Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals

Introduction

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Introductory chapter for the forthcoming edited volume, *Beyond Fragmentation: Cross-Fertilization, Cooperation, and Competition among International Courts and Tribunals*, Chiara Giorgetti and Mark Pollack, eds. (under review, Cambridge University Press).

The international community in the 21st century is both more legalized and more judicialized than at any other period in human history. In terms of legalization, international law has developed substantially over the past century in depth as well as breadth, laying down both binding laws and non-binding norms governing the behavior of both states and non-state actors across a wide range of issue areas from the use of force through trade, finance, investment, the protection of the global environment, and human rights, among others. In terms of judicialization, many (though not all) of these bodies of law are now subject to interpretation and application by international courts and tribunals (ICTs), which offer the promise of authoritatively interpreting the law and settling disputes about its application.

Yet the 21st century international legal order is also plural, or fragmented. Over the past half century, together with the long-standing body of general international law, a bewildering multitude of specialized legal regimes have arisen in areas such as trade, investment, environmental protection, and human rights, each with diverse memberships of states and/or individuals. This multiplication of legal regimes has been accompanied, over the past three decades, by the proliferation of international courts and tribunals, with some two dozen courts and hundreds of arbitral tribunals interpreting international law and adjudicating international legal disputes. By the turn of the century, the initial post-war euphoria over the spread of international law and courts gave way to widespread concern about the fragmentation of the international legal order into specialized and regional regimes, adjudicated by an uncoordinated assemblage of courts and tribunals with overlapping jurisdiction and with the possibility of inconsistent or divergent interpretations of the law.

In this volume, we and our fellow authors explore international judicial proliferation "beyond fragmentation." The contributors to the book, representing a diverse range of legal practitioners as well as scholars in law, sociology and political science, explore the interactions among international courts and tribunals across a wide range of issue areas. Building on a lively debate over the past two decades, we ask whether the proliferation of international courts and tribunals has produced harmful judicial competition, forum-shopping, divergent interpretations and fragmentation of international law, or - conversely - whether international courts have been able to cooperate to solve or mitigate these concerns, producing not divergence and fragmentation but rather convergence and unity within the international legal order.

Throughout the volume, we focus on the core theme of "cross-fertilization" across international courts, and explore the inter-action of different international courts from many diverse angles. While previous works have theorized in broad terms about how international courts and judges can coordinate amongst themselves to prevent fragmentation, promote convergence, and jointly "manage" the international legal and judicial orders, we and our contributors look more closely at processes of formal and informal cross-fertilization in practice. In doing so, we address three important themes.

A first set of chapters examines cross-fertilization in the area of *procedural law.* As we shall see, international courts receive only vague guidance from statutes and rules of court on many areas of procedure, and one might therefore expect that courts and tribunals with distinctive substantive coverage and with diverse state and non-state litigants might take very different approaches to procedural questions. Yet a growing body of literature suggests that courts learn and borrow from

each other and from general principles of law in establishing procedural rules, which show signs of convergence across both standing courts and arbitral tribunals. Contributions to the volume seek to understand both the nature of procedural cross-fertilization as well as the factors that promote and limit cross-fertilization and convergence of procedural law and practices.

A second set of contributions, in turn, looks at cross-fertilization in the area of *substantive* international law. Here, the focus shifts to the question of how different international courts and tribunals adjudicate similar substantive issues. Increasingly, complex international cases are now litigated in front of multiple international forums, raising multiple questions. Do courts engage with, cite, and perhaps even defer to each other's jurisprudence? If so, is there a de facto hierarchy of international courts, in which some courts – such as, perhaps, the International Court of Justice (ICJ) – are more central, widely cited and influential than others? What sorts of factors explain the highly variable decisions of judges on various courts and tribunals to engage with and cite the decisions of other courts, or conversely to ignore or break with those decisions? Perhaps most profoundly, what evidence to we see for convergence or divergence over time in the substantive jurisprudence of international courts and tribunals?

Third and finally, a set of contributors focus on identifying and understanding the *actors* or *agents* of cross-fertilization, including judges, states, litigants, counsel, and international and non-governmental organizations. As we shall see, existing accounts of cross-fertilization tend to focus primarily on international judges as actors, often assuming that judges possess an overarching interest in cooperating to protect the coherence of the international legal order. Chapters of the volume interrogate this question, asking about the mixed motives of international judges who often balance their interest in the coherence of international law with their equally legitimate interests in the autonomy of their respective legal regimes, the substantive values of those regimes, and their own autonomy as courts. Many of our contributors also look beyond international judges, to ask about the roles of other actors. States, for example, have both created a plurality of dispute settlement mechanisms and sought (at least at the margins) to establish doctrines to limit jurisdictional competition, while opportunistically taking advantage of such competition where convenient. We also focus on litigants, both state and non-state, and on the role of counsel as potential agents of cross-fertilization. These latter actors, we argue, may have few or no systemic concerns about the coherence of the international legal order, yet they may, like bees pollenating flowers, serve as unintended or unwitting sources of cross-fertilization, by arbitraging procedural or substantive questions across multiple international courts and tribunals. To these actors may be added the secretariats of various international arbitral institutions, such as the Permanent Court of Arbitration (PCA) and the International Center for the Settlement of Investment Disputes (ICSID), as well as non-governmental actors such as International Bar Association, all of which can and do promote standardization and learning across international courts and tribunals. For this reason, we argue, a full understanding of the phenomenon of cross-fertilization requires us to look beyond judges, and understand the interests and activities of a much wider range of judicial, state, and other actors.

In this introduction, we set the stage for the contributions in the book, by reviewing the relevant literatures, defining key terms, exploring important debates about fragmentation and unity of law in a world of international judicial proliferation, and previewing the core themes and contributions

of the current volume. The chapter is organized in four parts, the first three of which explore concepts and debates from existing literature, while the fourth previews the chapters to come.

We suggest that the understanding of judicial proliferation and the fragmentation of international law has progressed through three broad phases. In the first phase beginning in the 1990s, international legal scholars and practitioners reacted with alarm to the proliferation of the post-Cold War years, which they feared would lead to fragmentation in the international legal system. They sought to understand whether (and if so, how) the proliferation of international courts and tribunals had created "systemic problems" for international legal principles, for example through problems of overlapping and contested jurisdiction or through conflicting and divergent interpretations of law by different tribunals.[1] Diagnoses during this first period varied, with some analysts identifying serious potential problems, while others suggested either that the problem had been exaggerated or that the benefits of judicial proliferation vastly outweighed the possible inconveniences. Throughout this period, however, "postmodern anxieties" about the possible negative effects of international judicial proliferation weighed heavily on the field.

A second reaction produced a shift in the literature towards a more optimistic and heavily prescriptive view of international courts and tribunals. In this second phase, members of the invisible college of international law empirically identified – and normatively championed – a series of overlapping developments whereby international courts and other actors have sought more or less effectively to address the challenges of legal and judicial fragmentation through techniques such "cross-fertilization" and "management" across international courts, producing "convergence" in international procedural and substantive law and, in some accounts, recentralization of international law under the leadership of the ICJ. Put simply, the pendulum has swung in two decades from deep concern to a far more optimistic view that problems of judicial proliferation were essentially practical and not systemically threatening. Indeed, they turned out to be relatively minor, so that judges and other actors could manage them through techniques already in use in various corners of the international legal and judicial landscape.

This new and optimistic view has become the conventional wisdom in the international legal community today. However, in the opening salvos of a possible third wave, we begin to see the pendulum swinging back, as skeptics have also questioned aspects of the "management" account, suggesting that theorists of management and convergence may adopt unrealistically optimistic assumptions about the motivations of judges and generally on cross-fertilization. These works, while hardly taking us back to the nightmare scenarios of the 1990s, suggest a series of hard questions, leading us not only to celebrate cross-fertilization, but also to ask about how cross-fertilization plays out in areas of procedural and substantive law, the actors who promote and oppose it, and the limits of cross-fertilization in an international legal order that lies somewhere between fragmentation and unity.

[1] Although the terms are sometimes used interchangeably, we distinguish here between "conflicting" and "divergent" interpretations by international courts and tribunals. We thus refer to *conflicting* or *inconsistent* interpretations when two or more ICTs interpret a concept differently at any one point in time. By contrast, judicial interpretations can be *convergent or divergent*, meaning that they move either closer together, or farther apart, over time. The notion of conflicting interpretations provides a snapshot, a measure of judicial disagreements at a single moment, while the notion of diverging interpretations poses the even more disturbing prospect of judicial disagreements increasing with time.

This ongoing debate serves as the intellectual and analytic backdrop for all the chapters in this volume, and the next three sections of this chapter explore these three waves in greater detail. A fourth and final section previews the themes of the book and the contribution of its individual chapters before summarizing our core findings about procedural and substantive cross-fertilization and about the core actors involved in the process. With respect to procedural cross-fertilization, we suggest that there is indeed what Hélène Ruiz-Fabri and Joshua Paine call a "procedural cross-fertilization pull," with common or similar approaches being adopted across standing international courts and arbitral tribunals with respect to a wide range of procedural questions, in a fashion that seems to support the more optimistic accounts of "managed pluralism" and convergence. By contrast, our authors' studies of substantive cross-fertilization find a more mixed picture, with an impressive level of cross-referencing and the emergence of what Alina Miron calls an "*acquis judiciare*" in the law of the sea, but with a much more spotty and asymmetric record of cross-citation and engagement in Erik Voeten's study of human rights courts, calling into question the more optimistic accounts of international judicial dialogue. With respect to actors, finally, we argue that the observed patterns of procedural and substantive cross-fertilization can be explained only as a result of the interactions of a wide range of actors, including not only judges but also international governmental organizations, international court registries and arbitral secretariats, member states, litigants, and counsel. Each of these actors possesses mixed motives, weighing their (perhaps weak) interest in the coherence of the international legal system against their more parochial interests (perhaps dominant) interests in their own regional or substantive legal order, or indeed with simply winning their current dispute. The picture that emerges is one in which international judicial cross-fertilization and convergence are real and important, but also highly variable and asymmetric across courts and issue-areas, and likely to remain so.

