

Table of Contents

<i>Table of Cases</i>	<i>xi</i>
<i>Table of Instruments</i>	<i>xxiii</i>
<i>List of Abbreviations</i>	<i>xxxi</i>
<i>Postscript to the Paperback Edition</i>	<i>xxxv</i>
1. Agenda and Objectives	1
A. Framing the Problem	I
B. New Basic Concepts for International Courts	5
1. Multifunctionality	5
a) Dispute settlement	9
b) Stabilization of normative expectations	10
c) Law-making	12
d) Control and legitimation	14
2. The exercise of public authority	17
3. Democracy	18
C. Three Objections, Three Responses	21
1. A study of positive law or of normative theory?	21
2. An excessively broad concept of what constitutes a court?	23
3. Eurocentrism?	26
2. Basic Conceptions of International Courts	28
A. Courts as Instruments of Dispute Settlement	29
1. International courts in a state-centric world order	29
2. The cautious International Court of Justice	36
3. The Permanent Court of Arbitration and the Iran–United States Claims Tribunal	44
B. Courts as Organs of the Value-Based International Community	46
1. International courts as beacons of humanity	48
2. The daring ICJ	56
3. The European Court of Human Rights	63
4. International criminal courts	71
5. The International Tribunal for the Law of the Sea	76
C. Courts as Institutions of Legal Regimes	79
1. International adjudication for an interconnected world	79
2. The dispute settlement body of the WTO	85
3. Investment arbitration within the framework of the ICSID	90
D. Toward a Democracy-Oriented Theory	95

3. Key Elements of a Public Law Theory of Adjudication	101
A. The Public Authority of International Courts	101
1. <i>The inevitability of judicial law-making</i>	101
a) <i>Adjudication and law-making</i>	102
b) <i>Law-making for the case at hand and for the future</i>	105
c) <i>Reasons: on the difference between legislation and judicial law-making</i>	109
2. <i>The exercise of international public authority</i>	111
a) <i>The concept of authority and the judicial decision</i>	111
b) <i>Precedents in international law</i>	115
B. Specific Legitimation Problems of International Adjudication	119
1. <i>Centralized judiciary and a decentralized legislative power</i>	119
a) <i>Institutional asymmetries</i>	119
b) <i>The treaty and the two-level game</i>	122
c) <i>Why case-law needs a legislator</i>	123
d) <i>Why Lauterpacht's and Kelsen's theory is outdated</i>	125
2. <i>The potential and dangers of the constitutionalist argument</i>	128
a) <i>The constitutionalist approach</i>	128
b) <i>A constitution-supplementing function?</i>	131
c) <i>Internal constitutionalization of international organizations</i>	133
3. <i>Fragmentation as a problem for democracy</i>	134
C. A Concept of Democracy for International Adjudication	135
1. <i>Problem and approach</i>	135
2. <i>Basic elements</i>	140
a) <i>The democratic subject</i>	140
b) <i>Dual democratic legitimacy</i>	145
c) <i>From self-government to political inclusion</i>	146
3. <i>The role of representative institutions for international courts</i>	147
4. <i>The foundations of court-generated democratic legitimation</i>	152
4. Pathways of Democratic Legitimacy	156
A. Judges	158
1. <i>What makes a good bench? A democracy-oriented reconstruction</i>	159
2. <i>The nomination and selection process</i>	163
3. <i>The democratic potential of international bodies</i>	167
B. The Judicial Process	171
1. <i>Publicness and transparency</i>	172
a) <i>Oral proceedings</i>	172
b) <i>Decision-making by judges</i>	175
c) <i>Individual opinions</i>	177
2. <i>Intervention by third parties and amicus curiae briefs</i>	178
3. <i>A legal remedy</i>	184
C. The Decision	186
1. <i>Reasons and limits</i>	186
a) <i>Judicial method from a democracy-oriented perspective</i>	186
b) <i>Systematic interpretation as democratic strategy</i>	189
c) <i>The limits of a decision and its justification</i>	193

2. Judicial interaction as democratic control	196
3. Embeddedness in political processes	198
a) Democratically calibrated intensity of review	198
b) The use of soft law	201
c) Strengthening political processes	205
5. In Whose Name?	207
A. Courts as Actors of Global Governance	207
B. In Whose Name, Then?	209
C. Outlook	214
Bibliography	217
Index of Persons	261
Index of Subjects	263