Competing Jurisdictions of International Courts and Tribunals: Which Rules Govern?

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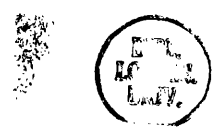

Abstract of thesis

Recent years have witnessed a sharp increase in the number of international courts and tribunals and greater willingness on the part of states and other international actors to subject themselves to the compulsory jurisdiction of international adjudicative mechanisms. However, because of the uncoordinated nature of these developments, overlaps between the jurisdictional ambits of the different judicial bodies might occur - i.e., the same dispute could fall under the jurisdiction of more than one forum. This, in turn, raises the question of coordinating between the competing jurisdictions, with a view of promoting the smooth operation of international law and safeguarding the rights and interests of the disputing parties.

The purpose of the thesis is to study the implications of jurisdictional competition and to identify standards which may alleviate problems associated with the phenomenon. The first part of the thesis examines the jurisdictional ambits of the principal international courts and tribunals and delineates areas of overlap between their respective jurisdictions. It reveals considerable overlaps, which have already resulted, on occasion, in multiple proceedings. The second part discusses some of the potential systematic and practical problems that arise out of jurisdictional competition (e.g., forum shopping and multiple proceedings) and considers the expediency of mitigating them. Finally, the third part identifies and studies existing rules of international law, which govern inter-jurisdictional competition, and considers the introduction of additional norms and arrangements (e.g., the *lis alibi pendens* rule and the abuse of rights and comity doctrines).

The central conclusion of the thesis is that jurisdictional competition, while positive in some ways, ought to be mitigated, or else it could undermine the coherence of the international legal system. Although existing rules regulate some aspects of inter-fora competition, additional rules are needed in order to preserve and improve the harmonisation of the international legal system.

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Table of Abbreviations

AB – Appellate Body (WTO)

ACHR – African Commission on Human and Peoples' Rights

ADB – Asian Development Bank

AHR Charter - African Charter on Human and People's Rights

AHR Court – African Court of Human Rights

A.J.I.L. – American Journal of International Law

Am. Soc. Int'l L. Proc. – American Society of International Law Proceedings

A.S.I.L. – American Society of International Law

Aust. L.J. - Australian Law Journal

Aust. L.Rep. - Australian Law Reports

B.I.S.D. – Basic Instruments and Documents

Buff. L. Rev. - Buffalo Law Review

B.U.L. Rev. – Boston University Law Review

B.Y.I.L. - British Yearbook of International Law

Cal. L. Rev. - California Law Review

Cal. W. Int'l L.J. - California Western International Law Journal

Cambridge L.J – Cambridge Law Journal

Canterbury L. Rev. - Canterbury Law Review

CARICOM – Caribbean Community

CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

CCJ – Central American Court of Justice

CEC – North American Commission for Environmental Cooperation

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

CERD – Convention on the Elimination of All Forms of Racial Discrimination

CFA – Committee on Freedom of Association (ILO)

CIS – Community of Independent States

C.J.S. – Corpus Juris Secundum

C.L.R. – Commonwealth Law Reports (Australia)

Colum. J. Transnat. L. - Columbia Journal of Transnational Law

Colum. L. Rev. - Columbia Law Review

COMESA – Common Market of Eastern and Southern Africa

Cornell L. Rev. - Cornell Law Review

Crim L.F. - Criminal Law Forum

CSCE – Conference on Security and Cooperation in Europe

C.T.S. – Consolidated Treaty Series (U.S.)

D. – Dalloz-Sirey (French Jurisprudence)

Denv. J.I.L.P. - Denver Journal of International Law and Policy

D.L.R. – Dominion Law Reports (Canada)

D.P. – Dalloz Périodique et critique (French cases)

DSB – Dispute Settlement Body (WTO)

DSU - Understanding on the Rules and Procedures Governing the Settlements of Disputes (WTO)

Duke J. Comp. & Int'l L. - Duke Journal of Comparative and International Law

Duke L.J. - Duke Law Journal

EC – European Community

ECHR – European Court of Human Rights

ECJ – Court of Justice of the European Communities

ECOSOC – The Economic and Social Council (UN)

E.C.R. – European Court Reports (EC)

ECSC – European Coal and Steel Community

ECSR – European Committee on Social Rights

EEA – European Economic Area

EFTA – European Free Trade Erea

EHR Comm'n – European Commission on Human Rights

E.H.R.R. – European Human Rights Reports

E.R. – English Reports

E.T.S. – European Treaty Series of Agreement and Conventions of the Council of Europe

EU – European Union

Euratom – European Atomic Energy Community

Eur. Comm'n H.R. Dec. & Rep. – Decisions and Reports of the European Commission of Human Rights

Eur. Ct. H.R. – European Court of Human Rights Publications

European HR Convention – European Convention on Human Rights and Fundamental Freedoms

Eur. L. Rev. – European Law Review

Eur. Y.B. – European Yearbook

F.C. – Federal Court Reporter (Canada)

Fordham Int'l L.J. - Fordham International Law Journal

FTA – Canada-U.S. Free Trade Area

GA – United Nations General Assembly

GAOR – General Assembly Official Records

GATT – General Agreement on Tariffs and Trade

Geo. Int'l Envtl. L. Rev. - Georgetown International Environmental Law Review

Geo. L.J. - Georgetown Law Journal

Harv. Hum. Rts. J. - Harvard Human Rights Journal

Harv. L. Rev. - Harvard Law Review

HRC – Human Rights Committee

Hum. Rts. L.J. - Human Rights Law Journal

Hum. Rts. Q. – Human Rights Quarterly

I/A CHR - Inter-American Court of Human Rights

I/A HR Comm'n – Inter-American Commission on Human Rights

I/A Court H.R. – Inter-American Court of Human Rights Reports

IBRD – International Bank for Reconstruction and Development

ICC – International Criminal Court (and also International Chamber of Commerce)

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

I.C.J. – International Court of Justice Reports

I.C.J. Y.B. – International Court of Justice Yearbook

I.C.L.Q. – International and Comparative Law Quarterly

ICSID – International Centre for Settlement of Investment Disputes

ICSID Rep. – ICSID Reports

ICSID Rev., F.I.L.J. – ICSID Review - Foreign Investment Law Journal

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the Former Yugoslavia

IDB – Inter-American Development Bank

IGO – Inter-Governmental Organisation

ILA – International Law Association

ILC – International Law Commission

I.L.M. – International Legal Materials

ILO - International Labour Organisation

I.L.Q. - International Law Quarterly

I.L.R. – International Law Reports

IMF – International Monetary Fund

Ind. J. Int. L. - Indian Journal of International Law

Inter-Am. C.H.R. – Annual Report of the Inter-American Commission on Human Rights

Int'l Lawyer – The International Lawyer

Iowa L. Rev. - Iowa Law Review

Iran-US Cl. Trib. Rep. - Iran-US Claims Tribunal Reports

Israel L. Rev. - Israel Law Review

Israel Y.B. Human Rights – Israel Yearbook on Human Rights

ITLOS – International Tribunal for the Law of the Sea

Jap. Ann. Int'l L. - Japanese Annual of International Law

J. World Trade - Journal of World Trade

Kan. L. Rev. - Kansas Law Review

League of Nations O.J. – League of Nations Official Journal

Loy. L.A. Int'l & Comp. L.J. - Loyola of Los Angeles International and Comparative Law Journal

L.N.T.S. – League of Nations Treaty Series

McGill L.J. - McGill Law Journal

Mel. U. L. Rev. - Melbourne University Law Review

MERCOSUR – Southern Common Market (South America)

Mich. J. Int'l L. - Michigan Journal of International Law

MWC - Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

NAAEC – North American Agreement on Environmental Cooperation

NAFTA – North American Free Trade Area

N.C.L. Rev. - North Carolina Law Review

Neb. L. Rev. - Nebraska Law Review

Neth. Y.B. Int'l Law - Netherlands Yearbook of International Law

NGO – Non-Governmental Organisation

N.J. – Nederlandse Jurisprudentie (Dutch cases)

N.S.W.L.R. – New South Wales Reports (Australia)

N.V.I.R. – Nederlandse Vereniging voor Internationaal Recht (Netherlands International Law Society)

N.Y.U.J. Int. L. & Pol. - New York University Journal of International Law and Politics

N.Y.U. L. Rev. – New York University Law Review

N.Z.L.R. - New Zealand Law Reports

OAS. – Organisation of American States

O.A.S. Off. Rec. – Organisation of American States Official Records

O.A.S. T.S. – Organisation of American States Treaty Series

OAU – Organisation of African Unity

OSCE – Organisation for Security and Cooperation in Europe

O.J. – Official Journal of the European Communities

PCA – Permanent Court of Arbitration

PCIJ – Permanent Court of International Justice

P.C.I.J. - Permanent Court of International Justice cases

P.D. – Piskei Din (Israeli Supreme Court Reports)

R. – Rettie's Court of Session Reports, 4th Series (Scotland)

R.I.A.A. – United Nations Reports of International Arbitral Awards

Sask L. Rev. - Saskatchewan Law Review

SC – Security Council

SCOR – Security Council Official Records

Sess. Cas. – Session Cases (Scotland)

S. Cal. L. Rev. - Southern California Law Review

SICA – Central American Integration System

S.L.R. - Singapore Law Reports

S.L.T – Scotts Law Times (Scotland)

South Carolina L. Rev. - South Carolina Law Review

Stan. J. Int'l L. - Stanford Journal of International Law

Stan. L. Rev. – Stanford Law Review

St. John's J. Legal Comment. - St. John's Journal of Legal Commentary

St. Lou. U.L.J. - St. Louis University Law Journal

T.I.A.S. – United States Treaties and Other International Acts Series

Tul. L. Rev. - Tulane Law Review

U.C.L.A. L. Rev. – University of California at Los Angeles Law Review

UN – United Nations Organisation

U.N.C.I.O. Doc. – United Nations Conference on International Organisation Documents

UNCITRAL – United Nations Commission on International Trade Law

UNCLOS – United Nations Convention on the Law of the Sea

UNESCO – United Nations Educational, Scientific and Cultural Organisation

U.N.T.S. – United Nations Treaty Series

U.L.A. - Uniform Laws Annotated

U. Miami L. Rev. - University of Miami Law Review

U. Pa. L. Rev. - University of Pennsylvania Law Review

U.S.C. – United States Code

Va. J. Int'l L. - Virginia Journal of International Law

Va. L. – Virginia Law Review

Wayne L. Rev. - Wayne Law Review

WB – The World Bank

WTO – World Trade Organisation

Yale J. Int'l L. - Yale Journal of International Law

Yale L. J. - Yale Law Journal

Y.B. Com. Arb. – Yearbook, Commercial Arbitration

Y.B. Eur. Conv. on Human Rights – Year Book of the European Convention on Human Rights

Y.B. Int. L. Comm. – Yearbook of the International Law Commission

Z.P.O. – ZivilprozeBordnung (German Civil Procedure Statute)

Introduction

1. International law at a time of transformation: the proliferation of international courts and tribunals

Every domestic system of law is designed to satisfy two basic needs, which are indispensable for the maintenance of social order: regulation of human conduct and peaceful settlement of disputes.[1] In a modern society, the first function is primarily achieved through law-creating institutions, whereas the second goal is normally secured by dispute settlement mechanisms, such as courts and other judicial and quasi-judicial procedures. Similar social needs exist in the international sphere.[2] Improved coordination and cooperation between the international actors [states, international organisations (IGOs), and, to some extent, natural and legal persons],[3] which is needed to promote the well being of the international polity, can only be realised through increased regulation of these actors' conduct.[4] Furthermore, since it is inevitable that disputes between international actors will continue to occur (given their frequently incompatible interests and needs)[5] peaceful methods for dispute resolution ought to be put in place in order to prevent the breakdown of legal arrangements on which the viability of the international polity depends.

The last century has witnessed an explosion in international law making through treaties, state practice and soft law legislation.[6] It has also witnessed the expansion of international law into what were before, by and large, unregulated areas of international relations (e.g., human rights and the protection of the environment).[7] This extensive body of norms nowadays provides international actors with reasonable, (albeit imperfect) guidance on how should to conduct their affairs. However, international law

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[1] Joseph Raz, *The Concept of a Legal System* (2nd ed., 1980)(1990 reprint) 229; Harry C. Bredemeier "Law as an Integrative Mechanism" *Law and Sociology* (W.M. Evan, ed., 1962) 73, 74.

[2] Malcolm N. Shaw, *International law* (4th ed., 1997) 717; Philip Allot "The Concept of International Law" 10 European Journal of International Law (1999) 31, 31; John A. Perkins "The Changing Foundations of International Law: From State Consent to State Responsibility"15 Boston University International Law Journal (1997) 433, 506.

[3] Shaw, supra note 2, at 191-195.

[4] Prosper Weil "Towards Relative Normativity in International Law?" 77 A.J.I.L. (1983) 413, 418-19.

[5] J. G. Merrills, *International Dispute Settlement* (3rd ed., 1998) 1.

[6] Soft law consists of conduct-regulating norms, which lack binding force, and is created primarily through non-binding resolutions and standards adopted by international organisations. Paul Szasz "General Law-Making Process" 1 *United Nations Legal Order* (Oscar Schachter and Christopher C. Joyner, eds., 1995) 35, 45-47.

has a far less satisfactory record in preventing and resolving international disputes concerning the interpretation and application of the said norms. Attempts to encourage states and other international actors to resort to effective international dispute settlement mechanisms, such as the International Court of Justice (ICJ), have encountered an almost insurmountable obstacle – the notion of state sovereignty, and the concomitant requirement of state consent as precondition to the introduction of most international obligations, including procedural ones.[8] Since it is well accepted that states cannot be compelled to participate in adjudication against their will, and given the disinclination of states to restrict their freedom of action, by subjecting themselves to the authority of international courts and tribunals,[9] no comprehensive and compulsory system for international dispute settlement, equivalent to the one found under domestic systems of law, has so far emerged.[10]

Still, this structural deficiency does not mean that the international law has altogether refrained from developing dispute settlement mechanisms. Quite on the contrary, diplomatic methods of dispute settlement (e.g., negotiation) have always been part of international relations. Further, many states have been willing, on some occasions, to refer specific disputes, or even entire classes of disputes, to adjudication. However, the basic unwillingness on the part of most states to undertake to refer all of their disputes to binding adjudicative procedures has remained intact.[11] Similar notions of aversion from becoming subject to the binding authority of international institutions has also thwarted the development of comprehensive and effective enforcement procedures designed to

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[7] Pierre-Marie Dupuy "The Danger of the Fragmentation or Unification of the International Legal System and the International Court of Justice" 31 N.Y.U.J. Int. L. & Pol. (1999) 791, 795.

[8] *The Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A), No. 10, at 18.

[9] Lois Henkin, *How Nations Behave* (1979) 187. See also Stephen M. Schwebel "Reflections on the Role of the International Court of Justice" *Justice in International Law* (1994) 3, 10; Jeffrey L. Dunoff "Institutional Misfits: the GATT, the ICJ and Trade-Environment Disputes" 15 Mich. J. Int'l L. (1994) 1043, 1089-90; J. Patrick Kelly "The International Court of Justice: Crisis and Reformation" 12 Yale J. Int'l L. (1987) 342, 365. At the same time, disputes perceived as unimportant might also not be submitted to adjudication. Richard Baxter "Introduction to Symposium on the International Court of Justice" 11 Va. J. Int'l L. (1971) 291, 291-94.

[10] While the text of articles 2(3) and 33 of the UN Charter suggests that such a duty exists, its precise scope is far from clear. Although, the UN Charter had imposed a clear prohibition against resolution of disputes through any means other than peaceful means, one can question whether it introduces a corresponding obligation to resolve disputes at all (i.e., a positive obligation to actively engage in dispute settlement). Shaw, supra note 2, at 718.

[11] This reluctance is most aptly demonstrated by the fact that only less than a third of the members of the UN have accepted the compulsory jurisdiction of the ICJ through the Optional Clause. Statute of the International Court of Justice, art. 36(2), 26 June 1945, Annex to the Charter of the United Nations, XV U.N.C.I.O. Doc. 355 [hereinafter 'ICJ Statute']. Further, only about a third of the states that have accepted the Court's compulsory jurisdiction have refrained from introducing reservations qualifying the scope of acceptance on their behalf.

execute the decisions of dispute settlement bodies. The combined effect of the paucity of competent fora before which aggrieved parties may uphold their rights and the poor chances of non-voluntary enforcement of the judgments of international courts and tribunals, have put into question the effectiveness of international legal norms. On account of this, some commentators have even questioned the very definition of international law as a system of law.[12]

However, with the intensification of international interdependence in recent decades, international law's dispute settlement facilities have undergone remarkable transformation. The traditional reluctance on the part of states to commit themselves, in advance, to judicial and quasi-judicial dispute-settlement mechanisms has gradually eroded and a growing number of international courts and tribunals have been invested with compulsory jurisdiction. This trend has coincided with considerable progress made towards institutionalisation of dispute settlement mechanisms, moving from *ad hoc* to new and permanent procedures. Thus, many states (and other international actors) nowadays agree to refer disputes concerning many vital areas of international law to adjudication, and have accepted for this purpose the compulsory jurisdiction of permanent international courts and tribunals.

These remarkable changes can be explained, in part, through (1) the increased density, volume and complexity of international norms, which required correspondingly sophisticated dispute settlement institutions to guarantee the smooth operation of the new legal arrangements and the continued clarification and development of their norms;[13] (2) the greater commitment to the rule of law in international relations, at the

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[12] Robert Y. Jennings and Arthur Watts (eds.) 1 *Oppenheim's International Law* (9th ed., 1992) 8-13. See also infra Chapter 3, at pp. 96-97.

[13] Georges Abi-Saab "Cours général de droit international public" 207 *Recueil des cours* (1987) 9, 93; Georges Abi-Saab "Fragmentation or Unification: Some Concluding Remarks" 31 N.Y.U.J. Int. L. & Pol. (1999) 919, 925; Cesare P.R. Romano "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" 31 N.Y.U.J. Int. L. & Pol. (1999) 709, 728-29.
Examples of new dispute settlement procedures incorporated in new and sophisticated legal regimes can be found under the WTO, UNCLOS and NAFTA. See e.g., Alan E. Boyle "Settlement of Disputes Relating to the Law of the Sea and the Environment" *International Justice* (Kalliopi Koufa, ed., 1997) 295, 305; Robert Y. Jennings "A New Look at the Place of the Adjudication in International Relations today" *1 Collected Writings* (1998) 450, 460; John H. Jackson "Fragmentation or Unification among International Institutions: The World Trade Organization" 31 N.Y.U.J. Int. L. & Pol. (1999) 823, 827.
One might also observe that the greater specificity of norms and the ensuing improved legal certainty has made states more comfortable with the idea of adjudication. Jennings, Adjudication in Int'l Relations, supra, at 462; Robert Y. Jennings "The Discipline of International Law" *1 Collected Writings* (1998) 314, 325; Robert Y. Jennings "The Progress of International Law" *1 Collected Writings* (1998) 271, 285;

expense of power-oriented diplomacy;[14] (3) the easing of international tensions, which had hampered in the past the growth of adjudicative procedures;[15] (4) the positive experience with some international courts and tribunal [e.g., the Court of Justice of the European Communities (ECJ) and the European Court of Human Rights (ECHR)], which has inspired the creation of similar bodies;[16] and (5) the unsuitability of the ICJ and other pre-existing courts and tribunals to address all kinds of disputes,[17] especially those involving complicated issues that require great specialisation[18] or are perceived to be best addressed on a regional level.[19]

Tullio Treves "Recent Trends in the Settlement of International Disputes" I Bancaja Euromediterranean Courses of International Law (1997) 395, 401.
Finally, litigation tends to 'level the playing field' between large and small international actors, thus attracting the participation of the latter in regimes which offer compulsory adjudication. See e.g., Third United Nations Conference on the Law of the Sea, 4th Sess., 58th mtg., V *Third United Nations Conference on the Law of the Sea – Official Records* (United Nations, 1976) 10, 11, 25-26, 33. 41, 48, 50. But see, *UNCLOS –Off. Rec.* id. at 34, 45.

[14] Ideas of democracy and rule of law have gradually diffused from internal politics to international politics. Thus, promotion of good governance and the habit of compliance with judicial decisions found in domestic law guide politicians and civil servants involved in international dealings. Shaw, supra note 2, at 11; Laurence R. Helfer and Anne-Marie Slaughter "Toward a Theory of Effective Supranational Adjudication" 107 Yale L.J. (1997) 273, 332. It is interesting to note that similar linkage between democratic values and international stability has already been identified by Kant. Immanuel Kant "Eternal Peace" *The Philosophy of Kant* (Carl J, Friedrich, ed., 1993)(1795) 475, 484 (in other publications the same article is titled "Perpetual Peace").
At the same time, there are considerations of efficiency which support the de-politicising of many international disputes. Jonathan Charney "The Impact on the International Legal System of the Growth of International Courts and Tribunals" 31 N.Y.U.J. Int. L. & Pol. (1999) 697, 703-04; Ernst-Ulrich Petersmann "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?" 31 N.Y.U.J. Int. L. & Pol. (1999) 753, 783; Jackson, supra note 13, at 827.

[15] Bruce Broomhall "Looking Forwards to the Establishment of an International Criminal Court: Between State Consent and the Rule of Law" 8 Crim L.F. (1997) 317, 318; Romano, supra note 13, at 729-33. The transformation of socialist and developing states from centralised into market economies has also contributed to the broadening of common international ground, which had enabled the development of new sophisticated legal regimes.

[16] John W. Bridge "The Court of Justice of the European Communities and the Prospects for International Adjudication" *International Courts for the Twenty First Century* (Mark W. Janis, ed., 1992) 87, 91; Romano, supra note 13, at 730.

[17] For instance, the ICJ cannot adjudicate disputes to which non-state actors are parties. Thus, it can hardly be utilised in areas of law where such actors play a central role (e.g., trade, human rights, investment). Jonathan Charney "Third Party Dispute Settlement and International Law"36 Colum. J. Transnat. L. (1997) 65, 76. In addition, there has been considerable criticism directed at the inadequate procedures of the ICJ and at what some states have perceived as political biases. Abi-Saab, General Course, supra note 13, at 255-57; Gilbert Guillaume "The Future of International Judicial Institutions" 44 I.C.L.Q. (1995) 848, 851, 854; Shigeru Oda "Dispute Settlement Prospects in the Law of the Sea" 44 I.C.L.Q. (1995) 863, 865; Petersmann, Constitutionalizing the UN, supra note 14, at 774 ; Jonathan I. Charney "Is International Law Threatened by Multiple International Tribunals" 271 Recueil des cours (1998) 101, 133.

[18] Charney, Is Int'l Law Threatened, supra note 16, at 351; Charney, 3rd Party Dispute Settlement, supra note 16, at 76; Rosalyn Higgins "International Law in a Changing System" 58 Cambridge L.J. (1999) 78, 86-87; Brigitte Stern "Concluding Remarks" 9 A.S.I.L. Bulletin (1995) 49, 51.

[19] Bridge, supra note 15, at 91; Charney, 3rd Party Dispute Settlement, supra note 16, at 76; Robert Y. Jennings "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers" 9 A.S.I.L. Bulletin

It is hereby argued that the combined effect of these two recent developments – greater acceptance of the compulsory jurisdiction of international courts and tribunals and the institutionalisation of international dispute settlement mechanisms, entails the advancement of international law into new levels of effectiveness. In many cases, it is no longer possible for a recalcitrant party to frustrate dispute settlement before judicial bodies simply by withholding his or her consent or refusing to cooperate with the available procedure. On the contrary, in areas of law where compulsory adjudicative jurisdiction can be found, legal obligations can be enforced on states by other parties (i.e., state or non-state actors), through the unilateral activation of existing judicial bodies, in a manner not dissimilar to that utilised in domestic legal settings. This is an important qualitative change, which will clearly encourage states to take their international obligations more seriously. Still, despite these impressive achievements the process of graduation of international is far from being complete. This is mainly because the actual execution of judgments against defiant litigants (especially states) still remains a vexing problem.

The convergence between the two aforementioned trends, which was first observed in 1920 in the context of the 'optional clause' introduced under the Statute of the Permanent Court of International Justice (PCIJ),[20] has gained a particularly impressive momentum, since the beginning of the 1990's. Recent years have evidenced a dramatic rise in the number of international judicial bodies (a phenomenon sometimes referred to as the 'proliferation of international courts and tribunals'), and the attribution of some degree of compulsory jurisdiction to almost all new judicial institutions.

In fact, seven new permanent courts have started operating in the last decade. These are the International Tribunal for the Law of the Sea (ITLOS), the Appellate Body of the World Trade Organisation dispute settlement system (WTO AB), the Court of the European Economic Area (EFTA Court), the Central American Court of Justice (CCJ), the Economic Court of the Commonwealth of Independent States (CIS Court) and the Court of Justice of the Common Market of Eastern and Southern Africa (COMESA Court). This is a remarkable development, since before the 1990's only some 6

(1995) 2, 3; W. Michael Reisman "Creating, Adapting and Designing Dispute Resolution Mechanisms for the International Protection of Human Rights" 9 A.S.I.L. Bulletin (1995) 8, 10.

international courts have been actually working (the ICJ, the Courts of Justice of the European, Andean and Benelux Communities and the European and Inter-American Human Rights Courts).

Further, all of the new courts were invested with some degree of compulsory jurisdiction over the parties to their constitutive instruments: ITLOS was granted compulsory jurisdiction over all 133 state parties to the 1982 Convention Law of the Sea (UNCLOS) over a few narrowly defined matters;[21] the WTO AB was invested with broad subject matter compulsory competence over all 140 parties to the WTO; and all but one of the regional courts were endowed with broad and mandatory powers over all states participating in the regional treaty regime.[22]

On top of the seven courts that have already started operating, several other international courts and are currently in the process of being created. Thus within a few years, the International Criminal Court (ICC), the Court of Justice of the Economic Community of West Africa (ECOWAS Court), the Caribbean Court of Justice (Caricom Court) and the African Court on Human and Peoples' Rights, may start functioning. All of these institutions are also expected to exert wide ranging compulsory powers of jurisdiction over all parties to their constitutive instruments.

Another notable development of recent years has been the establishment of new permanent and compulsory arbitration bodies invested with broad subject-matter jurisdiction. Such institutionalised arbitration mechanisms were introduced in the 1990's in the context of the WTO (the Panels system), the North American Free Trade Agreement (NAFTA) and MERCOSUR. One more new body, albeit invested with more limited powers, is the Court of Conciliation and Arbitration, created under a 1992 Convention, adopted under the auspices of the Organisation on Security and Cooperation in Europe (OSCE).[23] Once more, these developments are particularly impressive against the backdrop of only two pre-existing institutionalised arbitration

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[20] Statute of the Permanent Court of International Justice, 16 Dec. 1920, art. 36, 6 L.N.T.S. 390 [hereinafter 'PCIJ Statute']. According to this Article, states could declare that they accept *ipso facto* the compulsory jurisdiction of the Court vis-à-vis other states that have made a similar declaration.

[21] United Nations Convention on the Law of the Sea, 10 Dec. 1982, art. 187, 287, 290, 292, UN Doc. A/CONF.62/122 (1982), 21 I.L.M. (1982) 1261 [hereinafter 'UNCLOS'].

[22] The only exception is found in the case of the Central American Integration System (SICA), where only 3 of the 6 member states in the regime have accepted the jurisdiction of the Central American Court of Justice (CCJ).

procedures in the field of public international law [the Permanent Court of Arbitration (PCA) and the International Centre for Settlement of Investment Disputes (ICSID)].[24]

In addition to courts and other permanent adjudication mechanisms, several important quasi-judicial procedures have also emerged recently. Although the decisions of such bodies are not formally binding, they often exercise compulsory jurisdiction and can make a significant contribution to the settlement of numerous disputes. One can mention under this category of new bodies the World Bank Inspection Panels and the parallel investigation procedures adopted by the Inter-American and Asian Development Banks, the North American Environmental Co-operation Commission's citizens' submissions procedure, the new Collective Complaints procedure under the European Social Charter and the non-compliance procedures introduced under the Montreal Protocol and the Chemical Weapons Convention. Another complaints procedure, launched by a new Optional Protocol to the Convention Against Discrimination of Women, has just entered into force.[25] There are also a number of proposals to create more quasi-judicial bodies in the human rights and environmental spheres.[26] These new procedures supplement the very small number of quasi-judicial bodies which had been created before the recent institutional 'proliferation' [the Human Rights Committee (HRC), the Committee against Racial Discrimination and Torture and the African Commission on Human Rights (ACHR)].

Finally, it should be noted that there has been in recent years a considerable expansion of the compulsory jurisdictions of two important long-standing international courts – the ECJ and the ECHR, due to important reforms in their constitutive instruments.[27] In addition, the membership in the Council of Europe and the EC (the two Courts' respective sponsoring IGOs) has grown to a large extent since the mid-1980's. As a

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[23] Convention on Conciliation and Arbitration within the CSCE, 15 Dec. 1992, 32 I.L.M. (1993) 557.
[24] There are also several enduring arbitrations institutions maintained by private bodies (most notably, the International Chamber of Commerce). However, as will be elaborated below, these institutions do not generally apply international law, and are thus not considered truly international tribunals.
[25] Optional Protocol to the Convention on the Elimination of Discrimination against Women, 6 Oct. 1999, UN Doc. GA Res. A/54/4 (1999), 39 I.L.M. (2000) 281.
[26] Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1997/105 (1996); Report of the Subsidiary Body for Implementation, *Procedures and Mechanisms relating to Compliance under the Kyoto Protocol*, 17 Sept. 1999, UN Doc. FCCC/SBI/1999/7 (1999).
[27] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 11 May 1994, E.T.S. 155; Treaty of Amsterdam, 2 Oct. 1997, O.J. (C 340) 173.

result, the scope of the subject matter and personal jurisdiction of the two judicial bodies has expanded significantly.

The result of this impressive proliferation of new judicial and quasi judicial bodies (some 15 new permanent adjudicative mechanisms and 8 new quasi-judicial procedures) and the augmentation of pre-existing compulsory jurisdictions, is that in many areas of international relations, and in regard to a significant number of international actors, international law now offers relatively sophisticated and rather effective dispute settlement procedures, culminating in judicial or quasi-judicial mechanisms. Thus, despite the lingering problem of enforcement, it is safe to assert that recent years' improvements in dispute settlement facilities have contributed to greater legal normalcy in the operation of international law, assimilating to a considerable degree its dispute settlement procedures to those prevalent in domestic legal systems.

But, unfortunately, the process of graduation and institutionalisation of international law has not been exempted from certain notable weaknesses. In the absence of a central legislative organ, the emergence of international courts and tribunals has been sporadic and largely uncoordinated.[28] The different courts and tribunals have been established independently, often by separate constituencies, paying little attention to the question of their compatibility with existing dispute settlement mechanisms. Hence, each body was typically invested with its own unique scope of subject matter and personal jurisdiction. Because of this decentralised method of delineation of competencies, overlaps between the jurisdictional ambits of the different existing courts and tribunals may occur - i.e., a single dispute might fall under the jurisdiction of more than one judicial body.[29]

By way of example, the ICJ, which has jurisdiction to adjudicate any legal dispute between states, may have concurrent jurisdiction over inter-state disputes referred to specialised international tribunals (e.g., ITLOS, WTO); or to regional courts (e.g., the ECJ, or one of the regional human rights courts). The WTO, which has competence over inter-state trade disputes, might compete for jurisdiction with the regional trade liberalisation procedures (e.g., ECJ, NAFTA, EFTA Court, and Andean Court of

[28] Jennings, Proliferation of Adjudicatory Bodies, supra note 18, at 5; Shabtai Rosenne, II *The Law and Practice of the International Court, 1920-1996* (1997) 529.

