12. Dispute settlement

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I INTRODUCTION

Facilitating the settlement of disputes is commonly seen as one of the quintessential functions of modern international law. Article 1(1) of the UN Charter specifies as one of the organization's main goals the 'adjustment or settlement of international disputes or situations which might lead to a breach of the peace'. Originally a 'corollary' to the central principle of the prohibition of the use of force,[1] international legal scholarship has thus extensively examined the applicability and content of norms governing the settlement of disputes between nation states; after all, it was the military escalation of their conflicts that posed the gravest threat to the international order throughout much of the nineteenth and twentieth centuries. However, with the expansion of specialized areas such as international economic law, criminal law and human rights law (to name only a few), new actors, problems and types of disputes have become more prominent. The consequence has been a proliferation of international judicial institutions including quasi- and extra-legal mechanisms, both at the international and the regional level.[2] Confronted with exceedingly distinct legal questions, these diverse international bodies have come to fulfil functions that clearly go beyond dispute settlement in its original narrow conception. They now include stabilizing normative expectations, assessing norm compliance or controlling the exercise of authority by public actors.[3] It is in this evolving environment that cities, towns and other sub-national entities are becoming more involved in international legal proceedings – though with important caveats, as will be underlined in this contribution.

The aim of this chapter is to offer a non-exhaustive but structured overview of the analytical issues that arise in relation to the involvement of municipal authorities as prominent sub-national actors in international dispute settlement mechanisms. Given the broad range of forums, functions and actors that are nowadays involved in such processes, the discussion offered here is based on an inductive inquiry; the thematic categories were derived from a comparison of cases flagged as relevant in scholarship in various domains of international law. To encompass the breadth of these rather dissimilar cases, this exploration departed from

[1] Alain Pellet, 'Peaceful Settlement of International Disputes' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press) para. 3, at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e70?rskey=Y0W4PI&result=1&prd=MPIL> accessed 13 October 2020.

[2] See for example Duncan French, Matthew Saul and Nigel D. White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart 2010); and Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2013).

[3] See for instance Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority' (2013) 26 Leiden Journal of International Law 49; and Dinah Shelton, 'Form, Function, and the Powers of International Courts' (2009) 9 Chicago Journal of International Law 537.

the minimalist but nonetheless practical definition by the Permanent Court of International Justice in *Mavrommatis* of a dispute as any 'disagreement on a point of law or fact, a conflict of legal views or interests between two persons'.[4] The chapter focuses on specific disputes arising from a set of facts that is to be resolved primarily through the application and interpretation of already existing law as opposed to more general 'legislative' processes in which norms are under negotiation. Furthermore, the legal substance of the cases relevant to this chapter all relate explicitly to questions of international law, the theme of the present volume, to the exclusion of cases that deal purely with points of domestic law.[5] As a consequence, the focus will be on actions taken before international judicial institutions and other transnational forums, with one section discussing relevant proceedings that have taken place before domestic bodies.

This chapter begins by offering a more substantive introduction on the evolving nature of dispute settlement at the international level including the recent 'functionalist turn' in its analysis. The focus then shifts to the direct involvement of local authorities in international dispute settlement starting with the important observation that they cannot, in fact, bring claims against their own national government. This is followed by a section examining possibilities, rare and largely unused, in which they could become directly involved in dispute settlement. The subsequent section discusses their involvement in proceedings under European Union (EU) and domestic law in cases where disputes have raised questions of international law. Finally, the more established but likewise under-researched instances of indirect participation of local authorities will be addressed. The concluding part sums up the findings and reflects on the question of what cities' engagement with international dispute settlement tells us about international law as a field of practice and a discipline as it also proposes avenues for future research on the topic.