I. Initial Suspicions: Judicial Proliferation, Legal Fragmentation, and "Postmodern Anxieties"

The decade of the 1990s stands clearly as the height of international judicial proliferation. At the beginning of the decade, there were six standing international courts in the world, alongside the panel-driven dispute settlement system of the General Agreement on Tariffs and Trade. By the end of the decade, at least a dozen new international courts had been created in a great wave of international judicial proliferation which saw the creation of the new World Trade Organization (WTO) Appellate Body; two international criminal courts (for the former Yugoslavia and for Rwanda), followed at the end of the decade by the International Criminal Court (ICC); as well as a welter of regional economic and human rights courts.[2]

Although hailed by many as a great leap forward in the legalization and judicialization of the post-Cold War international order, the rapid creation of a series of mostly specialized global and regional international courts also created widespread concerns about the potentially negative and unintended consequences of judicial proliferation. As Benedict Kingsbury posed it in his introduction to a 1999 symposium on the subject:

[2] For good discussions of judicial proliferation during the 1990s, see e.g. Cesare P.R. Romano, *The Proliferation of International Judicial Bodies*: *The Pieces of the Puzzle*, 31 N. Y. U. J. INT'L. L. & POL. 709-51 (1999); KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: POLITICS, COURTS, RIGHTS 68-77 (2014).

> [T]he initial question … is whether the proliferation of international courts and tribunals, in a horizontal legal arrangement lacking in hierarchy and sparse in any formal structure of relations among these bodies, is fragmenting or system-building in its effects on international law. Or to put it more succinctly, is proliferation a problem?[3]

Nor was concern about the negative effects of international judicial proliferation limited to scholars. In a speech to the UN General Assembly, for example, ICJ President Gilbert Guillaume warned that one of the unfortunate consequences of international courts and tribunals' proliferation were the risk of overlapping jurisdictions and possible forum shopping.[4] Martti Koskenniemi and Jo Leino also famously summarized it in a 2002 article, the uncoordinated and simultaneous operation of multiple international courts created "postmodern anxieties" among international judges themselves, including ICJ presidents, who raised the alarm about the potentially deleterious effects of proliferation on the coherence and unity of the international legal order.[5] While the concerns expressed by scholars and practitioners were multiple, two – jurisdictional competition and divergent interpretations of law – stand out in most accounts.

First is the concern for overlapping jurisdiction.[6] The fear was one of unregulated *jurisdictional competition*, since multiple courts with potentially overlapping jurisdiction could potentially be seized with disputes addressing the same facts or the same set of legal questions.[7] This overarching concern then raised multiple potential sub-problems, including the possibility of simultaneous legal proceedings and/or the possibility that litigants (both state and non-state) might engage in abusive forum-shopping,[8] with powerful actors in particular taking advantage of their ability to

[3] Benedict Kingsbury, *Is the Proliferation Of International Courts And Tribunals A Systemic Problem*? 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

[4] Press Release, President of World Court Warns of 'Overlapping Jurisdictions' in Proliferation Of International Judicial Bodies, GA/L/315, (2000).

[5] Martti Koskenniemi and Paivi Leino, *Fragmentation of International Law*? *Postmodern Anxieties*, 15 LEIDEN INT'L L. J. 553 (2002).

[6] Vaughan Lowe, *Overlapping Jurisdicittion in International Tribunals*, 20 AUSTL Y.B. INT'L. L. 191, 683 (1999) ("An obvious concern is multiple tribunals addressing the same dispute, without adequate rules for dealing with overlapping jurisdiction").

[7] The literature on international judicial cooperation is large and growing. For a seminal treatment, *see* YUVAL SHANY, THE COMPETING JURISIDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2004); and Chiara Giorgetti, *Horizontal and Vertical Relationships of International Courts and Tribunals – How Do We Address Their Competing Jurisdiction*?, 30 ICSID REV. 99 (2015) ("The a-systematic growth of international judicial bodies has resulted in possible competition between international courts and tribunals. This happens when two or more competence courts are seized of similar issues, either legally or factually").

[8] For an excellent discussion of the forum-shopping debate in international law, *see* Shany, *supra* note 7, at 131-139.

litigate before the court or tribunal most conducive to their case-specific interests, and without regard to the health of the international legal system as a whole.[9]

The second concern is that proliferation would result in in *inconsistent or divergent interpretations* of identical or similar international legal provisions.[10] The fear in this situation was a threat to the coherence of the international legal system and a "cacophony of views" that would undermine the perception that an international legal system exists, but if like cases are not treated alike, the very essence of a normative system of law will be lost.[11]

These concerns about legal fragmentation were fed by a series of high-profile episodes in which both existing and newly created courts insisted upon their autonomy, as well as instances in which multiple international courts took inconsistent approaches to important questions of international law. With respect to the former, the international legal community was struck by the pronouncement of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), when it stated in its 1996 *Tadic* ruling that:

> International law, because it lacks a centralised structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).[12]

In that same ruling, the ICTY challenged established ICJ jurisprudence over the issue of State responsibility for actions of irregular forces to develop its own standard.[13] Indeed, when seized of the issue in 1986, the ICJ had held that State responsibility could only be found when a State exercised "effective control" over irregular forces.[14] Several years later, the ICTY adopted a

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[9] *Id.* at 143 ("In similarity to domestic and cross-boundary foreign shoppers, international forum shoppers may take into account a variety of considerations. These may include 'shopping' for applicable legal standards which are in the party's best interest (e.g. selection between the human rights definition under the European HR Convention and the ICCPR), the most appropriate procedure (e.g. selection between the NAFTA one-tiered panel system and the WTO two-tiered machinery), the most hospitable judges (e.g. selection between the diversely composed ICJ and a regional tribunal, composed of judges coming from the same region), and weighing the balance of conveniences to the parties (e.g. selection between an expedited regional procedure and a cumbersome and distant global procedure)").

[10] Kingsbury, *supra* note 3, at 683.

[11] Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 NYU J. INT'L L. & POL. 697, 699 (1999).

[12] *Prosecutor* v *Tadic* (1996) 35 ILM 32, 39.

[13] *See generally* Giorgetti, *supra* note 7, at 38.

[14] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America)(Merits)[1986] ICJ REP 14, para. 115 ("For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed").

different standard and found that an 'overall control' test should be applied. In the case at issue, heard by an international criminal tribunal, that meant that under the ICTY "overall control" test, the Federal Republic of Yugoslavia had overall control of the irregular forces of the Bosnian Serb Army of the Republica Srspka, and thus the provisions for conflict of an international nature applied.[15] Interestingly, the ICJ reassessed the application of the principle few years later in the context of an inter-States dispute, and reaffirmed its initial holding that an effective control of irregular forces was required to find State responsibility.[16]

Underlying the fear of both judicial competition among courts and tribunals and divergent interpretations of international law was a concern for the unity of the "international legal system." As Kingsbury noted in his early review of the subject, it is an open question whether a single international legal system – as opposed to a series of overlapping generalist and specialist, global and regional systems – can be said to exist. [17] On both positivist and critical grounds, he notes, one can argue that international law lacks the necessary coherence to be referred to as a system at all.[18] However, the majority position on this question, among an otherwise diverse collection of international legal scholars, is that the international legal order *does* possess sufficient coherence as to qualify as a legal order.[19] For example, Shany argues that, whether one defines a legal system in normative or institutional terms, the international legal order does indeed qualify as a coherent legal system.[20] And Andenas and Bjorge argue explicitly that, notwithstanding the rise of

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[15] Prosecutor v. Tadic´ ('Prijedor')IT-94-1, Appeal Decision (15 July 1999), http://www.icty.org/case/tadic/4, accessed 7 February 2020 ("Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State"). Note that under the application of Article 2 (Grave Breaches on the 1949 Geneva Conventions) of the ICTY Statute could not be triggered in the case of an internal conflict. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res 827, UNSCOR 48th Session, 3217th mtg at 1–2 (1993); 32 ILM 1159 (1993), art 2.

[16] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment) [2005] ICJ Rep 168 (the Court concluded that concluded that Uganda did not control the irregular forces of the Mouvement de Liberation du Congo).

[17] *See* Kingsbury's concrete question: "[I]s the substantive content and efficacy of international law as it now exists – which in the ordinary-language understanding of its practitioners comprises a plethora of sources, rules, and tribunals – sufficiently coherent and grounded to amount to a unified legal system?" Kingsbury, *supra* note 3, at 690.

[18] *Id.* Michaels and Pauwelyn, by contrast, refer to the "system" question about international law as an "ontological question" arguing that one need not answer it definitively in order to analyze and understand how courts deal with both conflicts of norms within legal systems, and conflicts of law across them. *See* Ralf Michaels and Joost Pauwelyn, *Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law*, in MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW, 19-44 (Tomer Broude and Yuval Shany, eds. 2010) available at: https://scholarship.law.duke.edu/facultyscholarship/2310

[19] Kingsbury, *supra* note 3, at 688-93.

[20] Shany, *supra* note 7, at Chapter 3. Shany does, however, supplement this finding with a second argument, to the effect that the international *judiciary* is fragmented and does not itself constitute a system.

specialized treaty systems, general international law remains "at the centre of a generalist discipline with continuing relevance for the emerging specialist treaty regimes and disciplines."[21]

Understood in this way, the most important question about international judicial proliferation is whether the inconvienences of jurisdictional competition and the prospects of divergent interpretations by different courts and tribunals would result in the fragmentation – the loss of unity and coherence – of the international legal system. Episodes such as those above suggested the theoretical possibility, if not yet the reality, of such fragmentation.

