



## *Book Review:*

### *The Performance of International Courts and Tribunals.*

**Theresa Squatrito, Oran R. Young, Andreas Follesdal and Geir Ulfstein. *The Performance of International Courts and Tribunals.* Cambridge University Press, 2018. Pp. 433, ISBN: 978-1-108-42569-8. Reviewed by Samira Alliou, PhD Candidate, Strasbourg University, France.**

Writing about the performance of international courts and tribunals is a daunting task. Excepting the article on “Measuring the Judicial Performance of the European Court of Human Rights”<sup>1</sup> written by Elisabeth Lambert, the few scholars<sup>2</sup> have only analyzed specific questions relating either to the design or the effects of introducing New Public Management on international courts.

Eighteen authors contributed to this volume; it emerged from an exchange continued over several workshops on the effectiveness and performance of international courts and tribunals. Titled *The Performance of International Courts and Tribunals*, the book opens with an introduction to the Framework for Evaluating the Performance of International Courts and Tribunals. In this first chapter, the authors explain which criteria they have chosen in order to provide common analytical tools for comparison across international courts. Moreover, they demonstrate why they consider several levels of performance to “gain a comprehensive understanding of the performance of international courts” (page 15). The contributors have distinguished among “the micro-, meso, and macro-levels, corresponding roughly to the level of the individual case, the level of the issue areas or governance arrangements to which cases belong, and the level of the overarching system in which cases arise” (page 15). They conclude by explaining the variant patterns in performance; this led the authors to search for the determinants of the performance. In other words, if “they think of performance as the dependent variable, they want to direct attention to the search for independent variables that allow them to explain or account for variance in the dependent variable” (page 18).

The book’s authors develop an integrated framework for the study of international courts. By contrast with previous academic approaches, these contributors explore factors that may explain a variety of models by offering a comprehensive comparative approach covering the full array of international courts and tribunals. Because all permanent bodies, both the international judicial bodies and the ad hoc judicial bodies, are included in the review, the authors are in a position to assess the extent to which each court has its own unique performance factors.

Because the research questions “why some international courts perform better than others and which factors affect the outcomes of these courts and tribunals?” the authors felt obligated to cover courts originating from different regions, developed and developing, and from different traditions. Attention also would focus on significant variations among international courts regarding not only their mandates, but also the practices they have adopted and the effects of their rulings. We have good reason to believe that factors such as these may have implications for the role regional law plays in the development of international law and global governance.

This book is divided into three parts. The first part consists of a set of chapters providing broad assessments of the roles of international courts in a number of distinct issue areas: trade, investment, human rights and international criminal law. The second part deals with the identification of factors relevant to understanding the performance of courts. The third part summarizes key findings and discusses future directions for research on the performance of international courts.

In the first part, chapters 2 and 3 cover the court performance within the multilateral trade regime and the Performance of Investment Treaty Arbitration (ITA) with a focus on the World Trade Organization Dispute Settlement Mechanism (WTO DSM). The contributions focus on the adjudication of international economic law. The main argument of the authors is that the WTO DSM is most often capable of facilitating the resolution of conflicts relating to market access. Another main argument of the authors is that the dispute settlement mechanism has an informal role in clarifying international trade law. The authors argue that the performance of the WTO DSM process is weakened by its inability to ensure access to justice. According to them, overrepresentation of the most powerful economies is problematic in the WTO DSM because disparities in legal capacity obstruct equal access. They add that the overrepresentation of powerful economies in the DSM also has repercussions for outcome performance. In these

1 E. Lambert Abdelgawad, « La mesure de la performance judiciaire de la Cour Européenne des droits de l’homme : une politique managériale à tout prix », *Revue Française d’Administration Publique* (Special Issue, Feb. 2017)

2 Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, Oxford University Press, 2014.

Brandeis Institute of International Judges, “The authority of international courts and tribunals: challenges and prospects”, 2016.

C. J. Carrubba and M. J. Gabel, *International Courts and the performance of international agreements: a general theory with evidence from the European Union*, Cambridge: Cambridge University Press, 2015, 251 pp.

M. Dakolias, “Court Performance around the world a comparative perspective”, World Bank Technical Paper n°430.

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chapters, in addition to the mechanisms previously mentioned, other dispute settlement processes embedded within preferential trade agreements are reviewed. Thus, these chapters cover unconventional “courts” in contrast with more conventional courts.

In the chapter dedicated to the performance of regional human rights courts (chap. 4), Dinah Shelton evaluates the performance of the European, Interamerican and African Courts of Human Rights. The author discusses how internal and external structural factors affect the performance of regional human rights courts. Her main argument is that “the regional human rights courts perform better than member states expect but not as well as victims would hope”. According to her, their process performance suffers from restricted access, lengthy proceedings, and the courts’ incapacity to address numerous and serious violations. Nonetheless, she argues all three courts generally perform well in terms of generating compliance with their decisions.

Chapter 5 analyzes the outcome performance of international criminal courts and tribunals. The author’s main argument is that “of interest here is one particularly controversial aspect of international criminal tribunals’ outcome performance: whether they contribute to the development of international humanitarian law and international criminal law. Nobuo Hayashi reveals that the normative contribution of international criminal courts to international humanitarian law and international criminal law has been more mixed than is often asserted.

In the second part of the book, the authors seek to identify factors relevant to understanding the performance of courts by emphasizing important determinants of international courts’ performance in previous studies. By this original research, the authors contribute to the understanding of whether, how and why international organizations perform as they do. The strong point is that the variation of these chapters illustrates how the concept of performance can be empirically applied across the dimensions, levels and issues areas pertaining to international law and courts.