Justice), and the HRC, which is a universal human rights quasi-judicial procedure, may have concurrent jurisdiction with regional procedures (European or Inter-American Court of Human Rights, African Human Rights Commission) or other specialised human rights bodies (e.g., UN Committees against Racial Discrimination and Torture).

Furthermore, different courts and tribunals might claim jurisdiction over a single complex dispute, which raises issues under more than one branch of international law. For instance, it is conceivable that a dispute over the expropriation of a foreign investment may involve investors' protection and human rights issues (e.g., breach of investment agreement and violation of right to property). As a result, the same situation can be brought simultaneously before one or more of the human rights procedures and an investment related procedure (e.g., ICSID). The same matter can also be probably referred, after espousal by the investor's state of nationality, to inter-state adjudication mechanism such as the ICJ or bilateral arbitration. Similarly, the commission of the war crime of torture, if attributable to a state, might give rise to proceedings against the responsible state under the various universal and regional human rights procedures [e.g., UN Committee against Torture (CAT Committee), HRC, ECHR] and before the ICJ (on the basis of the doctrine of state responsibility).[30] Further, the same set of facts might in the future result in a related prosecution before the ICC, which will adjudicate the individual responsibility of the perpetrators of the alleged crime.

Another example of jurisdictional interaction between courts and tribunals specialising in different branches of the law can be found with respect to trade and maritime disputes. In fact, a dispute over the legality of transit restrictions introduced by Chile against EC fishing vessels involved in the excessive taking of swordfish in international waters has been brought in the last months before both the WTO and UNCLOS dispute settlement machinery.[31]

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[29] Georges Abi-Saab "The International Court of Justice as a World Court" *Fifty Years of the International Court of Justice* (Vaughan Lowe and Malgosia Fitzmaurice, eds., 1996) 3, 13. According to Abi-Saab collision between different jurisdictions has become imminent.

[30] At present, crimes committed in the former Yugoslavia are the subject of several proceedings before the International Tribunal for the Former Yugoslavia and two cases before the ICJ - *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Yugoslavia).

[31] *Chile – Measures Affecting the Transit and Importation of Swordfish*, case no. WT/DS193/1 (complaint by the E.C); *Fisheries dispute with EU escalates; Primacy of Conservation over Trade is at Stake*, Latin America Weekly Report, 8 Aug. 2000, at 368 (reporting that Chile has formally requested arbitration under UNCLOS). However, the case has been settled out of court.

The potential for jurisdictional overlap between international courts and tribunals might lead in turn to predicaments normally associated with the phenomenon of concurrent jurisdictions between judicial bodies coming from the same domestic legal system or from different national legal systems.[32] Grave practical concerns such as forum shopping, parallel litigation, lack of finality, incompatible judgments and accelerated fragmentation of the law have thus been introduced into public international law.

However, until recently, such problems have been, by and large, unfamiliar to international lawyers. This is because in the past the number of disputes amenable to the compulsory jurisdiction of adjudicative mechanisms had been very modest to begin with. Only in highly extraordinary circumstances would a single dispute be amenable to the jurisdiction of more than one judicial forum. Further, a large proportion of past jurisdiction-conferring instruments had provided for adjudication before *ad hoc* dispute settlement mechanisms, such as arbitration tribunals, whose jurisdiction was typically narrowly defined, and left little room for interaction with the meagre compulsory jurisdiction of other international courts and tribunals.[33] So, although the potential for jurisdictional competition between international courts and tribunals has existed for a long time now (e.g., overlap between the ICJ and arbitration), the probabilities that forum shopping or multiple proceedings would actually taking place had been rather low.[34]

It is important to emphasise that the problems associated with jurisdictional competition do not merely raise practical concerns of a procedural nature. On the contrary, the question of the division of labour between international courts and tribunals poses a serious theoretic challenge and compels one to appraise the very nature of the

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For exploration of other scenarios where similar overlaps might take place, see Lakshman D. Guruswamy "Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes" 7 Minnesota Journal of Global Trade (1998) 287, 299.

[32] *See* Guillaume, supra note 16, at 862; Shigeru Oda "The International Court of Justice from the Bench" 244 Recueil de cours (1993) 9, 139-155; Stern, supra note 17, at 52.

[33] However, the problem of competing international jurisdictions was not unheard-of before the recent surge in the number of international courts and tribunals. As early as in the 1950's, the competition between *ad hoc* arbitration and the ICJ has been the subject of study by the International Law Commission. Model Draft on Arbitral Procedure, U.N. Doc. A/3859 [1958] II Y.B. Int. L. Comm. 80-88. Before that some academic writing addressed the competing jurisdictions of the PCIJ and arbitral bodies. See e.g., Giorgos Ténékidès "L'exception de litispendance devant les organisms internationaux" XXXVI *Revue générale de droit international public* (1929) 502.

[34] Abi-Saab, Fragmentation or Unification, supra note 13, at 924.

international legal system. Simply put, the question at stake is whether there is one coordinated system of international law or rather an accumulation of independent self-contained regimes. Indeed, it will be shown that failure to regulate instances of jurisdictional conflict might intensify the tensions operating against the unity of the international legal order and exacerbate some of the traditional problems of international law such as predictability, effectiveness and credibility.[35]

The novelty of the phenomenon of widespread competition between the compulsory jurisdictions of international courts and tribunals, the variety of the practical difficulties caused thereby, the magnitude of the underlying interests and the growing interest in the subject,[36] all justify the need to study the problem and look for possible methods to regulate it. This is the goal of the present work.

2. Methodology

The purpose of this research is to investigate overlaps between the compulsory jurisdictions of international courts and tribunals. The first aim of the study shall be to examine the jurisdictional ambit of the principal existing international courts, tribunals and quasi-judicial procedures and to delineate areas of overlap between their respective compulsory jurisdictions. The second objective will be to discuss the anticipated consequences of the current situation and consider the expediency of mitigating it. Finally, the third goal is to identify and study rules of international law, which might govern competition between different jurisdictions, and to consider introducing additional norms and arrangements.

This last stage constitutes the core of the present thesis. It will embrace the study of several alternative legal sources for such jurisdiction-regulating norms:

1) Analysis of jurisdiction-regulating provisions found in the constitutive instruments of international courts and tribunals and in other dispute settlement instruments;

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[35] Abi-Saab, Fragmentation or Unification, supra note 13, at 923.

[36] See e.g., *President of the World Court Warns of 'Overlapping Jurisdictions' in Proliferation of International Judicial Bodies*, UN Press Release GA/L/3157, 27 Oct. 2000, available at <http://www.pict-pcti.org/news/archive/months2000/october/ICJ.10.27.prolif.html (last visited on 15 Nov. 2000).

2) Examination of the relevant practice of international courts and tribunals in addressing situations of jurisdictional conflict, in order to identify any applicable rules of international law;
3) Evaluation of the possible importation into international law of traditional jurisdiction-regulating rules found in a variety of domestic legal systems, through their characterisation as 'general principles of the law'.
4) Discussion of the possibility of introducing into public international law new jurisdiction-regulating norms and engaging in structural reforms needed in order to confront any problems associated with the present situation.

While the first three potential sources for jurisdiction-regulating norms constitute *lex lata* the fourth source represents *lex ferenda.*

3. Scope of thesis

As has just been indicated, the purpose of this work is to study the problem of competing jurisdictions of international courts and tribunals.[37] However, more precise definition of the scope of research is needed in order to keep it within manageable proportions. In general, one can identify two categories of disputes[38] that can be brought before courts and tribunals operating independently of any domestic legal system. These are disputes of a 'public' nature, normally governed by international law, and of a 'private' nature, principally governed by domestic law or contractual arrangements. The

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[37] An international tribunal constitutes a judicial body which enjoys the following features: a) its decisions and procedure governed by law (normally - international law); b) it is authorised to render binding decisions, and not merely non-binding recommendations; it is created by international law's legislative process (i.e., normally, through an international instrument); and d) is manned by an independent body of judges. *Cf.* H.J. Schlochauer, "Internationale Gerichtsbarkeit", 2 *Worterbuch* (Karl Strupp, ed., 2nd ed., 1961) *cited* in Christian Tomuschat "International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction" *Judicial Settlement of International Disputes: The International Court of Justice, Other Courts and Tribunal, Arbitration and Conciliation* (Max Planck Institute for Comparative Public Law and International Law, 1974) at 289; Tomuschat, id. at 288-312.
An international court is a permanent tribunal potentially invested with both retroactive and prospective jurisdiction, whose constitutive elements - the appointment of judges, the selection of applicable law (including the applicable rules of procedure) and the creation of the administrative infrastructure, all come to being, as a rule, independently of a particular dispute. Rosenne, I *ICJ Law and Practice,* supra note 27, at 12.
But see, Romano, supra note 13, 711-12 (uses the terms - 'international tribunal' and 'international court' interchangeably).

[38] A dispute necessarily involves opposite claims of parties. *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 11 (a dispute consists of a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons");*South West Africa* (Ethiopia v. S.A.; Liberia v. S.A.), 1962 I.C.J. 319, 328 ("It must be shown that the claim of one party is positively opposed by the other"); *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12, 27-30

latter class mainly consist of commercial disputes addressed by private arbitration facilities such as the International Chamber of Commerce. Given the public international law focus of the present research (and of the present author), this study will concentrate primarily upon disputes predominantly governed by 'public' international law. This choice can also be justified by the fact that jurisdictional competition involving commercial arbitration procedures has already been dealt elsewhere,[39] whereas very little had been written on competition in the public international law context.

Another group of international tribunals, which can be put aside for the purposes of the present study, are international administrative tribunals, adjudicating claims presented by staff members of international organisations. Although these bodies apply what may be considered a specific branch of international law and adjudicate disputes to which IGOs (which are clearly international actors) are parties, their function resembles more that of a domestic labour court than that of an international court or tribunal addressing issues of general international concern. In fact, one may argue that international administrative tribunals deal with what are essentially private law issues, often implicating a contract of employment. In addition, the law and procedure applicable before international administrative tribunals can be regarded as highly *sui generis.*[40] As a result of these peculiarities, the capability of administrative tribunals to compete with courts and tribunals properly situated within the realms of public international law is somewhat negligible (with the possible exception of human rights issues) and shall not be expanded upon here.

Moreover, due to space limitations it is necessary to confine the research even further and concentrate on those areas of international law where interactions between international courts and tribunals are most likely to occur. Hence, this research will mainly focus on competition between courts and tribunals invested with broadly defined competence. This is because the broader the scope of jurisdiction is, the greater the chances are that an overlap with the jurisdiction of another court or tribunal will transpire. Naturally, some, or perhaps most conclusions reached in respect of

[39] See e.g., Gary B. Born, *International Civil Litigation in United States Courts* (3rd ed., 1996) 987-92; Andreas Lowenfeld, *International Litigation and Arbitration* (1993) 281-84, 331-45; J.D. McClean, *Morris: The Conflict of Laws* (4th ed., 1993) 131-42; Eugene F. Scoles and Peter Hay, *Conflict of Laws* (2nd ed., 1992) 1018-24.

competition between broadly empowered jurisdictions could also apply to cases of competition involving judicial bodies invested with narrow competencies.

In order to accommodate this last methodological concern, several distinctions will be offered in order to identify which courts and tribunals are typically invested with broad-based jurisdiction (and thus most likely to become involved in jurisdictional conflicts). The first proposed criterion for differentiation pertains to the *ad hoc* or permanent nature of the tribunal. It is contended that tribunals constituted exclusively for the purpose of dealing with a particular dispute are typically invested with jurisdiction over that dispute only.[41] Thus, it may be asserted that, by their very definition, *ad hoc* tribunals are endowed with limited jurisdiction.[42] Permanent courts and tribunals, on the other hand, are established to adjudicate a large (and sometimes indefinite) number of different disputes, over time, and therefore require a much broader scope of jurisdiction, which shall encompass the numerous disputes that could be referred to them.[43]

A second distinction ought to be made between 'truly' permanent international courts and tribunals, invested with both prospective and retroactive jurisdiction, on the one hand, and 'semi-permanent' tribunals that may be authorised to adjudicate numerous disputes, but are invested solely with retroactive jurisdiction, on the other hand. The first category of institutions may address disputes which had arisen before or after they have been constituted, while the second category of bodies may only adjudicate pre-existing claims. Only courts (e.g., the ICJ or WTO AB) and institutionalised arbitration mechanisms (such as the PCA or ICSID), are of a truly permanent nature, and can, in

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[40] Romano, supra note 13, at 726; Georges Vandersanden "Administrative Tribunals, Boards and Commissions in International Organizations" 1 *Encyclopaedia of Public International Law* (Rudolf Bernhardt et al, eds., 1992) 27, 30.

[41] However, it should be noted, that despite its narrow scope of coverage, the jurisdiction of treaty-based dispute settlement procedures is comparable in many ways to the jurisdiction of permanent judicial institutions. Thus, for example, an international court invested with residual jurisdiction (a clause conferring the court jurisdiction unless the parties have agreed to settle their dispute in a different manner) is expected to decline jurisdiction both when faced with another competent permanent international court or tribunal or with a dispute settlement agreement.

[42] Even where the jurisdiction-creating instrument (e.g., a compromissory clause or a general arbitration treaty) uses broad language encompassing a wide-ranging set of circumstances, the mandate of those *ad hoc* tribunals which had been actually established typically covers only the resolution of the immediate dispute at hand.

[43] Claims commissions, which are semi-permanent tribunals, created to address a large, but finite, number of disputes, are more similar in this respect to permanent courts and tribunals than to *ad hoc* bodies. The need to refer a large number of disputes to claims commissions (sometimes thousands of cases) also requires that their jurisdictional mandate be drafted in broad language.

theory, operate indefinitely. In contrast, the dockets of 'semi-permanent' tribunals invested with retroactive jurisdiction (even heavily burdened bodies such as the Iran-U.S. Claims Tribunal) are always exhaustible and after all disputes originating in situations occurring before the creation of the tribunal have been settled, the tribunal must be dissolved.

The rationale behind the distinction between 'truly' permanent and 'semi- permanent' courts and tribunals is quadruple. First, the existence of only retroactive jurisdiction necessarily denotes a limitation upon the scope of the tribunal's jurisdiction *ratione temporis.* This in itself might result in a narrower basis of jurisdiction than that enjoyed by a court of tribunal not limited in this manner, and thus not confined to a finite number of disputes.[44]

Second, and more significant, jurisdiction-conferring clauses that cover prospective disputes are necessarily drafted in more open-ended and general language than clauses that encompass only pre-existing claims. This is because the permanent fora are created at a time when the number of disputes to be eventually referred to them, their exact nature and the identity of the parties to each and every one of them, are mostly unknown. Given these uncertainties it is quite impossible to outline prospective jurisdiction in overly precise manner and vague language is often used.[45] At the same time, the mandate of tribunals exclusively invested with retroactive jurisdiction is determined, as a rule, after the principal circumstances underlying the covered disputes have become known to the parties. In these conditions, jurisdiction can be strictly circumscribed, so as to include only specified disputes between specified parties.

Third, the constituency of 'truly' permanent tribunals is typically more diverse than that of 'semi-permanent' ones. Experience shows that courts and institutionalised arbitration mechanisms have normally been established through multilateral instruments, whereas claims commissions have often been created as bilateral enterprises, in pursuance to

[44] Claims commissions are however a notable exception to the proposition that only permanent courts enjoy a heavy case docket. Some claims commissions have received thousands, or even millions of claims (this has been, for example, the case with the Iran-U.S. Claims Tribunal and with the UN Compensation Commission on Iraq).

[45] See e.g., UNCLOS, art. 286 ("... any dispute concerning the interpretation or application of this Convention shall ... be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section").

bilateral agreements. This, in turn, also contributes to the attribution to courts of greater potential for business, at least in terms of personal jurisdiction.

Finally, since the jurisdiction of 'semi-permanent' tribunals is usually determined after the facts underlying the relevant disputes have occurred, the parties may take into consideration, during the creation of the jurisdictional ambit of the tribunal, the availability of alternative venues for dispute settlement. Hence, they have the ability of defusing potential jurisdictional clashes simply by deciding whether to resort to pre-existing remedies or to conclude what is an essentially a special agreement to refer the dispute to a new adjudicative body. Such special agreement may arguably constitute *lex posteriori* and *lex specialis,* which presents a relatively minor jurisdictional challenge.[46] But the same option is often unavailable for parties involved in the drafting of a jurisdiction-creating instrument encompassing future disputes. The indeterminate scope of issues falling under the jurisdiction of the newly created body, and the difficulties in predicting whether they will also fall under the jurisdiction of other dispute settlement arrangements (which might be equally ambiguous in their areas of coverage), makes *a fortiori* regulation of all potential jurisdictional conflicts a complicated, if not impractical, undertaking.

In sum, courts and other permanent mechanisms invested with prospective jurisdiction are expected to enjoy a broader scope of jurisdiction than *ad hoc* and 'semi-permanent' adjudicative bodies and are therefore more likely to confront the problem of competing jurisdictions. Consequently, the first group of judicial bodies is of greater interest to the present research.

Despite attempts to restrict the scope of this work, the realities of international dispute settlement cannot be ignored. These realities support the extension of the purview of study so to address another group of frequently invoked dispute settlement mechanisms - permanent quasi-judicial procedures (such as UN human rights committees, inspection panels and non-compliance procedures).[47] Although these procedures do not meet the

[46] For discussion on the relations between conflicting jurisdiction-creating treaties see infra Chapter 6, at pp. 281-84.

[47] Like international courts and tribunals, quasi-judicial bodies have been created by international law instruments, their procedure is governed by legal norms and involves the study of specific disputes through contentious proceedings (conducted by complainants and respondents) and the dispute settlement process culminates in the issuing of a decision which is determined on the basis of legal considerations,

strict definition of international tribunals, because their decisions are non-binding in nature, they often operate in a manner very similar to that of 'genuine' courts or tribunals. Further, the realities of international relations are such that the binding nature of judicial decisions is often illusory. In the absence of enforcement procedures, international actors might, and sometimes do, ignore 'binding' judgments with relative impunity.[48] At the same time, the recommendations of quasi-judicial bodies, such as the HRC, are normally (though, again, not always) complied with.[49] Hence, the practical differences between judicial and quasi-judicial procedures are in many cases minimal.[50] Finally, quasi-judicial procedures are being invoked in an increasing rate and present a *de facto* viable alternative to formal adjudication.[51] As a result, incidents of jurisdictional competition involving quasi-judicial procedures need also to be studied here.

4. Focal Questions

This research shall concentrate on three different points in time at which competition between different jurisdictions can be identified and will search for applicable rules of law to regulate each of these instances:

1) ***Choice of forum*** – in situations where an international actor may bring a single dispute before more than one international court or tribunal, are there any norms that restrict his or her choice of procedure? In other words, does the claimant have unfettered discretion where to bring an international claim? Moreover, are there any restrictions upon the joint capacity of the parties to the dispute to select a specific forum, by way of agreement?

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derived, as a rule, from the realm of international law. However their decisions are not legally binding. Romano, supra note 13, at 727-28.

[48] See Merrills, supra note 5, at 163.

[49] Tom Barkhuysen and Michiel van Emmerik "Improving the Implementation of Strasbourg and Geneva Decisions in the Dutch Legal Order: Reopening of Closed Cases or Claims of Damages against the State" *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (T. Barkhuysen et al, eds., 1999) 3, 26.

[50] Benedict Kingsbury "The Concept of Compliance as a Function of Competing Conceptions of International Law" 19 Mich. J. Int'l L. (1998) 345, 351; Gidon Gottlieb "The Nature of International Law: Toward a Second Concept of Law", IV *The Future of the International Legal Order – The Structure of the International Environment* (Cyril E. Black and Richard A. Falk, eds., 1972) 331, 345; Weil, supra note 4, at 415-16. For instance, there are a few practical differences between judgments rendered by the Inter American Court of Human Rights and 'views' issued Human Rights Committee, with respect to findings of human rights violations.

[51] Tomuschat, supra note 37, at 285, 306.

2) ***Parallel proceedings*** – in the event that proceedings are already pending before an international tribunal, can either of the parties to the case initiate proceedings, in relation to the same dispute, before another international court or tribunal?
3) ***Successive proceedings*** – once a dispute had already been decided by an international court or tribunal, can either of the parties to the case initiate new proceedings, in relation to the same dispute, before a different international court or tribunal?

Part I

The Overlap between the jurisdictions of international courts and tribunals

Chapter One:

What constitute competing proceedings?

A key concept in this thesis is that of 'jurisdictional competition'. Since only the existence of competition justifies the application of jurisdiction-regulating norms, it is essential to try and understand which circumstance gives rise to competition between the jurisdictions of international courts and tribunals.

Jurisdictional competition (or overlap) necessarily means that a certain dispute can be addressed by more than one available forum. Indeed, in most cases of competition between different courts and tribunals, the conflicting parties may decide, acting separately or jointly, to bring the case to one forum or the other. However, meaningful competition can only take place between viable alternatives. In other words, jurisdictions would be deemed to truly compete with one another for business only if the involved parties can hope to achieve comparable results from the rivalling procedures. For this to happen, the competing dispute settlements mechanisms must offer to the disputing parties equivalent features (e.g., third party resolution of the dispute in accordance with legal parameters). Further, the relevant issues in the two or more sets proceedings must exhibit a certain degree of similarity so that the parties consider them as potential alternatives. Thus, only proceedings which address similar or related disputes (i.e., similar or related sets of opposing claims)[1] between similar or related parties can possibly qualify as competing procedures.

However, the definition of what are 'competing procedures' should not be proffered *in abstracto,* but rather should take into consideration the prevailing attitudes of the legal community toward this question. These attitudes are reflected, most prominently, in the manner of the application of traditional jurisdictional competition regulating rules, such as - *lis alibi pendens* and *res judicata.* The existing tests for the application of these

[1] *South West Africa* (Ethiopia v. S.A.; Liberia v. S.A.), 1962 I.C.J. 319, 328.

rules serve as a convenient yardstick to evaluate whether two adjudicative proceedings are in fact competing procedures.

Admittedly, this line of argumentation is circular, since it implies that the actual application of existing competition-regulating norms governs the definition of what should be considered situations of jurisdictional competition amenable to regulation. Still, the omnipresence and the longevity of the conditions for the applicability of the jurisdiction-regulating norms are indicative of the firm grasp they have on shaping legal perceptions as to what constitute conflicting judicial procedures. Their influence on legal thinking is also demonstrated by the extension of their rationale into new areas of competition-regulation.[2] Hence, throughout this work reference to competing proceedings will mean that they share a sufficient degree of similarity, so as to fall within the scope of the two principal conditions for the application of the traditional jurisdiction-regulating rules discussed hereunder.

1. The traditional jurisdiction-regulating rules

Several potential jurisdiction-regulating rules applicable both in international and domestic law will be discussed throughout the present study. Some of them address the question of forum selection, whereas others address the management of multiple proceedings. Of the latter category, three traditional rules of law - *lis alibi pendens, res judicata* and *electa una via*, should be elucidated at this preliminary stage, since they will be used extensively throughout the work. It is the purpose of this section not merely to explain the terms, but also to discuss the conditions for their application. This is because, as explained above, these conditions shape the legal community's perceptions of what constitute competing procedures.

The *lis alibi pendens* rule[3] governs the relations between parallel proceedings. This doctrine of litispendence entails that during the pendency of one set of proceedings before a judicial body it is prohibited to commence another set of competing

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[2] E.g., the incorporation of the 'same parties' and 'same issues' requirements into *forum non conveniens* and comity doctrines *Southern Pacific Properties (Middle East) Ltd. v. Egypt,* 3 ICSID Rep. 131, 144 (1988); Restatement of the Law, 2nd, *Conflict of Laws* § 84, comment c (1971).

[3] The term means in Latin: "a lawsuit pending elsewhere." *Black's Law Dictionary* (7th ed., 1999) 942. The *lis pendens* rule is of wider potential applicability and also encompasses disputes pending before the same tribunal.

proceedings over the same dispute before another judicial body.[4] The *res judicata* rule,[5] also known as the doctrine of finality, implies that the final judgment of a competent judicial forum is bindings upon the parties (i.e., carries an obligatory effect) and cannot be litigated again (i.e., carries a preclusive effect).[6] Thus, a final decision rendered in one set of proceedings bars any subsequent court or tribunal from exercising jurisdiction over the same dispute. While historically the *res judicata* rule operated to block successive claims, it is has been subsequently accepted that the rule may also preclude the re-litigation of distinct issues which had already been settled between the parties in past proceedings (even involving different disputes).[7]

The third, and in some ways the most expansive of the three rules, is the *electa una via* rule,[8] which is also less accepted than its two counterparts. This rule provides that once a party has selected a certain procedure for dispute resolution, he or she is precluded from seizing any other dispute settlement body.[9] The choice of a specific forum can be perceived as indicative of the intent to resolve the dispute in the selected forum to the exclusion of all alternative fora. This means that a party is estopped from initiating parallel proceedings or re-litigating an already settled case, if the first-in-time forum was seized on his or her initiative (or with that party's approval). In that sense the *electa una via* rule encompasses both the *lis alibi pendens* and *res judicata* rules. However, it should be realised that the *electa una via* rule, which is based upon the rationale of estoppel, only bars the plaintiff in the first set of proceedings. It does not, in itself, bar all other parties to litigations from pursuing multiple proceedings.

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[4] *Black's Law Dictionary* (6th ed, 1990) 931 ("The fact that proceedings are pending between a plaintiff and defendant in one court in respect to a given matter is a ground for preventing the plaintiff from taking proceedings in another court against the same defendant for the same object arising out of the same cause of action). Although this definition is limited to parallel proceedings initiated by the same party, it is generally accepted that the term can be also construed to bar the respondent as well from initiating a claim involving the same matter. See e.g., Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 Sept. 1968, art. 21, 1972 O.J. (L 299) 32, 29 I.L.M. (1990) 1413 [hereinafter 'Brussels Convention'].

[5] The full Latin maxim reads: "Res judicata pro veritate accipitur" (a matter adjudged is taken for truth)

[6] *Black's Law Dictionary* (7th ed.) 1312 ("1. An issue that has been definitively settled by judicial decisions. 2. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit").

[7] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) 337, 343-44.

[8] The full Latin title of the principle is *electa una via non datur recursus ad alteram.* It means that "when one way has been chosen, no recourse is given to another". *Black's Law Dictionary* (7th ed., 1999) 1633.

[9] George Schwarzenberger, 1 *International Law* (1945) 378.

2. The conditions for application of the traditional rules

What is common to all three rules is that their application depends upon a finding that the regulated sets of proceedings compete with each other. That is, that they share several prominent features, which intractably link them together. What is the rationale underlying this condition? As will be explained below, one of the central and common purposes of the three rules is to prevent the risk of incompatible judicial decisions. Thus, it is justifiable to regulate, on this basis, only those sets of proceedings capable of creating incompatibility – proceedings which address sufficiently similar disputes.[10]

Further, a well-established principle of justice, found in virtually all municipal legal systems and in international human rights law, asserts that a party to a dispute is entitled to have his or her day in court (or to have his rights and obligations determined by a competent and independent judicial authority).[11] This principle necessarily limits the sphere of application of jurisdiction-regulating rules. If the two relevant sets of proceedings do not deal with similar disputes, then excessive restriction of the right of access to adjudication before the second-in-time forum, by virtue of a previous, but different, set of proceedings, might conflict with the parties' ability to have their day in a competent court with relation to each distinct claim.

What are the elements that transform two or more sets of proceedings into competing proceedings under international law? Most sources of international law – treaties, case law, and the writing of jurists (as well as the predominant legal theory in most domestic law systems), have repeatedly insisted upon the identification of two prominent features: that the competing procedures involve the same parties and the same issues.[12] These two elements seem to reflect an adequate balance between the rationales underlying the traditional jurisdiction-regulating rules. They reduce the risk of incompatible judgments,

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[10] Giorgos Ténékidès "L'exception de litispendance devant les organisms internationaux" XXXVI *Revue générale de droit international public* (1929) 502.

[11] See e.g., *Richards v. Jefferson County,* 517 U.S. 793, 798 (1996); *Martin v. Wilks,* 490 U.S. 755, 761-62 (1989); International Covenant on Civil and Political Rights, 16 Dec. 1966, art. 14(1), UN GA Res. 2200 A (XXI), GAOR, 21st Sess., Supp. No. 16 (A/6316) 52, UN Doc. A/CONF. 32/4 [hereinafter 'ICCPR']; Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, art. 6(1), E.T.S. 5, 213 U.N.T.S. 221.

[12] *Certain German Interests in Polish Upper Silesia* (Germany v. Poland), 1925 P.C.I.J. (ser. A) No. 6, at 19-20 (jurisdiction); *Benvenuti and Bonfat Srl. v. Congo* 1 ICSID Rep. 330, 340 (1980); *Amco Asia, Pan American Development Ltd. v. Indonesia,* 1 ICSID Rep. 389, 409, 453, 460 (1983); *China Navigation Co., Ltd. (U.K.) V. U.S. (The 'Newchwang')*, VI R.I.A.A. 64, 65 (1921); Cases 172, 226/83, *Hoogovens Groep v. Commission,* [1985] E.C.R. 2843, 2846; Cases 358/85 and 51/86, *France v. Parliament,* [1988] E.C.R. 4846, 4850; Brussels Convention, art. 21; Cheng, supra note 7, at 339-47. See also Restatement of the Law, 2nd, Judgments §§ 17, 24; *Black's Law Dictionary* (7th ed., 1999) 1312.

but, at the same time, limit unnecessary curbs on the rights of the parties to litigate all of their distinct claims.

The first condition, 'same parties', has been narrowly construed by international courts and tribunals. It can be observed that the dominant test that had emerged in practice has been that of 'virtual identity'.[13] Hence, only multiple claims between the very same parties involved in the first set of proceedings or those validly acting on their behalf are prohibited.[14] Thus, for example, the HRC has held on several occasions that the *lis alibi pendens* rule, precluding parallel proceedings concerning the same dispute, does not bar a victim of an alleged human rights violation from seizing the Committee even if the same complaint is already pending before another international human rights procedure, provided that the first-in-time complaint had been submitted by complainants unrelated to the victim (i.e., not acting on his or her behalf).[15] It is useful to note in this regard that the *stare decisis* doctrine, according to which decisions in one case should govern similar future cases between different parties, has never been accepted by international law.[16] Thus, cases involving different sets parties cannot have a preclusive effect on each other, although they may, in appropriate circumstances, carry a considerable persuasive influence.[17]

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[13] However, in domestic U.S. law one can find two main exceptions to the application of the res judicata rule between the same parties - privity and adequate representation of interests. *Burns v. Unemployment Compensation Board of Review,* 65 A.2d 445 (1945); *Watts v. Swiss Bank Corp.,* 265 N.E.2d 739 (1970); *Southwest Airlines Co. v. Texas International Airlines, Inc.,* 546 F.2d 84 (5th Cir. 1977).