II THE EVOLUTION OF DISPUTE SETTLEMENT IN INTERNATIONAL LAW

While the settlement of disputes is a central objective of any legal system, it holds a specific meaning within the field of international law whose traditional conception can be described as narrow in terms of actors and broad in terms of mechanisms. On the one hand, international disputes were seen to arise solely between sovereign states, the primary subject of international law,[6] and only where their disagreement was 'formulated into a specific claim or assertion which is resisted by the other'.[7] On the other hand, states have not been considered under any general obligation to actually settle a dispute,[8] even if they are bound to negotiate in good faith.[9] They therefore also enjoy a wide discretion regarding the means by which a dispute could be settled: Article 33(1) of the UN Charter enumerates that the 'parties to any dispute …

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4 *Mavrommatis Palestine Concessions Case* (1924) PCIJ Rep Series A No. 2 [11].

5 Anne Peters, 'International Dispute Settlement: A Network of Cooperational Duties' (2003) 14 European Journal of International Law 1, 3.

6 As discussed in Chapter 9 by Yishai Blank in this volume.

7 Richard B. Bilder, 'An Overview of International Dispute Settlement' (1986) 1 Emory Journal of International Dispute Resolution 1, 4.

8 ibid 7.

9 Pellet (n 1) para. 20.

shall … seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'. The 1970 Friendly Relations Declaration of the UN General Assembly reaffirms this as the 'principle of the free choice of means'.[10] The only notable limitations include the cardinal principles of the prohibition of the use of force as well as sovereignty and non-intervention (the latter coming into play only in situations where one of the 'conflicting' parties holds no legal stakes under international law, which means that, in fact, no legal dispute exists).

While certainly not obsolete, this narrow conception under general international law has come under increasing pressure in recent times. A growing number of sub-fields of international law asserts their own and more specific conceptions of dispute settlement, thus adopting functions that, as some have argued, call for an altogether 'new paradigm' for analysing the relevance of international courts.[11] International investment law, for example, grants standing to private parties such as investors and includes institutionalized arbitration frameworks such as the one offered by the International Centre for Settlement of Investment Disputes (ICSID). In international human rights law, disputes usually arise between a state and a natural person who, claiming their rights to be unduly infringed, will file an application to a UN treaty body or a regional court such as the European Court of Human Rights (ECtHR) or the Inter-American Court of Human Rights. Many of these 'new style' international courts and mechanisms also hold compulsory jurisdiction, which effectively transforms them into law enforcement mechanisms.[12] In short, international dispute settlement has become both more multifaceted and fragmented with actors and procedures differing across domains of international law.[13] To account for this diversity, several authors have analysed and compared the varying functions of international judicial institutions,[14] mirroring what has been dubbed a 'functionalist turn' in generalist international legal theory in reaction to the expansion and fragmentation of international law.[15] Since many of these new functions go beyond the classical and narrow conception focused on containing the escalation of inter-state conflicts, a meaningful conception of dispute settlement must take a much broader and more 'implicit' perspective that contains or reinforces more specific functions. As Alter points out (echoing *Mavrommatis*), dispute settlement ostensibly only requires a case with 'two parties and a disagreement about the meaning of the law'.[16]

The complex functional expansion and transformation of international dispute settlement is relevant for this chapter insofar as it represents the backdrop for the growing involvement of cities and local authorities in these processes. To make sense of these parallel developments, the next sections draws a comparably simple distinction between essentially 'political' means

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[10] UNGA, 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States' (1970) UN GAOR 6th Comm., 25th Sess., 1883rd Plen. Mtg, Agenda Item 85, UN Doc A/RES/2625 (XXV).

[11] Von Bogdandy and Venzke (n 3) 72.

[12] Alter (n 2) 168.

[13] A description of the characteristics and workings of particular dispute settlement practices, which is beyond the scope of this chapter, can be found in Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018).

[14] See for instance Alter (n 2), Von Bogdandy and Venzke (n 3) and Shelton (n 3).

[15] Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009) 99.

[16] Alter (n 2) 165.

of dispute settlement (such as negotiation, fact-finding, mediation and conciliation) and more 'legal' forms (namely adjudication and arbitration).[17] Given the still-emergent status of cities as international actors,[18] it is hereby sensible to distinguish between instances where cities could participate *directly* in dispute settlement and those in which they are involved more *indirectly*, with central governments (and sometimes other actors) being in the driver's seat. In the prior and still relatively rare case, cities would themselves be able to use legal forms of dispute resolution while they have to rely on more political strategies in the second instance to exert influence on legal procedures indirectly. Instances of direct participation will be dealt with first here, starting with the limits that circumscribe such involvement.

