

Individuals and Non-State Entities before International Courts and Tribunals*

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It is both a privilege and an honor to have been invited to make this presentation on the occasion of the inauguration of the new facilities of the International Tribunal for the Law of the Sea, where so many distinguished jurists and old friends from many international negotiations and academic endeavours have a well-deserved seat. Thank you for your kindness.

I. The Transformation of the International Society

We are all aware that international society is becoming increasingly institutionalized within a process of globalization. Yet it is by its very nature a decentralized society where individuals, corporations and international organizations, both public and non-governmental, have an expanding role to perform and a specific interest to pursue. The perfecting of human freedoms and rights, like the parallel expansion of free market economies in trade, services and investments, ensures that these developments will attain new milestones as the twenty-first century unfolds.

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A transformation of international society as deep as the one we are experiencing poses inevitable tensions and conflicts of view, ranging from the role of sovereign states in a new world structure to the autonomy which individuals and other non-state actors need to undertake the functions they are being assigned. In this context international law is facing new challenges and exploring new frontiers, but it is still far from being a legal system providing for certainty and predictability, perhaps even less so than in the past. Yet, the functioning of a renewed international society, requires of a legal system that might be able to harmonize the different interests of its constitutive elements and ensures the necessary stability.

The fulfilment of these new expectations and requirements depends largely on the effectiveness of dispute settlement mechanisms established under international law. Two major trends can be discerned in the near future in this respect:

the first is that as international law also becomes decentralized and fragmented, international society needs to develop a constitutional function that will be able to keep the system united and coherent. Centralization and decentralization are a part of the same process, and mutually reinforce each other. Central issues relating to the interpretation of the basic principles of international law will probably lead, in the not to distant future, to the establishment of an International Constitutional Court, or at the very least, to the need to make these functions available within the context of the ICJ, and other courts, not only in respect of the United Nations System but also in respect of international society more broadly.

The second major trend is that related to the topic of this presentation:

the participation of individuals and non-state entities in international dispute settlement as an aspect that requires specific attention, as principal actors of the present international society, cannot be kept at the margins. In fact, the very effectiveness of the system needs to facilitate their access to adequate dispute settlement arrangements.

II. Early Developments: Anticipating the Future

We all know that this question is not new in international law. The right for an individual to appeal a national decision before an international tribunal, as recognized in the Hague Convention XII Relative to the Creation of an International Prize Court in 1907, like the recognition of

the individual's standing to claim against other states, first accepted under the Central American Court of Justice also in 1907, were early expressions of a trend that would leave its mark on international dispute settlement. Mass Claims for war damage would follow under the Treaty of Versailles and other Peace Treaties, allowing for individuals to claim against a foreign state or nationals of a foreign state separately from any espousal by his own government and to be directly entitled to compensation in his own right. It would not take long for the individual to be accorded a right to claim against the state of his nationality, as indeed happened as a result of a judicial interpretation of the 1922 Upper Silesian Convention. Individuals as claimants or defendants in the discussion of property rights, like creditors and debtors, were allowed to appear before claims commissions in the 1950's.

The right of individuals to petition an international body became well established under the regimes for the protection of minorities under the League of Nations, and was carried over under the Charter of the United Nations in the context of the Trusteeship Council, and the protection of human rights. The validity of treaties establishing rights directly in favour of individuals had also been recognized by the PCIJ since the *Case concerning the Jurisdiction of the Courts of Danzig*.

Limited as these first experiences were, they contained, nonetheless, all the relevant conceptual elements that served as the basis for the massive developments that would take place in the second half of the twentieth century in terms of the recognition of the legal personality of individuals to sue or be sued before international tribunals.

III. Human Rights and Duties: An Expanding System

Developments in the law of human rights marked the standing of individuals before international bodies in the second half of the past century; this time claiming specifically against the state of nationality. The access to this effect has ranged from the more traditional right of petition to the complaint before investigating bodies, and includes the alternative of taking a case before judicial bodies such as the European or the Inter-American Court of Human Rights either directly, as in the first case, or indirectly through the intervention of the Commission in the latter case. What is more important is the availability of these mechanisms to protect a vast array of rights which are continuously expanding, and to do so either in global terms or broad regional scales thus

making a significant difference with the early treaty regimes that covered only limited groups of people, selected rights or geographical areas.