II. An Optimistic Reappraisal: Proliferation as a Positive Development

Notwithstanding these concerns, a more optimistic analysis followed shortly thereafter and suggested that that the bogeyman of widely divergent international judicial opinions had not manifested itself, and that the judgments of international courts remain, if not uniform, then at least broadly coherent. In a pioneering 1998 survey of the interpretation of a number of core international law doctrines by various international courts and tribunals, Jonathan Charney found that "the different international tribunals of the late twentieth century do share relatively coherent views on these doctrines of international law. Although differences exist, these tribunals are clearly engaged in the same dialectic. The fundamentals of general international law remain the same regardless of which tribunal decides the case."[22] More than a decade later, Philippa Webb examined the extent of inegration or fragmentation of judicial decisions in three issue-areas (genocide, immunities, and the use of force) across four international courts (the ICJ, ICTY, ICTR, and ICC). Like Charney, she found that "although differences do exist, the … overall picture is one of genuine integration. There are some areas of apparent fragmentation where courts seem to hold conflicting positions on the same legal issue, but these tensions can be resolved through careful judicial reasoning."[23]

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[21] Mads Andenas and Eirik Bjorge, *Introduction: From Fragmentation to Convergence in International Law*, in A FAREWELL TO FRAGMENTATION:REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 1-33 (Mads Andenas & Eirik Bjorge eds., 2015).

[22] Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, in 271 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1998). Charney's chosen doctrines included "the law of treaties, sources of international law, state responsibility, compensation for injuries to aliens, exhaustion of domestic remedies, nationality, and international maritime boundary law," and he examined the interpretation of these doctrines by the ICJ, the ECJ, the ECtHR, the IACtHR, the GATT and WTO dispute settlement systems, the Iran-US Claims Tribunal, and various international tribunals, *see* Charney, *supra* note 11, at 699. *See also, generally*, David D. Caron, *International Courts and Tribunals: Their Roles Amidst a World of Courts*, 26 ICSID REV. 1 (2001) and Laurence Helfner & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899 (2005).

[23] Philippa Webb, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 203 (2013). In a concluding chapter, however, Webb tempers this general optimism, arguing that, while courts may generally avoid fragmentation in their decisions, "this is largely a matter of chance rather than due to judicial dialogue," *id*. at 204. In some cases, she writes, integration of law through judicial interpretation may be only apparent, covering "cracks and contradictions beneath the surface," thus raising a "small but genuine risk of fragmentation" in the future development of international law. *Id*. at 204. Webb also goes further than Charney in her analysis, seeking to explain v*ariations* in integration across issue-areas and courts, which she argues are a function of three factors: the type of court (e.g. standing courts vs. temporary or ad hoc tribunals), the characteristics of the issue (e.g., governed primarily by treaty or custom), and rules and procedures (among which are practices relating to judicial deliberation, use of precedent, and judicial dialogue).

While both Charney and Webb focused on judicial interpretations of *substantive* doctrines of international law, other scholars, beginning with Chester Brown, focused on a parallel development, which was the apparent convergence in *procedural* law among international courts and tribunals. As Brown points out, the statutes of international courts and tribunals are often vague with regard to fundamental aspects of procedural law, and one might have expected that different general, specialized, global and regional courts would adopt vastly different approaches to procedural questions. Brown's survey of basic procedural issues as well as the availability of remedies across international courts, however, suggested that international courts had used their considerable discretion in procedural matters to adopt broadly similar approaches to procedural law and remedies, leading to convergence over time and to what Brown called "a common law of international adjudication."[24]

Early optimists conceded that, in the absence of hierarchy among international courts, "complete uniformity of decisions is impossible," yet they concluded that, on the basis of the available evidence, "the variety of international tribunals functioning today do not appear to pose a threat to the coherence of an international legal system."[25] Indeed, by 2002, Koskenniemi and Leinen were dismissing anxieties about the fragmentation of law by international courts as "a rather theoretical, even esoteric problem," suggesting that,

> For most commentators… proliferation is either an unavoidable minor problem in a rapidly transforming international system, or even a rather positive demonstration of the responsiveness of legal imagination to social change. Even as the analysis of fragmentation is largely held to be correct, most lawyers express confidence in the ability of existing bodies to deal with it.[26]

And international judges agreed. ICJ President Higgins, who took the helm of the court after Judge Guillaume, confronted the same ICTY and ICJ divergent interpretations with far less concern:

> Much has been made of the virtually sole example of a relatively recent court deliberately deciding an issue of general international law differently from how the

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[24] Chester Brown, A COMMON LAW OF INTERNATIONAL ADJUDICATION 3 (2009) ("Essentially, the argument developed in this book is that international courts often adopt common approaches to questions of procedure and remedies. These common approaches lead in turn to increasing commonality in the case law of international courts. These common features include both the existence of procedural and remedial powers, and the manner in which those powers are exercised. This practice is seeing the emergence of what might be called a 'common law of international adjudication'"). Brown, it should be noted, does not survey all aspects of procedural law before international courts, but focuses on four areas that he regards as "representative of the issues that typically arise in international dispute settlement proceedings" and "for which constitutive instruments do not make exhaustive provision," including the rules of evidence, provisional measures, the power to interpret and revise judgments and awards, and the availability of remedies; *id*., at 9. Clearly, this leaves open the question of whether Brown's finding of convergence holds up with respect to other areas of international court procedure.

[25] Charney, *supra* note 11, at 699-700.

[26] Koskenniemi & Leino, *supra* note 5, at 574-5.

> same point had already been decided by the International Court of Justice. What is little commented on, but it is in my view of significantly more importance, is the tremendous efforts that courts and tribunals make, both to be consistent inter se and to follow the International Court of Justice.[27]

With the emergence of a consensus that the worst predicted outcomes of judicial proliferation had failed to manifest themselves, scholars turned increasingly to explaining the relative coherence of the international legal order in the face of international judicial proliferation. Some of these accounts promised inter-court convergence through *competition*, but the vast majority saw management and convegence as a consequence of *cooperation* among international courts and tribunals.

1. Convergence through Competition?

Some of these analyses suggested the judicial competition itself could create incentives for substantive or procedural convergence among courts, without any coordination or cooperation among them. In this view, most forcefully expressed by Jacob Katz Cogan, courts and tribunals with overlapping jurisdictions are forced to compete for the business of international dispute settlement, and the need to attract potential litigants forces courts to identify and imitate ligitant-friendly "best practices,"[28] thus producing procedural or substantive convergence through the invisible hand of the market.[29] In this view, jurisdictional competition is healthy, promoting accountability, efficiency, *and* convergence.[30] Cogan acknowledges that the benefits of competition only follow where courts face a genuine prospect of loss of business, and that competititive pressures may fail to reach courts that, for example, enjoy the benefits of a strong

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[27] Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT'L & COMP. L. Q. 791, 797 (2006).

[28] *See e.g.* the analysis of Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 440-41(2008) [hereinafter Cogan] ("Faced with losing market share (and its potential consequences) because States withdraw from or refuse to accede to their jurisdiction, courts – like any supplier of goods and services – will look to reinvent themselves as more customer-friendly.... Courts will endeavor to make rules – both procedural and substantive – that accord with the interests of States, and courts will monitor the decisions of their competitors (and how they are received) in order to decide whether to adopt those innovations themselves").

[29] *Id.* at 416 ("Competition among courts may also lead to better – and perhaps convergent – decisions over the long-term"), and 443-44 ("And the impact of this competitive framework is already evident in the acts of courts and in the public statements of judges. Older institutions have updated their rules to make them more user-friendly. And the practices or powers of one court – such as the authority to issue binding provisional measures and the use law clerks – are being reviewed, adopted, and sought by other courts in the hope that incorporating those techniques will make them more attractive to potential litigants (or at least as attractive as their competitors").

[30] *Id.* at 447 ("Competition is not only an innocuous means of control; it is also a valuable technique for the creation of better rules and more efficient courts").

case flow due to exclusive and compulsory jurisdiction.[31] For this reason, he argues that, from a normative perspective, states should strive not to limit but to *promote* jurisdictional competition.[32]

While theoretically plausible, this notion of competition alone producing convergence is open to question on several counts. First, Cogan's argument, and other accounts of jurisdictional competition that predict convergence, are premised on the notion that competition will produce *product standardization*, with each and every court moving to imitate the litigant-friendly "best practices" of its competitors. While this is a possibility, it is also theoretically possible that courts will respond to competition through *product differentiation*, offering litigants procedures, or even substantive doctrines, that distinguish a given court from its competitors. Which way courts will pivot is an empirical question, subject to empirical analysis.

Second, even if we accept the logic of convergence – namely, that all international courts will adopt similar practices in an effort to compete for business – there is no guarantee that competition will produce convergence around *normatively desirable* principles such as efficiency or fairness. As the large literature on regulatory competition makes clear, inter-jurisdictional competition can produce a "race to the bottom," as jurisdictions adopt standards that appeal to mobile actors (such as businesses) but are socially undesirable (such as the lowering of corporate taxes or production standards).[33] In the case of international courts, and perhaps especially in the case of arbitral institutions which need to compete for jurisdiction on a case-by-case basis, this may provide an incentive to provide litigants with individually desirable but socially pernicious benefits.[34]

Third, and relatedly, jurisdictional competition may produce bias in favor of the complainant, insofar as it provides courts with an incentive to appear complainant-friendly. Cogan dismisses this concern, arguing that the consent-based nature of international adjudication means that courts will adopt procedures and doctrines that will make both complainants and respondents better off,

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[31] *Id.* at 444 ("Competitive adjudication works, though, only if judges feel the need to compete. Consequently, when courts are guaranteed sufficient business (that is, when courts have exclusive and compulsory jurisdiction and when States have no option but to accede to that jurisdiction), they will not yield to the pressures of competition").