[14] See e.g., Comm. 75/1980, *Fanali v. Italy,* U.N. GAOR. 38th Sess., Supp. 40, at 160, 163 (Report of the HRC, 1983); Case C-406/92, *The Tatry* [1994] E.C.R. I-5439, 5474 (in circumstance where only some of the parties to the first set of proceedings are parties to the second, the second Court can apply the *lis pendens* rule only in respect of questions which involve only parties to the first set of proceedings); Tom Zwart, *The Admissibility of Human Rights Petitions* (1994) 181-82.

[15] Comm. R.13/56, *Casariego v. Uruguay*, U.N. GAOR, 37th Sess., Supp. 40, at 185, 187 (Report of the HRC, 1981); Comm. R.2/10, *Altesor v. Uruguay*, U.N. GAOR, 37th Sess., Supp. 40, at 122, 125 (Report of the HRC, 1982); Comm. 74/1980, *Estrella v. Uruguay*, U.N. GAOR, 38th Sess., Supp. 40, at 150, 156 (Report of the HRC, 1983). *Cf. A.G.V.R. v. Netherlands*, App. No. 20060/92, Decision of the EHR Comm'n of 10 April 1995, available in <http://www.dhcour.coe.fr/ Hudoc2doc/hedec/sift/ 1906.txt>(last visited on 13 Aug. 2000) (a complaint by one party before one tribunal cannot bar an identical complaint by another party to the same tribunal).
However, in one case, the I/A HR Comm'n has indicated that a claim presented to by an applicant unrelated to the victim may preclude the latter bringing the same matter again before it. Case 10.970, *Mejìa v. Peru*, Inter-Am. C.H.R. Report no. 5/96, OEA/Ser.L/V/II.91, Doc. 7, at 157, par. V (A)(1) (1996), available in <http://www1.umn.edu/humanrts/cases/1996/peru5-96.htm> (last visited on 4 Sept. 2000).

[16] Statute of the International Court of Justice, art. 59, 26 June 1945, Annex to the Charter of the United Nations, XV U.N.C.I.O. Doc. 355 [hereinafter 'ICJ Statute'].

[17] Cheng, supra note 7, at 341-42, 346; Mohamed Shahabuddeen, *Precedent in the World Court* (1996) 107-09.

The second condition, 'same issues' has been described by some of legal authorities as comprised of two sub-categories - similar object and similar grounds.[18] In any event, a sufficient degree of similarity is required both with relation to the facts and the law underlying the claim.[19] While some international courts and tribunals have been willing to introduce a certain degree of flexibility into the 'same issues' test and require that the claims in question would be 'essentially the same',[20] it is clear that mere linkage between the proceedings is not enough. The latter looser degree of similarity underlies the rule of connexity, which authorizes courts to join related claims to one set of proceedings,[21] and has not been incorporated into general international law.[22]

Two specific elaborations of the 'same issues' standard should be commented upon. First, it looks as if multiple litigation arising under different legal systems cannot be deemed to involve the 'same issue'. In two PCIJ cases, the Court has held that parallel litigation before two tribunals applying international and domestic law, respectively, does not qualify as jurisdictional competition.[23] In fact, in one of these case the Court has expressed the view that the requirement that the parallel sets of proceedings should

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[18] *Trail Smelter* (U.S. v. Canada), 3 R.I.A.A. 1907, 1952 (1941); Case 2272 (1975), *A v.* B, excerpts in *Collection of ICC Arbitral Awards 1974-1985* (1990) 11, 13.

[19] See *Haya de la Torre* (Peru v. Columbia), 1951 I.C.J. 71, 82 (previous judgment between the same parties is not preclusive because the first case dealt with the legality of a decision to grant diplomatic asylum, whereas the second decision - with the question of extradition of the same person); *Compagnie Générale de l'Orénoque* (France v. Venezuela) 10 R.I.A.A. 184, 279(1905)(counter-claims and claims for set-off are not the same actions as the original claim); *Pauger v. Austria,* App. No. 16717/90, 80 Eur. Comm'n H.R. Dec. & Rep. 24 (1995)(proceedings before the HRC on right to equality does not bar the claimant from bringing a petition against the same respondent to the Strasbourg machinery, alleging violation of due process rights); *Pauger v. Austria,* App. No. 24872/94, 80 Eur. Comm'n H.R. Dec. & Rep. 170, 174 (1995)(when proceedings before the HRC and the Strasbourg machinery involve essentially the same allegations, the second in time petition is barred).

[20] See Case 144/86, *Gubisch Maschinenfabrik* v *Palumbo* [1987] E.C.R. 4861, 4876 (the meaning of the term 'same cause of action' found in article 21 of the Brussels Convention "cannot be restricted so as to mean two claims which are entirely identical"); Case C-351/96, *Drouot Assurances SA v. Consolidated Metallurgical Industries (CMI Industrial Sites)*[1998] E.C.R. I-3075, 3087-89(Opinion of Advocate-General Fennelly)(for reasons of legal clarity one should adopt a more rigid test with respect of the 'same parties' than with respect of the 'same cause of action').

[21] This rule of discretion is found in many municipal legal systems (normally, as a rule of judicial discretion) and in the Brussels Convention. Brussels Convention, art. 22 (claims are treated as related proceedings when "... they are so closely connected that it is expedient to hear and determine them together..."); Committee on International Civil and Commercial Litigation, *Declining and Referring Jurisdiction in International Litigation - Third Interim Report submitted to the International Law Association London Conference* (2000) 7 (copy with author).

[22] *S.S. Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A), No. 10, at 48 (Dissenting Opinion of Judge Weiss).

[23] *Certain German Interests*, 1925 P.C.I.J. (ser. A) No. 6, at 20; *Factory at Chorzów* (Germany v. Poland), P.C.I.J. (ser. A), No. 9, at 31-32. See also George Schwarzenberger, 1 *International Law* (3rd ed., 1957) 142.

be conducted before tribunals of the same legal order is a third condition for the application of the *lis alibi pendens* rule.[24]

Second, it also seems that multiple claims relating to the same facts, but involving distinct legal claims under international law, do not necessarily meet the 'same issues' standard. The practice of the HRC can again provide useful guidance in that regard. Recent decisions of the Committee suggest that two identically phrased petitions, submitted to the Committee and to a competing procedure, would not be considered as the 'same matter' if there are relevant differences in the substantive scope of protection offered by the constitutive instruments of the two mechanisms.[25] It remains to see whether this trend, which if applied in an overly technical manner might be open for abuse,[26] will be followed by other judicial and quasi-judicial bodies.

A separate issue that might arise with respect to the examination of the relations between the competing legal claims is whether a party that could but did not raise a claim in the first set of proceedings is barred from raising it in subsequent proceedings arising out of the same facts pattern. Although, it is sensible to hold that a party should be precluded from engaging in 'piecemeal litigation' and from evading the principle of finality by reason of his or her omission,[27] there is no clear international precedent on the issue.[28]

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[24] *Certain German Interests,* 1925 P.C.I.J. at 20. Although the case dealt with the application of the litispendence rule, there is no reason why the same rationale would not apply in regard to the application of other jurisdiction-regulating norms. See also Dan Ciobanu "Litispendence between the International Court of Justice and the Political Organs of the United Nations" 1 *The Future of the International Court of Justice* (Leo Gross, ed., 1976) 209, 215.

[25] See Comm. 44/1990, *Casanovas v. France*, U.N. GAOR, 49th Sess., Supp. 40, at 131, at para. 5.1 (Report of the HRC, 1994); Human Rights Committee, General Comment 24 (52), para. 14, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994)(*electa una via* reservations should apply only where the legal rights and subject matter under the two competing instruments are identical). See also Laurence R. Helfer "Forum Shopping for Human Rights" 148 U. Pa. L. Rev. (1999) 285, 315-19.

[26] Helfer, supra note 25, at 367, 370. However, mere difference in language between legal texts does not suffice to transform petitions into 'different issues' and that meaningful substantive differences in the scope of rights or obligations should be demonstrated.

[27] *Cf. Henderson v. Henderson* 67 E.R. 313, 319 (1843); *Hoystead v. Commissioner of Taxation* [1926] A.C. 155, 165-66, 170 (P.C.); *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1977] 1 Q.B. 630, 640 (Lord Denning M.R.); G. Richard Shell "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration" 35 U.C.L.A. L. Rev. (1988) 623, 640-41; Nina Zaltzman, *Res judicata in Civil Proceedings* (1991) 16 (in Hebrew).

[28] In fact, human Rights bodies have adopted conflicting positions on this issue. Comm. 452/1991, *Glaziou v. France*, U.N. GAOR, 49th Sess., Supp. 40(II), at 250, 255 (Report of the HRC, 1994); Comm. 584/1994, *Valentijn v. France*, 51st Sess, Supp. 40(II), at 253, 257 (Report of the HRC, 1996)(new issues may be raised in subsequent litigation, despite the possibility of raising them in the first set of proceedings); *Ajinaja* v. *U.K.*, App. No. 13365/87, 55 Eur. Comm'n H.R. Dec. & Rep. 294, 296 (1988) (an applicant is barred from raising claims that he could have raised in previous set of proceedings).

The *res judicata* rule, which is the most widely acceptable of the three rules and, consequently, the most developed, contains several additional conditions, which derive from its unique characteristics. Since the rule is applied only after a judicial decision had been rendered, it focuses on the issues actually addressed by the decision and not necessarily on all issues raised by the original statement of claims. In this manner, the rule can achieve a more accurate balance between the main conflicting policy goals applicable to re-litigation attempts - stability and justice (i.e., finality of legal decisions and the right to have contested issue determined by a competent judicial forum). It is therefore accepted that the *res judicata* rule only applies with regard to settled issues – the operative part of the judgment and all decisions on questions of fact and law which were actually determined by the judicial body[29] and served as a basis of the operative part.[30] There is no preclusion over issue raised in the proceedings, but glossed over by the decision. In contrast to these two clear-cut rules there is considerable controversy as to whether the reasoning leading to the holding of the first-in-time tribunal is covered by the *res judicata* rule.[31]

With regard to preliminary and incidental issues, the decisions of the tribunal relating to them come within the scope of the *res judicata* rule only to the extent that they are an essential condition to the judgment on the merits.[32] Where these preliminary issues fall outside the scope of normal competence of the judicial body its decision shall constitute *res judicata* for the purpose of that judgment only and the parties will be able to raise again the contested issue in proceedings before other judicial fora.[33]

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[29] Case C-281/89 *Italy* v *Commission* [1991] E.C.R. I-347, para. 14; Case C-277/95 P *Lenz* v *Commission* [1996] E.C.R. I-6109, 6125 (in both cases it was held that the principle of *res judicata* applies only in respect of matters of fact and law actually or necessarily settled by a judicial decision); Joined Cases T-305-07, 313-16, 318, 325, 328-29 and 335/94, *Limburgse Vinyl Maatschappij NV v. Commission* [1999] E.C.R. II-931, 972 (earlier decision based on certain grounds does not preclude re-litigation of other grounds which were not decided in the first decision).

[30] *Compagnie Générale de l'Orénoque,* 10 R.I.A.A. at 276; Joined Case 97, 99, 193 and 215/86 *Asteris v. Commission* [1988] E.C.R. 2181, 2208.

[31] *Amco Asia,* 1 ICSID Rep. 543, 550-51 (1988) (Resubmitted case)(It is unclear whether there is a rule in international which gives *res judicata* effect to reasoning integral to the holding).

[32] Cheng, supra note 7, at 353.

[33] Cheng, supra note 7, at 353-54.

Chapter Two

Delineation of jurisdictional overlap - theory and practice

The following Chapter will try to systematically map areas of jurisdictional overlap between the different procedures, on the basis of their respective competences. For methodological purposes international courts and tribunals will be sorted into 4 jurisdictional categories, based on their geographical and subject matter reach:

(i) Courts and tribunals of universal jurisdiction *ratione personae* and general competence *ratione materiae* (universal courts and tribunals);

(ii) Courts and tribunals of universal jurisdiction *ratione personae* with specialised *ratione materiae* competence (global specialised courts and tribunals);

(iii) Regional courts and tribunals with general *ratione materiae* competence (regional courts and tribunals with unlimited competence); and

(iv) Regional courts and tribunals with specialised *ratione materiae* competence (regional specialised courts and tribunals).

This Chapter will discuss the potential for jurisdictional overlaps between judicial and quasi-judicial bodies belonging to different categories of courts and tribunals and between bodies belonging to the same category. In addition, those few occasions where direct or indirect conflict of jurisdictions had actually taken place will be highlighted. Finally, this Chapter will try to assess the probabilities for the occurrence of future jurisdictional conflicts in light of anticipated trends in the work of competing international courts and tribunals.

On the basis of the information considered here, it would become possible to appraise the magnitude of the phenomenon of competing jurisdictions. If the risk of concurrent proceedings is negligible, the present study is largely redundant (except perhaps as an academic exercise). But if, on the other hand, there is significant risk for incidence of jurisdictional conflicts, this work can hopefully make an important contribution in a relatively unexplored area of international law.

1. Conflicts between different courts and tribunals of general personal and subject matter jurisdiction [category (i) tribunals]

The only permanent international courts and tribunals that may review any international dispute between any two or more states (i.e., endowed with universal personal jurisdiction and unlimited subject matter jurisdiction) are the ICJ and the PCA. So far, there has not been an actual case of jurisdictional competition between the two institutions. Further, given the paltry caseload of the PCA in recent decades and the modest rate of acceptance of the ICJ's compulsory jurisdiction under the 'optional clause', this situation is not likely to change in the foreseeable future.

Still, inter-state disputes susceptible of being referred to the ICJ or the PCA can also be brought, on the basis of a *compromis* or a compromissory clause, before *ad hoc* arbitration tribunals. Thus, *ad hoc* arbitration may represent a potential jurisdictional alternative to both the ICJ and the PCA. Indeed, in a recent fisheries dispute – the *Southern Blue-Fin Tuna* case, the claimant states could unilaterally refer the dispute to the ICJ, which had jurisdiction over all parties to the dispute by virtue of their optional clause declarations, but preferred to submit the case to arbitration, in pursuance to a compromissory clause (article 287 to UNCLOS).[34]

The potential for concurrency between the jurisdictions of the ICJ and arbitration tribunals does not merely expand the parties' ability to forum shop. Rather, on a few occasions, multiple proceedings have actually taken place before the ICJ and arbitration tribunals. All of these cases follow a common pattern and consist of attempts to challenge the procedure or the decisions of arbitral tribunals before the ICJ (or its predecessor - the PCIJ). In some of these cases the ICJ (or PCIJ) was requested to supervise the proper conduct of arbitration (including the right to initiate proceedings),[35] but in three prominent cases the Court was requested to review *de novo* the merits of disputes decided by way of arbitration. The attempts to contest the final decision of arbitral tribunals before the ICJ raises in turn the question of the *res judicata* effect of

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[34] *Southern Bluefin Tuna* (Australia and New Zealand v. Japan), Award of 4 Aug. 2000 (Jurisdiction and Admissibility), available at <http://www. worldbank.org/icsid/bluefintuna/award080400.pdf> (last visited on 12 August 2000).

[35] *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, 1928 P.C.I.J. (ser. B) No. 16; *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, 1950 I.C.J. 65 (first phase) and 1950 I.C.J. 221 (second phase); *Anglo-Iranian Oil Co.* (U.K. v. Iran), 1952 I.C.J. 89; *Ambatielos* (Greece v. U.K.), 1953 I.C.J. 10; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12. See discussion in W. Michael

arbitral awards vis-à-vis other international tribunals,[36] which will be discussed at greater length in a subsequent Part of this work.

In the *Sociéte Commerciale* case,[37] the PCIJ had been asked by Belgium to confirm a commercial award rendered in arbitration proceedings between a Belgian firm and the Greek government. The Court held that since the arbitration clause had prescribed that the arbitral award was to be 'final and binding', it can neither confirm the award nor annul it.[38] In the *King of Spain* case,[39] Honduras and Nicaragua had referred to the ICJ, by way of agreement, a dispute over the validity of a 1906 arbitral award concerning a frontier dispute between the two countries. Again, the Court refused to reopen substantive questions that were decided by the arbitral tribunal, but agreed to examine allegations that procedural irregularities had been found in the method of establishment and work of the tribunal (although, these allegations were eventually dismissed). Finally, in the *1989 Arbitral Award* case,[40] Guinea-Bissau had unilaterally referred to the Court on the basis of an 'optional clause' declaration a dispute with Senegal over the validity of an arbitral award concerning maritime delimitation between the two states. This time the Court held that it would not intervene in the legal conclusions of the arbitral tribunal unless the latter "acted in manifest breach of the competence conferred on it by the Arbitration Agreement."[41] Since no 'manifest breach' had been found in the circumstances of the case, the Court refrained from upsetting the findings of the arbitrators.

These three examples demonstrate the possibility of seizing the ICJ after arbitration proceedings over the same dispute had been completed. This option is clearly feasible where both parties have accepted the compulsory jurisdiction of the ICJ under the 'optional clause'. In these circumstances any party to arbitration can unilaterally seize the Court (as had been done by Guinea-Bissau in the *1989 Arbitral Award* case).[42] Still,

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Reisman "Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication" 258 Recueil des cours (1996) 9, at Ch. II *passim*.

[36] Reisman, supra note 35, at 229.

[37] *Société Commerciale de Belgique* (Belgium v. France), 1939 P.C.I.J. (ser. A/B) No. 78, at 160.

[38] Id. at 174. For discussion, see Reisman, supra note 35, at 233-53.

[39] *Arbitral Award made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua), 1960 I.C.J. 192. For discussion, see Reisman, supra note 35, at 253-90.

[40] *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal) 1991 I.C.J. 53.

[41] *Arbitral Award of 31 July 1989,* 1991 I.C.J. at 69. For discussion, see Reisman, supra note 35, at 290-311, 316-71.

[42] According to the jurisprudence of the ICJ, the Statute does not place temporal limitation upon 'optional clause' based jurisdiction. Thus, an applicant state may accept the Court's compulsory jurisdiction, and immediately thereafter submit a claim against another state already subject to the

the Court's reluctance to interfere with substantive holdings of the arbitrators might deter some parties from attempting to utilise this procedural avenue.

In contrast, the risk of multiple proceedings, first initiated before the ICJ and subsequently submitted to *ad hoc* arbitration, or multiple proceedings before two different *ad hoc* arbitration proceedings (which can involve non-state parties, as well), can be regarded as rather minor. This is primarily because the jurisdiction of *ad hoc* arbitral tribunals is often based on a *compromis* signed shortly before the opening of the proceedings, and such instrument is not likely to be concluded when an alternative set of proceedings is impending. An exception to this proposition can be found in competition situations involving claims commissions (such as the Iran-U.S Claims Tribunal). Since the jurisdiction of such bodies is typically broader than that of *ad hoc* arbitral tribunals, and because their activation is less dependent upon cooperation by the parties, competition is more likely to ensue.

2. Conflicts between (i) courts and tribunals of general personal and subject matter jurisdiction and (ii) universal courts and tribunals of specialised competence

An area of considerable jurisdictional overlap can be identified between the respective competences of the ICJ, PCA and arbitral tribunals, on the one hand, and specialised international courts and tribunals (or quasi-judicial procedures) available to a universal constituency, on the other hand. This latter category includes ITLOS, the WTO dispute settlement bodies, the new International Criminal Court, the UN human rights treaty bodies (HRC, CERD and CAT Committees, and the prospective MWC and CEDAW Committees), ICSID, ILO complaint mechanisms, the World Bank Inspection Panel, the Montreal Protocol Non-Compliance Procedure and the CWC Verification Procedure. The bottom line is that almost every dispute falling under the jurisdiction of the aforementioned global specialised courts and tribunals could also conceivably be dealt with, in some way, by the ICJ or submitted to one or another form of arbitration.[43]

Court's jurisdiction under the 'optional clause'. See e.g., *Right of Passage over Indian Territory* (Portugal v. India), 1957 I.C.J. 125, 147 (Preliminary Objection); *Legality of Use of Force* (Yugoslavia v. Belgium), Order of 2 June 1999 (forthcoming in 1999 I.C.J.)(Provisional Measures).
However, some states have introduced reservations to their 'optional clause' declarations, imposing temporal limitations on proceedings initiated by another party on the basis of a new 'optional clause' declaration. See e.g., Declaration of United Kingdom under article 36(2) of the ICJ Statute, 654 U.N.T.S. 335 (1969).

[43] See e.g., Christoph Schreuer "Commentary on the ICSID Convention", 12 ICSID Rev., F.I.L.J. (1997) 59, 211.

Indeed, particular attention has been paid in recent years to the overlap between the jurisdictions of the ICJ and ITLOS.[44] This is because large parts of the jurisdiction of the latter body comprise disputes that also fall under the jurisdiction of the ICJ and, in fact, had been submitted to it on numerous past occasions.[45] Further, the 1982 Convention on the Law of Sea specifically designated ICJ, arbitration (ordinary and special arbitration) and ITLOS as alternative venues for litigation of disputes over the interpretation and application of the Convention.[46] This overlap, combined with a commonly held notion, according to which law of the sea disputes constitute a traditionally important and integral part of general international law, has led some ICJ judges to question the wisdom of establishing a new body to handle matters which the ICJ has effectively handled in the past.[47]

While, as a rule, cases amenable to the jurisdiction of the global specialised courts and tribunals can also fall under the jurisdiction of the universal bodies entrusted with unlimited subject-matter jurisdiction, this is not the situation *vice versa.* The potential subject matter jurisdiction of the ICJ, PCA or *ad hoc* arbitration tribunals is wider than the aggregate total of jurisdictions of the various specialised bodies, and, consequently, one can identify several issues that may be referred to the ICJ or arbitration but not to any of the global specialised courts or tribunals.[48]

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[44] Jonathan I. Charney "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea" 90 A.J.I.L. (1996) 69; Shigeru Oda "Dispute Settlement Prospects in the Law of the Sea" 44 I.C.L.Q. (1995) 863; Bernard H. Oxman " The Rule of Law and the United Nations Convention on the Law of the Sea" 7 European Journal of International Law (1996) 353; Tullio Treves "Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice" 31 N.Y.U.J. Int. L. & Pol. (1999) 809.

[45] See e.g., *Fisheries* (U.K. v. Norway), 1951 I.C.J. 116; *North Sea Continental Shelf* (F.G.R. v. Netherlands, F.G.R. v. Denmark), 1969 I.C.J. 3; *Fisheries Jurisdiction* (U.K. v. Iceland), 1974 I.C.J. 4; *Continental Shelf* (Tunisia/Libya), 1982 I.C.J. 18; *Gulf of Maine,* 1984 I.C.J. 246; *Continental Shelf* (Libya/Malta), 1985 I.C.J. 13; *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), 1993 I.C.J. 38.

[46] United Nations Convention on the Law of the Sea, 10 Dec. 1982 , art. 287, UN Doc. A/CONF.62/122 (1982), 21 I.L.M. (1982) 1261 [hereinafter 'UNCLOS'].

[47] See e.g., Shigeru Oda "The International Court of Justice from the Bench" 244 Recueil de cours (1993) 9, 144-45; Oda, Dispute Settlement Prospects, supra note 44, at 864-65; Gilbert Guillaume "The Future of International Judicial Institutions" 44 I.C.L.Q. (1995) 848, 855.

[48] E.g., land border delimitation disputes have often been the subject of ICJ or arbitration decisions. See e.g., *Temple of Preah Vihear* (Cambodia v. Thailand), 1962 I.C.J. 6; *Frontier Dispute* (Burkina Faso/ Mali), 1986 I.C.J. 554; *Boundary Dispute Concerning the Taba Area* (Egypt v. Israel), 27 I.L.M. (1988) 1421. However, such questions could not be brought before most global specialised tribunals.

A. Differences in the scope of jurisdiction ratione personae over states

At the same time, there are several caveats to the proposition that cases submitted to specialised tribunals can also be brought before the ICJ, PCA or *ad hoc* arbitration. The first caveat relates to the degree of acceptance of the compulsory jurisdiction of the latter institutions. Concurrency between the ICJ and a global specialised procedure presuppose that the both sets of procedures may exercise compulsory jurisdiction *ratione personae* over the same state parties to the dispute. However, since less than a third of the UN member states have accepted the compulsory jurisdiction of the ICJ (and most of the states that have done so appended reservations limiting their scope of acceptance), there are bound to be many instances in which only the global specialised courts or tribunals would enjoy jurisdiction over both parties to the dispute. For instance, the WTO dispute settlement procedures have compulsory jurisdiction over some 140 state parties, which is more than twice the number of states subject to the compulsory jurisdiction of the ICJ and, as a result, many states are parties only to the compulsory jurisdiction of the former. This situation is even more acute in the case of the PCA, whose long dormancy and near lack of compulsory jurisdiction turn it into a nonexistent alternative to the global specialised courts and tribunals. Finally, proceedings before *ad hoc* arbitration tribunals are often of strictly consensual nature and cannot be initiated by way of unilateral recourse by one of the disputing parties. However, an agreement to resort to arbitration is unlikely if one or more of the disputing parties are interested in submitting the case to a competent global specialised body.

B. Differences in the legal standing of individuals

Another fundamental issue concerns the different *locus standi* standards employed by ICJ and the global specialised tribunals. The ICJ exercises contentious jurisdiction over inter-state disputes only. As a result, disputes to which non-state actors (e.g., IGOs or natural or legal persons) are parties cannot be brought directly to the ICJ. By way of example, an individual victim of human rights violations can file a complaint with to the HRC but cannot seize the ICJ. The same problem arises, *inter alia,* with regard to claims before WTO involving the EC as a party, complaints by 'industrial associations' under the ILO complaint procedure, all World Bank Panel inspections and ICSID proceedings, which involve, by definition, a non-state party, and criminal prosecution of individuals before the ICC.

The problem of different *locus standi* standards can be partially rectified through elevating claims made on behalf of non-state entities into the inter-state level through 'diplomatic protection'.[49] That is, espousal of individuals' claims by their state of nationality,[50] or in the case of corporations - by the state of their place of association or registered offices.[51] Hence, with regard to human rights complaints and other individually initiated proceedings, competition between global specialised courts or tribunals and the ICJ presupposes the exercise of diplomatic protection before the latter instance by the relevant state of nationality. This possibility has been demonstrated in recent years by several ICJ cases where states had pursued human rights violations on behalf of their nationals.[52] For example, the recent *Diallo* case, which is pending before the ICJ[53] involves allegations by Guinea that Congo had discriminated against a foreign investor of Guinean nationality, and could also have been brought by the concerned individual to ICSID or one of the human rights tribunals.

However, diplomatic protection might not always be legally or politically feasible. The state of nationality could have formally pledged not to exercise diplomatic protection,[54] it may be unable to rely upon the compulsory jurisdiction of the ICJ, or it simply might be unwilling to sacrifice good relations with a foreign state for the advancement of the

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[49] The exercise of diplomatic protection by a state is defined as "taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rule of international law." *Panevezys-Saldutiskis Railway* (Estonia v. Latvia), 1939 P.C.I.J. (ser. A/B) No. 76, at 16. See also *Mavrommatis Palestine Concessions* (Greece v. Great Britain), 1924 P.C.I.J (ser. A) No. 2, at 12; Robert Y. Jennings and Arthur Watts (eds.), 1 *Oppenheim's International Law* (9th ed., 1992) 512-15; Malcolm N. Shaw, *International law* (4th ed., 1997) 562-67; Ian Brownlie, *Principles of Public International Law* (5th ed., 1998) 406-07.

[50] However there should be a genuine link between the individual and the espousing state. *Nottebohm* (Liechtenstein v. Guatemala), 1954 I.C.J. 4, 24.

[51] *Barcelona Traction, Light and Power Company Ltd.* (Belgium v. Spain), 1970 I.C.J. 4, 43.

[52] ***Vienna Convention on** Consular Relations (Breard)*(Paraguay v. U.S), 1998 I.C.J. 248 (Provisional Measures), 1998 I.C.J. 248; *LaGrand* (Germany v. U.S.), 1999 I.C.J. 9 (Provisional Measures). The interplay between the ICJ and human rights proceedings was demonstrated by the fact that the same issues raised in the *Breard* and *LaGrand* cases were also discussed by the I/A CHR (in pursuance to a request for advisory opinion by Mexico, not a party to any of the two ICJ proceedings). Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law'*, Opinion of 1 Oct. 1999, < http://corteidh-oea.nu.or.cr/ci/PUBLICAT/SERIES_A/A_16_ING.HTM> (last visited on 20 June 2000).

[53] *Diallo* (Guinea v. DRC)(application by Guinea, 28 Dec. 1998), available at < http://www.icj-cij.org/icjwww/idocket/igc/igc_orders/igc_iapplication_19981228.pdf > (last visited on 7 July 2000)(the Court has not yet taken any substantive decisions on the case).

[54] See e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, art. 27, 575 U.N.T.S. 159 [hereinafter 'ICSID Convention'].

interests of one of its citizens.[55] Further, espousal is out of the question when complaints alleging human rights abuses are directed against the victim's own state of nationality.

Moreover, even where diplomatic protection is feasible, it is not clear whether after transformation into the inter-state level the dispute remains the same. In fact, the PCIJ has stressed the qualitatively different character of disputes espoused by states and disputes between state and foreign nationals.[56] Simply put, the inter-state dispute might be considered fundamentally different from the original dispute, involving different sets of rights and interests. In that case, there will be no total overlap between the two alternative procedures, although they are bound to be closely related to each other.[57]

In practice, there has been one notable occasion where the ICJ, two human rights arrangements and one regional economic integration court have all been seized simultaneously, albeit by different claimants, with related legal claims emanating from the same situation. As a result of France's decision in 1995 to resume underground nuclear testing in the South Pacific, New Zealand had submitted a claim against France to the ICJ arguing that the French experiments were unlawful and in breach of an specific undertaking not to conduct such experiments (a pledge on which the ICJ had relied in 1974 when it dismissed a claim against French atmospheric nuclear testing).[58] At the same time, two cases were initiated by private parties before the HRC and the EHR Comm'n against France (two complainants had been involved, at first, in both sets of proceedings, but have subsequently retired from one of them), alleging in both cases that the tests represented a threat to the right to life of the claimants.[59] Finally, the legality of the French experiments was also challenged before the ECJ, in proceedings brought by yet a third group of individuals, residing in proximity to the testing area. These proceedings were introduced against the EC Commission for its assent to the

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[55] This is particularly the case where the individual in question may submit a claim on his or her behalf to an international tribunal.

[56] *Mavrommatis*, 1924 P.C.I.J. (ser. A) No 2, at 11. *Cf. Donnelly v. U.K.*, App. No. 5577-5583/72, 16 Y.B. Eur. Conv. on H.R. (1973) 212 (the EHR Comm'n was inclined to hold that inter-state and individual human rights petitions raising the same issues involve different parties, and thus, do not preclude each other). See Jennings and Watts, 1 *Oppenheim's Int'l Law,* supra note 49, at 512.

