that the actors of climate disputes, in particular, are forced to seek a forum,
- the question of how to relate to the increasing intervention of national courts acting based on international law,
- the question of whether environmental and climate litigation would be better dealt with through the creation of a specialised international court or the adaptation of litigation to environmental and climate issues,
- whether arbitration is an appropriate forum for human rights disputes, especially when they involve companies.

33. How can class actions be considered on an international scale?

This question aims to ask how to enable class actions to be brought on an international scale and assess the relevance of recourse to arbitration in this context.

34. Should new mechanisms be developed to allow third parties access to courts (intervention, *amici curiae* submissions, etc.)?

The question here is whether it would be appropriate and feasible to open the courts to interested third parties to a greater extent, in particular to effectively integrate new issues or issues that do not have a specific method of dispute settlement within the existing mechanisms and the difficulties or dangers that could result from this.

annex 01

persons interviewed

Disclaimer:

The interviews were all conducted under the Chatham House Rule. The statements in the above report are, therefore, not attributed.

Some of those interviewed did not wish to be mentioned.

- Dr. Yas Banifatemi, *doctor of law, Founding Partner of Gaillard Banifatemi Shelbaya Disputes, President of the International Institute of Arbitration, Arbitrator*
- Prof. Lawrence Boo, *Adjunct Professor of Law at the Universities of Bond and Singapore, Head of the Arbitration Chambers, Singapore, Mediator and Arbitrator*
- Prof. Bruno Deffains, *Professor of Economics at the University of Paris-Panthéon II Assas, President of the French Association of Legal Economics*
- Mr Martin Doe, *Senior Counsel at the Permanent Court of Arbitration (PCA), Member of the Quebec and New York Bars*
- Prof. Silvia Fernández de Gurmendi, *former President of the ICC, President of the Assembly of States Parties to the Rome Statute, Visiting Professor at the American University Washington College of Law*
- Prof. Hélène Gaudemet-Tallon, *Emeritus Professor of Private Law at the University of Paris-Panthéon-Assas*
- Prof. Shotaro Hamamoto, *Professor of International Law at Kyoto University, Counsel and Advocate of the Japanese Government*
- Ms Meg Kinnear, *Secretary General of the International Centre for Settlement of Investment Disputes (ICSID)*
- Prof. Pierre Mayer, *Emeritus Professor of Private Law at the University of Paris 1 Panthéon-Sorbonne, Arbitrator and Counsel*
- Ms Natalie Morris Sharma, Singapore's *Government Legal Counsel*
- Dr. Namira Ngem, *Doctor of Law, Senior Legal Adviser to the African Union, Ambassador*
- Dr. Achille Ngwanza, *Doctor of Law, Lawyer, Arbitrator, Member of the Disputes Committee of the Association of International Petroleum Negotiators, Chairman of the OHADA working group of the French Arbitration Committee*

- Dr. Nilüfer Oral, *Senior Fellow at the National University of Singapore, Member of the International Law Commission.*
- Prof. Allan Rosas, *former Judge at the CJEU and Professor of public international law*
- Ms. Claudia Salomon, *President of the ICC International Court of Arbitration, arbitrator*
- Pr. Philippe Sands, *Professor of Laws and Director of the Centre on International Courts and Tribunals at University College London, Arbitrator and Counsel*
- Pr. Bruno Simma, *Emeritus Professor of international law, Judge at the USICT, former ICJ judge and Member of the UN Committee on Economic, Social and Cultural Rights, Arbitrator*
- Robert Spano, *Professor of law, president of the ECtHR*
- Pr. Geir Ulfstein, *Professor of public international law at the University of Oslo, Co-director of Pluricourts*
- Fuad Zarbiyev, *Associate Professor of public international law at Geneva Graduate Institute, Counsel*

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White Paper n° 21 - Dispute resolution
realisation: October, 2022
graphic design: clémence hivert - *bluclemence@gmail.com*

www.ilaparis2023.org/en

Public consultation to January 31, 2023.

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