[32] *Id.* at 449 ("If competition is the priority, then States and courts should think less about 'system-protective' devices and more about competition-enhancing techniques. In negotiating treaties, States should incorporate dispute resolution provisions, like those in the UNCLOS, that provide a choice of fora or create new fora. They should also publicly communicate their dissatisfaction with judicial decisions more often, as the Legal Adviser of the U.S. Department of State did following a recent ICJ judgment. As Judge Meron has written: 'Constructive criticism facilitates self-examination and self-improvement by the judiciary.'").

[33] *See e.g.* Jeanne-Mey Sun and Jacques Pelkmans, *Regulatory Competition in the Single Market*, 33 J. COM. MKT. STUD. 67 (1995).

[34] For example, for the discussions on third-party funding presently underway at UNCITRAL Working Group III on reform of the ISDS process, see generally Stavros Brekoulakis and Catherine Rogers, *Third-Party Financing in ISDS*: *A Framework for Understanding Practice and Policy*," Academic Forum on ISDS Concept Paper 2019, 11, 31, 2019. More generally on procedural differences and possible competition among different international courts and tribunals, see Chiara Giorgetti, *Between Flexibility and Stability*: *Ad Hoc Procedures and/or Judicial Institutions*? in RECONCEPTUALISING THE RULE OF LAW IN GLOBAL GOVERNANCE: RESOURCES, INVESTMENT AND TRADE (Photini Pazartzis & Maria Gavouneli eds., 2016).

since the consent of both parties is required and since today's complainant knows that she is likely to appear in the future as a defendant.[35] However, this consent-based even-handedness disappears in systems with compulsory jurisdiction, where the consent of the respondent is not required in order to bring a case. Furthermore, certain international courts and tribunals, including investor-state arbitration systems as well as human rights courts and tribunals, involve complaints from non-state actors who have no prospect of appearing as defendants; in such cases, courts have a market incentive to appeal only to complainants. To be sure, concerns about reputation for fairness as well as for compliance provide a residual incentive for courts to pay attention to the views of respondents, but strictly speaking the logic of competition would seem in cases of compulsory jurisdiction and non-state complainants appears to point towards bias in favor of complainants.

2. Convergence through Cooperation?

Perhaps for these reasons, the vast majority of contributions to the literature on judicial proliferation have emphasized not *competition* among courts, but *cooperation* among them, as the most promising means of dealing with the inconveniences of judicial proliferation. Indeed, over the course of the past two decades, international legal scholars identified a series of concepts – including, *inter alia*, cross-fertilization, judicial dialogues, and ultimately "management" – to describe cooperative processes or tools that international judges (in some cases assisted by states and other actors) could use to minimize inconsistent interpretations and international legal fragmentation and promote the coherence of the international legal order. Common to these approaches is the claim that, even in the absence of a clear hierarchy among them, judges on the various international courts should be, and *are*, open to taking into account the procedures and the substantive judgments of other courts, coordinating amongst themselves with the aim of reducing fragmentation and increasing the coherence of the international legal and judicial systems. [36]

One of the central concepts of this literature, and of this volume as well, is *cross-fertilization*. As defined by Giorgetti,

> Cross-fertilisation among different international courts is an important method used by international courts to fill in gaps in their statutes and rules of procedures, as

[35] Cogan, *supra* note 28, at 441 ("The market for international legal services can serve as an effective control mechanism not only because it creates incentives for courts to mediate their actions in order to attract litigants, but also because the system, as constructed, does not establish a bias in favor of a particular set of litigants, plaintiffs or defendants. The dangers of forum shopping are, therefore, diminished considerably. Not all competitive systems are so evenhanded. In the United States, for example, state longarm statutes and choice-of-law rules allow plaintiffs in class-action tort litigation to unilaterally choose their forum, and elected state judiciaries have incentives to favor these plaintiffs, thereby creating a pro-plaintiff bias in certain jurisdictions. In the international system, plaintiffs do not have this choice, as the consent of both parties is required as a basis for jurisdiction, and plaintiffs must choose their forum with the foreknowledge that they may be subject to the same rules as a potential future defendant. Thus, as with arbitrators in international commercial arbitration, international judges 'have strong incentives to make decisions that make *both* parties to the case, ex ante, better off.'").

[36] *See e.g.* Andenas and Bjorge, *supra* note 21, 2-3 ("For international law to be an effective legal system, the ever-increasing number of bodies with a role to play in international law must take account of one another, including those which cannot be resolved, and in the course of doing so, contribute to the development of general principles and forms of hierarchies of norms and institutions").

> well as to strengthen their conclusions in line with other international courts and tribunals. In doing so, international courts routinely reference customary international law, general principles of law and rules developed in other international judicial and arbitral practice.[37]

By and large, cross-fertilization has been used in the literature to refer to explicit citation by one international court and tribunal to the prior decisions of other international courts. Such explicit citations to international courts can be used in various ways, in support of specific conclusions, or as way to differentiate from previous conclusions or in a separate or dissenting opinion as a way to show a different standard. To do that, courts refer to specific decisions by other international courts, with similar (but also not identical) jurisdiction.[38]

Much of the literature from the past decade has pointed to prominent instances in which international courts and tribunals have explicitly cited each other's judgments, suggesting that such cross-citations demonstrate concerted efforts by courts to acknowledge and learn from the rulings of other courts, and to promote coherence of the international legal order.[39] This language of cross-fertilization appears not only in international legal scholarship but also in the language of international judicial opinions, including Judge Greenwood's famous opinion in *Diallo*:

> International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.[40]

In this sense, theories of international judicial cross-fertilization are closely related to, and arguably nested within, broader theories of trans-judicial communication[41], judicial dialogues[42], and the

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[37] Chiara Giorgetti, *Cross-Fertilisation of Procedural Law among International Courts and Tribunals*: *Methods and Meanings*, in PROCEDURAL FAIRNESS IN INTERNATIONAL COURTS AND TRIBUNALS 223, 224 (Arman Sarvarian et al. eds., 2015).

[38] *Id*., at 225.

[39] *See e.g.* Andenas and Bjorge, *supra* note 21, at 14 ("This concerted reliance upon the case law of the different courts and tribunals leads to a strengthening of the unity of international law and the rule of law internationally").

[40] Ahmadou Sadio Diallo (Guinea v DRC) (Compensation phase) [2010] ICJ Rep 391, Separate Opinion of Judge Greenwood, para 8, quoted in Giorgetti, *supra* note 7, at 115.

[41] Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 9-138 (1994).

[42] Anne-Marie Slaughter, *Judicial Globalization*, 40 V. J. INT'L L. 1103 (2000).

creation of a "global community of courts," both national and international.[43] In Anne-Marie Slaughter's influential formulation of the concept,

> This community of courts is constituted above all by the self-awareness of the national and international judges who play a part. They are coming together in all sorts of ways. Literally, they meet much more frequently in a variety of settings, from seminars to training sessions and judicial organizations. Figuratively, they read and cite each other's opinions…. The result is that participating judges see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavor that transcends national borders. They face common substantive and institutional problems; they learn from one another's experience and reasoning; and they cooperate directly to resolve specific disputes…. Over time, whether they sit on a national supreme or constitutional court or on an international court or tribunal, they are increasingly coming to recognize each other as participants in a common judicial enterprise.[44]

Slaughter's conception of judicial dialogues is wider than that of cross-fertilization, taking in informal as well as formal exchanges, and incorporating national as well as international courts and tribunals. Nevertheless, the two literatures share a conception in which judicial cross-citations serve as the external manifestations of a self-conscious, cooperative, and non-hierarchical process whereby judges engage in dialogue across jurisdictions.[45] Theories of cross-fertilization and judicial dialogue do *not* naively assume harmony among the judges of international courts and tribunals, each of whom are constrained to follow the substantive and procedural laws of their respective general or specialized regimes; but the emphasis in both is on cooperation, and cross-citations are taken to be a manifestation of dialogue among a global community of judges.

3. The Management Approach

Laurence Boisson de Chazournes introduced an important and influential new vision in 2017, founded on a "management" approach. She argues that states have clearly and repeatedly chosen plurality over unity in international dispute settlement, opting for multiple adjudicative fora despite

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[43] Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INTE'L L. J. 191 (2003); and Anne-Marie Slaughter, A NEW WORLD ORDER Chapter 2 (2004).

[44] *Id*., at. 192-193.

[45] The literature on international judicial dialogues is large and growing. For useful reviews, *see e.g*. Ronald J. Krotoszynski, *I'd Like to Teach the World to Sing* (*In Perfect Harmony*): *International Judicial Dialogue and the Muses - Reflections of the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321 (2006); Cesare P. R. Romano, *Deciphering the Grammar of the International Jurisprudential Dialogue*, 41 NYU J. INT'L. L. & POL. 755 (2009); David S. Law, and Wen-Chen Chang, *The Limits of Global Judicial Dialogue Symposium*: *Global Law and Its Exceptions*, WASH. L. REV. 86, 523-78 (2011). The concept of judicial dialogues also plays an important part in international legal pluralist theory, *see* Paul Berman, *Global Legal Pluralism*, 80 SO. CAL. L. REV., 1155-1237 (2007); and in the study of European Union legal integration, *see* Francis G. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems*: *The European Court of Justice*, 38 TEX. INT'L L. J. 547-556 (2003).

the twin risks of overlapping jurisdiction and conflicting or divergent interpretations of law.[46] Like previous optimistic treatments of the subject, she argues further that "the risks of fragmentation in international dispute settlement are more perceived than they are real."[47] Just as importantly, she argues, both judges and states have responded actively to the challenges of proliferation, seeking not to eliminate plurality, "but, rather, to organize it," in a "managerial" fashion[48], creating normative "threads" that tie together branches of international law and systems of international dispute settlement into a common "fabric."[49]

Boisson de Chazournes presents three core arguments, which themselves draw upon the threads of earlier treatments of fragmentation and weave them into a unified and highly optimistic theory in which well-intentioned central players deliberately draw upon legal doctrines and transjudicial communications to manage the inconveniences of plurality and proliferation and promote the coherence of both international law and international dispute settlement.