[57] States engaged in international disputes have radically different interests and concerns than private litigants. Thus for instance, it is conceivable that a state exercising diplomatic protection would be willing to forgo an investor's claim in return for future trade concessions on the part of the host-state. See e.g., *Heathrow Airport User Charges* (U.S. v. U.K.), 102 I.L.R. 215, 278-81 (1992); Schreuer, supra note 43, at 212 (parallel proceedings before ICSID and inter-state arbitration cannot 'strictly compete' with each other since they involve different sets of parties).

[58] *Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Test* (New Zealand v. France), 1995 I.C.J. 285.

continuation of the French experiments in alleged violation of the provisions of the Euratom Treaty governing dangerous experiments.[60]

In the end, all four applications were dismissed for lack of jurisdiction or lack of standing, and the relations between the different proceedings did not become an issue. Still, notwithstanding the differences between the identity of the parties and the specific legal claims raised in the various sets of proceedings, these cases demonstrate the potential for interaction between different international courts and tribunals addressing the same situation. It is possible to envision slightly different circumstances in which genuine competition would have existed. This would have happened, for instance, had a single claimant asserted essentially the same legal claims before all individual-initiated procedures (the human rights bodies and the ECJ), and had these claims been presented by a state espousing the same individual's case before the ICJ.

C. Differences in the legal standing of international organisations

Disputes involving IGOs are even less likely to generate jurisdictional competition between the ICJ and the global and specialised courts and tribunals. This is because there is no doctrine of diplomatic protection that states may exercise vis-à-vis international organisations, which is comparable to that applicable to private parties.[61] However, indirect espousal of claims on behalf of an IGO is conceivable in certain extraordinary circumstances.

First, a claim on behalf of a person whose legal rights had been infringed while working in the service of an IGO can be espoused either by the said organisations or by his or her state of nationality.[62] Thus, the same claims could be brought on the individual's behalf before the ICJ, by the state of nationality, and before another forum, by an IGO. However, while diplomatic protection proceedings have taken place on occasion before

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[59] *Tauira v. France*, App. No. 28204/95, 83 Eur. Comm'n H.R. Dec. & Rep. 112 (1995); Comm. 645/1995, *Bordes v. France*, UN Doc. CCPR/C/57/D/645/1995 (Decision of the HRC, 1996).
[60] Case T-219/95 R, *Danielsson v. Commission* [1995] E.C.R. II-3051.
[61] See *Maclaine Watson v. Dept. of Trade and Industry* [1989] 3 All E.R. 523, 529 (H.L.); Shaw, supra note 49, at 921-23. This disparity is explained through the historical origins of the diplomatic protection doctrine, which tended to equate an offence against a foreign national with an offence against his or her state of nationality. *Mavrommatis*, 1924 P.C.I.J. (ser. A) No 2, at 11-12; Louis Henkin, Richard C. Pugh, Oscar Schachter and Hans Smit, *International Law Cases and Materials* (3rd ed., 1993) 375. No parallel rationale can be found in support of espousal of claims on behalf of inter-governmental organisation, especially since it is widely accepted that, unlike individuals, IGOs are independent owners of numerous rights and obligations under international law.
[62] *Reparation for Injuries Suffered in the Service of the United Nations,* 1949 I.C.J. 174, 185; *Barcelona Traction,* 1970 I.C.J. at 39.

the ICJ (even in cases brought by IGOs through advisory opinion proceedings),[63] it is quite hard to envision diplomatic protection claims brought by IGOs before any of the global specialised courts or tribunals (in contrast with claims before regional specialised judicial bodies).[64]

Second, it cannot be ruled out that under certain conditions it will be possible to attribute to states international responsibility for acts committed by IGOs in which they participate or with whom they cooperate.[65] For example, it is cannot be ruled out entirely that claims brought against the EC before the WTO dispute settlement bodies or against some of the institutions comprising the World Bank Group before the World Bank Inspection Panel, might not also be submitted to the ICJ as inter-state claims against some or all of the EC states or against the state in whose territory the contested World Bank project takes place.[66] However, in all such cases, it seems difficult, if not impossible, to assert that the parties to both sets of international proceedings are the same.[67]

Finally, it should be remembered that the ICJ enjoys a broad advisory jurisdiction beside its contentious jurisdiction and it is conceivable that the advisory jurisdiction of the ICJ might be invoked instead of, or in parallel with other proceedings to which IGOs are party. For instance, World Bank institutions may seek an advisory opinion from the ICJ

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[63] *Reparation for Injuries,* 1949 I.C.J. 174; *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* 1999 I.C.J. 62.

[64] Indeed, the EC Commission has presented in the past a claim to the ECJ against Belgium on account of the alleged violation of the privileges and immunities accorded to its employees under the Protocol on Privileges and Immunities of the EC. Case 85/85, *Commission v. Belgium* [1986] E.C.R. 1149. In theory, an infringement of privilege could also constitute a human rights violation and the employee's state of nationality could have brought inter-state proceedings against Belgium (provided that the employee is not Belgian).

[65] See Report of the International Law Commission, *Commentary on Draft Article 13 on State Responsibility*, par.3, UN GAOR 51 Sess., Supp. No. 10, Doc. A/51/10 (1996), available at <http://www.law.cam.ac.uk/rcil/ILCSR/rft/Sr13.rtf> (last visited on 20 Oct. 2000)("... it is not always sure that the action of an organ of an international organization acting in that capacity will always be purely and simply attributed to the international organization as such rather than, in appropriate circumstances, to the States members of the organization, if it is a collective organ, or otherwise to the State of nationality of the person or persons constituting the organ in question"). It should be noted however that article 13 was deleted from the 1998 version of the Draft Articles.
In the field of human rights, attempts to attribute responsibility to states for human rights violation by international organizations have been generally unsuccessful. See Comm. 217/1986, *H.v.D.P. v. Netherlands*, UN GAOR, 42nd Sess., Supp. 40, at 185, 186 (Report of the HRC, 1987). See also *Maclaine Watson* 1989] 3 All E.R at 529; Shaw, supra note 49, at 921-23.

[66] *Cf.* Daniel D. Bradlow "International Organisations and Private Complaints: The Case of the World Bank Inspection Panel" 34 Va. J. Int'l L. (1994) 553, 558.

[67] It seems that the examples offered above implicate legal rights and obligations common to more than one international actor and it is hardly consistent with established legal doctrine to assert that proceedings involving different holders of a common right or obligation are proceedings involving the same parties. See e.g., *A.G.V.R.*, supra note 15.

relating to a question which may also be subject to review by its own independent Inspection Panel.

Hence, it seems that despite the narrow rules of *locus standi* employed by the ICJ, some disputes involving non-state actors that could be addressed by global specialised courts or tribunals, could also find their way to the ICJ. Albeit, this result can only be achieved through the application of somewhat controversial legal doctrines (at least with regard to IGOs), whose ability to create genuine competition is in doubt.

D. Related proceedings

In other situations, where direct competition is unfeasible, there still might be considerable interaction between proceedings conducted before the ICJ and global specialised courts and tribunals, involving different, but somewhat related, sets of parties. An obvious example of related proceedings can be found in the litigation arising out of the events that took place in the Former Yugoslavia since the early 1990's. The egregious crimes committed during the civil war inside the Former Yugoslavia gave rise to numerous criminal proceedings before the *ad hoc* ICTY,[68] designed to determine the individual criminal responsibility of the accused persons. At the same time the ICJ is presently adjudicating two inter-state claims between Bosnia Herzegovina and Yugoslavia[69] and between Croatia and Yugoslavia,[70] addressing *inter alia* the question of state responsibility for the alleged commission of the crime of genocide by state agents. Hence, although the proceedings before the ICTY and the ICJ involve different sets in parties, and cannot be deemed to truly compete with each other, they are intimately related. This is because both judicial bodies are required to reach findings on the same legal questions (e.g., whether genocide has taken place) in light of the same set of facts.[71]

A jurisdictional situation has recently been averted by virtue of the decision of the ICTY Prosecutor not to initiate criminal proceedings against NATO servicemen for acts

[68] See e.g., Case IT-95-5-R61, *Prosecutor v. Karadzic*, 108 I.L.R. 86, 133-135 (1996) (Rule 61).
[69] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Yugoslavia), 1993 I.C.J. 3 (Provisional Measures) and 1996 I.C.J. 595 (Preliminary Objections).
[70] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Yugoslavia)(application by Croatia, 2 July 1999), available at <http://www.icj-cij.org/icjwww/idocket/icry/ icry_orders/ icry_iapplication_19990702.PDF> (last visited on 6 July 2000).
[71] Theodor Meron "The Ad Hoc International Criminal Tribunals and the Proposed International Criminal Court" 9 A.S.I.L. Bulletin (1995) 15, 18.

committed during the Kosovo crisis.[72] Since Yugoslavia had brought legal proceedings against 10 NATO members before the ICJ,[73] alleging that they are responsible for war crimes committed by their servicemen, ICTY trials of NATO personnel could have resulted in closely related proceedings, in which the legality of the same acts of war would have been addressed by two different international courts and tribunals.

E. Competition involving arbitral tribunals

The above-mentioned caveats, which mitigate the probabilities of competition between the ICJ and the global specialised tribunals, do not apply, in principle, with regard to the PCA and *ad hoc* arbitration tribunals, since these judicial bodies are open to non-state actors, as well as states. As a matter of fact, on a few occasions the Iran-U.S. Claims Tribunals has competed with a global commercial arbitration institution - the International Chamber of Commerce Court of Arbitration (which is open to all states and individuals, but exercises specialised competence, encompassing commercial disputes only).[74] While jurisdictional interactions with this latter body have been mostly left outside the scope of the study, since International Chamber of Commerce arbitrations do not apply, as a rule, international law but rather contract and domestic law, this specific interaction, which resulted in multiple proceedings is of some interest to this study, since it demonstrates the potential for jurisdictional competition between arbitral tribunals and global specialised courts or tribunals.

In *Flour Corp. v. Iran,*[75] the question of propriety of parallel arbitration proceedings was at issue. The case involved a contractual claim brought before the Iran-U.S. Claims

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[72] Office of the ICTY Prosecutor Press Release, 13 June 2000, Doc. PR/ P.I.S./ 510-e, available at <http://www.un.org/ icty/pressreal/p510-e.htm> (last visited on 7 July 2000); Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), para. 90-91 <http://www.un.org/icty/pressreal/ nato061300.htm> (last visited on 7 July 2000).

[73] *Legality of Use of Force* (Yugoslavia v. Belgium), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures); *Legality of Use of Force* (Yugoslavia v. Canada), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures); *Legality of Use of Force* (Yugoslavia v. France), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures); *Legality of Use of Force* (Yugoslavia v. Germany), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures); *Legality of Use of Force* (Yugoslavia v. Italy), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures); *Legality of Use of Force* (Yugoslavia v. Netherlands), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures); *Legality of Use of Force* (Yugoslavia v. Portugal), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures); *Legality of Use of Force* (Yugoslavia v. Spain), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures); *Legality of Use of Force* (Yugoslavia v. U.K.), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures); *Legality of Use of Force* (Yugoslavia v. U.S.), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures).

[74] See generally, Philippe Sands (ed.), *Manual on International Courts and Tribunals* (1999) 107-20.

[75] Case 333, *Flour Corp. v. Iran*, 11 Iran-U.S. Cl. Trib. Rep. 296 (1986)(Interim Award).

Tribunal by an American company against the Iranian National Oil Company, with which it had been involved in several joint ventures, and the jurisdiction of the Tribunal was based upon the Algiers Declaration that invested the Tribunal with exclusive jurisdiction over certain disputes between American firms and the Iranian government (or government-owned entities). However, the original joint venture contracts contained an arbitration clause, referring disputes to ICC arbitration, and providing that claims must be initiated within a fixed period of time. Since Iran had raised several objections to the jurisdiction of the Tribunal, the claimant, fearing that its ability to initiate ICC proceedings might expire before the Tribunal decides whether it has jurisdiction over the case, has sought to commence parallel ICC litigation, but stated that it intends to pursue ICC proceedings only in respect of parts of the claim that would eventually fall outside the Tribunal's scope of jurisdiction. Still, Iran requested the Tribunal to enjoin the claimant from initiating ICC proceedings by virtue of the exclusive nature of the Tribunal's jurisdiction, which ought to preclude adjudication before other fora.[76]

The Tribunal has held that given the lack of certainty as to its competence over the claim, the declaration of intent of the claimant and the refusal of the respondent to waive time-bar objections before the ICC, it would be inappropriate to enjoin the claimant from initiating ICC proceedings.[77] Moreover, it has held that the Algiers Declaration did not appear to preclude adjudication before arbitration panels (as opposed to adjudication before courts).[78] This last ruling seems to overturn an earlier decision of the Tribunal adopted in the *Reading & Bates* case,[79] where the Tribunal ordered a stay of proceedings initiated by the claimant before the ICC with regard to a claim already pending before the Iran-U.S. Claims Tribunal.[80]

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[76] Claims Settlement Declaration, art. VII (2). On this basis the Tribunal has ordered stay of proceedings before municipal courts on a number of occasions. See e.g., Case 338, *E. Systems, Inc. v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 51 (1983)(Interim Award); Case 59, *Questech, Inc. v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 96 (1983)(Interim Award); Case 93, *Ford Aerospace & Communications Corp. v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 281 (1983)(Interim Award); Case 370, *Watkins-Johnson Co. v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 362 (1983); Case 480, *Touche Ross and Co. v. Iran,* 3 Iran-U.S. Cl. Trib. Rep. 59 (1983)(Interim Award); Case 928, *CBA International Development Corp. v. Iran,* 4 Iran-U.S. Cl. Trib. Rep. 53 (1983)(Interim Award); Case 159, *Ford Aerospace & Communications Corp. v. Iran,* 5 Iran-U.S. Cl. Trib. Rep. 104 (1984) (Interim Award); Case 158, *Aeronutronic Services v. Air Force of Iran,* 7 Iran-U.S. Cl. Trib. Rep. 217 (1984) (Interim Award); Case 395, *Component Builders, Inc. v. Iran,* 8 Iran-U.S. Cl. Trib. Rep. 216 (1985)(Interim and Interlocutory Award) .

[77] *Flour,* 11 Iran-U.S. Cl. Trib. Rep. at 298.

[78] *Flour,* 11 Iran-U.S. Cl. Trib. Rep. at 297

[79] Case 28, *Reading and Bates Corp. v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 401 (1983) (Interim Award).

[80] Eventually both the *Reading & Bates* and *Flour* cases were settled out of court.

The *Bendone-Derossi* case[81] raised the question of successive proceedings before multiple judicial fora, more specifically – whether it is possible to rely on an award rendered by ICC arbitration in proceedings before the Iran-U.S. Claims Tribunal. The claimant, an American cloth manufacturer, has sued in 1980 (before the establishment of the Iran-U.S. Claims Tribunal) the Iranian Air Force before the ICC Court of Arbitration, on the basis of a contractual arbitration clause in force between the parties. Arbitration proceedings took place (without Iranian participation) and an award was rendered in favour of the claimant. Since Iran refused to comply with the decision and pay damages to the claimant, the latter brought a claim before the Iran-U.S Tribunal to enforce the ICC award. However, the Tribunal has held that it had no jurisdiction over the claim since it is not authorized to grant *exequatur* to arbitral awards of other tribunals or to recognise the award as a separate cause of action.[82] Thus, it would seem that the Tribunal refused to attribute any legal significance to the outcome of the previous set of proceedings.

Still, despite the experience of the Iran-U.S Tribunal, there are bound to be only a few instances of competition between arbitration and global specialised courts and tribunals, which might end up in multiple proceedings. This is because concurrency of jurisdictions presupposes agreement on the part of the parties to arbitrate a dispute also amenable to the jurisdiction of a global specialised body. However, such agreements are expected to be quite rare because of the unique nature of some specialised procedures available at the global level, which renders them unsuitable for arbitration, [83] and because some or all of the parties might believe that it is redundant to establish a new arbitral tribunal when alternative permanent fora are readily available to them.

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[81] Case 375, *Bendone-Derossi International v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 130 (1984)(Interim Award) and 18 Iran-U.S. Cl. Trib. Rep. 115 (1988).

[82] *Bendone-Derossi,* 18 Iran-U.S. Cl. Trib. Rep. at 118-19. The conclusion that awards of other tribunals may not constitute an independent cause of action is supported by another decision of the Tribunal on the status of municipal judgments. Case 458, *Marks v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 291, 296 (1985)(Interlocutory Award); *Ford Aerospace,* 11 Iran-U.S. Cl. Trib. Rep. at 196.

[83] E.g., it is unlikely to expect that there will be an agreement to arbitrate a dispute between a human rights violation victim of violating state.

3. Conflicts between (i) courts and tribunals of general personal and subject matter jurisdiction and (iii) regional courts and tribunals with unlimited jurisdiction ratione materiae

There are only a few international tribunals or quasi-judicial procedures that belong to the third category - regional bodies invested with general *ratione materiae* jurisdiction. These are the OSCE dispute settlement bodies - the Court of Conciliation and Arbitration, and the Valletta Mechanism,[84] which may address any question of international law arising between OSCE states, and two Latin American economic integration courts – the Central American Court of Justice (CCJ) and the prospective Caribbean Court of Justice (Caricom Court), who may address any inter-state dispute between the state parties subject to their jurisdiction.

In theory, it is possible that parties to an inter-state dispute will be simultaneously subject to the jurisdiction of the ICJ (or to PCA or *ad hoc* arbitration) and the OSCE or the Latin American judicial and quasi-judicial bodies.[85] However, the prospects that such competition would result in multiple proceedings seem farfetched. Only a modest number of states have acceded to the compulsory jurisdiction of the OSCE Court of Arbitration (5 states) and the CCJ (3 states), whereas the Caricom Court has not even been established. Furthermore, several matters have been excluded from the compulsory jurisdiction *ratione materiae* of the CCJ,[86] and may be excluded from the compulsory jurisdiction of the OSCE Court.[87] Thus, in statistical terms, it is improbable that two or more of the meagre number of states that might be parties to inter-state proceedings before one of the regional judicial bodies would also accept the jurisdiction of the ICJ or arbitration over the same dispute.

However, this line of analysis does not seem to apply with regard to the conciliation proceedings before the OSCE Court of Conciliation or the Valletta Mechanism. Both

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[84] Provisions for a CSCE Procedure for Peaceful Settlement of Disputes, Report of Valetta, 8 Feb. 1991, 30 I.L.M. (1991) 390 and Decision of the Stockholm Council Meeting of the CSCE Council, 15 Dec. 1992, both reprinted in Arie Bloed (ed.), *The Conference on Security and Cooperation in Europe — Analysis and Basic Documents, 1972-1993* (1993) 573, 869.

[85] Thus, for example, four of the five states that have accepted the compulsory jurisdiction of the OSCE Court have also accepted the compulsory jurisdiction of the ICJ.

[86] Agreement on the Statute of the Central American Court of Justice, 10 Dec. 1992, art. 22(a), 34 I.L.M. (1995) 921 [hereinafter 'CCJ Statute']. The matters excluded are frontier, territorial and maritime disputes. These matters can be referred to the CCJ by way of agreement.

[87] Convention on Conciliation and Arbitration within the CSCE, art. 26(2), 15 Dec. 1992, 32 I.L.M. (1993) 557. Areas that may be excluded from the scope of declaration of acceptance are disputes

mechanisms enjoy compulsory conciliation jurisdiction over a considerable number of states (29 and 54 states, respectively), with regard to a broad scope of matters. Hence, they may represent a viable quasi-judicial alternative to adjudication and their jurisdiction might actually conflict with that of the ICJ or other universal tribunals. Still, in light of the dormancy until now of all OSCE dispute settlement bodies, competition with the ICJ (which has addressed only a relatively small number of disputes between OSCE states in recent years), or other arbitration bodies, is improbable, at present.

Another exception ought to be made with regard to the CCJ, where there seems to be even now some jurisdictional competition between it and the ICJ. Although the CCJ exercises jurisdiction only over three states, and has been active for merely 6 years, it has already handled several inter-state cases.[88] Furthermore, all three states parties to the CCJ Statute have also accepted the compulsory jurisdiction of the ICJ, and had been parties to a 1992 ICJ case;[89] two CCJ states - Honduras and Nicaragua had also been parties to a previous case before the ICJ[90] and are at present parties to a pending case before the ICJ.[91] Thus, given the predisposition of these countries to litigate their disputes between international courts and tribunals, it is certainly conceivable that the three states could someday get involved in multiple proceedings before the CCJ and the ICJ.

4. Conflicts between (i) courts and tribunals of general personal and subject matter jurisdiction and (iv) regional courts and tribunals of specialised competence

In similarity to the jurisdictional relations between universal and specialised judicial and quasi-judicial bodies, operating at the global level, there is considerable overlap between

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concerning a state's territorial integrity, national defence, title to sovereignty over land territory, or competing claims with regard to jurisdiction over other areas.

[88] *Non-compliance or Violation of SICA Norms* (Nicaragua v. Honduras), Decisions of 30 Nov. 1999 and 17 Jan. 2000; *Revocation of laws, administrative and other acts adopted by the Republic of Nicaragua that affect and violate the law and operation of SICA* (Honduras v. Nicaragua), Decision of 12 Jan. 2000 (Measures of Protection). Both decisions are available at <http://www.sicanet.org.sv/instituciones/index.html > (last visited on 7 July 2000).

[89] *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras; Nicaragua intervening), 1992 I.C.J. 351. However, the issues raised in these proceedings would have probably fallen under the exceptions to the compulsory inter-state jurisdiction of the CCJ.

[90] *King of Spain,* 1960 I.C.J. 192.

[91] *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Application of 8 Dec. 1999, available at <http://www.icj-cij.org/icjwww/idocket/iNH/iNH_orders/Inh_iapplication_ 19991208.pdf >(last visited on 16 July 2000)(no decision has yet been rendered in the case).

the jurisdictions of the ICJ, the PCA and *ad hoc* arbitration, on the one hand, and the regional specialised procedures, on the other hand. These latter courts, tribunals and quasi-judicial procedures consist primarily of economic integration judicial bodies (ECJ, the Benelux Court, Andean court of Justice, CCJ, EFTA Court, CIS Economic Court, COMESA, NAFTA and the future Caricom Court) regional human rights procedures (ECHR, I/ACHR and I/A HR Commission, African Commission and the ECSR) and investment bank inspection procedures (Inter-American and Asian Development Banks).

Here too, every dispute falling under the jurisdiction of the regional specialised bodies could, in theory, also be referred to the ICJ or to arbitration. The opposite is of course not true, given the narrowly defined jurisdiction *ratione materiae* of the regional specialised bodies and their only partial geographical reach.[92] However, the same caveats concerning jurisdictional overlaps, which were discussed in the context of competition between universal and global specialised courts and tribunals, also apply vis-à-vis the jurisdictional interaction between universal and regional courts and tribunals. These caveats perhaps apply with even greater force here given the dominant role of individuals and IGOs in litigation before the regional and specialised courts and tribunals,[93] and the intricate nature of most economic integration regimes, which renders voluntary acceptance of the jurisdiction of external bodies, such as the ICJ, over such complex issues, highly unlikely. Further, since no regional IGO has been authorised to seek advisory opinions from the ICJ until now, this type of jurisdictional competition between the ICJ and regional arrangements has also been precluded, for the time being. Still, it is perfectly reasonable to expect that similar questions, albeit involving different parties, may be raised in ICJ advisory proceedings and in advisory and contentious proceedings before the regional specialised courts and tribunals.[94]

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[92] E.g., in Asia, regional inter-state proceedings can only be referred to the universal procedures.

[93] Most of the disputes that have been submitted to the regional, to date, have involved non-state actors, as parties. See e.g., all but one of the contentious cases brought before the ECJ have involved EC organs. In addition, much of the Court's business has comprised of preliminary rulings proceedings that involve private parties. This is also more or less the contemporary record of other regional integration courts and tribunals. Non-state actors have been parties to all cases before the EFTA Court; to more than 99% of the cases before the Andean Court; to 22 out of 25 cases before the CCJ; to more than 90% of the cases before the CIS Economic Court; and to more than 90% of NAFTA cases. Similarly, all but a handful of the thousands of cases handled by regional human rights tribunals have involved non-state parties, and all proceedings before the regional investment banks' inspection mechanism involve, by definition, claims brought by individuals. An exception can be found in the practice of the new COMESA Court – in which only one of the two cases brought before it to date had involved non-state actors.

[94] Advisory Opinion OC-1/82, *"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64, American Convention on Human Rights)*, I/A Court H.R. (ser. A) No. 1, at para. 50 (1982), reprinted in 3 *Human Rights Law Journal* (1982) 140.

In practice, there have been a few occasions in which similar issues were raised before the ICJ and regional and specialised judicial and quasi-judicial bodies, although the proceedings in question had involved different sets of parties. First, as indicated above, there had been one time in which a similar question (the legality of French nuclear testing) has been the subject of inter-state ICJ proceedings,[95] complaint procedures before two human rights procedures, including a regional procedure - the European Commission on Human Rights[96] and proceedings before a regional court of economic integration – the ECJ.[97]

Another recent case of jurisdictional interaction has involved challenges against the legality of death sentences imposed by the U.S judicial system, when applied to foreign nationals. In a number of cases, the U.S. domestic authorities have failed to promptly inform foreign criminal suspects, who were eventually sentenced to death, of their right to receive consular assistance in accordance with the 1963 Vienna Convention on Consular Relations.[98] Several states whose nationals had been put on death row without being properly informed on the availability of consular help had brought proceedings against the U.S before international courts. Thus, Paraguay and Germany brought proceedings before the ICJ under a Protocol to the Consular Relations (the *Breard* and *LaGrand* cases)[99] and Mexico had referred the same question to the I/A CHR, so it would pronounce on the matter in the form of an advisory opinion.[100] For the sake of completion, it should be noted that another individual complaint case against Peru were also pending at the time before the I/A CHR, in which alleged violations of the same right to receive consular assistance had also been claimed.[101]

Both the nuclear testing and consular assistance cases demonstrate once more the real potential for jurisdictional interaction between the ICJ and the regional and specialised bodies. While the 'competing' cases have involved different claimants, it is easy to imagine circumstances in which the same state would initiate both the ICJ and regional

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[95] *Examination of Nuclear Tests Judgment*, 1995 I.C.J. 285
[96] *Tauira*, 83 D & R. 112 (1995).
[97] *Danielsson*, 1995 E.C.R. II-3051
[98] Vienna Convention on Consular Relations, 24 April 1963, 596 U.N.T.S. 261.
[99] *Breard*, 1998 I.C.J. 248; *LaGrand*, 1999 I.C.J. 9; *LaGrand*, Judgment of 27 June 2001 (Forthcoming in 2001 I.C.J.), available in <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (last visited on 10 July 2001).
[100] *Consular Assistance*, supra note 52. Since the U.S. did not ratify the I/A HR Convention, inter-state proceedings were unavailable to Mexico.
[101] Case 52, *Castillo Petruzzi v. Peru*, Judgment of 30 May 1999, available at <http://corteidh-oea.nu.or.cr/ci/PUBLICAC/SERIE_C/C_52_ESP.HTM> (last visited 6 June 2000).

human rights proceedings. It is also conceivable that the same violation could give rise both to inter-state proceedings before the ICJ and to one or more individual petitions submitted to regional human rights tribunals by nationals of one of the parties to the ICJ litigation.

Finally, with regard to competition with arbitral tribunals, it seems that given the flexible rules of standing in arbitration (either before the PCA or ad hoc tribunals), all disputes that may be submitted to regional specialised courts and tribunals, including those involving non-state actors, could also be referred, in theory, to arbitration. However, it is rather improbable for parties to regional sub-systems to agree to supplement the readily available (and easily invoked) regional dispute settlement mechanisms, endowed with considerable expertise over their subject matter, with external procedures, such as consent-based arbitration proceedings. This is especially the case with regional integration regimes that offer their own internal arbitration services (thus making the reference to external arbitration largely redundant).[102]

5. Conflicts between different universal courts and tribunals of specialised competence [two category (ii) tribunals]

Although most universal and specialised courts and tribunals address distinct branches of international law (e.g., trade, maritime, criminal, human rights, investment, development and environmental law), certain overlaps can be identified between the competences of some courts and tribunals. The most conspicuous case of jurisdictional competition involves the HRC, on the one hand, and the more specialised UN human rights procedures – the CERD and CAT Committees, on the other hand. Since the ICCPR prohibits any form of discrimination[103] and outlaws torture,[104] both CERD and the CAT Committees are in direct competition with the HRC over their business (although the lists of states subject to the jurisdiction of each procedure are somewhat different).[105] Once the MWC and CEDAW Committees (which has just been entrusted

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[102] See e.g., Treaty Creating the Court of Justice of the Cartagena Agreement, 28 May 1979, art 38, 18 I.L.M. (1979) 1203, as revised by the Protocol Modifying the Treaty Creating the Court of Justice of the Cartagena Agreement, 10 March 1996, available in < http://www.comunidadandina.org/english/andean/ande_trie2.htm> (last visited on 24 June 2000); CCJ Statute, art. 22 (ch); Treaty Establishing the Common Market for Eastern and Southern Africa, 5 Nov. 1993, art. 28, 33 I.L.M. 1067 (1994).

[103] ICCPR, art. 2(1), 26.

[104] ICCPR, art. 7.

[105] 98 states have accepted the competence of the HRC to receive individual complaints, while only 29 states have accepted this competence of the CERD Committee and 44 states have accepted the comparable quasi-judicial jurisdiction under CAT. As to inter-state competence, 48 states and 41 state

with quasi-judicial competence) will begin to exercise jurisdiction, they too will compete with the HRC, which affords protection under the ICCPR, to a number of foreign workers and women's human rights.[106]

Despite the clear potential for jurisdictional overlap, there have not been any known cases to date in which the same complaints were brought before more than one UN Treaty body. This is hardly surprising with regard to the interaction between the HRC and the CERD Committee, since the latter procedure has hardly been ever used.[107] In contrast, given the fact that the CAT Committee is experiencing an impressive and steadily growing caseload,[108] a jurisdictional conflict between it and HRC seems to be inevitable.

Another area of overlap between global human rights mechanism can be found between the HRC and the ILO CFA. Both bodies monitor freedom of association issues,[109] and have overlapping constituencies (nearly all parties to the ICCPR Optional Protocol are also ILO member states). However, the rules of standing before the two bodies are considerably different. Whereas complaints under the Optional Protocol must be brought by natural or legal persons who were victims of a breach of the Covenant, the CFA may, *inter alia,* receive complaints from groups that were not directly affected by the contested measure. Nonetheless, it is still plausible that an identical situation could be discussed by the two procedures in parallel and involve essentially the same complainants.[110] Furthermore, it should be remembered that it is possible, although

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have accepted the jurisdiction of the HRC and CAT, respectively. In contrast, all 156 state parties to CERD are subject o the Committee's inter-state jurisdiction.

[106] The MWC affords parallel protection to many of migrant worker rights which are also protected by the ICCPR, such as the right to life, liberty, freedom from torture, due process, equality and protection of family life. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec. 1990, art. 7-14, 16-20, 24, 31, 44, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990)[hereinafter 'MWC']; ICCPR, art. 6-27. Similarly, CEDAW protects various political, family and equality rights, which are also protected by the ICCPR. Convention on the Elimination of all Forms of Discrimination against Women, 18 Dec. 1979, art. 2-4, 7, 15-16, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46; ICCPR, art. 6-27.