Another issue discussed in part II (chap. 6) is related to the deterrence ability of the international criminal court. The contributors of this part, H. Jo, M. Radtke and B. A. Simmons, focus on outcome performance in order to argue that the international criminal court’s performance should be assessed in terms of its capacity to deter crimes that are subject to its jurisdiction. Jo, Radtke and Simmons formulate, “two kinds of evidence to assess the outcome performance of the international criminal court: whether there is evidence that the international criminal court or domestic law have had deterrent effect and whether it has had an impact on domestic law”.

The link between institutional fragmentation and international court performance is explored in chapter 7. Benjamin Faude considers how the proliferation of international courts challenges the commonly held assumption that international courts do not interact with one another. His main argument is that “forum shopping may occur as a result of institutional fragmentation and that this can generate a return to politicized resolution of interstate conflicts”.

Process performance has also been studied by Jeffrey L. Dunoff and Marck A. Pollack who broaden the theoretical and methodological approaches traditionally used in evaluating court performance by introducing practice theory to evaluate judicial performance (chap. 8). Their main argument is that “to understand performance of international courts, it is necessary to assess the performances of judges”. According to them, judicial performances are also created by judges themselves in the practices they adopt. From that point, they consider that “judicial practices exist throughout a dispute’s lifecycle and include multiple performances of judges”. In order to underpin their argument, they try to highlight the evidentiary and fact-finding practices of the International Court of Justice, offering contrasts to other international courts and link these practices to the outcome performance of the court.

The way international courts try to influence their own performance by focusing on strategies of socialization is an important issue explored in this book (chap. 9). Nicole de Silva’s main argument is that international courts can formulate policies and practices aimed directly at socializing actors into the norms, rules and procedures that underpin the performance of international courts. She presents a framework for conceptualizing international courts socialization strategies and their influence on the actual and perceived performance of international courts by showing how international courts can formulate socialization strategies in response to challenges to their actual and perceived performance. In doing so, she highlights a realm of international court decision-making and activity that has not been studied much to date. The analysis of international courts’ reported policies and practices demonstrates that these socialization strategies are an important instrument by which international courts aim to shape their performance and actors perceptions of it.

Factors relating to compliance are also discussed. (chap. 10). Chiara Giorgetti reviews the compliance mechanisms international courts use and discusses the political, sociological, and other factors that affect compliance. She argues that compliance with court judgments is meaningful in determining whether a court is effective and performs as intended. She focuses her analysis on three international courts: the International Court of Justice, the European Court of Human Rights, tribunals under the auspices of the International Convention for the Settlement of Investment Disputes, and the United Nations Claims Commission. The objective is to offer an assessment of a variety of mechanisms that reflect the full range of existing compliance mechanisms as well as to evaluate their operability in “real life”. The author argues that these formal mechanisms of compliance contribute to judgment compliance to varying degrees, noting that several legal factors affect compliance. The author also explains that political constraints and features of the state, such as its domestic judicial system, contribute to compliance with international courts judgments.

In chapter 11, Steinar Andresen asks what the analysis of international court performance can learn from the literature on international regimes. He discusses how previous literature reveals particular methodological challenges in assessments of international courts

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performance. Another argument is that “it is pertinent to focus on problem structure, asking to what extent international courts are able to deal effectively with difficult issues”. In addition, he suggests that “the performance of regional human rights courts is linked to how long they have existed, their participatory scope and the severity of challenges facing them”.

In the third part of the book, key findings are summarized, and future directions are discussed for research on the performance of international courts. Chapter 12 focuses on methodological considerations for future research on international court performance. Here, Theresa Squatrito discusses the operationalization and measurement and their advantages and disadvantages. In addition to that, the author invokes some options for methods that researchers might use to evaluate and explain international court performance. She explores five methods (experimental designs, meta-analysis, qualitative comparative analysis, counterfactual analysis, and multimethod research) and how they might be useful for future research on the performance of international courts. In this chapter, it is interesting to see how the author highlights lesser known methodological options without replacing more conventional qualitative case studies or quantitative analysis based on observational data.

Chapter 13 concludes the book by considering basic questions about the performance of international courts: how well have they performed and does performance vary by issue area? What are the determinants of performance in this realm? What can we expect regarding trends in performance during the foreseeable future?

Overall, this is an important, instructive and interesting book, in large part for the case studies covered. The case studies are entertaining as well as enlightening. Virtually any reader is likely to learn something new from the cases. It is a bit risky for the authors to analyze so many different courts, but the benefit is that there is a high degree of coherence among the case studies, a rarity in edited volumes with authors from multiple backgrounds. *The Performance of International Courts and Tribunals* is a remarkable book that will enable scholars and practitioners to better understand the role that international courts and tribunals play from a variety of perspectives. The authors infuse their textbook with a wealth of knowledge and analysis regarding the roles of international courts and tribunals rather than merely producing definitive conclusions regarding their performance. This stimulates the growing need to take international courts seriously on the intersection of this vitally important area of law. This volume will play an important role in understanding the roles that judicial institutions currently play in international society.

There are some noteworthy gaps in the book’s coverage. One significant weakness is its failure to offer definitive answers regarding the determinants of the performance, leaving the reader only with a critical assessment of the evidence relating to the relative importance of a variety of specific factors. Second, the extreme diversity makes it difficult to engage in systematic comparisons regarding the performance of international courts and tribunals in the four issue domains. Third, the textbook devotes insufficient attention to the cutting-edge issue of the analysis of the judgments that courts render.

To conclude, one of the most interesting lessons to draw from “The Performance of International Courts and Tribunals” is that there is a broad range of issues relating to the performance of international courts that remain to be examined. We should keep in mind that reform efforts always often involve trying to figure out how a court can perform better. The cases studies at the heart to *The Performance of International Courts and Tribunals* don’t give an entirely clear answer to that question, but that may be because there is no clear answer.