III CITIES' CLAIMS AGAINST THEIR OWN NATIONAL GOVERNMENTS IN INTERNATIONAL FORUMS

The first important point for understanding cities' direct involvement in international disputes is that they are normally barred from bringing a claim against their own government within international forums. Unsurprisingly, questions of constitutional and administrative law regarding the boundaries of centralized and decentralized jurisdiction are considered internal matters and therefore for domestic courts to settle.[19] There have certainly been instances in which local authorities have tried to challenge this conception, for instance before the ECtHR, which has consistently rejected such attempts.[20] Indeed, the Court has argued that local authorities, regardless of the degree of their autonomy, constitute public bodies rather than non-governmental organizations, which would enjoy legal standing under Article 34 of the European Convention on Human Rights. It also recognized that 'a conflict between a central State organ and a municipality is rather a conflict of jurisdiction which is not for the Court to solve'.[21] In another instance where the mayor of the French city of Seclin applied as an individual rather than on behalf of his municipality, the Court declared the case admissible but recognized the French government's wide margin of appreciation to decide whether he had surpassed his public functions in calling for a boycott of Israeli products.[22] The case in question, *Willem v. France*, is interesting and relevant also insofar as the mayor justified his actions as a 'countermeasure' against Israeli violations of international humanitarian law during the conflicts in Gaza and Lebanon.[23] While the Court (tellingly) did not consider this point, it is

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[17] Peters (n 5) 4–9.

[18] See introduction to this volume.

[19] See, however, Article 11 of the European Charter of Local Self-Government, 15 October 1985, Europ. TS No. 122, which establishes a right for local governments to legal protection. The Congress of Local and Regional Authorities of the Council of Europe has referred to Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the ECHR where it has assessed states' compliance with this provision. See also Giovanni Boggero, *Constitutional Principles of Local Self-Government in Europe* (Brill 2018) 270.

[20] For a discussion of some of these cases, see Barbara Oomen and Moritz Baumgärtel, 'Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law' (2018) 29 European Journal of International Law 607, 622.

[21] *Danderyds Kommun v. Sweden* App no. 52559/99 (ECtHR, 7 June 2001).

[22] *Willem v. France* App No. 10883/05 (ECtHR, 16 July 2009).

[23] Helmut Aust, *Das Recht der globalen Stadt* (Mohr Siebeck 2017) 389.

not the only time that mayors have implemented boycotts on human rights grounds.[24] Whether such initiatives can truly be considered countermeasures within the meaning of chapter II of the International Law Commission's Articles on State Responsibility (ASR) remains an open question that has to be answered against the backdrop of restrictions regarding legal personality.[25] Yet, one may argue that local authorities could invoke such a justification as 'organs of a State' according to Article 4 ASR.[26] That said, the relation between countermeasures and dispute settlement remains a complex one, seemingly pointing to mutually exclusive courses of reactions to breaches of international legal obligations.[27] Further research is necessary to ascertain how responses by local authorities fit within this larger story of interlocking procedural requirements given the circumstance, in particular, that their actions may well be *ultra vires* from a standpoint of domestic law.

While the judgments of the ECtHR illustrate a reluctance on the part of international judicial bodies to respond to domestic jurisdictional conflicts, international human rights bodies are nonetheless receptive to local *indigenous* communities filing applications against their central government, for example when they claim their right to accessing ancestral land and natural resources. Such actions are possible in legal contexts that recognize indigenous people's rights, as for example in the Inter-American system[28] or in the African Court of Human and Peoples' Rights.[29] However, it is important to understand that it is the recognition of the special status of indigenous peoples (rather than local authorities) that gives rise to these entitlements and therefore opens up the possibility for judicial proceedings.