[107] By April 2000, the number of cases presented before the CERD Committee since its establishment totalled 17.

[108] By February 2000, 154 complaints have been submitted to the CAT Committee against 19 states; most of them also parties to the Optional Protocol of the ICCPR.

[109] ICCPR, art. 22; Function of the ILO and Mandate of the Committee on Freedom of Association, Doc. 101, par. 5, *Committee on Freedom of Association Digest of Decisions* (1996).

[110] Concurrent proceedings in direct competition to each other may take place in situations where a labour organisation itself is a victim of a human rights violation. In that case, the directly affected trade union may seize, in its independent capacity, both the HRC and the ILO CFA. In contrast, where trade union leaders are affected both in their personal and official capacity by the challenged governmental policy (e.g., if they are imprisoned for illegal trade union activity), they can bring the HRC complaint in

rather improbable, that inter-state claims alleging non-compliance with freedom of association principles would be raised before both the HRC and the CFA.[111]

Once the MWC Committee will come into existence, it would exercise considerably overlapping jurisdiction with the various ILO complaint mechanisms.[112] This might however result in direct competition only over inter-state cases (although a few, if any, such cases are expected), since individual petition cases before the MWC would be brought by individuals, who have no right of standing before the ILO machinery.

Until now, there has been one major case of competition between the HRC and the ILO CFA. In 1980, a Canadian national trade union submitted three consecutive petitions to the ILO CFA, challenging limitations imposed by the government of the province of Alberta, Canada on the right to strike in the public sector.[113] Before the third CFA report was rendered, members of the trade union's executive committee, acting in their private capacity, submitted another communication concerning the same matter to the HRC.[114] Canada strongly urged the HRC to dismiss the communication by reason of *lis alibi pendens* (relying on Article 5(2) of the Optional Protocol), but the HRC has held the application to be inadmissible for other reasons and refrained from addressing the effects of the concurrent proceedings.[115]

Outside the human rights field, only a small number of conflicts between the jurisdictions of global specialised courts and tribunals are expected given the different areas of specialisation the various bodies. However, competition could take place between inter-state proceedings conducted before the WTO DSB and Montreal Protocol

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their individual capacity, but the ILO complaint must still be brought by the union (and the leaders could participate in the proceedings as representatives of the union). Although, technically, there are different claimants in each procedure, one could argue that they are essentially the same.

[111] To date, no government has ever brought proceedings before the HRC, and only a few inter-state proceedings had been initiated before ILO bodies.

[112] The MWC introduces a host of labour standards and freedom of association rights which are also protected by numerous ILO conventions. *Cf.* MWC, art. 25-27, 40, 42-43, 52, 54; Freedom of Association and Protection of the Right to Organize Convention, 9 July 1948, ILO Convention No. 87; Convention concerning Migration for Employment (Revised 1949), 1 July 1949, ILO Convention No. 97; Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 24 June 1975, ILO Convention No. 143. Even at present there is normative overlap between UN human rights mechanisms and the ILO in questions related to migrant workers. Theodor Meron "Norm Making and Supervision in International Human Rights: Reflections on Institutional Order" 76 A.J.I.L. (1982) 754, 760.

[113] Case 893, *Canadian Labour Congress v. Canada*, LXIII ILO Official Bulletin (ser. B) No. 3 (1980) (Report of the CFA).

[114] Comm. 118/1982, *J.B. v. Canada*, UN GAOR, 41st Sess., Supp. 40, at 151 (Report of the HRC, 1986).

[115] Id. at par. 7.

Non-Compliance procedure or the CWC Verification Procedure (over the legality of trade restrictions) or between individually initiated proceedings against states before ICSID and the HRC (over the discriminatory treatment of foreign investors).

Many other scenarios, which may result in related proceedings before different specialised judicial and quasi-judicial bodies can also be envisioned (however, between different set of parties). For instance, the ICC and HRC might address similar factual and legal questions (e.g., whether international crimes, which also constitute human rights violations, had taken place); and similarly, the World Bank Inspection Panel might address human rights issues that can also be examined by the HRC (e.g., whether population resettlement required by a Bank Project conforms with human rights standards). Finally, a case of alleged mistreatment of foreign investors by a host state might be discussed in ICSID proceedings and by the WTO (e.g., alleging breach of the national treatment standard under TRIMs).[116]

In practice, there have been only a few examples of multiple proceedings before more than one global specialised tribunal (outside the human rights field). Under the old GATT system, conflicts could arise between dispute settlement procedures established under the GATT and the other related trade agreement, and in some instances limited jurisdictional competition did take place.[117] With the establishment of the WTO and the consolidation of the different dispute settlement machineries into the DSB, this problem was supposed to be eliminated. However, an oversight has been revealed in the *Bananas* litigation, with relation to competition between post-report arbitration proceedings on the permissible level of suspension of concessions due to the non-complying member state and on the consistency of measures taken to comply with Panel or AB reports with WTO law.[118] It seems that the DSU does not regulate at present the precise relations

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[116] Agreement on Trade-Related Investment Measures, 15 April 1994, (Annex 1A to the Agreement establishing the World Trade Organisation,_15 April 1994, available at <http://www.wto.org/english/docs_e/legal_e/18-trims.pdf> (last visited on 1 Nov. 2000).

[117] Ernst-Ulrich Petersmann "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction" *International Trade Law and the GATT/WTO Dispute Settlement System* (Ernst-Ulrich Petersmann, ed., 1997) 5, 53.

[118] Non-compliance with a Panel or AB report could lead to two or more distinct proceedings taking place simultaneously. The first set of proceedings is to be litigated before a DSB Panel (preferably, the original Panel that had adjudicated the merits of the dispute) and is aimed at identifying whether measures taken by the non-complying state are consistent with the report; Understanding on the Rules and Procedures Governing the Settlements of Disputes, Annex 2 to the Agreement establishing the World Trade Organisation (WTO), 15 April 1994, art. 21.5, 33 I.L.M. (1994) 1226 [hereinafter 'DSU']. The second set of proceedings is arbitration, which may or may not take place before the original Panel, aimed at reviewing the legality of sanctions applied against the non-complying state. DSU, art. 22.6. In the *Bananas* case, the DSB instituted in the same month (January, 1999) three proceedings. The first two were

between these two proceedings, and it is not inconceivable that two separate arbitration panels would convene and reach inconsistent results.[119]

Perhaps the most prominent case of multiple proceedings before global and specialised tribunals, to date, is the case of an investment dispute referred to ICC arbitration, and brought subsequently before ICSID. The *Southern Pacific Properties* case (the 'Pyramids case') involved a dispute between a Hong Kong based corporation and the government of Egypt over a cancelled investment project in Egypt. The case was submitted to ICC arbitration, in pursuance to a contractual compromissory clause, and the arbitrators ruled in favour of the foreign company, after rejecting the Egyptian challenge to their jurisdiction.[120] However, Egypt has subsequently managed to get the arbitral award nullified by a French court (France being the *situs* of the arbitration), by reason of lack of jurisdiction of the ICC tribunal.[121] In parallel to the annulment proceedings, Southern Pacific initiated new arbitration proceedings, this time before an ICSID tribunal, relying upon an Egyptian law accepting *ipso facto* the jurisdiction of the Centre. The ICSID tribunal accepted jurisdiction over the case (rejecting the Egyptian claim that previous rulings in the case had *res judicata* effect),[122] and adjudicated the merits of the dispute, holding, like its ICC counterpart, in favour of the private company. While the details of the reasoning of the ICSID tribunal will be discussed at some length

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article 21.5 proceedings, designed to examine the conformity of the new EC regulations with the Panel and Appellate Body reports, and were established at the request of the EC and Ecuador, respectively. *EC - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by the EC*, WTO Doc. WT/DS27/RW/EEC (1999); *EC - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador*, WTO Doc. WT/DS27/RW/ECU(1999). The third was article 22.6 arbitration intended to examine the proportionality of U.S. suspension of concessions (convened at the request of the EC). *EC - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the EC Under Article 22.6 of the DSU*, WTO Doc. WT/DS27/ARB (1999). Fortunately, the DSB assigned all three proceedings to the same Panel that has handled the original dispute and all three reports were issued on the same day (April 6, 1999). Thus the risk of embarrassingly conflicting decisions had been averted this time. It should be noted that in the arbitration proceedings, the Panel had rejected EC's request to commence litigation only after the other proceedings were concluded (which, if adopted as a general policy could have improved inter-proceeding coordination), citing the strict time limits fixed for arbitration under art. 22.6 of the DSU. *Bananas,* (art. 22.6 arbitration), at p. 3.
The same dispute was also subject in 1998 to another set of arbitration proceedings before a single arbitrator, aimed at fixing the duration for implementation of the report. *EC - Regime for the Importation, Sale and Distribution of Bananas - Arbitration under article 21.3(c) of the DSU*, WTO Doc. WT/DS27/15 (1998).

[119] The panel in the *Bananas* case conceded that the present sate of things was unsatisfactory since there remained problems of coordinating between the different roles it has been entrusted with. *Bananas*, (art. 21.5 recourse by EC), at p. 15.

[120] *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, 3 ICSID Rep. 45 (1983)(ICC Award).

[121] *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, Judgment of 12 July 1984, 3 ICSID Rep. 79 (France, Cour d'appel); *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, Judgment of 12 July 1984 ICSID Rep. 92 (Netherlands, District Court).

[122] *Southern Pacific Properties (Middle East) Ltd. v. Egypt,* 3 ICSID Rep. 112 (1985) and , 3 ICSID Rep. 131 (1988). For discussion, see infra Chapter 6, at pp. 257-58, 278-80.

in Part III of this study, it is sufficient to note here that the case highlights the potential for jurisdictional conflicts between different specialised courts.[123]

In the last few months another high profile case of competing jurisdictions has emerged. A dispute over the legality of transit restrictions introduced by Chile against EC fishing vessels involved in the taking of swordfish in international waters has been brought by the EC before both the WTO dispute settlement system (challenging the Chilean invocation of the environmental exception to the GATT) and by Chile to the UNCLOS dispute settlement machinery (challenging the environmental soundness of EC fishing practices).[124] Although the case was settled, it again underscores the actual likelihood of jurisdictional competition between different specialised bodies.

6. Conflicts between (iii) regional courts and tribunals with unlimited jurisdiction ratione materiae and (ii) or (iv) courts and tribunals of specialised competence

In theory, the OSCE Court of Conciliation and Arbitration and the Valletta Mechanism can handle any inter-state dispute. This is also the case, with the almost unlimited compulsory jurisdiction *ratione materiae* of two Latin American economic integration courts – the CCJ and the planned Caricom Court, over inter-state disputes. As a result, these bodies have the jurisdictional potential to deal with any disputes that falls under the subject matter jurisdiction of the specialised courts and tribunals, whether they operate on the global or at the regional level, provided that the state parties to the dispute are subject to the jurisdiction *ratione personae* of the competing procedures.

However, as has been commented with regard to the ICJ, the aforementioned regional procedures have unlimited subject matter jurisdiction only over inter-state cases, while many of the specialised international procedures permit participation by non-state actors

[123] Generally similar circumstances took place in the *MINE v. Guinea* case, where arbitration proceedings took place before the American Arbitration Association and subsequently, following refusal by U.S. Courts to enforce the award, before an ICSID arbitral tribunal. *Marine International Nominees Establishment (MINE) v. Guinea,* 4 ICSID Rep. 54, 68-69 (1988). See discussion in Schreuer, supra note 43, at 156-58.

[124] *Chile – Measures Affecting the Transit and Importation of Swordfish*, case no. WT/DS193/1 (complaint by the E.C); *Fisheries dispute with EU escalates; Primacy of Conservation over Trade is at Stake*, Latin America Weekly Report, 8 Aug. 2000, at 368. For exploration of other such scenarios, see Lakshman D. Guruswamy "Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes" 7 Minnesota Journal of Global Trade (1998) 287, 299.

in the proceedings. As a result, competition is often not feasible (except where states are willing and able to exercise diplomatic protection).

Further, given the dormancy of the OSCE mechanisms, the limited acceptance of the Court of Arbitration's compulsory jurisdiction and the non-existence of the Caricom Court, reference of cases amenable to the jurisdiction of specialised procedures to these virtually non-functioning regional mechanisms seems to be unrealistic. Nonetheless, the situation with regard to the CCJ seems to be slightly different. Although its compulsory jurisdiction encompasses only 3 states, these states have demonstrated in the last decade their willingness to litigate inter-state dispute both before the ICJ[125] and the CCJ.[126] Hence, it is possible that they might also try to litigate their future disputes before the CCJ in competition with proceedings before specialised courts and tribunals such as ITLOS (with regard to their maritime differences)[127] or the WTO (with regard to some of their trade-related disputes).[128]

7. Conflicts between (ii) universal and (iv) regional courts and tribunals of specialised competence

Another important area of jurisdictional overlap is found in the relations between the respective competences of global and regional tribunals. This pertains primarily to two jurisdictional interactions – between the WTO and regional trade arrangements, and between the HRC and regional human rights mechanisms.

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[125] *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. 351.

[126] *Non-compliance or Violation of SICA Norms*, supra note 88; *Revocacion of laws, administrative and other acts,* supra note 88.

[127] At present, only two of the three CCJ states (Honduras and Nicaragua) are parties to UNCLOS, though none of them accepted the compulsory jurisdiction of ITLOS. Still, it is interesting to note that questions of maritime delimitation, amenable to the jurisdiction *ratione materiae* of UNCLOS, had been the subject of the ICJ case, to which all three states were parties, and one recent inter-state case before the CCJ.

[128] This is made possible by the fact that all three states subject to the jurisdiction of the CCJ are also WTO member states. Indeed in a recent case, Honduras joined a request of consultations brought to the WTO against Nicaragua – a fellow member state subject to the compulsory jurisdiction of the CCJ. See infra, at n. 157.

A. Trade-related jurisdictional conflicts

Jurisdictional overlaps with regard to trade-related matters have been made possible by the fact that most parties to regional economic integration or trade liberalisation regimes (such as the EC, EEA, Andean Community, SICA, COMESA and NAFTA) are also parties to the WTO,[129] and that many trade-related issues are regulated both by the GATT (or one of the other WTO side agreements) and by the substantive law applicable in the regional arrangements' courts and tribunals. As a result, numerous disputes concerning direct or indirect restrictions on regional trade can be brought both before the WTO and a competent regional dispute settlement procedure.[130]

In practice, most multiple proceedings trade-related cases to date have taken place in the context of disputes between the member states of NAFTA whose reciprocal trade relations are governed both by NAFTA and the GATT/WTO (all three state parties to NAFTA are members of the WTO). Similarly, prior to the conclusion of NAFTA, the disputes concerning the trade relations between Canada and U.S. were also addressed both by the dispute settlement bodies of NAFTA's precursor - the Canada-U.S. Free Trade Agreement (FTA)[131] and the GATT.

Indeed, on four major occasions there have been multiple proceedings before both the FTA/NAFTA and GATT/WTO adjudicative mechanisms. Two of the four cases have been of similar nature and arose out of the imposition of antidumping countervailing duties by the U.S. on certain products imported from Canada. In the pork cases, an administrative determination made by the U.S. Department of Commerce, imposing countervailing duties on pork products from Canada (by reason of a Canadian subsidy program) was challenged by Canada in 1989 before both the GATT[132] and an FTA binational Panel, established under Chapter 19 of the FTA (which is similar to Chapter

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[129] The EC itself and all of its member states are parties to the WTO Agreement. So are all member states of EFTA, the Andean Community, SICA and NAFTA. By contrast, almost none of the member-states of the CIS are WTO members.

[130] See generally, Gabrielle Marceau "NAFTA and WTO Dispute Settlement Rules – A Thematic Comparison" *International Trade Law and the GATT/WTO Dispute Settlement System* (Ernst-Ulrich Petersmann, ed., 1997) 489; Gabrielle Marceau "Review Essays of Dispute Settlement Mechanisms – Regional or Multilateral: Which One is Better" 31 J. World Trade (1997) 167, 176-79; Jeffery L. Dunoff "Institutional Misfits: The GATT, The ICJ and Trade-Environment Disputes" 15 Mich. J. Int'l L. (1994) 1043, 1077-79.

[131] U.S- Canada Free Trade Agreement, 2 Jan. 1988, 27 I.L.M. (1988) 868.

[132] *Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada* (Canada v. U.S.), GATT BISD (38th Supp.) at 30 (1991)(Panel's Report issued on 18 Sept. 1990).

19 to NAFTA).[133] The GATT Panel found the challenged U.S. determination to be inconsistent with the GATT, while the FTA binational Panel (which issued its report only ten days later) has reached a similar result only with respect to certain parts of the determination.

In the lumber cases, two closely-related determinations of the U.S. Department of Commerce imposing countervailing duties on Canadian lumber products (by virtue of a Canadian export subsidy programme), have also been challenged by Canada before the GATT dispute settlement machinery and a binational FTA Chapter 19 Panel. The GATT Panel found the interim duties (imposed by the U.S. pending conclusion of the investigation) to be incompatible with the GATT,[134] and the FTA binational Panel, seized by the Canadian government at a time when GATT proceedings were still pending, addressed the final determination of the U.S. Department of Commerce (adopted at the end of the investigation) and held that significant parts of the determination were unclear or incorrect under U.S. law.[135]

Interestingly enough, the decisions of the various GATT and FTA panels in the pork and lumber cases did not attribute any significance to the concurrency between the procedures (although the GATT report was admitted into evidence in the FTA Lumber case). This is perhaps explained by the fact that reports rendered by GATT Panels were decided in accordance with international law (mainly, the GATT), whereas Chapter 19 FTA Panels have applied U.S. domestic law.[136] Thus, it is questionable whether genuine competition between the two proceedings has taken place (although the cases were clearly related to each other).[137]

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[133] Case USA-89-1904-06, *Fresh, Chilled and Frozen Pork* (Canada v. U.S.), Report of 28 Sept.1990 (binational Panel) available at < http://www.nafta-sec-alena.org/images/pdf/ ua89060e.pdf> (last visited on 8 July 2000).

[134] *Measures Affecting Imports of Softwood Lumber from Canada* (Canada v. U.S.), GATT B.I.S.D. (40th Supp.) at 358 (1993)(the Panel's Report was issued on 19 Feb. 1993).

[135] Case USA-92-1904-01, *Certain Softwood Lumber Products from Canada* (Canada v. U.S.), Report of 6 May 1993 (FTA binational Panel), available at < http://www.nafta-sec-alena.org/images/pdf/ ua92010e.pdf> (last visited on 8 July 2000).

[136] However, it is well established that U.S. law should be read in light of the GATT. See e.g., *Lumber,* supra note 134, at 105.

[137] Another factor might have been the differences in the identity of the parties to the two cases. While Canada was the sole applicant in the GATT cases, the FTA proceedings were brought by the government of Canada together with several provincial governments and Canadian producers of meat and lumber products, as co-applicants. However, one can regard both cases as involving essentially the same parties, since Canada, in effect, represented the interests of its domestic producers and municipal authorities also before the GATT machinery. In any case, at least with regard to the rights and obligations of the Canadian government full competition seem to have taken place.

In a recent case, a dispute between the U.S. and Mexico over an antidumping investigation by the Mexican authorities concerning high fructose corn syrup imported from the U.S., was submitted by the US to the WTO DSB while a case concerning essentially the same issues, but between different parties was pending before a NAFTA Chapter 19 binational Panel (the NAFTA case was brought by private parties, without the involvement of the US government).[138] During the WTO proceedings, a controversy had arisen as result of an attempt by the U.S. to enter into record alleged discrepancies between the positions that Mexico had taken before the two tribunals, in order to undermine its credibility. Mexico strenuously objected to this attempt, arguing that the two dispute settlement mechanisms were of different nature and addressed disputes between different parties. In the end, the WTO Panel has admitted the piece of evidence requested by the U.S. but held, at the same time, that the alleged discrepancies were insignificant, thereby evading the need to rule on the precise nature of the relations between the two proceedings [139]

Another example of multiple proceedings had been the filing of subsequent applications to GATT and FTA panels concerning Canadian restrictions on exportation of certain fish products. In 1986, the U.S. initiated GATT proceedings against Canada challenging the legality of a Canadian ban on the export of unprocessed salmon and herring and a GATT Panel found the Canadian restrictions to be incompatible with Articles XI and XX of the GATT.[140] A subsequent dispute over a substitute measure introduced by Canada after removal of the unlawful export ban was referred in 1989, by way of agreement, to an arbitral panel constituted under Chapter 18 of the FTA (similar to Chapter 20 to NAFTA). The FTA panel reviewed the legality of the new Canadian measure *inter alia* under Articles XI and XX of the GATT (which were incorporated in the FTA) and explicitly adopted the reasoning employed by the earlier GATT panel. Consequently, it has held that the Canadian requirements were incompatible with the GATT and the FTA.[141] Still, it is not clear whether these two closely related sets of proceedings could

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[138] *Mexico-Anti Dumping Investigation of High Fructose Corn Syrup (HFCS) from the U.S.*, WTO Doc. WT/DS132/R (Panel Report, 28 Jan. 2000), available at < http://www.wto.org/english/tratop_e/dispu_e/5405d.pdf > (last visited on 8 July 2000); Case MEX-USA-98-1904-01, *Imports of High-Fructose Corn Syrup Originating in the U.S.* (NAFTA Chapter 19 Panel)(still pending).

[139] *High Fructose Corn Syrup* (WTO), supra note 138, at 185.

[140] *Measures Affecting Exports of Unprocessed Herring and Salmon* (U.S. v. Canada), GATT BISD (35th Supp.) at 98 (1988)(Panel's Report issued on 20 Nov. 1987).

[141] Case CDA-89-1807-01, *Landing Requirement for Pacific Coast Salmon and Herring* (U.S. v. Canada), Report of 16 Oct. 1989 (FTA Chapter 18 Panel), available at < http://www.nafta-sec-alena.org/images/ pdf/cc89010e.pdf> (last visited on 8 July 2000), reprinted in 1989 FTAPP LEXIS (1989) 6.

be regarded as being in complete competition with each other. Although, both procedures had involved the exact same parties, had been governed by international law and had addressed essentially the same legal arguments, they had different 'object' – since the challenges targeted different Canadian measures.

The overlap between WTO and NAFTA procedures was demonstrated once more through the response of the international community to the Helms-Burton Act introduced by the U.S. in 1997 (imposing trade sanctions on foreign companies trading with Cuba).[142] Following the adoption of the act, consultations have been initiated by the EC before the WTO and before NAFTA by Canada and Mexico.[143] Canada also jointed the WTO proceedings as a third party. Although litigation was not actively pursued, the possibility of parallel proceedings had clearly been a real one.[144]

The existence of competition between NAFTA and the WTO is further underlined by the fact that eight inter-state trade-related claims between NAFTA members had been referred since 1995 to the WTO machinery[145] and not to that of NAFTA (which also had competence to address these issues). At the same time, five inter-state cases without any involvement of private parties – thus, also potentially amenable to the jurisdiction of the WTO machinery, had been referred only to NAFTA Panels.[146] Given the propensity of

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[142] 22 U.S.C. §§ 6021-91 (1997).

[143] *U.S. - The Cuban Liberty and Democratic Solidarity Act*, case no. WT/DS38 (complaint by the EC); See Christopher L. Doerksen "The Restatement of Canada's Cuban (American) Problem", 61 Sask. L. Rev. (1998) 127, 152-53.

[144] Iran had also brought proceedings against the U.S. before the Iran-U.S. Claims Tribunal with relation to the Iran-Libya Sanctions Act (which is comparable to the Helms-Burton Act). *U.S. Policy Toward Iran Doesn't Violate Algiers Accords, United States Says,* 12(9) Mealey's International Arbitration Report (Sept. 1997).

[145] *Canada - Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/AB/R (1997)(Report of the AB)(complaint by the U.S.); *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products,* WTO Doc. WT/DS103/AB/R (1999)(Report of the AB)(complaint by the U.S.); *Canada – Patent Protection Terms*, WTO Doc. WT/DS170/R (2000)(Panel Report)(complaint by the U.S.); *U.S. – Measures Treating Export Restraints As Subsidies* (case no. WT/DS194/1, complaint by Canada)(still pending); *U.S. – Reclassification of Certain Sugar Syrups* (case no. DS 180/1)(complaint by Canada)(still pending); *U.S. – Countervailing Duty Investigation with respect to Live Cattle from Canada* (case no. WT/DS167/1)(complaint by Canada)(still pending)(the case was initially also referred to a NAFTA proceedings, which were however discontinued); *U.S. – Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada* (case no. WT/DS144/1)(complaint by Canada) (still pending); *U.S. - Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico* (case no. WT/DS49, complaint by Mexico) (settled by agreement).

[146] Case CDA-95-2008-01, *Tariffs applied by Canada to Certain U.S.-Origin Agricultural Products* (U.S. v. Canada), Report of 2 Dec. 1996 (NAFTA binational Panel), available at <http://www.nafta-sec-alena.org/images/pdf/cb95010e.pdf> (last visited on 9 July 2000)(complaint by the U.S.); Case USA-97-2008-01, *U.S. Safeguard Action taken on Broomcorn Brooms from Meixco* (Mexico v. U.S.), Report of 30 Jan 1998 (NAFTA binational Panel), available at <http://www. nafta-sec-alena.org/images/pdf/ ub97010e.pdf > (last visited on 8 July 2000). 2 Other cases brought by Mexico against the U.S. are still pending before NAFTA Panels. Case no. USA-98-2008-01, *Cross-border Trucjing Services and Investment;* Case USA-98-2008-02, *Cross-border Bus Serives.*

the parties to NAFTA to litigate their trade disputes, their inclination to utilise both the global and regional dispute settlement procedures available to them and the fact that closely related multiple proceedings have occurred in the past, it can be expected that there is considerable likelihood that parallel or successive proceedings would take place in the future before the two competing jurisdictions. However, as will be discussed below, this possibility has been significantly circumscribed by the text of NAFTA, which bars most types of multiple proceedings.[147]

Outside North America there has been one prominent case of interaction between proceedings conducted under the GATT/WTO and the EC trade regimes in respect of the banana importation policy of EC states. In the early 1990's, before the introduction of a common EC banana importation policy, the Italian policy of imposing a consumer tax on bananas imported from non-EC states has been subject to a number of challenges before Italian domestic courts by private importers of bananas from Latin American states (including *inter alia* Columbia, Honduras and Saint Lucia). On a few occasions the Italian courts referred questions that had arisen in these domestic proceedings to the ECJ for preliminary rulings,[148] and the latter court had to address the compatibility of the Italian government's measures with Community law, the GATT and the 4th Lomé Convention [which granted preferential trade conditions to some African, Caribbean and Pacific (ACP) states].[149]

While proceedings on the legality of the trade restrictions had been pending before the Italian courts and the ECJ, Columbia and 4 other Latin American banana-exporting countries initiated parallel GATT Panel proceedings against the EC, challenging the legality of its quantitative restrictions on importation of bananas and the tariff preferences granted to ACP states by several EC states, including Italy.[150] The Panel accepted the complaint and held that the trade policies of the reviewed EC states are inconsistent with the GATT (however, the report was never adopted by the GATT Council). Shortly thereafter, the ECJ rendered its preliminary rulings in *Chiquita Italia*, in which it has ruled that the GATT has no direct effect in the EC and that as a result its

[147] North American Free Trade Agreement, 17 Dec. 1992, art. 2005, 32 I.L.M. (1993) 289 and 605 [hereinafter 'NAFTA']. See infra Chapter 5, at pp. 221-22.
[148] Case C-228/90, 234/90, 339/90. 353/90, *Simba SpA v. Ministero delle Finanze* [1992] E.C.R. I-3713; Case C-469/93, *Administrazione delle finanze dello stato v. Chiquita Italia SpA* [1995] E.C.R I-4533.
[149] Fourth ACP-EEC Convention, 15 Dec. 1989, 1991 O.J. (L 229) 1.
[150] *EEC Member States' Import Regimes for Bananas* (Columbia et al v. EEC), GATT Doc. DS32/R (1993), 1993 GATTPD LEXIS 11.

provisions may not be invoked before a municipal court.[151] As a result of the position of the ECJ, it is perhaps understandable that the ECJ did not consider the findings of the GATT Panel relevant for guiding the Italian courts.

Multiple proceedings have also been observed with relation to the importation of bananas after the EC has adopted in 1993 a new common policy on the matter.[152] The new policy had been challenged in 1994 before the ECJ (in a case brought by Germany)[153] and before the GATT (in a case brought by several Latin American countries).[154] While the GATT Panel report (which was never adopted) found that the regulation violated the most-favoured nation requirement under the GATT, the ECJ again refused to rely upon the provisions of the GATT and held the regulations to be legal under EC law. As is well-known, subsequent challenges to a revised version of the EC regulations had also been made before the WTO DSB, which found this EC policy to be illegal too.[155] Thus, the *Bananas* litigation serves as a useful reminder of the potential of complex trade issues to produce voluminous litigation before regional and global trade tribunals.

The potential for competition between the WTO and regional economic integration regimes has also been shown by a recent trade related dispute between two members of Mercosur - Brazil and Argentina, which had been referred to the WTO and not to the alternative (though dormant) arbitration machinery of Mercosur,[156] and by a claim brought against Nicaragua, to which Honduras – a fellow member of SICA (and, like Nicaragua, a state subject to the compulsory jurisdiction of the CCJ), has joined.[157]

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[151] *Chiquita Italia,* [1995] E.C.R., at I-4565-66. The Court did not however consider the effects of the conclusion of the WTO on the status of GATT rights and obligations. *Chiquita Italia,* 1995 E.C.R., at I-4533 (Opinion of Advocate-General Lenz).

[152] Council Regulation (EEC) 404/93 of 13 Feb. 1993 on the Common Organisation of the Market in Bananas, 1993 O.J. (L 47) 1.

[153] Case C-280/93, *Germany v. Council,* [1994] E.C.R. I-4973, 5071-74.

[154] *EEC- Import Regime for Bananas,* 34 I.L.M. (1995) 177 (GATT Panel Report, 1994).

[155] *E.C. - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R (1997) (Panel Report); *E.C. - Regime for the Importation, Sale and Distribution of Bananas*, 37 I.L.M. (1998) 243 (Report of the AB, 1997).

[156] *Argentina – Transitional Safeguard Measures on Certain Imports of Woven Fabrics of Cotton and Cotton Mixtures Originating in Brazil* (case no. WT/DS190/1)(still pending).

[157] *Nicaragua – Measures Affecting Imports from Honduras and Colombia (I)* (case no. WT/DS188/1) (request by Columbia)(still pending). Honduras recently requested from the DSB to initiate consultations on this matter. *Nicaragua – Measures Affecting Imports from Honduras and Colombia (II)* (case no. WT/DS201/1)(request by Honduras)(still pending).

So, it can be asserted that many GATT/WTO cases have the proven capacity of falling under the jurisdictional ambit of regional economic integration arrangement. Nevertheless, it must be remembered that this is not necessarily the case *vice versa*. The GATT and its related agreements regulate only limited areas of international economic law whereas the subject-matter jurisdiction of regional tribunals (i.e., ECJ, Andean Court, EFTA Court, COMESA and NAFTA) is generally broader. Consequently, many disputes amenable to the jurisdiction of the regional bodies cannot fall under the jurisdiction of the GATT/WTO mechanism.[158] In addition, unlike regional tribunals, the WTO does not afford *locus standi* to private parties and offers only limited access to IGOs.[159] By contrast, the vast majority of trade-related disputes brought to date before the regional economic integration bodies have involved private parties or IGOs as litigants. Still, the rather common practice of espousing private trade-related grievances by states (without formal diplomatic protection) can enable some of these issues to reach the WTO nonetheless (albeit between different sets of parties).