First, she offers an argument about the core actors or managers of plurality, with international judges in a starring role. Indeed, she not only examines the words and actions of international judges, but she assigns them a very specific intentionality, arguing that "judicial actors increasingly view their function as including the need to serve as guardians of the fabric of international dispute settlement by ensuring its coherence through coordination".[50] State actors play a secondary role in this vision, primarily by crafting provisions in international treaties to minimize the negative effects jurisdictional competition, but the primary role of managers of plurality falls to international judges. "This is an informal approach," she argues, "but an apparently necessary one, and it is ultimately concerned with solving problems through cooperation with other actors."[51]

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[46] Laurence Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals*: *The Threads of a Managerial Approach*, 28 EUR. J. INT'L L. 13 (2017) ("A plurality of courts and tribunals has long been a feature of the international legal order. It is the result of a consistent choice, and the legal architecture surrounding dispute settlement has more often facilitated plurality than restricted it"). In a wide-ranging survey of the history of international judicial design, for example, she notes that the statute of the Permanent Court of International Justice left open the possibility of pursuing international arbitration, while modern state practice has been to create multiple judicial systems with overlapping jurisdictions, and often (as in the case of the law of the sea) with explicit provision for choice of forum. *Id*., at 16-30.

[47] *Id*., at 34 ("The practice of international courts and tribunals reveals that proliferation has not caused many problems, contrary to popular assumptions. Where there has been divergence, there is more often legitimate justifications for such divergence, or this divergence can simply remain unproblematic so long as the instances from which it stems remain isolated and do not develop into trends… and we must remember that the number of apparently conflicting decisions are very few indeed").

[48] *Id*., at 30.

[49] *Id*.

[50] *Id*., at 14.

[51] *Id*., at 15.

Boisson de Chazournes's second argument, in this context, focuses on the formal and informal judicial dialogue among international judges about the substance of international disputes, including but not limited it cross citations across courts and tribunals.[52] The aim of these dialogues is, once again, to ensure the coherence of the international legal order, which is achieved when "similar issues, both in terms of fact and law, are treated similarly."[53] Communication across courts, in turn, can promote coherence, as "various areas of law can be nourished by other areas of law, and judicial dialogue can greatly assist in the cross-fertilization of legal systems."[54]

Third and finally, Boisson de Chazournes argues that "the coordination of the system of international courts and tribunals by judicial and state actors is evident… by recourse to certain tools that have the effect of managing proceedings before a diverse set of fora."[55] Boisson de Chazournes argues that international economic law has served as "something of a laboratory in this respect," and she traces the use by judges of various procedural tools or doctrines including *lis pendens*, *connexité*, *res judicata* and *electa una via*, as well as the insertion by states of "coordinating tools" in new treaties.[56]

Boisson de Chazourne's analysis draws earlier work by scholars like Slaughter, Charney, Shany, Brown, and Giorgetti into a compelling and comprehensive synthesis, presenting a picture of an international legal and judicial order that is indeed plural, and irremediably so, but also one in which the predicted negative effects of plurality have failed to manifest themselves thanks to jurisdictional coordination and transjudicial communication across courts. Writing in a similar vein, Anne Peters in 2017 examined the various "techniques" that international judges, arbitrators,

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[52] *Id*., ("I argue that 'internal communication' occurs between different actors involved in the world of international dispute settlement. This can take the form of judicial dialogue. Such dialogue is apparent through various means, including, but not limited to, cross-referencing between judicial decisions, opinions or awards. The substance and very existence of this communication also reveals that the actors who are part of this fabric are concerned with its coherence for the sake of those subject to it and for its legitimacy and authority").

[53] *Id*., at 36 ("International courts and tribunals have indeed developed an increased awareness of their potential contribution to strengthening the world of dispute settlement that they inhabit. They have also, in some ways, become actors in the promotion of a coordinated approach, which tends to ensure greater coherence within the international legal order. Judicial actors have pursued coherence through various tools of communication, such as cross-referencing or other forms of judicial dialogue. Interaction among judicial actors of different legal regimes is well known and has been affirmed and even encouraged by academics and practitioners for many years now. Judicial dialogue can be the result of a cross-cutting concern for coherence and judicial economy and is evidenced by the development of specific tools, such as cross-references, which help to harmonize legal norms and are intended to coordinate decision making. Beyond these objectives, there is perhaps a natural tendency towards coherence. Indeed coherence is a foundational element in a legal system for many legal theorists and resonates with a basic human desire for intelligibility. Coherence is achieved where similar issues, both in terms of fact and law, are treated similarly. Where there is difference, this should be explained").

[54] *Id*., at 38.

[55] *Id*., at 15.

[56] *Id*., at 15-16; 64-70. For earlier explorations of the promise and limits of these doctrines, *see* Shany, *supra* note 7, and Giorgetti, *supra* note 7, at 107-116.

and other actors use to "coordinate the various subfields of international law," and argued that, in light of these efforts, it was "time to bury the f-word" of fragmentation.[57]

III. Too Good to Be True? The Possible Limits of Cross-Fertilization

The pendulum of international scholarship, in short, has swung dramatically over the past two decades, from post-modern anxieties to a new-found confidence that judicial dialogues, cross-fertilization, and management can at least contain the ill-effects of proliferation, and at best promote the centralization and unity of the international legal order.

It would be premature to suggest that the pendulum has begun to swing back toward pessimism. Yet a handful of recent works, including responses to Boisson de Chazournes's management manifesto, suggest the outlines of a skeptical critique, which can and should counsel caution among scholars, as well careful attention to a set of issues that have been ignored or bracketed in previous scholarship. This skeptical critique highlights elements for re-thinking how we see and understand cross-fertilization as such, and more generally the relationships among international courts and tribunals. We highlight five such elements here, grouped under the headings of motives, actors, methods, empirics, and normative considerations, respectively.

First, and perhaps most pointedly, one can question whether the optimistic literature, which attributes to international judges an overriding concern with the coherence of the international legal order, has not misspecified the *motives* of these key actors. As we discuss in Chapter 7 of this volume, critics of the management perspective point out that, while judges may indeed have an interest in the coherence of the international legal order, they likely balance this collective interest against their own institutional and substantive interests in the autonomy and integrity of their own legal order and in the substance of their own jurisprudence, with the "pull" of the latter overwhelming the former.[58] Indeed, from a legal realist perspective, calls for coherence and cross-fertilization may offer a mask for an essentially political, even hegemonic, struggle among international courts and tribunals to define the meaning of the law and establish their own supremacy within a fragmented international judicial order.[59] In this view, the management perspective relies on an unrealistic harmony of interests among international judges and arbitrators, who may in fact be engaged in competition to shape the global interpretation of international law and their own place in a *de facto* international judicial hierarchy.

A second element has to do with *actors* or agents of cross-fertilization and management. Boisson de Chazournes, as we have seen, focuses almost exclusively on international judges as the key managers of the international legal order, with states playing a supporting role. By contrast with this tight focus, Thomas Streinz suggests that cross-fertilization and management may be driven

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[57] Anne Peters, *The Refinement of International Law*: *From Fragmentation to Regime Interaction and Politicization*, 15 INT'L J. CONS. L. 671, at 672 (2017).

[58] Yuval Shany, *Plurality as a Form of* (*Mis*)*management of International Dispute Settlement*: *Afterward to Laurence Boisson de Chazournes' Forward*," 28 EUR. J. INT'L L. 1246 (2018).

[59] *See supra* note 22 at 561-562.

in part by other actors, such as state and non-state litigants, counsel, non-governmental organizations, international arbitral institutions. Such actors may have little or no interest in the coherence of the international legal order as such, but may rather promote or resist judicial cross-fertilization as a function of their own specific interests and values. In this image, "parties who do not like their odds under a judicial body's own case law are likely to refer to other regimes under the pretext that such outreach was required to maintain the coherence of the international legal order," while parties favored by precedent within the specialized legal order will reject such outside influence.[60] If this view is correct, then international judicial cross-fertilization is likely to be a far more complex, and far less harmonious, process than that depicted in management accounts – and indeed, this volume includes numerous examples of diverse actors championing and resisting the invocation of practices and substantive law from other international courts and tribunals.

Third, with respect to *methodology*, it seems likely that the disagreement between pessimistic and optimistic authors reflects not only their normative commitments, but also the methodological question of case selection. Pessimists, in short, have tended to focus on the (perhaps rare) instances of overt disagreement among courts, holding these up as harbingers of a possible future fragmentation of the international legal order. Optimists, by contrast, often seek out instances in which international courts and tribunals have successfully managed overlapping jurisdiction and engaged in productive cross-fertilization, and hold these cases up as examples of "best practice" to be both celebrated and emulated. In this view, even patchy evidence of cross-fertilization, management or convergence is meaningful, as a proof of concept and a road map for the way ahead. Skeptics of the management perspective fear that optimists may be engaging in "selection bias," misleadingly generalizing from what may be isolated instances or "threads" to a non-existent tapestry,[61] while ignoring broader, inconvenient patterns such as the overall rarity and asymmetric character of international judicial cross-citations.[62]

Fourth, with respect to *empirics,* large-n empirical studies of cross-citations across international courts[63], suggest that patterns of cross-fertilization among international courts and tribunals – at least as expressed through overt citations – are highly asymmetric, and may represent differences in power and prestige among courts and tribunals. In perhaps the most ambitious such study of "borrowing and nonborrowing" among international courts and tribunals, Erik Voeten examines a rich dataset of European Court of Human Rights (ECtHR) citations to foreign and international

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[60] Thomas Streinz, *Winners and Losers from the Plurality of International Courts and Tribunals*: *Afterward to Laurence Boisson de Chazournes' Forward*, 28 EUR. J. INT'L L. 1253 (2018).

[61] *Id*., at 1251.