IV INCHOATE POSSIBILITIES OF DIRECT PARTICIPATION

Next to being barred from bringing claims against their own government, cities and towns and their role in international dispute settlement must also be understood against the background of their historical marginalization in international law.[30] Their participation, especially in formal proceedings, has been circumscribed by the general absence of legal personality.[31] Instead, the mainstream view remains that states are answerable and therefore responsible under international law for the conduct of the local authorities within their jurisdiction.[32] As a result, municipalities (like other sub-state actors such as states and provinces) are not usually direct participants in legal dispute settlement. There are, however, two examples of specific legal regimes that allow for this possibility.

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[24] Compare ibid 391.

[25] See Chapter 9 by Yishai Blank in this volume.

[26] Aust (n 23) 149.

[27] Federica Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (Cambridge University Press 2018) 282–283.

[28] For example *Case of the Mayagna Community (Sumo) Awas Tingni v. Nicaragua*, I/A Court HR, Series C No. 79 (31 August 2001).

[29] *African Commission on Human and Peoples' Rights v. Republic of Kenya*, African Court of Human and Peoples' Rights, App No. 006/2012 (26 May 2017).

[30] See Chapter 6 by Mirko Sossai in this volume.

[31] See Chapter 9 by Yishai Blank in this volume.

[32] See Chapter 11 by Katja Creutz in this volume.

For one, Article 25 of the ICSID Convention possibly extends the jurisdiction of the Centre 'to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and the national of another Contracting State'.[33] The option implied in this provision for states to consent to direct liability for their sub-national units has only been used by four countries, namely Australia, Canada, Indonesia and the UK.[34] The number of actual disputes involving sub-national actors under the ICSID Convention is consequently also low. The most interesting suits implicated a number of Canadian provinces (Alberta, British Columbia and Ontario), for example in a case concerning the expropriation of assets of a US timber company.[35] Still, the primary effect of the noticeable increase in potentially litigable measures taken by local governments against private investors has been a corresponding growth in 'immunity' provisions that shield national governments from the 'vicarious liability' that they have traditionally held under classical international law.[36] It is interesting to observe that investment arbitration, one of the most dynamic fields when it comes to international dispute settlement, has undergone a jurisdictional closure rather than opening as a result of the rise of sub-state actors.

A somewhat different development can be witnessed in the quite specific example of host city contracts that the International Olympic Committee (IOC) signs with future venues of Olympic Games.[37] Invariably governed by Swiss law, these contracts (for example for the 2024 Olympic Games in Paris) state that 'validity, interpretation or performance of the HCC shall be determined conclusively by arbitration … by the Court of Arbitration for Sport in accordance with the Code of Sports-Related Arbitration of such Court'.[38] This has not happened so far (or has, at the least, been kept confidential) given that 'it would be against the self-interest' of the host city or another agent to take the IOC to arbitration.[39] It should be noted, however, that the respect and protection of international human rights norms forms an integral part of a host city contract for the first time for the 2024 and 2028 Olympic Games, which make it more likely that actions may be taken against hosts by the IOC in the future.[40] In any case, such a type of involvement has certainly become a legal possibility.

While rather specific and thus far not utilized, it should be noted that both possibilities of direct participation of local authorities are relatively recent creations. It therefore is possible that further legal arrangements could come about in the future where states find that they can

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[33] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [ICSID Convention] (Washington, 18 March 1965), 575 UNTS 159, entered into force 14 October 1966.

[34] Timothy Meyer, 'Local Liability in International Economic Law' (2017) 95 North Carolina Law Review 261, 289.

[35] ibid 276 and 289. At the time of writing, there had been no cases actually involving cities.

[36] ibid.

[37] See also Chapter 23 by Antoine Duval in this volume.

[38] International Olympic Committee, 'Host City Contract – Principles Games of the XXXIII Olympiad in 2024', 13 September 2017, Article 51.2. In case the Court of Arbitration for Sport refuses a case 'for any reason', the case is to be referred to the Swiss state courts in Lausanne.

[39] Ryan Gauthier, *The International Olympic Committee, Law, and Accountability* (Routledge 2016) 162.