B. Jurisdictional conflicts between human rights bodies

Perhaps, the most vivid example of competition between global and regional dispute settlement procedures is found in the practice of the HRC and the regional human rights bodies. The HRC handles complaints alleging violation of the ICCPR, a text that largely corresponds to provisions found in regional human right conventions.[160] Consequently, almost all cases presented to date before the HRC have been within the potential subject-matter jurisdiction of the regional procedures. Furthermore, the large majority of parties to the Optional Protocol to the ICCPR participate in one of the regional human rights sub-systems.[161] Since there are millions of individuals, which have *locus standi* both before the HRC and one of the regional mechanisms, and given the inclination of individuals to vindicate their rights through litigation (unlike states, that are often

[158] For example, the ECJ may address environmental questions, even if not directly related to trade. Philippe Sands, *Principles of International Environmental Law* (1995) 544-50.

[159] The EC is at present the only international organisation that enjoys membership privileges before WTO dispute settlement bodies.

[160] For a detailed comparison between the ICCPR and the European HR Convention, see Report of the Committee of Experts to the Committee of Ministers of the Council of Europe, *Problems arising from the Co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights – Differences as regards the Rights Guaranteed*, 1 Aug. 1970, Doc. No. H (70) 7; Parliamentary Assembly of the Council of Europe, *Information Report on the Protection of Human Rights in the United Nations Covenant on Civil and Political Rights and its Optional Protocol and in the European Convention on Human Rights,* 27 April 1976, pp. 4-6, Doc. No. 3773; Girogio Gaja "New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe?" *The EU and Human Rights* (Philip Alston, ed., 1999) 781, 783-84.

[161] All but 17 of the 98 state parties to the Optional Protocol are subject to the jurisdiction of some regional human rights procedure.

reluctant to litigate),[162] the number of instances of multiple litigation in this area of the law can be expected to be relatively high. And indeed, at least on 40 occasions, virtually the same human rights complaints have been brought before both global and regional procedures.

As far as the HRC is concerned, multiple proceedings are governed by Article 5(2)(a) of the Optional Protocol, which bars the admissibility of communications simultaneously pending before other international investigation or settlement procedures (a *lis pendens* clause). It should be noted that this clause, which will be further analysed in Part III of this study, does not preclude the admissibility of successive communications that had already been settled by another human rights procedures. However, several of the parties to the Optional Protocol have introduced a reservation excluding from the jurisdiction of the HRC communications that were previously reviewed by other procedures (*electa una via* reservations).[163] Most of the discussion of multiple proceedings by the HRC was undertaken within the legal framework of these two jurisdiction-regulating provisions, and will be described below, in accordance with the conditions for their application.

The first group of cases where jurisdictional conflicts have occurred are cases brought to the HRC after they had been dealt with by another human rights procedure. In more than 10 cases, not covered by any *electa una via* reservation, the HRC simply took note of the fact that the communications had also been the subject of other international proceedings.[164] It is notable that in a few of these cases the Committee has reached

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[162] Laurence R. Helfer and Anne-Marie Slaughter "Toward a Theory of Effective Supranational Adjudication" 107 Yale L.J. (1997) 273, 285.

[163] To date, 19 states have submitted a reservation to this effect, most of them in pursuance to a recommendation made in a Report issued by a Committee of Experts, operating along the Council of Europe's Committee of Ministers. Report of the Committee of Experts to the Committee of Ministers of the Council of Europe, *Problems arising from the Co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights – Part I: Problems arising from the Co-existence of the Two Systems of Control provided for by the European Convention and by the UN Covenant on Civil and Political Rights*, 29 Feb. 1968, pp. 7-11, Doc. No. CM (68) 39.

[164] Comm. R.2/8, *Lanza v. Uruguay*, UN GAOR, 35th Sess., Supp. 40, at 111, 113 (Report of the HRC, 1980); Comm. R.7/28, *Weinberger v. Uruguay*, UN GAOR, 36th Sess., Supp. 40, at 114, 116 (Report of the HRC, 1981); Comm. R.10/44, *Pietroroia v. Uruguay*, UN GAOR, 36th Sess., Supp. 40, at 153, 155 (Report of the HRC, 1981); Comm. 201/1985, *Hendricks v. Netherlands*, UN GAOR, 43rd Sess., Supp. 40, at 230, 235 (Report of the HRC, 1988); Comm. 210/1986, 225/1987, *Pratt v. Jamaica*, UN GAOR, 44th Sess., Supp. 40, at 222, 226 (Report of the HRC, 1989); Comm. 401/1990, *J.P.K v. Netherlands*, UN GAOR, 46th Sess., Supp. 40, at 405, 409 (Report of the HRC, 1991); Comm. 403/1990, *T.W.B.M v. Netherlands*, UN GAOR, 46th Sess., Supp. 40, at 411, 414 (Report of the HRC, 1991); Comm. 381/1989, *L.E.S.K. v. Netherlands*, UN GAOR, 47th Sess., Supp. 40, at 374, 377 (Report of the HRC, 1992); Comm. 402/1990, *Brinkhof v. Netherlands*, UN GAOR, 48th Sess., Annex, par. 7.3, UN Doc. CCPR/C/48/D/402/1990 (1993); Comm. 453/1991, *Coeriel v. Netherlands*, UN Doc. CCPR/C/52/D/453/1991 (Report of the HRC, 1994); Comm. 824/1998, *Nicolov v. Bulgaria*, para. 8.2, UN Doc. CCPR/C/68/D/824/1998 (Report of the HRC, 2000).

decisions inconsistent with those reached by the regional bodies that have previously reviewed the same matter.[165]

In situations governed by *electa una via* reservations (about 10 more cases), the HRC has tended to decline jurisdiction only where the competing procedure examined the substance of the same communication (during either the admissibility or the merits stage),[166] although there have been exceptions to this trend.[167] Thus, where dismissal by the first procedure was made on purely procedural grounds, the Committee generally held that the reservation was inapplicable.[168] Only in a handful of cases did the Committee find communications addressed by other procedures to be inadmissible.[169]

The second category of cases involves parallel proceedings before the HRC and a regional court or tribunal. In some 10 cases, where the HRC has observed the existence of litispendence involving another international procedure, it simply requested the author of the communication to withdraw the complaint which had been pending before the

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[165] *Brinkhof,* supra note 164 (difference between permissible grounds for conscientious objection could be deemed discriminatory); *Brinkhof v. the Netherlands*, App. No. 14215/88, Eur. Comm'n Decision of 13 December 1989 (application is ill-founded). *Coeriel,* supra note 164 (refusal to register surname change for its foreign sound is arbitrary); id. at para. 2.4 (EHR Comm'n decided on 2 July 1992 that an application by the same applicants should be struck off the list of cases as ill-founded).

[166] The same matter being the same claim concerning the same individual. *Fanali,* supra note 14, at 163; Comm. 191/1985, *Blom v. Sweden*, UN GAOR, 43rd Sess., Supp. 40, at 211, 216 (Report of the HRC, 1988). *Cf. Mejìa v. Peru*, supra note 15, at par. V (A)(1) (importing the test adopted by the HRC with respect to what constitutes the same case under the Inter-American System). See Manfred Nowak, *A Commentary on the U.N. Covenant on Civil and Political Rights* (1993) 702.

[167] Comm. R.26/121, *A.M. v. Denmark*, UN GAOR, 37th Sess., Supp. 40, at 212, 213 (Report of the HRC, 1982). See discussion in Dominic McGoldrick, *The Human Rights Committee* (1991) 184-85; Nowak, supra note 166, at 702; R. Ghandi "The Human Rights Committee and the Right of Individual Communication" 57 B.Y.I.L. (1986) 201, 231. *Cf. X v. Switzerland,* App. No. 8878/79, 20 Eur. Comm'n H.R. Dec. & Rep. 240, 245 (1980)(holding that a case terminated by the EHR Comm'n on technical grounds does not bar the submission of a new petition to the same body on the same matter).

[168] Comm. 158/1983, *O.F. v. Norway*, UN GAOR, 40th Sess., Supp. 40, at 204, 211 (Report of the HRC, 1985); *Casanovas v. France*, supra note 25, at 133-34.

[169] *A.M. v. Denmark*, supra note 167; Comm. 168/1984, *V.O v. Norway*, UN GAOR, 40th Sess., Supp. 40, at 232, 234-35 (Report of the HRC, 1984); Comm. 467/1991, *V.E.M. v. Spain*, UN Doc. CCPR/C/48/D/467/1991 (Report of the HRC, 1993)(holding that the Spanish reservation is broader than most other *electa una via* reservations and precludes the very act of submission to two procedure); Comm. 421/1990, *Trebutien v. France*, UN GAOR, 49th Sess., Supp. 40(II), at 277, 281 (Report of the HRC, 1994); *Glaziou v. France*, supra note 28, at 255; *Valentijn,* supra note 28, at 257. See also Helfer, supra note 25, at 302.

In two other cases the Committee found the communications inadmissible for other reasons and did no discuss the applicability of either the *lis pendens* clause or *electa una via* reservation. Comm. 217/1986, *H. v. d.P.V. v. Netherlands*, UN GAOR, 42nd Sess., Supp. 40, at 185, 186 (Report of the HRC, 1987); Comm. 393/1990, *A.C. v. France*, UN GAOR, 47th Sess., Supp. 40, at 384, 387 (Report of the HRC, 1992).

competing regional procedure (the I/A HR Comm'n, in the vast majority of cases).[170] Upon withdrawal of the case, the HRC proceeded to address the communication.[171]

In other cases in which parallel proceedings were pending, the HRC construed the *lis pendens* clause narrowly. For example, in four cases it held that parallel communications submitted to the other international procedure before the entry into force of the Optional Protocol, were not covered by the *lis pendens* clause.[172] In three other cases the HRC held that communications submitted to other international procedures by complainants unrelated to the victim of the alleged violation do not bar the latter (or those entitled to submit communications on their behalf) from seizing the HRC simultaneously.[173]

It should also be noted that the HRC has also encountered instances of interaction with international dispute settlement procedure, which do not fall under the Optional Protocol's definition of a competing international procedure.[174] Hence, parallel international procedures conducting general investigation of human rights situations, which were not adversarial-type review of individual complaints (e.g., thematic or country studies by the UN Human Rights Commission's Rapporteurs), were not deemed to be covered by the *lis pendens* clause (notwithstanding the fact that such procedures

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[170] Nowak, supra note 166, at 695; *Christina* Cerna "The Inter-American Commission on Human Rights: its Organization and Examination of Petitions and Communications" *The Inter-American System of Human Rights* (David J. Harris and Stephen Livingstone, eds. 1998) 65, 94.

[171] Comm. R.1/4, *Ramirez v. Uruguay*, UN GAOR, 35th Sess., Supp. 40, at 121,123 (Report of the HRC, 1980); Comm. R.14/63, *Antonaccio v. Uruguay*, UN GAOR, 37th Sess., Supp. 40, at 114, 116 (Report of the HRC, 1982); *Altesor*, supra note 15, at 125; Comm. 84/1981, *Barbato v. Uruguay*, UN GAOR, 38th Sess., Supp. 40, at 124, 126 (Report of the HRC, 1983); Comm. 85/1981, *Romero v. Uruguay*, UN GAOR, 39th Sess., Supp. 40, at 159, 161 (Report of the HRC, 1984); Comm. 123/1982, *Lluberas v. Uruguay*, UN GAOR, 39th Sess., Supp. 40, at 175, 179 (Report of the HRC, 1984); Comm. 321/1988, *Thomas v. Jamaica*, UN GAOR, 49th Sess., Supp. 40 (II), at 1, 2 (Report of the HRC, 1994); Comm. 575, 576/1994, *Guerra v. Trinidad and Tobago*, UN Doc. CCPR/C/53/D/575/1994 and 576/1994 (Report of the HRC, 1995); Comm. 645/1995, *Bordes v. France*, UN Doc. CCPR/C/57/D/645/1995, at par. 5.2 (Report of the HRC, 1996); Comm. 577/1994, *Campos v. Peru*, UN Doc. CCPR/C/61/D/577/1994 (Report of the HRC, 1998).

[172] Comm. 8/1977, *Lansa v. Uruguay*, UN GAOR, 35th Sess., Supp. 40, at 111, 113 (Report of the HRC, 1980); Comm. R.1/6, *Sequeira v. Uruguay*, UN GAOR, 35th Sess., Supp. 40, at 127, 128 (Report of the HRC, 1980); Comm. R.2/11, *Motta v. Uruguay*, UN GAOR, 35th Sess., Supp. 40, at 132, 133 (Report of the HRC, 1980); Comm. 32/1978, *Touron v. Uruguay*, UN GAOR, 36th Sess., Supp. 40, at 120, 123 (Report of the HRC, 1981); Comm. 1/1976, *A. v. S.*, UN Doc. CCPR/C/OP/1 at 17 (1984).

[173] *Altesor*, supra note 15, at 125; *Casariego*, supra note 15, at 187; Comm. 74/1980, *Estrella*, supra note 15, at 156. See also *Sequeira v. Uruguay*, supra note 172, at 127 (reference to the individual circumstances of the author in a two-line statement in a case involving hundreds of persons brought to the I/A HR Commission by an unrelated third party, does not bar the HRC from reviewing the case); For criticism, see Meron, Norm Making and Supervision, supra note 112, at 776.
The I/A HR Commission has seem to have adopted a different view on the preclusive effect of unrelated third party claims. *Mejìa*, supra note 15, at para. V (A)(1).

[174] Nowak, supra note 166, at 696-98.

may examine individual cases during their investigation).[175] Similarly, review of complaints by NGOs was held not to qualify as a parallel 'international' procedure.[176]

The third group of cases includes complaints that had been brought first to the HRC and only subsequently to a regional human rights procedure. As a result, the need to make judicial pronouncements on the permissibility of such multiple proceedings has been delegated to the regional procedures, in accordance with their own rules on admissibility.

On a couple of occasions the EHR Comm'n held, by virtue of article 35(2) [ex-article 27(1)(b)] of the European HR Convention, which is an *electa una via* clause, that petitions previously presented to other dispute settlement procedures were inadmissible.[177] There has also been one case before the African Human Rights Comm'n where a similar decision was reached.[178] However, no similar practice has been found with regard to the I/A HR Comm'n.

As is the case in trade-related matters, the overlap between regional and global human rights procedures is not absolute. Regional bodies generally enjoy broader based jurisdiction *ratione materiae* than the HRC, since the ICCPR fails to address certain economic and social rights that are protected by the regional instruments (most notably, the European Social Charter).[179] In addition, there have been some significant

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[175] *A. v. S.*, supra note 172 (referral of the same dispute to the UN bodies under the procedure of ECOSOC Res. 1503 or to UNESCO does not constitute the 'same matter', since these bodies deal with the study of general situations); Comm. 146/1983 *Baboeram v. Suriname,* UN GAOR, 40th Sess., Supp. 40, at 187, 191-92 (Report of the HRC, 1984); Comm. 172/1984, *Broeks v. Netherlands*, UN GAOR, 42nd Sess., Supp. 40, at 139, 144 (Report of the HRC, 1987); Comm. 180/1984, *Danning v. Netherlands*, UN GAOR, 42nd Sess., Supp. 40, at 151, 153 (Report of the HRC, 1987); Comm. 182/1984, *Zwaan-de Vries v. Netherlands*, UN GAOR, 42nd Sess., Supp. 40, at 160, 162 (Report of the HRC, 1987); Comm. 441/1990, *Blanco v. Nicaragua*, UN GAOR, 49th Sess., Supp. 40, at 12, 13 (Report of the HRC, 1994); Comm. 540/1993, *Atachahua v. Peru*, UN GAOR, 51st Sess., Supp. 40(II), at 112, 113 (Report of the HRC, 1995). For criticism, see Meron, Norm Making and Supervision, supra note 112, at 767.

[176] *Baboeram v. Suriname,* supra note 175, at 191-92; *Blanco v. Nicaragua*, supra note 175, at 13.

[177] *Fornieles v. Spain*, App. No. 17512/90, 73 Eur. Comm'n H.R. Dec. & Rep. 214, 223-24 (1992); *Pauger* (EHR Comm'n App. No. 24872/94). supra note 19, at174. It should be noted that in some cases, where successive application were submitted, the Secretariat of the Commission had advised the applicant to withdraw the complaint without registering it. Directorate of Human Rights of the Council of Europe, *Effects of the Various International Human Rights Instruments providing a Mechanism for Individual Communications on the Machinery of Protection established under the European Convention on Human Rights*, 1 Feb. 1985, p. 12, Doc. No. H (85) 3, 11.

[178] Comm. 15/88, *Mpaka-Nsusu Andre Alphonse v. Zaire,* 7th Annual Report of the African Commission on Human and Peoples' Rights, 1993-94, 30th Sess. (1994), available at < http://www1.umn.edu/humanrts/ africa/ACHPR2.htm> (last visited on 15 Oct. 2000)

[179] See First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, art. 1-2, E.T.S. 9 (1952) [hereinafter 'European HR Convention, Protocol 1'](right of property and right to education); Inter-American HR Convention, art. 14 (right to reply), art. 18 (right to

inconsistencies, in terms of personal jurisdiction over states, between the global procedure and its regional counterparts.[180] Hence, it is not unimaginable that certain human rights violations will be amenable to the jurisdiction of one human rights procedure only. Furthermore, *locus standi* standards before the HRC differ from those applicable in proceedings before two out of the three principal regional procedures. While the HRC and the ECHR admit only claims presented by directly affected individuals or on their behalf,[181] the Inter-American and African complaint procedures allow NGOs and other interested persons, even if not directly affected, to bring complaints.[182] In contrast, the standing requirements before the ECSR, where only collective complaints by specifically designated NGOs are admissible, are, as a rule, narrower than those applied by the HRC.[183]

The European and Inter-American Human Rights Commissions have also had the opportunity of dealing with conflicts of jurisdiction in their relations with universal procedures other than the HRC. Both Commissions have addressed cases that were previously submitted to the ILO CFA (the EHR Comm'n has found, on one occasion, a case to be inadmissible for that reason).[184] At the same time, the ILO had on a couple of occasions the opportunity to deal with cases after they had been decided by regional human rights procedures.[185]

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a name), art. 21 (right to property); and AHR Charter, art. 14 (right to property), art. 15 (right to equitable work conditions), art. 16 (right to health), art. 17 (right to education).

[180] For example, 6 out of the 41 states subject to the jurisdiction of the ECHR have not ratified the Optional Protocol; similarly, 8 out of the 25 states parties to the I/A HR Convention have not ratified the Optional Protocol.

[181] Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec. 1966, art. 1, UN GA Res. 2200 A (XXI), GAOR, 21st Sess., Supp. No. 16 (A/6316) 52, UN Doc. A/CONF. 32/4. See McGoldrick, supra note 167, at 134.

[182] American Convention on Human Rights, 22 Nov. 1969, art. 44, O.A.S. T.S. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, Doc. 21, Rev. 6 (1979), 9 I.L.M. (1970) 673 [hereinafter 'I/A HR Convention']; African Charter on Human and People's Rights, 27 June 1981, art. 55, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. (1982) 58 [hereinafter 'AHR Charter'].

[183] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9 Nov. 1995, E.T.S. 158.

[184] *Martins v. Spain*, App. No. 16358/90, 73 Eur. Comm'n H.R. Dec. & Rep. 120, 134-35 (1992); *Cf. Council of Civil Services Unions v. U.K.*, App. No. 11603/85, 50 Eur. Comm'n H.R. Dec. & Rep. 228, 237 (1987)(holding that a complaint submitted to the ILO CFA by one trade union does not bar another trade union from raising the same matter before the EHR Comm'n); Case 11.381, *Nicaraguan Customs Service v. Nicaragua*, Inter-Am. C.H.R., Report no. 14/97, OEA/Ser.L/V/II.95, Doc. 7 rev. 535, at par. 38-47 (1997)(holding that an ILO case concerning right to strike does not preclude the I/A HR Comm'n from admitting a case arising out of the same events but involving also questions of due process). In an earlier case before the I/A HR Comm'n it was held that the ILO proceedings do not constitute a competing dispute settlement procedure, which precludes proceedings under the I/A HR Convention. Cerna, supra note 170, at 95 (cites Case 7579, *Salazar v. Nicaragua*). See also Helfer, supra note 25, at 319-321.

[185] Case 1318, *German Worker's Confederation v. Federal Republic of Germany*, LXVIII ILO Official Bulletin (ser B) No. 3 (1985) (Report of the CFA)(holding that previous decision of the EHR Comm'n

Like the HRC, the regional bodies have also encountered interaction with dispute settlement procedures, which they did not deem capable of creating genuine competition. The I/A HR Comm'n refused in one case to block petitions pending in parallel before an international mechanism for investigation of general human rights situations.[186] A similar decision was adopted by the EHR Comm'n in a case involving an international fact-finding committee.[187] In another case, the EHR Comm'n held that the fact that the complaint in question had been previously reviewed by an international NGO is not a bar to its admissibility.[188] Finally, the ACHR has held, in one case, that previous proceedings before another tribunal in which no decision on the merits had been reached, are not covered by the African Charter's *res judicata* clause.[189]

Another overlap, similar to the one existing between the HRC and the regional procedures, might be observed in the relations between the latter procedures and the CERD, CEDAW and CAT Committees (and in the future, vis-à-vis the MWC Committee). Since all regional procedures prohibit discrimination (including discrimination against women and migrant workers)[190] and torture,[191] they seem to be in direct competition with the specialised UN mechanisms, which include some of the participants in the regional sub-systems.

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that the petition is inadmissible is of no relevance to the ILO CFA); *Observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany*, LXX ILO Official Bulletin (ser. B) Supp. 1 (1987)(Report of Commission of Inquiry) (relying, *inter alia,* on two decisions of the ECHR with regard to the persons whose dismissal was at issue before the ILO).

[186] Case 10.580, *Quiñones v. Ecuador*, Inter-Am. C.H.R., Report no. 10/95, OEA/ser.L./V/II.91, Doc. 7, at 76, par. II.2 (1996); Case 11.227, *Diaz v. Colombia*, Inter-Am. C.H.R., Report no. 5/99, OEA/ser.L/V/II.95, Doc. 7 rev 99, at par. E.69 (1997). This outcome is specifically prescribed by the rules of procedure of the I/A HR Comm'n on parallel proceedings. Regulations of the Inter-American Commission on Human Rights, art. 39(2)(a), O.A.S. Official Records OAS/Ser.L.V/II, Doc. 31, rev. 3 (1980).

[187] *Varnava v. Turkey,* App. No. 16064-66, 16068-73/90, Decision of the EHR Comm'n of 14 April 1998, available at < http://www.dhcour.coe.fr/hudoc/ViewRoot.asp?Item=1&Action= Html&X=709212229 &Notice=0&Noticemode=&RelatedMode=0 > (last visited on 9 July 2000).

[188] *Lukanov v. Bulgaria*, App. No. 21915/93, 80 Eur. Comm'n H.R. Dec. & Rep. 108, 124 (1995).

[189] Case 40/90, *Ngozi Njoku v. Egypt*, ACHR Report of 11 Nov. 1997, 11th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1997/98, 22nd and 23rd Ordinary Sessions, Annex II (1998), available at < http://www1.umn.edu/humanrts/ africa/11thannex2.html > (last visited on 9 July 2000).

[190] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, art. 14, E.T.S. 5, 213 U.N.T.S. 221, as revised by Protocol No. 11, 11 May 1994, E.T.S. 155 [hereinafter 'European HR Convention']; Protocol no. 12 to the European Convention on Human Rights and Fundamental Freedoms, 26 June 2000, E.T.S. 177 [hereinafter 'European HR Convention, Protocol 12']; I/A HR Convention, art. 24; AHR Charter, art. 2-3.

[191] European HR Convention, art. 3; I/A HR Convention, art. 5; AHR Charter, art. 5.

To date there have been two cases before the CAT Committee which were also presented to regional bodies. In both cases, the Committee has held that the applications are inadmissible (but only in one of the two cases, by reason of the preclusive effect of the competing set of proceedings).[192]

C. Other areas of overlapping jurisdictions

Another example of parallel jurisdiction can be found in the review of the activities of international investment banks. Since international development projects can be financed by more than one investment bank, it is possible that complaints against the adverse effects of a planned project will be brought, at the same time, and at the initiative of the same directly affected individuals, before the World Bank Inspection Panel and one or more of the two regional review procedures. However, it should be realised that such proceedings are not in full competition with each other, since they will necessarily involve different respondents, and because there might be significant variations between the different banks' policies and procedures, that had been allegedly violated.

This exact scenario has transpired in the context of a joint Argentinean/Paraguayan project – the *Yacyretá* hydroelectric project, which has been co-financed by the World Bank and the Inter-American Development Bank. The same Paraguayan NGO has filed two simultaneous complaints to the World Bank Inspection Panel, and the IDB's Independent Investigation Mechanism, alleging a variety of adverse repercussions of the planned project. This has resulted in two separate inspection proceedings, resulting in two reports published one day apart from each other.[193] Both reports have identified generally similar shortcomings in the project and recommended to introduce certain improvements so to enable the continued execution of project. This good level of conformity may be explained, in part, by the fact that the two panels had consulted each other throughout their respective investigation.[194]

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[192] Comm. 10/1993, *A.E.M. v. Spain*, UN GAOR, CAT, 13th Sess. Annex 5, at 43, UN Doc. A/50/44, para. 3.3-5.2 (1994)(inadmissible on other grounds); Comm. 26/1995, *Mbulu v. Canada*, UN Doc. CAT/C/15/D/26/1995 (1995)(dismissed for being previously reviewed by the I/A HR Comm'n).

[193] *Argentina/Paraguay: Yacyretá Hydroelectric Project*, Report of the Inspection Panel of 16 Sept. 1997, available at <http://www.worldbank.org/html/ins-panel/Yacyreta%20Panel%20Review%20 Sept%2016 %201997.htm> (last visited on 10 July 2000); *Yacyretá Hydroelectric Project*, Report of 15 Sept. 1997, IDB Doc. GN-1947-8, available at <http://www.iadb.org/cont/ poli/yacyreta/yacying.htm> (last visited on 30 June 2000).

[194] IDB *Yacyretá* Report, supra note 193, at Preface, 3rd Para.; Richard E. Bissel "Recent Practice of the Inspection Panel of the World Bank" 91 A.J.I.L. (1997) 741, 743.

Other less evident areas of potential overlap between global and regional specialised bodies, which do not seem to have arisen to date, can nevertheless be identified in the following cases:

- The ILO complaint mechanisms, the African Commission and the ECSR collective complaint mechanism all have jurisdiction with regard to work conditions.[195]
- Investment disputes might be amenable to the jurisdiction of ICSID and the regional economic integration tribunals, which have competence over trade in capital (e.g., ECJ,[196] EFTA Court[197] and NAFTA[198]).
- Investment disputes concerning loss or depreciation of investment as result of governmental act or omission could fall under the jurisdiction of ICSID and the ECHR, I/A CHR and ACHR (all of which protect the right to property).[199]
- Disputes over detention of vessels and crew, which entail harm to property and curbs on the ability of the crew to leave the place of detention, may be subject to the compulsory jurisdiction of ITLOS[200] and to that of the regional human-rights procedures (competent to adjudicate complaints over violation of the right to property and freedom of movement).[201]
- Disputes concerning national policies for emission control of substances covered by the Montreal Protocol can be referred both to the Protocol's Implementation Committee and to the ECJ, by virtue of the EC legislation on the protection of the ozone[202] or to the CEC, on the basis of the North American Agreement on Environmental Cooperation.[203]

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[195] See e.g., Convention concerning Occupational Safety and Health and the Working Environment, 22 June 1981, ILO Convention no. 155; AHR Charter, art. 15; European Social Charter, 18 Oct. 1961, part II, 529 U.N.T.S. 89, E.T.S. 35.

[196] Treaty Establishing the European Economic Community, 25 March 1957, art. 56-58, 298 U.N.T.S. 3, as revised in 10 Nov. 1997, 1997 O.J. (C340) 173.

[197] Agreement on a European Economic Area, 2 May 1992, art. 40-42, 1994 O.J. (L1) 3.

[198] NAFTA, art.1101-1114. According to NAFTA, the parties to an investment dispute may choose whether to bring it before ICSID or to arbitration, in accordance with the UNCITRAL Rules. NAFTA, art. 1120.

[199] European HR Convention, Protocol 1, art. 1; I/A HR Convention, art. 21; AHR Charter, art. 14.

[200] UNCLOS, art. 292.

[201] European HR Convention, Protocol 1, art. 1; Protocol no. 4 to the European Convention on Human Rights and Fundamental Freedoms, 16 Sept. 1963, art. 2, E.T.S. 46; I/A HR Convention, art. 21-22; AHR Charter, art. 12, 14.

[202] Sands, *Principles of Int'l Env'l Law,* supra note 158, at 556-57.

[203] North American Agreement on Environmental Cooperation, 14 Sept. 1993, art. 3, 22-24, 32 I.L.M. (1993) 1480 [hereinafter 'NAAEC').

8. Conflicts between different regional tribunals of specialised competence [two category (iv) tribunals]

The last cluster of potential jurisdictional overlaps can be found in the relations between different regional and specialised courts and tribunals with comparable jurisdiction *ratione personae*. This applies primarily to the interaction between regional human rights protection mechanisms and economic integration regimes, where several areas of overlap can be identified.[204]

The most prominent example of this interaction is found in the context of the relations between the ECJ and the ECHR. Many aspects of everyday life in Europe are governed by both EC and European human rights law, and the ECJ has consistently viewed fundamental human rights as general principles of Community law.[205] Thus, for instance, labour standards, which include the principle of non-discrimination, applicable in the territory of the EC member states, are governed both by EC legislation, on the one hand, and the provisions of the European HR Convention and the European Social Charter (both instruments are binding upon all member states of the EC), on the other hand.[206] Similarly, restrictions on the movement of persons and items might violate both human rights and EC law.[207]

In addition, the actions of EC institutions may themselves give rise to human rights concerns. By way of example, the employment practices of EC bodies[208] or the use of

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[204] Juliane Kokott and Frank Hoffmeister, "Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms" 90 A.J.I.L. (1996) 664, 666; Francis G. Jacobs "The Protection of Human Rights in the Member States of the European Community - the Impact of the Case Law of the Court of Justice" *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (James O'Reilly, ed., 1992) 243, 249-250.

[205] Case 29/69, *Stauder v. Ulm* [1969] E.C.R. 419, 425. See also Jacobs, supra note 204, at 244-49.