[62] *See* e.*g*. Kingsbury, supra note 3, at 682 (suggesting that authors like Charney focused their attention on areas such as maritime delimitation, which are arguably best-case scenarios for cross-fertilization and convergence).

[63] *See e.g*. Marc Busch, *Overlapping Institutions*, *Forum Shopping*, *and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007); Nathan Miller, *An International Jurisprudence*? *The Operation of 'Precedent' across International Tribunals*," 15 LEIDEN J. INT'L L. 483 (2002); Gerald L. Neuman, *Import*, *Export*, *and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L 101 (2008); and Erik Voeten, *Borrowing and Nonborrowing among International Courts*, 39 J. LEGAL STUD. 547 (2010).

courts, alongside previous studies of other courts, and offers four highly suggestive findings.[64] First, the ECtHR, like other well-established international courts, very rarely cites other the decisions of other international courts[65], although individual judges do so more frequently in their separate dissenting or concurring opinions.[66] Second, there are large asymmetries in cross citations among international courts, with some courts far more likely to engage in cross-citations than others, seemingly falsifying the image of a reciprocal exchange of citations among a global community of judges.[67] Third, the ideology of individual judges matters, with more activist judges being more likely to cite other international court decisions.[68] Fourth, more established courts (such as the ICJ, the ECJ, and the ECtHR) are far less likely to cite other courts than more recently established courts and tribunals (e.g. the IACtHR and the ICTY).[69] Such empirical studies suggest that cross-fertilization is a complex and highly selective process, influenced by the relative power of international courts, the nature of the legal issues and jurisprudence, and the preferences of the judges.

Fifth and finally, even if one accepts its empirical reality, one can question the *normative desirability* of cross-fertilization.[70] It is, for example, debatable whether international judges in a particular specialized regime, empowered to interpret a specific body of law for the benefit of a specific membership, should draw upon the jurisprudence of other courts with different substantive preoccupations and distinct memberships. The assumption in the literature is that judges can increase their legitimacy by grounding their decisions in a broader international legal consensus, but citations to "external precedents" are often contested as illegitimate, including by dissenting judges in the citing courts.[71] Furthermore, the practice of citing to foreign law invites charges of what the late Justice Scalia referred to as "cherry-picking," in which judges selectively cite foreign

[64] *Id*.

[65] For example, in a sample of 7,309 judgments up to 2006, ECtHR judgments cited the ICJ just five times, the Inter-American Court of Justice (IACtHR) five times, and the European Court of Justice is cited eight times as a guide to interpretation of the ECHR. *Id*., at 562-66.

[66] Interestingly, separate opinions that cite international courts *de novo* (i.e., without a prior citation in the majority decision) typically argue for a higher level of human rights protection, although some dissenting opinions cite foreign judgments in order to criticize the majority for doing so in the decision. *Id*., at 556-67.

[67] Both the ECJ and the IACtHR cite the ECtHR are dramatically higher rates than the ECtHR cites those courts. *Id*., at 563, 565.

[68] *Id*., at 568.

[69] *Id*., at 572 ("The most developed courts are the sources of external citations but themselves rarely use them. They also do not cite each other, so the evidence cannot be easily explained away with reference to the quality of legal judgments. The community of international courts does not reflect the horizontal network ideal posited by Slaughter").

[70] *See supra* note 45 at, 238-39 (raising and responding to three potential normative objections to cross-fertilization).

[71] *See supra* note 63 at, 556-67.

or external decisions to bolster their own preferred interpretation of the law.[72] Our point here is not that cross-fertilization across international courts and tribunals is normatively undesirable or illegitimate, but that its normative desirability is contested, and cannot be taken for granted.

IV. A Preview of the Volume

Our review and assessment of the literature, in short, can be read as a Hegelian dialectic, in which an initial thesis (international law is fragmenting) meets an antithesis (international legal plurality is being managed), with the early sprouts of a possible synthesis (cross-fertilization exists, but with multiple actors behaving unsystematically and for diverse, and possibly opportunistic, reasons). It is against the backdrop of this vigorous debate that the contributors to this volume engage in a diverse series of studies of procedural and substantive cross-fertilization, looking for evidence of mutual influence and learning, but with an eye to the limits, the asymmetries, and the failures of cross-fertilization and management of the international legal order. Each contributor addresses multiple questions within the scope of her or his empirical territory, but with varying emphases, and so we organize the chapters roughly according to their primary emphasis on (1) procedural cross-fertilization, (2) substantive cross-fertilization, and (3) the actors or agents of cross-fertilization. In this final section of the chapter, we preview the findings of these individual chapters, and conclude by summarizing our and our contributors' findings about the processes and actors of international judicial cross-fertilization.

1. Procedural Cross-Fertilization

Following this first chapter, the book includes two chapters that provide overviews of the issue of procedural cross-fertilization among international courts and tribunals, from scholarly and practitioner viewpoints, respectively. In *The Procedural Cross-Fertilization Pull*, Hélène Ruiz Fabri and Joshua Paine explore cross-fertilization among international courts and tribunals with respect to questions of procedure. Procedural questions, they posit, are inescapable for any court or tribunal, which has a duty to decide on a wide range of procedural issues from the filing of an initial dispute to the submission of written materials by litigants (and potentially third parties), the conduct of oral hearings, the issuing of provisional measures, and more. International court statutes and rules of procedure, however, are often silent or ambiguous on procedural questions, leaving judges with wide discretion to interpret statutes and rules of procedure. It is in this setting, they argue, that procedural questions exert a "cross-fertilization pull," insofar as adjudicators find "off-the-shelf" solutions to difficult problems, avoid "reinventing the wheel," and bolster the legitimacy of their procedural decisions by imitating and adapting existing practices from other jurisdictions. This process is facilitated, moreover, by the increasing number of participants – whether as adjudicators, counsel, registry or secretariat officials, or experts – who gain experience in more

[72] Jeffrey Toobin, *Swing Shift*: *How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005 (quoting Justice Scalia: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry"). *See also* Chief Justice Roberts, who argued in his Senatorial confirmation hearing that, "Domestic precedent can confine and shape the discretion of the judges. Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends." Quoted in Robert Barnes, *Breyer Says Understanding Foreign Law is Critical to Supreme Court's Work*,WASH. POST, Sept. 12, 2015.

than one international jurisdictions, bringing lessons from one forum to another. As a result of this gradual process, they argue, cross-fertilization both contributes to, and is in turn shaped by, "an emerging model of due process" at the international level, which includes equality of treatment between the parties, the independence and impartiality of the judiciary, and the transparency of proceedings. This pull towards cross-fertilization is not, however, without resistance, and the ability of courts to borrow from their counterparts is limited both *ex ante* by the specific provisions of their mandates and *ex post* by control mechanisms employed by litigants and states-parties. In part for this reason, they argue, procedural cross-fertilization "is hardly ever a pure import," and most often involves the adaptation of procedures from one setting to another, different setting.

In *Procedural Convergence in International Courts and Tribunals*, John R. Crook undertakes a similarly wide-ranging and eclectic survey of procedural cross-fertilization, from the perspective of a long-time practitioner and scholar. Casting his net widely, Crook examines procedures across both international courts as well as commercial arbitration, investment arbitration, and interstate claims tribunals, arguing forcefully that "there is much similarity, or even convergence, in the procedures that international law-applying institutions typically use in performing their tasks." This convergence, he argues, has not been spontaneous, but can be attributed to specific historical precedents as well as to the deliberate efforts of intergovernmental organizations, nongovernmental organizations, and individuals, and finally to the effects of competition among adjudicators. With respect to history, Crook points to the seminal role of 1899 Hague Convention on Pacific Settlement of International Disputes, which established a first basic set of procedures, as well as the procedural rules established for the Permanent Court of International Justice and later the International Court of Justice, each of which provided templates from which later institutions could draw. With respect to intergovernmental organizations, Crook focuses on the fundamental role played by the United Nations Commission on International Trade Law (UNCITRAL) in establishing efficient dispute settlement procedures, such as the 1976 UNCITRAL Arbitration Rules, that were acceptable across cultural boundaries and adaptable to different contexts. Crook also looks at the important role of NGOs, such as the International Bar Association, in developing common procedural rules on core issues such as taking evidence and assessing conflicts of interests of adjudicators; and he traces the role of individuals who have worked to diffuse procedural rules and innovations across jurisdictions, especially in the domain of international claims commissions. Finally, in a fascinating and detailed discussion of the effects of competition among dispute-settlement institutions, Crook identifies instances of product standardization (in areas such as emergency arbitrators and simplified procedures), as well as product differentiation (with respect to regional and linguistic expertise), divergence of procedures (as between commercial and investment arbitration with respect to transparency of proceedings), and pushback against harmonization by dissatisfied parties (in the Prague Rules on document production). Thus, while Crook identifies multiple factors and actors driving procedural convergence in international adjudication, he concludes that such convergence is neither inevitable nor always desirable.

The challenges of procedural cross-fertilization are the focus of Rebecca Hamilton's chapter on *New Media Evidence Across International Courts and Tribunals*, in which Hamilton points to the *limits* of what she calls "organic cross-fertilization" to keep pace with the procedural challenges posed by rapidly evolving technology. Hamilton's focus is on the growing volume of digital evidence making its way into the proceedings of international courts and tribunals. Such new

media evidence poses profound challenges to courts, she argues, because digital technologies have given rise to sophisticated forgeries, or "DeepFakes," putting international judges and arbitrators in the "unenviable position" of having to make determinations on the basis of such evidence. Based on a comprehensive survey of procedures at 15 different international courts and tribunals, she finds that extant procedural rules provide little guidance and broad discretion for adjudicators, who have thus far worked through the challenge of assessing new media evidence "in a wholly unsystematic manner," adopting inconsistent or fragmented approaches across as well as within ICTs. Hamilton argues that standards for the evaluation of new media evidence are essential for courts to pursue their mandate, and she warns that the organic cross-fertilization process we normally see in other settings is too slow to keep pace with the rapidly evolving technology of new media. For these reasons, she argues that new media evidence is an area ripe for proactive coordination among courts and tribunals.