[40] Daniela Heerdt, 'Tapping the Potential of Human Rights Provisions in Mega-sporting Events' Bidding and Hosting Agreements' (2018) 17 The International Sports Law Journal 170, 171.

resolve specific substantive and political challenges.[41] However, the jurisdictional closure in the context of Article 25 of the ICSID Convention shows that such a development is not self-evident and that it is just as (or perhaps even more) likely for states to avoid creating any such arrangements. This creates somewhat of a dissonance with the general proliferation and functional opening of international adjudicatory bodies. More structured research will be required to explore whether this reluctance can also be found regarding (potential) institutional arrangements in other domains as well as across states, most notably with a view to their different domestic legal systems and foreign policy priorities.

V 'DISPUTE SETTLEMENT' UNDER EU AND DOMESTIC LAW

As opposed to other frameworks of international law, a specific set of considerations applies when it comes to EU law. On the one hand, local entities have been recognized as potential participants in disputes before the European Court of Justice (ECJ). The legal basis for such involvement, although more implicit than for example in the ICSID system, is hereby no less firm, with the ECJ underscoring their independent legal responsibility under EU law as a corollary of the constitutional principle of direct effect.[42] It therefore follows that local authorities may find themselves in the position of respondent at the Luxembourg Court (as, for example, in the *Fratelli Costanzo* case). On the other hand, there have even been instances in which actions taken by sub-state actors against the central government have found their way to the ECJ. However, such cases concern the interpretation of specific substantive provisions of EU law rather than the resolution of jurisdictional conflicts, which remain a matter for domestic courts to settle.[43] The unusual possibilities for local participation offered by EU law are a consequence of the special character of the preliminary ruling procedure under Article 267 TFEU, which, strictly speaking, does not function to settle disputes but to offer interpretative assistance for a national court or tribunal 'to enable it to give judgment'. That said, the procedure does allow participants to present their viewpoint both in writing and orally to thereby influence the legal outcomes that will eventually arise (back) at the domestic level. Whether this has allowed local authorities to make their concerns properly heard in Luxembourg is a different question, one that may likely have a negative answer.[44]

Disputes involving cities concerning the application and interpretation of international law may also find their way into domestic courts. To date, the most famous example of

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[41] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421.

[42] In the words of the Court, 'it would … be contradictory to rule that an individual may rely upon the provisions of a directive … in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive … It follows that … all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions'; Case 103/88 *Fratelli Costanzo SpA v. Comune di Milano* [1989] ECR 1839 [31].

[43] For example, a case was brought against the Greek government by a prefecture claiming that the diversion of a local river was not in conformity with EU law concerning environmental protection; Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* [2012] ECLI:EU:C:2012:560.

[44] Fernanda Nicola, 'Invisible Cities in Europe' (2011) 35 Fordham International Law Journal 1282.

a sub-national entity making a claim based on international law involves not a municipal authority but the province of Quebec in the 1998 secession case, where the Supreme Court of Canada famously held that a people is expected to achieve self-determination with the framework of an existing state as long as the principles of equality and non-discrimination are respected by the central government.[45] The judgment is still considered the most prominent case on the question of secession in general.[46] However, Canadian jurisprudence also knows a number of decisions where cities brought a claim based on international law. In *Spraytech*, for instance, the town of Hudson had adopted a bylaw against the usage of pesticides that the Supreme Court of Canada eventually upheld, based on, among others, the precautionary principle as recognized in the 1990 Bergen Ministerial Declaration on Sustainable Development.[47] The ruling is seen as significant also because the Court mentioned that the principle may be reflective of customary international law.[48] Comparable cases also exist in the human rights domain: the mayor of the Turkish town of Dikili, for instance, relied on arguments based on international human rights law (as well as on the European Charter of Local Self-Governance) in a criminal case alleging abuse of power for not charging residents for using a certain amount of water.[49]

These examples underline the importance of exploring how such proceedings play out within the context of different national legal systems, with international law and local government law possibly having a mutual effect on one another. In fact, it can be argued that mapping domestic legal requirements (in all their diversity[50]) represents a crucial analytical step for understanding the changing role of cities and towns in international law,[51] with domestic disputes being the manifestation of the relevance of such questions. One can also make a separate legal argument for the pertinence of these cases: according to Article 11 of the European Charter of Local Self-Government, '[l]ocal authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation'.