[206] See e.g., Case 43/75, *Defrenne v. Sabena,* [1978] E.C.R. 1365 (age discrimination against employed women); Case 236/87, *Bergemann v. Bundesanstalt für arbeit,* [1988] E.C.R. 5125 (eligibility of foreigner married to local citizen for unemployment benefits); Case T-12.93, *CCE de Vittel v. Commission,* [1995] E.C.R. II-1247 (duty to consult with workers' organisations while considering changes in business ownership); Case C-13/94 *P v. S.* [1996] E.C.R. I-2143 (dismissal of worker for being a transsexual); Case C-249/96, *Grant v. South West Trains Ltd.* [1998] E.C.R. I-621 (refusal to accord a worker's non-married spouse work benefits conferred upon married spouses). EC case law may also involve ILO-related obligations. Case C-345/89, *France v. Stoeckel,* [1991] E.C.R. I-4047; Case C-158/91, *France v. Levy,* [1993] E.C.R. I-4287; Case C-13/93, *Office National de l'Emploi v. Minne,* [1994] E.C.R. I-371. See also Case C-41/90, *Höfner v. Macrotron GmbH,* [1991] E.C.R. I-1979.

[207] See e.g., Case 60, 61/84, *Cinéthéqe SA v. Fédération nationale des cinémas français,* [1985] E.C.R. 2605 (restrictions on videotape releases raise issues of freedom of movement of goods under EC law and freedom of expression under the European HR Convention).

[208] See e.g., Case C-308/87, *Grifoni v. Commission,* [1990] E.C.R. I-1203 (compliance of Euratom with ILO work safety standards); Case T-45/90, *Speybrouk v. European Parliament,* [1992] E.C.R. II-33 (termination of employment of a pregnant EC worker); Case 404/92 P., *X v. Commission* [1994] E.C.R. I-4737 (requirement that new Community employees undergo medical examination).

the Commission's investigation powers[209] might be regarded inconsistent with human rights standards.[210] It is also often that regulation of European economic life by EC organs affects the level of enjoyment of a considerable number of human rights (e.g., regulation of the media market may affect the freedom of expression,[211] and introduction of environmental safeguards might affect the enjoyment of a host of human rights[212]). In particular, the conferring of commercial rights and obligations upon individuals under EC law (e.g., through intellectual property or trade licensing rules) might collide with traditional human rights such as the right to property and freedom of association.[213]

The area of overlap between the ECJ and the ECHR has been significantly increased of recent, following the entry into force of the Treaty of Amsterdam, which authorises the ECJ to exercise jurisdiction with respect to certain police and judicial cooperation matters.[214] With the recent conclusion of a EU Charter on Fundamental Rights,[215] the overlap between the two dispute settlement systems is bound to increase even further.

It should also be noted that given the similarities between EFTA and EC law, some of the aforementioned situations might also give rise to multiple proceedings involving the EFTA Court.[216] Furthermore, the same jurisdictional overlaps can be found, more or less, in the relations between the ACHR and I/A HR Comm'n and Court, on the one hand, and African and American regional economic integration arrangements (COMESA, ECOWAS, Andean Community, CCJ,[217] Caricom, Mercosur, NAFTA), on the other hand.

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[209] Joined cases 209-215 and 218/78, *Heintz van Landewyck S.a.r.i. v. Commission,* [1980] E.C.R. 3125 (due process violations by Commission); Case 46/87, *Hoechst AG Dow Benelux Metal v. Commission* [1989] E.C.R. 2875 (respect of right to privacy by EC competition investigators).

[210] Another example is public access to EC documents. Cases C-174, 189/98 P, *Netherlands v. Commission,* Judgment of 11 Jan 2000 (forthcoming in 2000 E.C.R.)

[211] Case C-23/93, *TV10 S.A. v. Commissariaat Voor de Media* [1994] E.C.R. I-4795.

[212] See e.g., *Guerra v. Italy,* 26 E.H.R.R. 241 (1998).

[213] Case 5/88, *Wachauf v. Bundesamt für Emährung und Forstwirtschaft,* [1989] E.C.R. 2609 (right to compensation of traders deprived of milk quotas by EC legislation).

[214] Treaty Establishing the European Union, 7 Feb. 1992, art. 35, 46, 1992 O.J. (C224) 6, as revised in 10 Nov. 1997, 1997 O.J. (C340) 145 [hereinafter 'EU Treaty']. The Treaty of Amsterdam also opened the door for expansion of the Court's jurisdiction into other areas by those states interested in closer cooperation. EU Treaty, art. 40. For discussion, see Bruno De Witte "The Past and Future Role of the European Court of Justice in the Protection of Human Rights" in *EU and Human Rights,* supra note 160, at 859, 885-86.

[215] Charter of Fundamental Rights of the European Union, 18 Dec. 2000, 2000 O.J. (C364) 1.

[216] Carl Baudenbacher "Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area" 3 Columbia Journal of European Law (1997) 169, 200.

So far, there has been little known practice, where the same dispute was addressed both by human rights and economic integration regional courts and tribunals. One of the few cases where some interaction between the ECJ and the ECHR was evidenced concerned the ban in Ireland on the advertisement of abortion clinics in the U.K., which has been the subject of proceedings before both institutions (however, involving different sets of parties). In *Society for the Protection of the Unborn Children v. Grogan*,[218] the ECJ has addressed a request for preliminary ruling arising out of proceedings before the Irish courts, which were initiated by an anti-abortion NGO that sought to enforce the advertising ban against a student organisation that distributed information pamphlets on abortion services. The Court held that the case at hand was not covered by EC law (since the students could not be regarded as service providers),[219] and thus refrained from reviewing the human rights aspects of the case. In *Open Door Counselling v. Ireland*,[220] the ECHR was confronted with the consequences of the decision of the Irish courts in another case arising under the same ban, initiated by the same anti-abortion organisation, but directed, this time, against the providers of counselling services, and held that the sweeping ban on the activities of the counselling services constituted an unnecessary and disproportional restriction on the applicants' freedom of expression. Although both the ECJ and the ECHR acknowledged the existence of concurrent proceedings, there was little interaction between the two procedures. This can be explained in part by virtue of the reasoning adopted by the ECJ, neutralising the human rights factors of the case before it.

Competition between different regional and specialised courts and tribunals might take place not only in between human rights and economic integration dispute settlement bodies. In the European context, there is also jurisdictional overlap between the competences of the ECHR and ECSR, which can address some similar human rights issues (e.g., in discrimination in employment or freedom of association cases). Finally, jurisdictional conflicts may also take place in respect of environment-related disputes involving the state parties to NAFTA, who are also subject to the jurisdiction of the

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[217] However, competition between the CCJ and human rights bodies is circumscribed by the CCJ Statute, which excludes from the court's jurisdiction questions falling under the exclusive competence of the I/A CHR. CCJ Statute, art. 25.

[218] Case C-159/90, *The Society for the Protection of Unborn Children In Ireland Ltd. v. Grogan* [1991] E.C.R. I-4685.

[219] *Society for Unborn Children*, 1991 E.C.R. at I-4740.

[220] *Open Door Counselling Ltd v. Ireland*, 15 E.H.R.R. 244 (1992).

NAAEC dispute settlement machinery.[221] Indeed, in one recent case, involving a Californian ban over certain gas products, a foreign gas company had initiated proceedings against the U.S. both under Chapter 11 to NAFTA (providing for arbitration of investment disputes) and a citizen submission under article 14 to the NAAEC. The risk of multiple proceedings had nevertheless been averted since the CEC Secretariat has held that it is barred from hearing the case by virtue of the *lis alibi pendens* clause found in article 14(3)(a) of the NAAEC.[222]

9. Multi-faceted disputes

Jurisdictional competition is not limited to instances where a single legal and factual question falls squarely under the jurisdiction of more than one international court or tribunal. International disputes are by their very nature complicated and often raise a host of different issues. In addition, the growing complexity of the law also leads to greater proximity between distinct legal branches.[223] As a result, it is possible that one complex set of facts would raise a multitude of questions in different areas of the law, which would fall under the respective competences of different courts and tribunals.

By way of example, breach of an obligation under international law by one state might lead *inter alia* to the imposition of retaliatory trade sanctions. The ensuing dispute will thus raise questions under trade law and one or more additional branches of international law.[224] As a result, the same set of events might give rise to claims before a trade tribunal (e.g., the WTO or a regional economic integration court or tribunal) and another general or specialised tribunal (e.g., ICJ, ITLOS, human rights tribunals, ILO Procedures, ICSID, the Montreal Protocol Implementation Committee or the CWC Verification Procedure).

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[221] The NAFTA agreement sets out an obligation to implement certain international agreements on the protection of the environment. NAFTA, art. 104. As a result, it seems that derogation by one NAFTA member state from these standards may be challenged before the NAFTA dispute settlement machinery. See generally, Joseph F. Dimento and Pamela M. Doughman "Soft Teeth in the Back of the Mouth: the NAFTA Environmental Side Agreement Implemented" 10 Geo. Int'l Envtl. L. Rev. (1998) 651, 661-62. However, to the extent that the same environmental standards are also protected by the domestic laws of the state concerned, failure to apply them may also be brought before the CEC. Such a complaint can be brought by an NGO or a member state in pursuance to the NAAEC. NAAEC, art. 14, 22-24. See Kevin W. Patton "Dispute Resolution under the North American Commission on Environmental Co-operation" 5 Duke J. Comp. & Int'l L. 87, 108-109 (1994); Richard H. Steinberg "Trade-Environment Negotiations in the EU, NAFTA and WTO: Regional Trajectories of Rule Development" 91 A.J.I.L (1997) 231, 248.

[222] *Methanex Corp. v. U.S.*, Determination of 30 June 2000, Doc. A14/SEM/99-001/06/14(3)(CEC Secretariat), available at <http://www.cec.org/files/english/99001dis.pdf >(last visited on 29 July 2000).

[223] Philippe Sands "Treaty, Custom and the Cross-fertilization of International Law" 1 Yale Human Rights and Development Law Journal (1998) 85, 89.

Similarly, an act of aggression which had been retaliated with a counter-attack that caused an environmental disaster, such as a major oil spill, might involve questions of the legality of the use of force, human rights (loss of life in war, the right to a clean environment as a component of the right to healthy life),[225] environmental law and a host of issue under general international law (e.g., state responsibility for damages).[226] As a result, a variety of tribunals can potentially be seized.

Since there might be considerable differences in the scope of jurisdiction of the alternative courts and tribunals, it is possible that they might be involved in partial competition only – that is, competition with respect to some elements of the claims which can be raised before both sets of proceedings.[227]

Another type of interaction between different proceedings, though not capable of generating direct jurisdictional competition, is found in situations where the procedure applied by one court or tribunal, has been challenged before another court or tribunal for alleged inconsistency with international standards. This interaction does not amount to genuine jurisdictional competition because the issues at the second set of proceedings (the propriety of the first set of proceedings) are technically different from the issues raised in the first set of proceedings (the merits of the original dispute). However, in reality, the second set of proceedings must often examine the merits of the original dispute in order to pass judgment on the conduct of the first in time court or tribunal.

As mentioned above, the ICJ had, on several opportunities reviewed the propriety of arbitral procedures. Furthermore, allegations of human rights (due process) violations in the operation of the EC dispute settlement machinery had been submitted in one notable case– *Melchers*,[228] to the EHR Comm'n. However, in that case the Comm'n held that it

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[224] See e.g., *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products,* 38 I.L.M. (1999) 118 (Report of the AB, 1998).
[225] *Cf. Lopez Ostra v. Spain*, 20 E.H.R.R. 277 (1995).
[226] *Cf. Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (use of nuclear weapons raises a host of humanitarian law, human rights and environmental law issues).
[227] For example, in competition between WTO and ITLOS over a dispute composed of the following three factual elements: 1) systematic breach of the terms of fishing license by a foreign vessel; followed by 2) imposition of trade sanctions by the coastal state against the flag state; and 3) unilateral revocation of the fishing license by the coastal state, the WTO DSB will have jurisdiction over elements 1 and 2, whereas ITLOS will have jurisdiction over elements 1 and 3.
[228] *Melchers & Co. v. Germany*, App. 13258/87, 1990 Y.B. Eur. Conv. on H.R. 138 (Eur. Comm'n on H.R.).

does not have jurisdiction to review the activities of Community organs, since the EC is not a party to the European HR Convention.[229]

10. Interim conclusions

The above survey clearly establishes that jurisdictional conflicts between different international courts and tribunals (and quasi-judicial procedures) are not only possible, but also a real and inevitable phenomenon. In a number of cases, the entire jurisdiction of a surveyed court or tribunal falls squarely under the jurisdiction of another judicial or quasi-judicial body as well. This is typically the case with the jurisdictional relations between courts and tribunals invested with unlimited subject matter jurisdiction either on the global or regional level (e.g., ICJ, arbitration, the OSCE bodies and some Latin American courts), or between these judicial fora and all other specialised courts and tribunals (provided that jurisdiction *ratione personae* conditions have been met). This state of relations can also be found in the relations between the HRC and the more specialised UN human rights bodies, such as the CERD or CAT Committees.

In a number of other cases, partial overlap has been identified in relation to important areas of international law. Thus, the relations between global and regional specialised tribunals, operating in the same area of the law (e.g., WTO and NAFTA or HRC and ECHR or I/A CHR) generally exhibit considerable overlap, as do some of the interactions within the categories of global and regional specialised courts, when dealing with multi-dimensional issues, which fall under more than one area of the law (e.g., ICSID and HRC, or ECJ and ECHR). Finally, some situations can be envisioned in which complicated and multifaceted disputes arise. Such disputes may give rise to a number of separate legal claims that fall under the jurisdiction of more than one judicial body.

What's more, jurisdictional overlaps are not a hypothetical scenario. In several dozens of instances competition between courts and tribunals, resulting in multiple proceedings has actually taken place. These cases have mostly arisen in two areas of international law – human rights and trade liberalisation law, a phenomenon that can perhaps be explained by the prominent role that private parties play, directly and indirectly, in such multiple litigation. The propensity of private parties to resort to judicial and quasi-judicial mechanisms and the accessibility of human rights and trade liberalisation

[229] See also *CFDT v. Council,* App. 8030/77, 13 Eur. Comm'n H.R. Dec. & Rep. 231 (1978).

dispute settlement mechanisms to a vast number of individuals (or to states representing the interests of a large number of immediately concerned private parties, such as businesses involved in international trade), make these mechanisms most susceptible to jurisdictional competition. Indeed, as will be shown below, human rights and trade liberalisation mechanisms are generally characterised by a more meaningful level of jurisdictional regulation than most other judicial and quasi-judicial bodies, although several deficiencies in such jurisdictional arrangements will be subsequently identified and discussed at some length. Still, cases of actual or close to actual jurisdictional competition have been encountered in nearly all areas of international law, and with respect to almost all types of international courts and tribunals.

In sum, the growing intricacy of international disputes, on the one hand, and the proliferation of courts and tribunals and the expansion of their *ratione personae* and *ratione materiae* jurisdictions, on the other, dramatically increase the probabilities that international disputes would generate a variety of legal issues which might fall under the respective jurisdictions of more than one body or procedure. Moreover, even today such possibility is a real one and not merely speculative.[230]

On the basis of the conclusion that there are considerable overlaps between the jurisdictions of international courts, tribunals and quasi-judicial procedures, and that there are real chances of encountering multiple proceedings, it is necessary to move to the next stage of the study and examine the desirability of regulating this phenomenon. In other words, does competition between international courts and tribunals present a problem to the international legal community?

[230] Georges Abi-Saab "The International Court of Justice as a World Court" *Fifty Years of the International Court of Justice* (Vaughan Lowe and Malgosia Fitzmaurice, eds., 1996) 3, 13.

Part II

Legal and Policy Issues Concerning the Competition between the Jurisdictions of International Courts and Tribunals

Chapter Three:
Jurisdictional competition in view of the systematic nature of international law

1. The jurisdictional implications of the proliferation of international courts and tribunals

The situation in which multiple fora may be seized by the parties to one international dispute may give rise to a host of practical and theoretical questions. However, until recently, matters such as forum shopping or parallel and successive proceedings have been seldom discussed by international lawyers. While this might not be surprising given the novelty of the phenomenon of overlapping jurisdictions in the international sphere, at least in its current dimensions, it means that the present review of the jurisdictional implications of the multiplicity of judicial and quasi-judicial bodies must proceed in mostly uncharted territory.

It would seem that the most significant effect of the upsurge in the number of international courts and tribunals (and the expansion of the jurisdiction of existing bodies) is an increase in the role of adjudication in international relations, in general, and in international dispute settlement, in particular. Potential parties to international litigation now have a greater variety of fora to choose from and, as a result, there is greater likelihood that they will find a court or tribunal that accommodates their concerns and interests.[1] This evolution is accentuated by the fact that many of the new international judicial bodies have been entrusted with a considerable degree of compulsory jurisdiction and can be seized unilaterally by any of the disputing parties. Hence, more international fora are available for judicial dispute settlement, and referral of cases to adjudication is easier than ever before.[2] The combination of these two

[1] Tullio Treves "Recent Trends in the Settlement of International Disputes" I Bancaja Euromediterranean Courses of International Law (1997) 395, 421.
[2] Jonathan I. Charney "The Implications of the International Dispute Settlement System of the 1982 Convention on the Law of the Sea on International Law" 9 A.S.I.L. Bulletin (1995) 33, 35; Benedict

developments has already begun to bring about enhanced resort to international courts and tribunals.[3]

The enhanced role of international courts and tribunals has some notable advantages and disadvantages. In a nutshell, it would seem that more disputes could be expeditiously resolved through adjudication and that the more frequent reference to legal standards in litigation would strengthen the rule of law in international relations[4] and encourage the further development of international law. [5] At the same time, one might fear that the increased resort to courts and tribunals might circumscribe resort to diplomatic methods of dispute settlement, which are often less contentious and rigid, and more time and cost-efficient than litigation.[6]

In any event, a discussion on the pros and cons of the increased resort to adjudication would not be further elaborated upon here since it is obviously beyond the scope of the present work. The multiplicity of courts and tribunals is by now an accomplished fact and reviewing the desirability of this reality is therefore, in essence, an academic and

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Kingsbury "Forward: Is the Proliferation of International Courts and Tribunals a Systematic Problem" 31 N.Y.U.J. Int. L. & Pol. (1999) 679, 686.

[3] Bernard H. Oxman "The Rule of Law and the United Nations Convention on the Law of the Sea" 7 European Journal of International Law (1996) 353, 370.

[4] Stephen M. Schwebel, *Address to the Plenary Session of the General Assembly of the UN*, 26 Oct. 1999, available at < http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA54_ 19991026. htm > (last visited on 12 July 2000)(increased resort to adjudication may create an healthy 'judicial habit'); Jonathan Charney "Third Party Dispute Settlement and International Law"36 Colum. J. Transnat. L. (1997) 65, 76; Pierre-Marie Dupuy "The Danger of the Fragmentation or Unification of the International Legal System and the International Court of Justice" 31 N.Y.U.J. Int. L. & Pol. (1999) 791, 796.

[5] Georges Abi-Saab "Fragmentation or Unification: Some Concluding Remarks" 31 N.Y.U.J. Int. L. & Pol. (1999) 919, 926; Steven P. Croley and John H. Jackson "WTO Dispute Procedures, Standard of Review, and Deference to National Governments" 90 A.J.I.L. (1996) 193, 193. At the same time, the existence of clear rules governing the issues at hand may encourage settlements of disputes out of court. John H. Jackson "Fragmentation or Unification among International Institutions: The World Trade Organization" 31 N.Y.U.J. Int. L. & Pol. (1999) 823, 828.

[6] See e.g., Robert A. Green "Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes" 23 Yale J. Int'l L. (1998) 79.
Still, the actual effects of compulsory adjudication procedures on the utilisation of diplomatic dispute settlement procedures are far from clear. It could be argued that without the 'threatening shadow' of compulsory adjudication in the background, the chances that parties will resort to any form of dispute settlement, or will agree upon a settlement, would be rather low. See Alan E. Boyle "Settlement of Disputes Relating to the Law of the Sea and the Environment" *International Justice* (Kalliopi Koufa, ed., 1997) 295, 302; Jonathan I. Charney "Is International Law Threatened by Multiple International Tribunals?" 271 Recueil des cours 101, 352 (1998); Jonathan I. Charney "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea" 90 A.J.I.L. (1996) 69, 71; Robert Y. Jennings "The International Court of Justice and the Judicial Settlement of Disputes" *1 Collected Writings* (1998) 433, 433; Kingsbury, supra note 2, at 687; Harold H. Koh "Why Do Nations Obey International Law?"106 Yale L.J. (1997) 2599, 2649; Ernst-Ulrich Petersmann "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction" *International Trade Law and the GATT/WTO Dispute Settlement System* (Ernst-Ulrich Petersmann, ed., 1997) 5, 81.

futile retrospective exercise. This study rather focuses on working within the existing system of multiple fora and examining the necessity of introducing measures, which may be needed to improve upon the current situation.

The present work is mainly interested in one important feature associated with the new multiple-jurisdictional legal environment. This is the question of jurisdictional relations between the various international courts and tribunals, or, more specifically, the question of coordinating and harmonising the operation of different judicial or quasi-judicial procedures. The question of coordination and harmonisation arise primarily in two contexts: (1) concurrency of jurisdiction over a single dispute (jurisdictional competition), and (2) consistency in the lines of decisions rendered by the different courts and tribunals, pertaining to similar legal questions, but arising out of different disputes (coherent development of the law).[7]

The second question will not be discussed comprehensively here because, among other thing, it has already been addressed elsewhere, and so far has not proved to constitute a major doctrinal problem (albeit, this might arguably change in the future).[8] This work rather focuses on the first question, namely, investigation of situations in which different international courts and tribunals exercise competing jurisdictions over a single dispute. However, some of the insights offered hereby are bound to be influenced by the views of the present author on the need for developing international law in a coherent manner.

In light of the findings of the previous Part, it can be ascertained with confidence that certain classes of international disputes are amenable nowadays to the jurisdiction of more than one international court or tribunal. Furthermore, there have already been a few notable instances where a single dispute gave rise to multiple proceedings before different international fora. This state of affairs has several practical and theoretical implications which need to be assessed.

First, there are questions that pertain to the choice of forum. It seems that unless the situation is regulated, parties to a given dispute may exercise their utter discretion and select any available forum for the conduct of proceedings. Such choice may be undertaken by one of the parties acting unilaterally (assuming that the selected forum

[7] Tullio Treves "Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice" 31 N.Y.U.J. Int. L. & Pol. (1999) 809, 810.

enjoys compulsory jurisdiction), or by all parties to the case, by way of agreement. Although the right to choose is generally regarded as a commendable expression of party autonomy, unilateral seizing of courts by interested parties might give rise to several problems. The ability to bring a case before more than one forum induces 'forum shopping', which is sometimes regarded as a form of manipulation of the legal system and the cause of undue hardship to some of the parties to litigation. It also creates the risk of a 'race to the court house' between the parties to the dispute (especially where a jurisdiction-regulating rule accords preference to the first-seized forum). Further, it is conceivable that referral of disputes to inappropriate fora (e.g., a forum which cannot effectively protect and promote the interests of the entire international community), even by way agreement, might be perceived as undesirable from a systematic point of view.

Second, if more than one court or tribunal enjoys jurisdiction over a single dispute, simultaneous proceedings might take place before multiple fora. This state of things might cause major inconvenience to the parties and introduce the risk of conflicting judgments. This situation also raises practical questions relating to the effective utilisation of international judicial resources.

Third, there exists the question of finality of proceedings. The availability of more than one court or tribunal presents the possibility that the same dispute will be submitted to more than one forum in a successive order. If a party may re-litigate a case already settled by one judicial forum before another court or tribunal, grave concerns might arise with regard to authority of the first judgment, not to mention the inconvenience caused to the parties unwillingly exposed to prolonged proceedings. This scenario might also have systematic implications on the efficiency and the credibility of international law.

This Part will examine, in detail, the jurisdictional implications of the existence of multiple fora. Since only a few international law precedents exist on this subject, the examination will be based to a large extent on the experience gathered by domestic legal systems, which have addressed comparable situations of competition between judicial bodies operating within the same national legal system (domestic or intra-systematic interaction) and between courts of different nations (cross-border or inter-systematic interaction). Although, there are significant conceptual and other differences between the

[8] Charney, Is Int'l Law Threatened? supra note 6.

international and national legal systems,[9] it is submitted that methods by which different domestic legal systems have tackled problems associated with concurrent jurisdiction[10] may inspire the international legal system in moulding its own jurisdiction-regulating regime.[11] In particular, attention should be given to the special case of competition between international and domestic courts (e.g., in the area of international criminal law), since the regulation of this situation often involves the application international standards and policy considerations.

As will be shown, different jurisdiction-regulating measures have been adopted under domestic laws to accommodate different types of jurisdictional interaction. These measures can be described in accordance with their of levels of intensity, which range from mere jurisdictional coordination (allowing for a certain degree of jurisdictional competition, but mitigating its results) to stricter rules of harmonisation (barring jurisdictional competition, fully or partially). It will be hereby contended that selection of the applicable jurisdiction-regulating measure by domestic legal systems has been highly influenced by institutional considerations, namely, the structural relations between the competing fora. Generally speaking, competition occurring within the framework of a single legal system has been less tolerated than competition occurring between judicial bodies from different legal systems. Thus, it will be argued that international law should follow a similar path and embrace jurisdiction-regulating measures which are required to meet the structural needs of the system.

It therefore seems that evaluation of the propriety of the current level of regulation of the jurisdictional interaction between international courts and tribunals and discussion of the need for introducing new rules, requires the prior examination of the systematic nature of international law and of the structural relations between international courts and tribunals. In other words, an attempt will be made to situate the relations between international courts and tribunals on a continuum between a full-fledged judicial system (comparable to a national legal system) and a non-system (comparable to the relations between different national legal systems) and to identify, on that basis, the legal regime which should regulate jurisdictional competition between international judicial bodies.

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[9] See e.g., Robert Y. Jennings "The Judicial Enforcement of International Obligations" *1 Collected Writings* (1998) 494, 502.

[10] There is, in effect, no international law governning allocation of jurisdiction within a single state and only very rudimentary rules governing cross-boundary jurisdictional conflicts.

[11] It is acknowledged, however, that importation of rules developed under domestic law into international law can be done only with 'great care'. Jackson, Fragmentation or Unification, supra note 5, at 829.

Such findings will serve as the basis for the next Chapter of this study in which jurisdiction-regulating rules found in domestic legal systems will be critically analysed and the desirability of introducing them into international law discussed.

2. Influence of the structural relations between competing fora on the selection of jurisdiction-regulating rules

Jurisdictional overlaps can be said to raise two main classes of problems - practical problems (e.g., costs to the parties and judicial economy), which will be expounded in the following Chapter, and doctrinal problems (e.g., inconsistency of judicial decisions), which will be discussed in the present Chapter. The study will show direct correlation between the potential gravity of the doctrinal problems at hand, as viewed by courts and tribunals involved in jurisdictional competition, and their level of tolerance towards its occurrence. In other words, the greater is the perceived threat to the legal system's welfare, the more hostile are the system's judicial organs towards jurisdictional competition. At the same time, no similar correspondence can be found with respect to the practical problems associated with jurisdictional competition. In fact, the opposite might be true. One might find a loose level of jurisdictional-regulation in situations presenting serious practical difficulties (e.g., multiple proceedings before courts of different nations), whereas tougher standards have been applied in more manageable circumstances (e.g., strict allocation of jurisdictions between domestic courts and tribunals).

As will be shown below, jurisdictional competition within a single legal system that might lead to inconsistent judgments has not been normally tolerated and many domestic legal systems have employed clear-cut rules designed to abate jurisdictional competition and to maintain and restore, where necessary, the coherence of the legal system. But, by contrast, in situations of competition between courts and tribunals operating in different national legal systems, flexible jurisdiction-regulating rules have often been adopted (notwithstanding the weighty practical concerns supporting the suppression of cross-border jurisdictional competition).

This change in outcome can be explained, in part, through conceptual differences relating to the essence of the dispute (courts from different countries might even differ as to whether they have the same dispute at hand), parochial notions of distrust in

foreign courts and specific public policies justifying litigation before local courts (even if resulting in multiple proceedings).

However, it is submitted that the principal cause for the tolerant attitude taken by the courts of one state towards jurisdictional competition with courts of other states is of a doctrinal nature. While domestic legislators and courts often regard competition within the same legal system as having the disruptive potential of undermining the effectiveness and credibility of the entire system,[12] they do not necessarily perceive competition between different national courts to threaten the continued integrity and coherence of the legal system in which they operate. Because local courts enjoy inherent superiority over courts of other nations in determining what law applies in their territory, foreign judgments might be considered inferior, or even irrelevant, under domestic law.[13] As a result of this rule of precedence, conflicting decisions of foreign courts present only a minor challenge to the domestic legal order. This is of course also true *vice versa* - from the vantage point of the foreign legal system.

Consequently, the incentive to regulate inter-systematic competition in inter-state cases may be considerably smaller than that found in cases arising within the same system of law, and a certain degree of jurisdictional coexistence may be permitted (especially, if justified by other pertinent considerations). Simply put, competition between equals (courts operating in the same legal universe) is more problematic and in need of regulation than competition between 'non-equals' - a competent local judicial forum and a foreign court lacking power of authority outside its state's territory.

In sum, it is possible to envision a continuum between watertight legal systems which permit little, if any, internal judicial competition and apply 'rules of harmonisation' (rules designed to prevent jurisdictional conflicts), on the one hand, and an interplay between different legal systems, where a few, if any, rudimentary 'rules of coordination' (rules designed to mitigate some of the effects of jurisdictional conflicts) govern the relations between the competing legal proceedings

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[12] Ronald Dworkin, *Law's Empire* (1986) 217; H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983) 116; Hans Kelsen, *Pure Theory of Law* (M. Knight trans., 1970) 205; Michel van de Kerchove and François Ost, *Legal System Between Order and Disorder* (Ian Stewart trans., 1994) 51.

[13] Neil MacCormick "Institutional Normative Order: A Conception of Law" 82 Cornell L. Rev. (1997) 1051, 1059.

The third model presented in this Part - competition between international and national procedures, is somewhat of a conundrum, and the level of regulation of jurisdictional competition between international and national courts and tribunals has been quite varied. This perhaps reflects doctrinal disagreements on the relations between international and national law, which are in place in different national jurisdictions.[14] Indeed, empirical review of the rules governing the interaction between international and national courts and tribunals (e.g., in the human rights or economic integration spheres) produces a rather mixed record. In some regimes rules of harmonisation can be found (e.g., EC doctrines of direct effect and supremacy),[15] whereas in other areas only a few rules of coordination exist.[16] Further, in some areas of interaction between international and national judicial bodies (e.g., in the criminal sphere) special considerations apply, which support the existence of a *sui generis* regime, whose jurisdictional-regulating rules might be inapplicable to other jurisdictional interactions.

As a result of this inconsistent picture, the international-national model of jurisdictional interaction seems to be of relatively limited utility to the search for an appropriate model for the relations between international courts and tribunals. Still, the next Chapter will examine the jurisdictional-regulating rules governing this relationship in order to try and identify whether any international standards have emerged, that could be adapted to apply in cases of pure international competition.