2. Substantive Cross-Fertilization

Following these chapters on procedural cross-fertilization, the next two chapters, by Alina Miron and Erik Voeten, focus on both the achievements, and the limits, of substantive cross-fertilization in two areas of law, namely the law of the sea and human rights law. Both of these areas are important arenas for international judicial cross-fertilization, each featuring multiple global or regional courts and tribunals hearing disputes and adopting case-law in a common or overlapping issue-space with no formal hierarchy among them. It is in such areas that we would expect to see the most extensive and effective cross-fertilization, and we focus on the lessons of these two studies here.

In *The Acquis Judiciaire, a Tool for Harmonization in a Decentralized System of Litigation? A Case Study in the Law of the Sea*, Alina Miron explores the horizontal mechanisms which lead to the harmonization and uniform interpretation of the law of the sea, which she calls a "great laboratory" for judicial cross-fertilization. Miron's focus is on how international tribunals deciding law of the sea issues systematically refer, or even defer, to prior case-law of other courts and tribunals, both out of courtesy and out of necessity. As Miron points out, United Nations Convention on the Law of the Sea (UNCLOS) creates a compulsory yet flexible system for the judicial settlement of disputes, requiring states to choose among several judicial mechanisms, including the ICJ, the International Tribunal for the Law of the Sea (ITLOS) and *ad hoc* arbitral tribunals, all charged with resolving law of the sea disputes and interpreting the same UNCLOS principles. The law of the sea was, indeed, a central concern for fragmentation pessimists, who feared divergent interpretations of UNCLOS rules. Instead, Miron argues, we have witnessed the emergence of an *acquis judiciaire* –the gradual building of uniform law through the reiteration and cross-referral of converging decisions – in the law of the sea. Undertaking a set of three case studies, she illustrates the way in which *acquis judiciaire* has progressively emerged in the law of the sea. First, on matters of maritime delimitation, which represent the overwhelming majority of international law of the sea cases, a specific three-step process has emerged and is now followed by international courts, both at the ICJ and ITLOS, and is cogently described in the 2009 ICJ Judgment in the *Black Sea* case. In that case, the Court identifies and defines three stages to accomplish maritime delimitation: (1) the establishment of a provisional equidistance line; (2) the identification of the relevant circumstances and the potential adjustment of the equidistance line; and (3) the disproportionality test. This approach has now been widely accepted, and explicitly

cited, by other tribunals. A similar process can be seen in the development of principles for the exercise of jurisdiction on questions related to the delimitation of the continental shelf beyond 200 nautical miles, a relatively new question in international adjudication. Here again, we also see cross-citations and references by all the forums deciding law of the sea questions to each other's decisions, where, for example, the ICJ refers now not only to its own case-law, but also to the one of ITLOS and of the arbitral tribunals – and vice-versa. Not all issues, of course, follow this path. Indeed, areas of persistent ambiguities exist, for example on matters of the role of islands in maritime delimitations and on the exception of military activities. Yet, the existence of the phenomenon of *acquis judiciare* is remarkable. Indeed, it is possible to identify three stages in which the *acquis* is gradually built: at first, jurisprudential variations exist; this is then followed by the establishment of a precedent which states the rule or principle in a clear and authoritative manner; finally, the *acquis* is crystalized by cross-references and acceptance by other tribunals. Through this recursive process, Miron demonstrates both successful management and substantive convergence of interpretation among multiple international courts and tribunals.

In his chapter, Erik Voeten offers a theoretical and empirical contribution focusing on cross-fertilization, and in particular citation to other international courts and tribunals, by the European Court of Human Rights (ECtHR). In *Why Cite External Legal Sources? Theory and Evidence from the European Court of Human Rights*, Voeten starts from the theoretical assumption that judges are primarily interested in resolving their cases in a way that is seen as legitimate by its audiences, with at best a secondary interest in the cohesion of the system of international law. In this context, Voeten hypothesizes that judges make citation choices strategically, using citations to send signals to multiple audiences, including member governments, national courts, and the "invisible college" of international lawyers. In this strategic view, the choice to cite another international court may increase the persuasiveness of a decision, by signaling to audiences that a decision is consistent with broader international standards; yet such citations may also have costs, exposing courts to charges of exceeding their mandates. In this view, the most interesting question is not *whether* international courts and tribunals cite each other – clearly, they sometimes do – but in which kinds of cases, and under what circumstances, different types of judges might do so. To get at this question, Voeten draws on a unique data set of ECtHR judgments and dissenting opinions between 1998 and 2016, seeking to determine both the frequency and the correlates of judicial citation to international legal materials. He finds that while the ECtHR mentions external international law sources in 15% of the judgments that engage in some form of new legal interpretation, it cites other international court judgments in only 3% of those judgments. This scarcity of citations to other international courts, he argues, stands in stark contrast to the behavior of the Inter-American Court of Human Rights, which cites other courts in virtually all of its rulings; it also suggests that ECtHR judges are selective in their citations of external case law, and that "an overall concern with the coherence of the system of international law is not a driving concern of ECtHR judges." Looking beyond the frequency of citations, Voeten then analyses the correlates of such citations, finding that citations to external case law are most common in particularly important or contentious cases (i.e. those designated as Type 1, those that go to the Grand Chamber, or those that include a dissenting opinion); most common in areas where international law is most developed (such as torture); and most common where the judges have a history of "activist" jurisprudence, whereas more deferential judges are less likely to cite external court precedents. As in his previous research on "borrowing and nonborrowing," Voeten presents an empirical picture of cross-fertilization that is highly uneven across courts, rare and highly selective among powerful and established courts

like the ECtHR, and correlated with a variety of factors including the type of case and the ideology of the judges.

Taken together, these two chapters suggest that cross-fertilization is present and important, if unevenly so, in the law of the sea and human rights. Our authors' findings, moreover, resonate strongly with the existing scholarship on international economic law, and especially international investment law. As it is known, international investment law lacks one overarching multilateral instrument that specifies rights and obligations of investors and States, nor does it have a common multilateral court that can implement and interpret international investment law principles cohesively. Rather, international investment law is characterized primarily by a series of bilateral investment treaties (BITs), which by and large contain similar principles; and international investment tribunals, which are generally composed of three individuals selected ad hoc for the purpose of resolving a given dispute and cease to exist (are "functus officio") once their award is issued. Rather than producing a highly fragmented system, however, international investment law is developing as a rather coherent one. The development of a largely accepted understanding of the "fair and equitable treatment" (FET) standard is a case in point. While FET is a principle found in most BITs and regional instruments, it is normatively vague. As a general matter, it guarantees a degree of stability and certainty to a foreign investor entering a host State based on the rule of law, yet the contours of the principle are unclear. Amidst this vagueness and indeterminacy, Stephan Schill remarks that "it was arbitral tribunals that took it upon themselves to concretize and further develop the normative content of FET. They did so case-by-case, and rather independently of the formulation of the FET clause, by building on arbitral precedent in ways that resemble a common law system of (persuasive) precedent."[73] Indeed, in support to his conclusion, Schill cites three key cases (decided by tribunals operating under ICSID Additional Facility and UNCITRAL Rules and applying the Spain-Mexico BIT, NAFTA, and the Netherlands-Czech Republic BIT) that honed a common understanding of the FET principle.[74] These cases perfected the contour of FET and were followed and cited by many others.[75] Through a process of cross-fertilization, arbitral tribunals have engaged with each other and slowly honed the meaning of a key principle of international investment law which now serves as a compelling precedent. What we begin to observe is a process, similar to the one identified by Miron, where different arbitral tribunals build on each other conclusions and together move forward towards a common understanding. Other similar examples exist in international

[73] Stephan W. Schill, *Landmark Cases on Fair and Equitable Treatment*: *Empowering and Controlling Arbitrators as Law Makers*, in INTERNATIONAL INVESTMENT LAW: AN ANALYSIS OF THE MAJOR DECISIONS (Hélène Ruiz Fabri and Edoardo Stoppioni eds., forthcoming 2020). *See also*, *generally*, Stephan W. Schill, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 321-357(2009).

[74] The cases are *Técnicas Medioambientales Tecmed, SA* v *The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003). *Waste Management, Inc* v *United Mexican States*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) (*Waste Management II*). *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), *see* Schill, "Landmark Cases", *supra* note 72.