But this is not purely a question of rights. International Law has also made progress in holding the individual responsible for grave breaches of its fundamental rules. Responsibility for war crimes under Part VII of the Treaty of Versailles, the elaboration of the governing principles in the Nuremberg and Tokyo trials, like their endorsement in United Nations General Assembly Resolutions, and the specific obligations spelled out in the 1949 Geneva Conventions and related Protocols, have all established an enduring trend in this context. Further confirmation of this trend is found in the parallel developments in the prohibition of piracy, the nationality of ships, the crime of genocide, torture and a number of other matters defined as crimes under international law engaging the direct responsibility of individuals.

These trends have been institutionalized under the jurisdiction of the International Criminal Tribunal for the former Yugoslavia and that for Rwanda, and more recently with the idea for an International Criminal Court. These experiences have broadly opened the way for the prosecution and punishment of individuals held responsible for crimes against humanity, a development that must be welcome. However, it should not pass unnoticed that these tribunals have also adopted a number of questionable practices or interpretations which do not always appear to be in line with the meaning of international law or the observance of due process. A genuine purpose of enhancing the rights of the individual and the pursuit of justice must guide all these efforts, detached from any political motive that would prompt adverse reactions and not the desired progress.

IV. Will the Tide Reach the International Court of Justice?

As the access of the individual and non-state entities to international dispute settlement advances, the question inevitably arises as to whether this will also be the case of the ICJ. Again the issue is not new as it was the subject of important considerations in the League of Nations at the time of the preparation of the Statute of the Permanent Court. And in practice a good number of cases before the Court have dealt with rights of individuals and corporations, most notably *Asylum*, *Haya de la Torre*, *Nottebohm* or the *Barcelona Traction*. Indirect representation of the individual, by the state has been a common practice in this context

and it is considered by Rosenne that even the direct appearance of the individual before the court for given purposes would not be contrary to the Statute.

The key point, however, is whether the individual might have full access to the Court to bring a case. Rosalyn Higgins has convincingly explained that there are powerful reasons for amending the Statute to allow for this development. Access to the Court by international organizations could also be considered, for given aspects within their mandates. The same writer has also warned that a number of procedural safeguards would need to be introduced together with this step in order to avoid misconceived or frivolous claims, in particular a screening service similar to the function that the European Commission of Human Rights had in respect of the Strasbourg Court. A Special Committee of Jurists has also been proposed to work in conjunction with the ICJ to this end and also to screen requests for advisory opinions.

The advisory role of the ICJ can also be developed as an effective mechanism to deal with questions involving the basic principles of international law. Not only should international organizations avail themselves of this right but also the Secretary-General of the United Nations should be similarly authorized in respect of matters pertaining to his competence. Additional organs of the United Nations and specialized agencies might be similarly empowered to the extent that they have a meaningful role within the system. Major regional organizations might also benefit from this authorization. Institutional and procedural arrangements to facilitate the request of advisory opinions by the General Assembly, for example by lowering the required majorities, have also been advanced.

Individuals and non-governmental organizations are also likely candidates to enjoy the right to request advisory opinions in the future. However, since on occasions these entities have heavily politicized the international law issues with which they are concerned, this suggestion does not seem viable in the near future, unless strict requirements of professionalism, accountability and transparency are first met; these being the very requirements such entities claim from the organizations they wish to participate in. The screening mechanisms discussed above would be particularly pertinent in this matter. The suggestion that private parties and non state entities might also request advisory opinions from the Permanent Court of Arbitration should also be retained in this context.

The possibility of an *actio popularis* for the international community, allowing the principal actors of the international system to take action

before the Court when fundamental issues of international law are involved in a given situation, has also been discussed, but for the time being this does not seem to be a likely development. Similarly, a proposal has been made to establish an Advocate-General of the Court whose functions would be to present to the Court the fundamental issues of international law and society involved in the cases submitted.

One other important aspect should be considered in connection with the outlook for the ICJ in respect of the participation of non-state entities. This is the referral by other international tribunals, or even by high domestic courts, of questions of international law that are not within the sphere of their respective specialized jurisdiction. Again a number of safeguards would have to be built in so far as to prevent a misuse of the referral arrangements and to ensure its acceptance by the tribunals concerned.