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[45] *Reference Re Secession of Quebec* [1998] 2 SCR 217.

[46] Daniel Thürer and Thomas Burri, 'Secession' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press) para. 34, at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1100?rskey=OFCy9h&result=1&prd=MPIL accessed 13 October 2020.

[47] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* [2001] 2 SCR 241 [31–32].

[48] ibid [32]. See also Carl Bruch, 'Is International Environmental Law Really Law?: An Analysis of Application in Domestic Courts' (2006) 23 Pace Environmental Law Review 433.

[49] Barbara Oomen, Moritz Baumgärtel and Elif Durmus, 'Accelerating Cities, Constitutional Brakes? Local Authorities Between Global Challenges and Domestic Law' in Ernst Hirsch Ballin, Gerhard van der Schyff, Maarten Stremler and Maartje de Visser (eds), *European Yearbook of Constitutional Law 2020* (T.M.C. Asser Press 2021) 249–272.

[50] Compare Boggero (n 19) 271–272.

[51] Oomen and Baumgärtel (n 20) 626–627.

VI INDIRECT INVOLVEMENT OF CITIES IN DISPUTE SETTLEMENT

Indirect as opposed to direct involvement represents the more standard way for a city or a town to participate in dispute settlement.[52] Indirect refers in this context to circumstances where local authorities are not among the litigating parties but where they still hold a stake, for example because their independent actions constitute the factual background of a case or because they otherwise hold an interest, thus supporting one of the parties involved or becoming involved as third party interveners. Such connections can also overlap, transforming municipal authorities into a participant in the proceedings in all but a formal sense. Yet, such involvement is still distinct from the direct type from a doctrinal point of view as it does not assume or require them to hold legal personality. Where local authorities end up on the defending side, it also triggers state responsibility within the meaning of Article 4 ASR, which confirms that the conduct of 'any State organ shall be considered an act of that State under international law'. In other words, the responsibility of local authorities comes to be subsumed under the one of the nation state. That said, the 'need to look behind the monolithic face of "the state"'[53] has by now also been recognized internationally in such indirect cases, most notably by the International Court of Justice,[54] which is remarkable because it highlights the importance of their indirect (and therefore informal) role formally speaking.

One domain in which the indirect participation of local authorities is relatively frequent is international investment law. Here, nation states have, in a number of cases, been tasked with defending the actions of cities and towns in claims brought by private companies before arbitral tribunals. The earliest and most well-known case in this context is *Metalclad v. United Mexican States*.[55] Metalclad, a US corporation, had bought a waste treatment plant in the Mexican municipality of Guadalcazar, which subsequently prohibited the construction and operation of the landfill due to environmental concerns. Having suffered defeat before the Mexican judiciary, Metalclad submitted the case for arbitration to ICSID, arguing that the denial of permit constituted a violation of the North American Free Trade Agreement (NAFTA). In one of its first decisions to find for the private investor,[56] the panel held that Mexico was responsible for the actions of its municipalities and that it, therefore, had not extended fair and equitable treatment to the investors.[57] Strikingly, the arbitrators also asserted that the lack of clear domestic regulation concerning the powers of local authorities was incompatible with NAFTA and more specifically the duty of providing transparency and predictability for investment.[58] *Metalclad* thereby became the first of a number of arbitration

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[52] See Chapter 11 by Katja Creutz in this volume.

[53] Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press 2009) 140.

[54] For instance, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 [67].

[55] *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 1 (30 August 2000). For a detailed commentary, see Gerald E. Frug and David J. Barron, 'International Local Government Law' (2006) 38 The Urban Lawyer 1, 40–44, as well as Chapter 22 by Jorge E. Viñuales and Lucy Lu Reimers in this volume.

[56] Frug and Barron (n 55) 40.

[57] *Metalclad* (n 55) [73], [101].