[75] Indeed, a more recent case concluded that it was "clear from the repeated reference to 'fair and equitable' treatment in investment treaties and arbitral awards that the FET treaty standard is now generally accepted as reflecting recognisable components, such as: transparency, consistency, stability, predictability, conduct in good faith and the fulfilment of an investor's legitimate expectations." *Murphy Exploration & Production Company International v Republic of Ecuador*, UNCITRAL, PCA Case No 2012-16, Partial Final Award (6 May 2016) para 206. See also Schill, *supra* note 72.

investment law, and there are signs that international investment tribunals not only cross-fertilize with each other, but also take cognizance and strong consideration of the jurisprudence of international tribunals in other fields of international law. International investment tribunals, for example, cite cases from human rights courts and the WTO Appeal Body with a certain frequency. An initial 2018 study by Steininger, for example, found that approximately 9 per cent of the concluded investment arbitration cases contained a reference to a human right instrument (be it international, regional or local).[76] A similar observation could be made on cross-references between investment arbitration cases and WTO Appeal Body cases.[77] These are recent and interesting developments, which suggest that cross-fertilization is both substantial and important in international economic law, and ripe for further study.[78]

3. The Actors of Cross-Fertilization

The third and final section of this book groups together three chapters focusing on the actors and agents of cross-fertilization. In our opening chapter of this section, Giorgetti and Pollack offer a new theoretical framework for thinking about the roles of different types of actors – judges, arbitrators, international court registries, arbitral secretariats, intergovernmental organizations, nongovernmental organizations, member governments, state and non-state litigants, and counsel – who participate in processes of cross-fertilization. We begin by pointing out that all of these actors have complex or mixed motives: that is to say, while actors may place some value on the coherence or unity of the international legal system, all actors weigh such systemic concerns against other, more immediate – and possibly dominant – concerns. International judges, for example, may place considerable value on the coherence of the international legal system, but they may place equal or greater emphasis on the coherence and autonomy of their own specialized or regional legal order, on the normative values that order embodies, and their own authority as the authoritative interpreter of a particular body of law. Other actors, including states-parties, litigants, and legal counsel, may place little or no value on international legal coherence *per se*, but rather favor or oppose cross-fertilization entirely as a function of its effect on the success of their legal arguments and their likelihood of prevailing in a dispute. If actor preferences are complex, as we believe they are, then the process of cross-fertilization is likely to resemble, not so much a consensual process of management, but rather a constant (unseen and probably unconscious) struggle among a wide variety of actors, some of whom will champion cross-fertilization while others seek to prevent or limit it. Against this backdrop, we then theorize the motivations and the behavior of the various actors who participate in international dispute settlement, and the ways in

[76] Silvia Steininger, *What's Human Rights Got to Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration* 31 LEIDEN J. INT'L. L. 33 (2018).

[77] Roger Alford, *Does the WTO Rely on Investment Arbitration Awards as Persuasive Authority?*, KLUWER ARB. BLOG (27 Sept. 2012).

[78] On this, see for example, Bruno Simma and Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology* in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Christina Binder et al. eds. 2009); Eric de Brabandere, *Human Rights Considerations in International Investment Arbitration*', in THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS *183* (Malgosia Fitzmauric and Panos Merkouris eds. 183-215).

which they may – intentionally or unintentionally – advance or impede the process of cross-fertilization.

Following our broad survey of the range of actors in cross-fertilization, Fedelma Smith focuses on one specific actor: the Permanent Court of Arbitration (PCA). In *A View From the Coal Face? The Authors of Cross-pollination from the Perspective of the Permanent Court of Arbitration*, Smith focuses on the various roles the PCA played in the development of international law, both as an actor in, and as a framework for, international arbitration. The PCA behaves as an actor in the form of its secretariat, the International Bureau, which provides support services for arbitration in The Hague and around the world; and it has behaved as a framework, in the first instance, by providing the world's first set of rules of arbitration procedure in 1899 and 1907. These PCA arbitration rules served as an early influence on the procedural law of arbitration, and in recent decades we have witnessed impressive and recursive procedural cross-fertilization among multiple international arbitral institutions, with the 1976 UNCITRAL Rules informing the adoption of the 2010 ICSID rules, which in turn informed the adoption of the PCA's own updated rules of procedure in 2012. PCA-administered arbitral tribunals have also engaged in substantive cross-fertilization, engaging with and citing ICJ decisions as well as the awards issued by PCA- and ICSID-administered tribunals, among others. Significantly, however, Smith also points to some important limits to the PCA's role in cross-fertilization and convergence, including most notably the principle of party autonomy, since the parties are free to set the rules of procedure and the applicable law for each individual arbitration, and any excess of mandate by the tribunal can result in an award being set aside. These party-based limits to convergence are exemplified in the high degree of variation in transparency among PCA-administered arbitrations, which run the gamut from highly transparent proceedings and awards in some cases to fully confidential arbitrations whose existence is not even acknowledged on the PCA website. Despite these limits, Smith concludes that, both as an actor and as a framework, the PCA serves as an important mechanism whereby both procedural and substantive international law is distilled, developed, and diffused.

Finally, Freya Baetens explores cross-fertilization in practice through an analysis of forum choices in a world of multiple and overlapping jurisdictions. In *Abusive Forum Shopping or Legitimate Forum Choice*? Baetens explores the exercise of forum choice at the international and regional levels, focusing on the respective roles of litigants, counsel, states, and international courts. While forum shopping can raise issues of legitimacy, fairness, cost, and integrity, she argues, forum choice should nevertheless be recognized as valuable tool for parties to best exercise their rights, consistent with the fair administration of justice. Overall, she argues, abusive forum shopping is rare. Litigating parties, both states and private parties, nearly always have legitimate reasons for their forum choice, which is informed by considerations such as the prospect of receiving a favorable decision, the finality of that decision, and the prospects for enforcement. Baetens then surveys the roles of various types of actors in the process and management of forum choice. Counsel, she suggests, have some general obligations regarding the fair administration of justice, but their primary duty is to serve the interests of their clients. States can play an important role in regulating forum choice by adopting treaty regimes setting down explicit principles for forum selection. International courts and tribunals, finally, should review the reasons litigating parties give to explain forum choices so to accept or decline jurisdiction by using doctrines such as abuse of process, abuse of rights, *forum non conveniens, lis pendens*, *res judicata* and *connexité*. In this way, Baetens concludes, the interactions of multiple actors should and can result in the

successful management of overlapping jurisdiction, to the benefit of litigants and international tribunals alike.

4. Empirical Findings and Conclusions

In this volume, we and our contributors set out to explore the phenomenon of cross-fertilization across international courts and tribunals, alongside a suite of related questions including the fragmentation or convergence of international procedural and substantive law, as well as claims about judicial dialogues, cooperation, and management whereby international judges and arbitrators seek to preserve and promote the coherence of the international legal order. Taken together, our contributors' findings allow us to draw a set of important conclusions about the extent and character of international judicial cross-fertilization, which we summarize here in terms of our guiding themes of procedural cross-fertilization, substantive cross-fertilization, and actors of cross-fertilization, respectively.

First, then, with respect to procedural cross-fertilization, the chapters by Ruiz-Fabri & Paine, and Crook provide broad support for theories of convergence through cross-fertilization, and align with and build on Chester Brown's seminal work of an emerging common law of international adjudication, albeit within the broad limits set by international adjudicators' statutes and rules of procedure, and by the preferences of litigants and states parties. Indeed, where Brown surveyed a handful of courts on four selected procedural questions, the authors in the first part of this volume cast their net more widely, surveying both standing courts and arbitral tribunals, and showing that Brown's "common law" extends far beyond those questions, taking in issues from the independence and ethical standards for adjudicators to the equal rights of litigants and the rules of evidence. In each of these areas, we find clear evidence of convergence of procedural law and practice around Ruiz-Fabri and Paine's emerging model of international due process.

Just as importantly, our contributors identify the mechanisms underlying the "procedural cross-fertilization pull," including judges' duty to decide procedural issues, the imprecision of international judicial statutes and rules of procedure, and the appeal of existing and accepted standards of domestic and international procedural law as legitimate templates for addressing new questions. By the same token (and anticipating our findings about "actors"), Ruiz-Fabri & Paine and Crook also make clear that the adoption of common or similar procedural norms is by no means left solely to judges; instead, and repeatedly, we see international governmental and nongovernmental bodies, such as the UNICTRAL, ICSID, and the IBA working to elaborate and diffuse procedural norms designed to accommodate the views of diverse actors from the world's various legal traditions.

To be sure, our authors also identify limits to procedural cross-fertilization, including both statutory provisions that limit judicial discretion as well as the views of courts' states-parties and litigants who may prefer to resist harmonization of procedural law – most notably in terms of greater participation and transparency. Furthermore, as Hamilton points out, "organic" cross-fertilization, left to the spontaneous and informal initiatives of adjudicators observing and learning from each other's experiences, may proceed too slowly to produce common approaches to substantive issues. Nevertheless, the findings of our chapters find impressive evidence for processes of both cross-fertilization and convergence of procedural law across a wide range

international courts and tribunals, pursued by a wide range of actors, in a process informed by Boisson de Chazournes's management paradigm, but occuring at least in part as a secondary and unintended process.

Moving from procedural to substantive cross-fertilization, the findings of our authors are mixed. On the one hand, Miron's analysis of the emergence of an *acquis judiciaire* among the ICJ, ITLOS, and arbitral tribunals on the law of the sea appears to approximate the ideal type of the management approach. Although not without tensions and occasional disagreements, the tribunals in this area have clearly influenced each other in their interpretation of important provisions of UNCLOS, preventing fragmentation and promoting coherence and convergence on important substantive issues. On the other hand, Voeten's study of cross-citations in the human rights realm presents a far more complex picture: while human rights courts do indeed engage with each other's jurisprudence, the resulting citation patterns are highly asymmetric, highly selective, and demonstrate correlations with factors that have been largely ignored by proponents of the management approach. This is not to suggest that substantive cross-fertilization is absent among international courts and tribunals, but it does suggest that cross-fertilization is less uniform and less harmonious than an ideal-typical management framework might suggest, and that it varies both across and within courts in ways that are highlighted in this book.

With respect to the actors of cross-fertilization, finally, the contributions to this book suggest that the number and types of actors, and the motivations of those actors, are more complex than existing theoretical frameworks might suggest. With respect to both procedural and substantive cross-fertilization, our contributors find, exchanges among international courts and convergence in their rulings and practices are shaped not only by the judges who adopt those rulings, but also by international governmental organizations, international court registries and arbitral secretariats, member states, litigants, and counsel. Furthermore, we argue, each of these actors possesses mixed motives, weighing their (perhaps weak) interest in the coherence of the international legal system against their more immediate (perhaps dominant) interests in their own regional or substantive legal order, or indeed with simply winning their current dispute. These mixed motives, we suggest, can explain why judges may not cite to the case-law of other courts, as well as the asymmetries in citation among courts, and the complex patterns of those citations; and they suggest that the various actors engaging in international adjudication may indeed resemble bees who, to the extent that they promote cross-fertilization of procedural and substantive law, may do so quite incidentally, and for reasons very different from promoting the flowering of a coherent international legal system.