V. A New Wave under ITLOS

The Law of the Sea Convention made an important step in the direction explained by allowing access of corporate entities undertaking sea-bed mining to the settlement of disputes under the International Tribunal for the Law of the Sea. The compulsory jurisdiction of the Sea-Bed Disputes Chamber applies also to private contractors, both in respect of disputes between parties to contracts or between the Authority and prospective contractors. Disputes concerning the interpretation and application of a contract may also be submitted to binding commercial arbitration; except that those issues relating to the interpretation of the Convention must be referred to the Tribunal Chamber.

It is also of interest to note that the Authority (arts 156 et seq.) may bring action against states for violations of Part XI and related Annexes, just as states may bring action against the Authority for similar violations or for excess of jurisdiction or misuse of power. There is a power of judicial review within the confines established in the Convention. In other matters, such as the prompt release of vessels and crews, an Application before the Tribunal must be made by or on behalf of the Flag state, even if such sponsorship might be in some cases more nominal than real, particularly in respect of flags of convenience. The interpretation has also been advanced that private parties, international organizations and states could bring cases to the Tribunal by special agreement, and that the possibility of bringing public interest actions is left unresolved, but not necessarily excluded. Even if some of these interpreta-

tions may be open to question, they do respond to a trend that is developing throughout the international dispute settlement system and should at some time be addressed, certainly not ignored. The same may be said of the possibility of requesting advisory opinions from the Tribunal.

VI. Changing Role of Diplomatic Protection and Mass Claims

In the light of this changing role of states, international organizations, individuals, and other entities in the international legal system the traditional distinction between subjects and objects of international law has also become less meaningful and practical. What really matters is if a given entity or individual is a genuine participant in the system of international law, working under its rules across national borders.

Increasingly the possibility for the individual to claim in his own right has been recognized and diplomatic protection is acquiring a residual role rather than the principal one it had in the past. As a consequence, the link of nationality is becoming more flexible, the rule of continuance of nationality is being adapted, transferability of claims is becoming responsive to the needs of the global market, double nationality is increasingly relying on the principle of effectiveness and the nationality of corporations is no longer following the *Barcelona Traction* dictum but responding to the more practical issue of economic control and the need to provide protection to shareholders.

The greater degree of flexibility in respect of nationality requirements is confirmed by the contemporary institutional arrangements for the settlement of mass claims and the practice of lump-sum settlement agreements. A most relevant contemporary source of practice is that of the Iran-United States Claims Tribunal, where again effectiveness of nationality, corporate control and *pro rata* recovery in certain instances have been the guiding criteria. Another most relevant source of contemporary practice is that of the United Nations Compensation Commission, where nationality requirements have also been adapted, trusteeship arrangements may also be used to extend protection to persons who are not in a position to have their claims submitted by a government, and corporate claimants do not always need the sponsorship of their governments. Shareholders in some cases may claim independently from the corporate entity, and a proportional interest is admitted for claims relating to partnerships. In a number of relevant points these de-

velopments are confirmed by the recent practice of lump-sum claims settlement. The recent experience of the settlement of mass claims in the context of the Swiss dormant accounts tribunal, where expediency and simplicity are important concerns, also confirms the role that individuals have acquired in their own right, as will probably be the experience of the recently established claims settlement mechanism for slave workers.

VII. The Investor a Central Actor: ICSID's Key Turning Point

It is appropriate to turn now to the question of globalization and dispute settlement from the perspective of specialized jurisdictions, where the role of individuals has already been well established in the context of investment disputes and is beginning to permeate the arrangements for international trade, economic integration and other matters.

The individual as a claimant in his own right is the most distinctive feature of the International Centre for the Settlement of Investment Disputes (ICSID), which has contributed to a key turning point in international dispute settlement arrangements. Interestingly enough the Centre has jurisdiction to decide disputes between a private investor and state, but it has no jurisdiction to arbitrate disputes between two states or between private entities. However, the functional test applied by the Tribunal in the case *Ceskoslovenska Obchodni Banka, A. S. v. the Slovak Republic* has allowed a state owned entity to bring a claim as long as the activities are "essentially commercial rather than governmental in nature".

It is also of interest to note that the global nature and operation of financial markets and the role of companies therein has been recently recognized in the case *Fedax N. V. v. Venezuela*. The globalization and harmonization of dispute settlement arrangements will be further enhanced by the application of the most favoured nation clause to the dispute settlement provisions of investment treaties, recently decided by another ICSID Tribunal.