[58] ibid [99].

cases that have adopted and reinforced a 'centralizing logic'[59] within international investment law. A very similar set of facts and legal outcome can be found in *Tedmed*, where the arbitral tribunal found that the Mexican environmental agency, in response to opposition by the community and elected officials of the town of Hermosillo, had unduly denied a Spanish company a permit to construct a landfill.[60] States' responsibility for the conduct of local authorities has been asserted in other investment awards as well,[61] though one must keep in mind that there has been a corresponding (or at the least concurrent) rise in immunity provisions in both international trade law and in bilateral investment treaties that shield states from this sort of 'vicarious liability'.[62]

There are also interesting examples that demonstrate that, at least in principle, indirect participation can go the other way, with strategically minded local authorities supporting other actors in cases against the national government. We know of at least one such instance from the Netherlands, where local civil servants from a Dutch municipality provided informal support to human rights lawyers to advance the claims of undocumented migrants for emergency shelter in a case that eventually ended up before the European Committee of Social Rights.[63] With local authorities becoming generally more autonomous and resourceful, particularly in large cities, one can hypothesize there to be more such examples. A strong argument can hence be made to pursue further empirical research on the influence that cities and towns wield through informal channels that allow for indirect participation in international adjudication, particularly in sub-fields such as international human rights and environmental law.

VII CONCLUDING OBSERVATIONS

Like the role of cities and towns in international law, international dispute settlement is rapidly changing. In particular, the number and the function of its mechanisms has evolved – and with it the very definition of dispute settlement. It is plausible to consider both developments as parts of a larger story where growing global interdependence empowers new actors, legally or otherwise, while also making it necessary to hold them responsible for their actions. Unsurprisingly, therefore, we can observe local authorities becoming more involved in international adjudicatory proceedings, though with some crucial qualifications. First, cities and towns are usually barred from bringing claims against their own national governments in international forums. Secondly, there are still only a few and mostly inchoate legal arrangements

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[59] Frug and Barron (n 55) 45.

[60] *Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) [9]. See also Frug and Barron (n 55) 45–47.

[61] See for instance *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, settlement agreement rendered on 11 March 2011, *Generation Ukraine, Inc v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003) [10.1]–[10.7], and *Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002) [96]. For a useful overview regarding environment-related cases that also classifies for local and regional measures, see Daniel Behn and Malcolm Langford, 'Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration' (2017) 18 Journal of World Investment and Trade 50.

[62] Meyer (n 34).

[63] Interview with local government representative, June 2013. The case in question is *Conference of European Churches (CEC) v. the Netherlands* Complaint No. 90/2013 (ECSR, 10 November 2014).

that allow for direct participation, even if it cannot be ruled out (given the two trends described above) that more will emerge in the future. It is possible, however, to point to an uptick in domestic court cases featuring local authorities that invoke international law. Likewise, there are more instances where municipalities are indirectly involved in international dispute settlement. More research needs to be undertaken on all of these themes, most notably when it comes to the choice of states and their governments to allow (or limit) local authorities' various types of participation and the impact of local government law on their participation, as well as the strategic choices and effective influence of cities and towns particularly in a context of indirect participation.

Probing the role of local authorities in international dispute settlement, now broadly defined, also tells us something about the international law as an academic discipline and a field of practice. First, their involvement is more of a topic in certain fields than in others, with international economic law and human rights law standing out in this regard. This, to be sure, does not imply a complete opening of these areas as there are still few possibilities for direct participation, with local authorities being involved either indirectly or in a domestic setting. Yet, it is proof, too, of the fragmented nature of international law in cases where local authorities become involved in disputes, as well as an indication of where we can expect further developments to happen. The prevalence of indirect participation also highlights the significance of informal practices that, from the perspective of a municipality, may well be more practical and effective than forcing direct access, which may offer little added value. Like the chapter on responsibility, this contribution thus calls into question the urge to insist on the formal recognition of local authorities; this may be useful, but not necessarily so. Finally, this chapter highlighted the importance of domestic law and courts, with the latter providing important avenues for municipalities to engage with international law. 'International' dispute settlement might in this sense be 'going domestic' with the rise of cities, thus removing it even further from what international lawyers traditionally used to associate with the term.

FURTHER READING

Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2013).

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