VIII. The Internationalization of Justice: Trade Agreements

Although individuals and corporations engaged in international trade have not been generally accorded a right of access to international dispute settlement concerning their interests, this is an aspect that is also beginning to change significantly. It must first be noted that under given arrangements directed to ensure international trade competition, individuals are occasionally granted a right of action, sometimes in terms of domestic claims, as happens under the 1974 United States Trade Act and the 1988 Omnibus Trade and Competitiveness Act, but sometimes also on a regional basis that provides a framework for international claims of this kind, as is most notably the case of the European Union. This is often the gate to access the dispute settlement system of the World Trade Organization.

There is next a most interesting innovation introduced under the North American Free Trade Agreement (NAFTA) and other similar trade pacts. This is the international judicial supervision by means of a bi-national panel review of the legislative enactments of the parties or trade determinations reached by their administrative authorities. It is interesting to note that the panel is required to apply the national legislation and legal principles that a court of the importing party otherwise would apply to such a review. NAFTA Parties are under the obligation not to provide for an appeal of panel decisions before domestic courts, but an Extraordinary Challenge Procedure is available. This limited form of internationalization of domestic judicial functions has been criticized on legal and constitutional grounds, but it has endured the test of time.

IX. Enhanced Participation in Economic Integration

This is not the occasion to discuss the jurisdictional features of the European Court of Justice or that of the Court of First Instance, that in many respects comes close to a high federal court that can even exercise some constitutional functions and is broadly open to actions by individuals and institutions, but simply to note that to the extent that economic relations reach advanced levels of integration, the dispute settlement procedures correspondingly move to a greater degree of participation by individuals. A comprehensive approach is also found under the new Central American Court of Justice and the Andean Community

Court of Justice, or in a more limited manner in the dispute settlement arrangements of MERCOSUR.

X. Individuals Rights and the Rule of Law in International Organizations

Dispute settlement under international organizations offers yet another model where the individual and non-state entities have been accorded an increasing participation. The establishment of Administrative Tribunals within major international organizations has provided an important precedent in this respect. The rich practice and jurisprudence of these tribunals, including the judicial review of discretionary powers of the administration has resulted in an effective protection of rights under the rule of law.

An equally noteworthy development is the creation of the World Bank Inspection Panel, that allows for the review of operations upon complaints made directly by private parties affected by a given project, such as an organization, association or other grouping of individuals. This innovative development has been conceived as a part of a broader policy of public participation in the Bank's policies and project development.

XI. An Integrated Dispute Settlement System: Winds of Change in WTO

Because centralization and decentralization as noted above, are a part of the same process both trends are gradually developing links and inter-relations that would make possible a structured and integrated system of international dispute settlement combining a role for both public and private mechanisms, for states and individuals alike.

One such contemporary experience is that of the World Trade Organization, where an integrated dispute settlement system has been put in place and where gradually, the individual has also been accorded a role. A salient feature of the WTO Dispute Settlement Understanding is that it has been structured as an integrated system, combining various methods under the central administration of the Dispute Settlement Body. Political methods, such as consultations, good offices, conciliation and mediation are combined with the intervention of legal meth-

ods. The most significant of these is the mandatory panel procedure and the important innovation of the WTO Standing Appellate Body to which parties to a dispute may appeal the panel report. Arbitration is also called for "as an alternative means of dispute settlement".

Although formally the WTO is an inter-state dispute settlement system, in practice many of the cases brought to it have involved the interest of individuals and corporations who have been sponsored by their governments. Moreover, the very WTO arrangements call for an intervention of domestic courts and procedures in some kinds of disputes, where individuals will have a role of their own. The WTO dispute settlement system has begun to accept a role for individuals. Important steps have been made in this respect by the Appellate Body in the *Bananas* Case in which, in fact, the United States was claiming on behalf of a major banana producer and an industrial association that had initiated domestic action under Section 301 of the United States Trade Act. The prevalence of the private interest was so evident in this case that the decision also made the significant step of allowing the claimant to include counsel for private parties.

A policy for consultation and cooperation with non-governmental organizations concerned with matters, within the scope of the WTO has also begun to develop. The Appellate Body has recently clarified some important aspects relating to the submission of briefs, by holding, in particular, that panels may accept briefs by non-governmental sources even if these have not been requested, and also that the parties may include, in their own submissions, briefs prepared by non-governmental organizations. While, no doubt, progress can also be expected in respect of the participation of non-governmental organizations in the framework of WTO, the criteria expressed above about the need to ensure professionalism, transparency and accountability of these entities is also applicable in this context.

The confidential nature of WTO procedures has been particularly criticized by non-governmental organizations seeking a recognition of their participation on the basis that this policy amounts to a lack of transparency in the handling of issues of interest for society. The experience of dispute settlement arrangements in many other areas has showed, however, that confidentiality is essential for the parties to come to a agreement, or for the tribunal to reach a decision without the pressure of public opinion or other forms of interference with their difficult function.

It has been pointed out that this opening could result in the overloading of the system by private claims, and that to alleviate this prob-

lem there would be a need to enlarge the panel system, have full-time Appellate Body members and strengthen the Secretariat, establishing in essence a court of international trade. Many of these and other improvements are of course feasible and perhaps desirable, but the experience of the ICSID and other specialized dispute settlement systems allowing for private claims shows, that while there is a gradual growth of submissions, this does not amount to an unmanageable situation. A separate dispute settlement forum, for individual claims under WTO has also been proposed. In any event, to the extent that private claims might not require, in the future, government sponsorship, there will still be a need for a screening procedure in order to ensure that only those claims involving genuine merit and interests will accede to the dispute settlement arrangements.

XII. An International Alternative Dispute Resolution System

The need to facilitate dispute settlement in a broader context, particularly in so far as disputes increasingly involve private interests in a global market, has led to the development of an international alternative dispute resolution system, supplementing the public system of international adjudication. One element encouraging alternative arrangements is the need of contemporary dispute settlement to ensure prevention rather than resolution of ongoing disputes, an objective which can be repeatedly achieved only by means of new mechanisms. The prevalence of market economies already noted will increasingly have a strong influence in the development of alternative dispute settlement.

As a result of this development, the traditional methods for dispute settlement under international law have been experiencing a rapid and significant transformation. This is particularly noticeable in conciliation, mediation and arbitration, for example, in the introduction of new approaches such as fast-track arbitration. The development of private commercial arbitration has had also an important influence in the perfection of arbitration mechanisms generally. Domestic alternative dispute resolution methods such as court-ordered arbitration, private judging or neutral evaluation, among others, are gradually finding their way into international dispute settlement as they offer practical and less costly approaches to reaching a settlement.

Since the international community has presently a system of public courts, albeit limited, and also a limited alternative dispute resolution

system, both likely to be importantly developed in the twenty-first century, the question that follows is whether all of it can be brought together to the extent necessary to provide an effective system of international justice. It must be kept in mind, however, that not all arrangements need to be integrated into some common structure, nor should this lead to a strict hierarchy of international tribunals or methods as this would result in curtailing the freedom of choice of the parties or the flexibility to arrange for specific dispute settlement in the context of particular activities or problems. It is rather a question of bringing to the parties' attention, in an organized way, the various choices at their disposal and how they could take advantage of these alternatives:

a first approach is to encourage the referral of some cases by the ICJ or other tribunals to alternative dispute resolution if this is considered useful for the settlement of the dispute. Both the PCIJ and the ICJ have, in fact, occasionally encouraged the parties to negotiate and settle in the course of the proceedings, and this other suggestion would simply provide a more systematic approach and a greater variety of choices conducive to the same end. A second approach is to consider to the extent necessary the development of an international supervisory function interrelating, in particular, arbitration with the role of the ICJ or other such arrangements. Recent proposals point toward an institutionalized international review of arbitral awards by means of the establishment of an International Arbitral Court of Appeal or the creation of an International Court of Arbitral Awards.

XIII. A Privatized System of Dispute Resolution

The kind of interrelationship of methods that has been discussed is not restricted, of course, to courts and arbitration, but covers the whole spectrum of alternative dispute resolution to the extent that it might be useful and conducive to a settlement. The principle of subsidiarity has also an important role to play in international dispute settlement. Just as in a domestic context this principle calls for state intervention only when individuals cannot appropriately perform a social or economic function by themselves, so too in the international community a privatized system of alternative dispute resolution should be allowed to undertake these tasks to the fullest extent possible, and public courts should only intervene in some kind of disputes or else in exercising a supervisory function.

To the extent that these various approaches are organized, guided and encouraged, the alternative dispute resolution system that has been gradually emerging will become broadly available in the twenty-first century. In this context the individual and other non-state entities will attain the full expression of their international legal personality. It is only then that we might be able to say that we truly belong to a global international community.

Thank you again for your invitation.