The next section of this Chapter will examine the nature of the relations between the different international courts and tribunals in order to evaluate what type of regime should govern the interaction between them. For this purpose, it is first necessary to situate the structural links between international fora on a continuum between a full-fledged judicial system and an anarchical non-system. Simply put, the question presented here is whether there is an international 'system' of courts and tribunals? On the basis of this analysis one can assess which of the two principal models of regulation

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[14] According to the monist theory, applicable in most continental law countries, international law is part of the law of the land (i.e., part of the same legal system). According to the dualist theory applied in England, and in some other common law countries, international law (mainly – treaty law) is a separate system of law, and has no validity within the domestic law system, unless it has been transformed thereto via domestic legislation. See Robert Y. Jennings and Arthur Watts (eds.), *I Oppenheim's International Law* (9th ed., 1992) 53-81; Ian Brownlie, *Principles of Public International Law* (5th ed., 1998) 31-33.

[15] Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] E.C.R. 1; Case 6/64, *Costa v. ENEL* [1964] E.C.R. 585.

[16] E.g., all human rights courts and tribunals permit successive litigation – since they require that recourse to them be made after domestic procedures had been exhausted.

(harmonisation or coordination), or perhaps an interim model, should apply to the interaction between international judicial bodies.

3. Is there a system of international courts and tribunals?

The relations between international courts and tribunals are at the heart of the present research. It is necessary to ascertain the nature of these relations in order to identify the type of jurisdiction-regulating regime that ought to govern international jurisdictional competition. However, it also crucial to understand the nature of these inter-relations in order to determine that a jurisdictional overlap exists in the first place. The proposition that there exists a jurisdictional overlap - i.e., that the same international dispute (a dispute between the same parties concerning the same issues) might be amenable to the jurisdiction of more than one international judicial body, presupposes that the nature of the international dispute remains the same before all international fora. However, since most international courts and tribunals adjudicate disputes in accordance with specific instruments (e.g., GATT/WTO, UNCLOS, ICCPR, European HR Convention, Rome Statute), competition can take place only if it is shown that an international dispute has overriding common attributes even when addressed under different specific treaty regimes (which might belong to different branches of international law).

By way of example, a situation involving the discriminatory taking of property belonging to a foreign investor by a host state might give rise to proceedings under universal and regional human rights procedures (e.g., HRC and ECHR), arbitration (e.g., ICSID) and inter-state adjudication (e.g., ICJ). However, for the four proceedings to constitute competing procedures one must establish that they involve the same parties and essentially the same subject matter. One of the difficult questions, which arise in this regard, is whether claims concerning the same set of facts, but grounded in different legal bases, can be regarded as essentially the same. In other words, could a claim presented before ICSID (which adjudicates disputes primarily in accordance with the texts of private contracts and the domestic and international law applicable in the territory of the host state), be deemed to raise the 'same issues' as a claim against the same state conduct which is brought before the ICJ (which will address it under general international law)?[17] Further, does a legal claim before the HRC under the ICCPR

[17] The PCIJ has held in the past that adjudication by courts and tribunlas operating under domestic law cannot compete with adjudication before international courts. *Certain German Interests in Polish Upper Silesia* (Germany v. Poland), 1925 P.C.I.J. (ser. A) No. 6, at 20 (Jurisdiction); *Factory at Chorzów* (Germany v. Poland), P.C.I.J. (ser. A), No. 17, at 27. Applying this case law to cases of competition

remain the same when it is brought to the ECHR under the European HR Convention, especially, if the relevant rights are somewhat differently defined in the two human rights instruments?

In order to confront these issues, one must adopt a stance on the very nature of international law. Is it a unified system of law in which disputes can be considered from a broad and integrated international context, or merely an assortment of independent legal regimes?[18] This question is, in a way, a mirror image of the question relating to the classification of the interaction between international courts and tribunals. If the relations between international judicial bodies comport to the intra-systematic model than surely all international disputes can be said to arise within the same legal system. Thus, proceedings concerning similar sets of facts may truly overlap with each other, notwithstanding the different legal claims that have been presented by the parties (in order to fall under the jurisdiction of a particular dispute settlement mechanism).[19] However, if international courts and tribunals fall under the inter-systematic model, then it might be the case that 'competing procedures' before different courts and tribunals are not really in competition with each other.

The main point seems to be that whenever proceedings are brought under different legal systems, their very nature might not the same (despite factual similarities between the claims). Indeed, the case law of some international courts and tribunals leans towards the view that the decisive test for determining whether two claims involve the same issues - is legal (whether the same legal assertions can be made in each case) and not factual (whether the facts underlying each claim are the same).[20]

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between ICSID and the ICJ, it would seem that the different legal basis of the decision precludes a genuine overlap.

[18] See e.g., Gunther Teubner "'Global Bukowina': Legal Pluralism in the World Society" *Global Law Without a State* (Gunther Teubner ed., 1996) 3, 4 (Global law can only be explained on the basis of legal pluralism reflecting differentiation within international communities); Abi-Saab, Fragmentation or Unification, supra note 5, at 926.

[19] E.g., the 2000 EC/Chile dispute over trade restrictions in response to allegedly unlawful fishing practices was characterised as a predominantly trade issue and referred to the WTO and by Chile as predominantly a law of the sea issue, and referred to the judicial bodies competent under Part XV to UNCLOS.

In the same manner, mixed issues falling under more than one legal branch of domestic law (e.g., contracts and torts; administrative and constitutional law) might be presented as predominantly falling under one legal branch in order to secure a certain remedy. *Cf.*, Leslie E. John "Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort" 74 Calif. L. Rev. (1986) 2033, 2034-35; A.J. Stone, III "Consti-Tortion: Tort Law as an End-Run around Abortion Rights after Planned Parenthood v. Casey" 8 American University Journal of Gender, Social Policy & the Law (2000) 471, 472-74.

[20] There is clear support in the case law of the PCIJ to the proposition that there can be no competition between courts and tribunals belonging to different legal orders. *Certain German Interests*, 1925 P.C.I.J.

A third alternative model of inter-fora relations beside the intra- and inter-systematic models is also conceivable. Even if different international proceedings are deemed to compete with each other, either because it is possible to link them to a more or less coherent system of international law, or because an objective and factual definition of the nature of the dispute is to be preferred over a legal one, the relations between the different international courts and tribunals might still not comport to the traditional intra-systematic model. As will be discussed below, it is possible to imagine a body of norms which constitutes a coherent legal system but is being applied by judicial bodies that do not form a meaningful judicial system. Hence, the existence of a halfway model, whereby judicial bodies are only loosely related to each other - mainly through their reference to a common normative system, must also be explored.

Obviously, the discussion here is going to be somewhat circular, for it is the very existence or lack of existing jurisdiction-regulating measures which enables one to form an opinion on whether the various international judicial bodies constitute a system. However, expanding the scope of discussion from specific jurisdiction-regulating rules to the structure of the international judiciary might offer some unique perspectives. For instance, it may help in singling-out norms, which do not comport to the overarching model of the structural relations between international courts and tribunals stemming from the totality of jurisdiction-regulating rules. Further, additional jurisdiction-regulating measures might be proposed in order to accommodate the current level of systemisation of international courts and tribunals or even to promote a new and improved vision of the international legal system.

A. International law as a system of law

Pinning down the nature of international law has been the source of controversy for some time now. Given the absence of organised enforcement procedures designed to ensure compliance with the prescriptions of international law and in light of the feeble guarantees against the use of force which are in place, some scholars have even

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(ser. A) No. 6 at 20; *Chorzów Factory*, P.C.I.J. (ser. A), No. 17, at 27. Further, recent case law of the HRC suggests that proceedings before multiple treaty bodies applying differently defined human rights under their respective instruments are not in competition with one another. Comm. 44/1990, *Casanovas v. France*, UN GAOR, 49th Sess., Supp. 40, (Report of the HRC, 1994) at para. 5.1; Human Rights Committee, General Comment 24 (52), para. 14, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994). See also Laurence R. Helfer "Forum Shopping for Human Rights" 148 U. Pa. L. Rev. (1999) 285, 315-19.

questioned whether international law is really law.[21] Other modern theories, while accepting the validity of international legal norms, in theory, have cast serious doubts as to whether international law influences state conduct in the 'real world' in any meaningful manner.[22] For understandable reasons these theoretical debates are outside the scope of the present study. Still, it seems safe to assert that there is relative consensus among modern scholarship that international law should be regarded as law, as this concept is normally perceived,[23] and that rules of international law do effectively shape the conduct of international actors in most situations.[24] Therefore, the question that is going to be discussed in this segment is not whether international law is really law or effective, but rather whether international law can be regarded as a legal system.

I. Definition of a 'legal system'

A system can be defined as a purposeful arrangement or constellation of inter-related elements or components, which cannot accurately be described and understood in isolation from one another.[25] It is submitted that the working definition that ought to be adopted here should incorporate three central ideas which are captured by the term 'system': (1) a set of elements; 2) arranged in an order (characterised by the interaction between the different elements); and 3) possesses a certain degree of unity or cohesion (which facilitates apprehension of the elements as parts of a bigger whole).[26] This definition also enables one to delineate the outer limits of any system and to determine whether particular elements belong to it or not.[27]

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[21] Thomas Hobbes, *Leviathan* (1651)(C.B. Macpherson, ed., 1981) 189-217; John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble ed., 1995) 171. For survey of positions contesting the legal nature of international law, see Prosper Weil "Cours général de droit international public" 237 Recueil des cours (1992) 9, 46-47.

[22] Henry Morgenthau, *Politics Amongst Nations* (6th ed., 1985) 312. For survey of positions contesting the social effect of international law, see Weil, Cours général, supra note 21, at 43-46.

[23] H.L.A. Hart, *The Concept of Law* (2nd ed., 1994) 219-20; Gidon Gottlieb "The Nature of International Law: Toward a Second Concept of Law", IV *The Future of the International Legal Order – The Structure of the International Environment* (Cyril E. Black and Richard A. Falk, eds., 1972) 331, 358-61.

[24] Ian Brownlie, *The Rule of Law in International Affairs* (1998) 13; Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990) 24; Louis Henkin, *How Nations Behave* (2nd ed., 1979) 47; Oscar Schachter, *International Law in Theory and Practice* (1991) 9; Malcolm N. Shaw, *International Law* (4th ed., 1997) 6; Gottlieb, supra note 23, at 353. See also Jonathan Charney "Universal International Law" 87 A.J.I.L. (1993) 529, 533; Weil, Cours général, supra note 21,at 48.

[25] Jean Combacau "Le Droit International: Bric-à-Brac ou Système?" 31 Archives de Philosophie du Droit (1996) 85, 86.

[26] Santi Romano, *L'ordre juridique* (L. François and P. Gothot, trans., 2nd ed., 1975) 7; Abi-Saab, Fragmentation or Unification, supra note 5, at 920.

[27] Van de Kerchove and Ost, supra note 12, at 5-6; Abi-Saab, Fragmentation or Unification, supra note 5, at 920 ("[e]very legal order has its own frontiers").

Several attempts have been made in the past to define what constitute a legal system and to determine whether international law should be considered as one.[28] These attempts have tended to focus on the second ingredient of the present working definition, and discuss the necessary relations between different components of a legal system that transpose an assortment of rules and institutions into a coherent order distinguishable from other rules and institutions (i.e., identification of the 'principle of integration' of the system).[29] Five of these attempts merit special consideration given the stature of the authors and their influence on legal theory. These five theories can be roughly divided into two categories - normative theories, focusing on the rules of the legal system, and institutional theories, focusing on the function of legal institutions in social life. After briefly reviewing these five theories a sixth model, which is in essence a marriage of two normative and institutional theories, will be offered.

H.L.A. Hart had observed that legal systems constitute the union of primary and secondary norms.[30] He also stated two conditions which he deemed necessary and sufficient for the existence of a legal system: (a) general obedience to the rules of the system by its subjects; and (b) acceptance of a secondary rule of recognition by the system's officials.[31] The second criterion is the hallmark of Hart's theory in his seminal work – 'the Concept of Law'. According to Hart, the existence of an accepted rule of recognition provides officials with authoritative criteria for identifying and changing primary rules and for deciding whether primary rules have been violated and if so, what sanctions to apply. Consequently, the rule of recognition constitutes a basic unifying feature which transforms a set of binding rules into a coherent system of law.[32] Applying his criteria of analysis, Hart had concluded that international law deserves to come within the concept of law, i.e., it consists of binding and effective norms, but it does not contain a meaningful rule of recognition, and cannot be considered a system of law.

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[28] For example, Austin has defined a legal system as a set of laws legislated by the same sovereign, who is superior to the subjects of the laws and is habitually obeyed. Austin, supra note 21, at 19. Under this definition, international law, lacking a 'sovereign' cannot be regarded as a legal system (or even as law).
[29] Van de Kerchove and Ost, supra note 12, at 10.
[30] Hart, supra note 23, at 94.
[31] Hart, supra note 23, at 116-17. According to Hart, one should distinguish between primary rules, which directly regulate behaviour and secondary rules, which facilitate the operation of primary rules. *Cf.* MacCormick, supra note 13, at 1058.
[32] Hart, supra note 23, at 92.

Nevertheless, he conceded that future developments might lead to a different conclusion.[33]

Kelsen, who introduced his 'Pure Theory of Law' several decades before Hart's 'Concept of Law', has adopted a somewhat similar approach to that offered by Hart, but reached a very different conclusion on the nature of international law. According to Kelsen, a plurality of norms form a single legal system if the validity of the norms can be traced back through norms higher in their constitutional ranking to a common basic norm (*grundnorm).*[34] This is the Kelsenian 'chain of validity'. Since all valid rules of the system derive from the same basic norm, a common attribution, which constitutes the principle of integration of the system (equivalent to Hart's rule of recognition), is found. In addition, Kelsen posited that there should be 'general correspondence' between the prescriptions of the legal system and reality in order for a system to be considered valid (a principle of effectiveness).[35] International law, whose basic norm according to Kelsen is that reciprocal behaviour of states creates law, from which all international customs are derived (including *pacta sunt servanda,* which is the basis of treaty law), meets the Kelsenian requirements for structural hierarchy and thus qualifies as a legal system.[36]

Of these two opinions on the nature of international law the conclusions articulated by Kelsen seem to be more in touch with contemporary reality (despite their greater longevity). For even if one accepts Hart's model, international law does appear to meet today the conditions for identifying a legal system. One can identify within international law both primary rules (regulating the conduct of international actors) and secondary rules, governing the conditions for validity and enforcement of primary rules (rules on emergence of custom, laws of treaties, state responsibility etc.).[37] Moreover, among the secondary rules, several possible rules of recognition can be found.[38] This could be a general principle accepted by the various branches of international law as the source of

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[33] Id. at 236-37. Hart's view is shared by other scholars; John W. Head " Supranational Law: How the Move toward Multilateral Solutions is Changing the Character of 'International' Law" 42 Kan. L. Rev. (1994) 605, 662-63); and criticised by others. Brownlie, *Rule of Law in Int'l Affairs,* supra note 24, at 6.

[34] Hans Kelsen, *Introduction to the Problems of Legal Theory* (1934)(1992 reprint) 55. Raz criticizes this part of Kelsen theory and posits that 'basic norms' may derive from a different legal order (e.g., law of a colonial power). He therefore suggests using the term 'basic power' instead of 'basic norm'. Joseph Raz, *A Concept of a Legal System* (2nd ed., 1980)(1990 reprint) 102-05.

[35] Kelsen, *Introduction to Legal Theory*, supra note 34, at 62; Gottlieb, supra note 23, at 366. However, general correspondence does not imply a perfect record of compliance. Id. at 372.

[36] Kelsen, *Introduction to Legal Theory*, supra note 34, at 108. Furthermore according to Kelsen, international law is at the basis of all municipal legal systems. Id. 120-121. But see, Shaw, supra note 24, at 41-42.

[37] Dupuy, Danger of the Fragmentation or Unification, supra note 4, at 793.

validity of all international norms (e.g., *pacta sunt servanda* or 'obligations entered into must be performed');[39] or a more detailed list of sources of international law (such as that found in article 38 of the ICJ Statute).[40] In practical terms, a readily available list of sources seems to meet Hart's conditions, since it provides international actors with sufficiently precise guidance as to which normative prescriptions should be considered valid law and on how to modify the law (e.g., conclusion of treaties or formation of new custom). In addition, international judicial and quasi-judicial fora habitually rely upon such lists in order to adjudicate disputes (determine whether violation has occurred and what sanctions to apply). As a matter of fact, the situation under international law is not very different form that under various domestic systems of law, where officials (including courts) are instructed, (sometimes in vague language) to apply a host of legal sources - legislation, case law, international law and domestic customary law.[41]

It is therefore submitted that a unifying principle, which transform international law into a system of law, whether defined as a basic norm or a rule of recognition, can be identified under both the Hartian and Kelsenian models.[42] Still, under both theories one has to examine the general effectiveness of the system.[43] It is submitted that this requirement is generally fulfilled nowadays, despite the moderate levels of efficacy attributed to formal enforcement procedures under international law, such as forcible sanctions.[44] As a result, international law should qualify as a system of law under both theories.

A different approach than that presented by Hart and Kelsen is found in the writings of Joseph Raz. Raz's central thesis is that legal systems consist of an intricate web of

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[38] Georges Abi-Saab "Cours général de droit international public" 207 Recueil des cours (1996) 9, 122.
[39] Combacau, supra note 25, at 90-91. Another formulation that has been suggested is 'common consent of the international community to create binding law'. Jennings and Watts, I *Oppenheim's Int'l Law,* supra note 14, at 14.
[40] Charney, Universal Int'l Law, supra note 24, at 534; Gottlieb, supra note 23, at 361. See also Raz, supra note 34, at 200.
[41] Brownlie, *Rule of Law in Int'l Affairs,* supra note 24, at 5.
[42] For support, see Charney, Universal Int'l Law, supra note 24, at 531.
[43] *Cf.* Raz, supra note 34, at 205. Raz argues that the examination of systematic efficiency should avoid oversimplified computation, attribute different weight to different offences, take into account relevant circumstances and intentions, consider the actual effects of law on behaviour, examine utilisation of power-conferring rules and attach great importance to constitutional law. Applying Raz's comments to international law, it would seem that the assertion that international law is normally followed, might not suffice to conclude that it is an efficacious system, since breaches of the most important norms of international law (e.g., prohibition of the use of force) have occurred from time to time and have sometimes gone relatively unpunished.
[44] Abram Chayes and Antonia Chayes, *The New Sovereignty - Compliance with International Regulatory Agreements* (1995)(1998 reprint) 32-33.

inter-connected norms. Such inter-relations may be characterised as 'genetic relations' (hierarchy of norms) or 'operative relations' (substantive links such as that between a duty and a sanction).[45] Among the latter links, Raz considers enforcement of legal duties by way of coercion and institutionalised control over the use of force to constitute particularly important features of a legal system.[46] This implies a minimal substantive content found in all valid systems of law.[47] The contents of a legal system, at any given time, must be determined through the practice of the system's law-applying organs (this is Raz's version of the Hartian rule of recognition).[48] The important role that Raz designates for law-applying organs necessarily implies also a minimal institutional structure in every system of law.[49] Finally, Raz links between law and society and argues that legal systems always serve as defining features of a social entity (e.g., state, religion, tribe, etc.),[50] although Raz argues that the term society should be interpreted very loosely.[51]

Applying Raz's criteria to international law, one is able to identify a rudimentary, but nevertheless a genuine system of law (although Raz himself did not address this issue). All norms of international law are linked through 'genetic relations' to what is sometimes referred to as the constitutional component of international law (rules on custom and treaty formation, criteria of statehood, etc.). In fact the 'genetic relations' required by Raz are not significantly different than the Kelsenian 'chain of validity' doctrine, whose existence has already been established. In addition, the existence of rules such as those that address state responsibility[52] and individual criminal responsibility[53] seem to provide the system with the necessary 'operative relations' and perhaps with a sufficient coercive element. Since 1945, the use of force in international law has been normatively regulated, and various institutionalised and centralised law-applying organs (courts,

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[45] Raz, supra note 34, at 183-85. An attempt to elaborate the contents of such operational links has been made by van de Kerchove and Ost. These writers identify several operative features that exist in every legal system: deductive relations can be found between some of the system's norms, norms are not repetitive of each other and are consistent with each other, and the entire gamut of norms provides completeness - i.e., ability to address every legal question. Van de Kerchove and Ost, supra note 12, at 38-45, 50-55. However, it may argued that these tests may more appropriately serve as criteria for evaluation of the coherence of the system, rather than to check its ultimate validity.

[46] Raz, supra note 34, at 185-86, 192-94.

[47] Id. at 141 .

[48] Id. at 191-92, 212.

[49] Id. at 212.

[50] Id. at 188, 211.

[51] Id. at 208.

[52] See ILC Draft Articles on State Responsibility, 37 I.L.M. (1998) 440.

[53] Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/Conf.183/9, 37 I.L.M. (1998) 999 [hereinafter 'ICC Statute'].

IGOs, the UN Security Council, etc.) routinely identify and apply the law. As to the social component, one could probably speak of a loosely constructed international community or society, which constitutes a political framework for cross-boundary interaction. Hence, it would seem that even under Raz's more exacting (but, perhaps, more appropriate) standards, international law would meet the requirements of a legal system, though barely.

An alternative approach altogether to the question of what characterises a legal system is found in the writings of Santi Romano and Georges Abi-Saab, which might be catalogued under the law and society school of thought. Romano, an early 20th century jurist, has considered the existence of institutions and mechanisms designed to apply legal norms to be the cornerstones of a legal system.[54] According to Romano, legal institutions and processes, being the means through which society seeks to achieve its goals, as reflected in its laws, provide the framework and inner-structure that are the distinctive elements of a system.[55] Thus, in theory, a legal system can exist without norms, but it can never exist without institutions.[56]

Abi Saab, in his Hague Lectures, has accepted Romano's main thesis that law cannot be viewed separately from the society in which it operates. At the heart of the system are institutions and mechanisms that play vital social functions - legislative, adjudicative and executive functions. [57]As a result, Abi-Saab has rejected both Kelsen and Hart's normative theories of what constitutes a legal system for being overly technical and oblivious of the strong links between law and the society in which it functions.[58] However, Abi-Saab also criticised Romano for putting an exaggerated emphasis on institutions, while failing to appreciate the importance of norms in maintaining the coherence of the legal system.[59] Hence, in Abi-Saab's view, the decisive factor in determining the boundaries of the legal system is the common basis of legitimacy attributed to the system's rules and procedures.[60] The system's institutions derive their legitimacy from the social order,[61] and, at the same time, bestow legitimacy upon norms

[54] S. Romano, supra note 26, at 10, 29-31.
[55] Id. at 17-19.
[56] Id. at 14-15.
[57] Abi-Saab, Cours général, supra note 38, at 126; Abi-Saab, Fragmentation or Unification, supra note 5, at 920.
[58] Abi-Saab, Cours général, supra note 38, at 120.
[59] Id. at 114.
[60] Abi-Saab, Fragmentation or Unification, supra note 5, at 920.
[61] Id. at 921.

(created, applied and enforced by these institutions) and other institutions operating within the same system.

Applying the institutional approach to international law, both Romano and Abi-Saab have concluded that international law should be considered a legal system.[62] Indeed, one can identify within the international community various legal institutions performing a variety of legislative, adjudicative and executive roles (e.g., courts, IGOs and treaty-making conferences). These institutions derive their legitimacy from a common source - they reflect the will of the international community or polity. As far as they function satisfactorily, they promote the legitimacy of international law.

In the opinion of the present author, the chasm between the two schools of thought is bridgeable, along the lines suggested by Raz and Abi-Saab. It is submitted that modern legal systems have both normative and institutional components, which although closely linked to each other, may also be described separately. In order to fully assess the level of systemisation of a given legal system one must look at the coherence of both its body of norms and institutional structures.[63] In addition, one ought to examine the strength of links found between the system's normative and institutional components (i.e., to what degree do norms and institutions influence one another).

Thus, at one end of the scale, one may find a full-fledged legal system (such as the developed national legal systems) whose ingredients - norms and legal institutions, can be described, jointly and separately, as a system - i.e., a coherently organised assortment of elements. In such a system, norms and institutions have strong and reciprocal links (law is created and applied by institutions which are governed by law), which derive their ultimate legitimacy from the social polity in which they function. At the other end of the spectrum there may be anarchical societies, where there exist several uncoordinated rules and institutions. The relations between different national legal systems may conform to this description. When viewing the relations between the English and French legal systems, one can hardly find unifying factors which would enable to view the two sets of norms and legal institutions as part of a bigger whole, on

[62] S. Romano, supra note 26, at 39-48; Abi-Saab, Cours général, supra note 38, at 125.

[63] Coherence (or integrity) implies a shared set of preferences regarding principles of justice, fairness and due process ('community of principles') from which rules derive in a logical manner. See Dworkin, supra note 12, at 225-26, 243. Some however deny that legal systems are characterised by high levels of coherence, and regard law rather as a process of *ad hoc* political compromises between conflicting policies and interests. Id. at 272.

either the normative or institutional level (although they do occasionally interact). In between these two extreme poles there could be numerous intermediary models, representing different levels of systemisation of the normative or institutional component of the legal order. In sum, it is submitted that the discussion whether a set of norms and institutions forms a legal system should, in principle, involve a three-pronged analysis – examining the rules and institutions of the scrutinised 'system' and their interrelations.

II. Is international law a legal system?

Moving to apply this method of analysis with regard to international law, one might reasonably deduce from the above discussion that the norms of international law can be viewed as a system of norms according to the most important legal theories (of which Raz's is arguably the most sophisticated). There are also obvious links between international norms and institutions (one can identify law making and law applying institutions governed by international law). However, with regard to the institutional component of the system, when viewed separately, a more problematic picture emerges.

Generally speaking, the various institutions of international law (e.g., political organisations, judicial and quasi-judicial bodies and treaty-making conferences) enjoy poor levels of coherence. Due to the decentralised nature of the international community, and the *ad hoc* nature of many legal institutions (most notably, arbitration tribunals and treaty-making conferences), only a few structural links have been built between international organs from different geographical regions and between those operating in diverse areas of the law.[64] The following section will demonstrate that even between a group of international institutions performing a similar function - judicial and quasi-judicial bodies, one can hardly make out a unified structure. As a result, while international law can be viewed as a system on the normative level, it enjoys only limited degree of institutional coherence. Therefore, international law is probably

[64] As a rule, outside the UN structure, there have been a few, if any cross-regime organisational links between important bodies such as the WTO, the ILO, the ECJ, the OSCE, the World Bank Group and the UN. See Klaus T. Samson "Human Rights Coordination within the UN System" *The United National and Human Rights: A Critical Appraisal* (Philip Alston, ed., 1992) 620, 658; Nicolas Valticos "Activités Normatives et Quasi Normative: Contrôle" *A Handbook on International Organizations* (René Jean Dupuy, ed., 2nd ed., 1998) 461, 483-84.
However, there have been some notable examples of institutional links within regimes operating in a single region or in special subject matters. For instance, strong institutional links can be found between the Council of Europe, the ECHR, ECSR and various treaty-making bodies (experts committees, committees of deputies, etc.) operating under the auspices of the Council. Similarly, the UN Organisation

somewhere in the middle of the continuum between an anarchical and a full-fledged legal system.

Nevertheless, the bottom line seems to be that international law can be regarded as a legal system.[65] This is because even a limited degree of coherence, in some systematic features, might suffice to transform an assortment of legal elements into a system, albeit, of a loose nature. Thus, despite the poor level of systemisation of international institutions, the degree of coherence found in the other relevant interactions – between norms and between norms and institutions, could satisfy the minimum requirements of a legal system. Further, as will be elaborated below, the normative coherence of the norms international law reflects upon the relations between the functioning institutions, endowing them with a limited level of coherence as well. In light of this conclusion on the systematic nature of international law, it may be argued that jurisdictional competition, with its potential for introducing inconsistent judgments into international law, might jeopardise even the modest degree of normative harmonisation achieved so far and introduce disharmonising tensions into the international legal system.

III. Differences between the international legal system and domestic legal systems

Although international law can probably be described as a legal system, it must be acknowledged that it is a system that differs from the paradigm of domestic legal systems in some significant ways.

Unlike domestic legal systems, where a more or less clear hierarchic normative structure is in place (e.g., constitution, primary legislation, secondary legislation), international norms (customs, treaties and general principles of law) are generally considered to be on the same normative level. The lack of hierarchy is most troubling in respect of certain important secondary rules (such as the Vienna Convention on the Law of Treaties), which belong to the same normative level of the very primary rules they regulate.[66] This

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includes a net of institutional links between organs such as the UN General Assembly, the various councils, the ICJ, the ILC and treaty making conferences (such as UNLCOS).

[65] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994)(1996 reprint) 1; Hersch Lauterpacht, *The Development of International Law by the International Court* (1958) 165-66; Jennings and Watts, *I Oppenheim's Int'l Law*, supra note 14, at 12-13; Shaw, supra note 24, at 53; Rosalyn Higgins, "Policy Considerations and the International Judicial Process" 17 I.C.L.Q. (1968) 58-84. But see Anthony Carty, *The Decay of International Law?* (1986) 1.

[66] Combacau, supra note 25, at 89; Prosper Weil "Towards Relative Normativity in International Law?" 77 A.J.I.L. (1983) 413, 428.

has led some writers to cast doubts upon the truly systematic nature of international law.[67]

In response to these concerns, one might argue that hierarchy is not an indispensable feature of a legal system. Normative hierarchy is only one of the means to an end – the maintenance of systematic coherence, which can also be achieved through alternative ways.[68] Furthermore, there are noteworthy exceptions to the proposition that international law lacks hierarchical structures.[69]

As Kelsen pointed out, one can identify a basic norm, superior to all other international norms.[70] In addition, certain customary norms are deemed nowadays to be *jus cogens* and cannot be derogated from by treaty or custom.[71] Hence, they are constitutionally superior to 'ordinary' norms.[72] Furthermore, the UN Charter, the most fundamental international agreement, enjoys prominence over other treaties,[73] and is perceived by some as the constitution of the world community.[74] Finally, it has been common practice to authorise international organisations to promulgate secondary legislation, which is constitutionally inferior to the norms found in the organisations' constitutive treaties.[75] However, it must also be acknowledged that, at present, international law possesses only sporadic 'constitutional' norms, and that, as a result, its hierarchical features are in the

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[67] Van de Kerchove and Ost, supra note 12, at 68.

[68] S. Romano, supra note 26, at 40; Gottlieb, supra note 23, at 335-36, 365-66. Some modern jurisprudential approaches reject the notion of an unwavering principle of hierarchy in law and point instead to circular method of interaction and reciprocal influences between norms of all normative levels. Van de Kerchove and Ost, supra note 12, at 67-72.

[69] Jennings and Watts, *I Oppenheim's International Law*, supra note 14, at 12.

[70] Kelsen, *Introduction to Legal Theory*, supra note 34, at 107-08.

[71] Vienna Convention on the Law of Treaties, 23 May 1969, art. 53, 1155 U.N.T.S. 331[hereinafter 'Vienna Convention']. See Charney, Universal Int'l Law, supra note 24, at 541-42.

[72] Weil, supra note 66, at 421.

[73] UN Charter, art. 103. See also Ignaz Seidl-Hohenveldern "Hierarchy of Treaties" *Essays on the Law of Treaties: a collection of essays in honour of Bert Vierdag* (Jan Klabbers and René Lefeber, eds., 1998) 7, 16-18.

[74] Pierre-Marie Dupuy, "The Constitutional Dimension of the UN Charter Revisited" 1 Max Planck Year Book of UN Law (1997) 30-33; Bardo Fassenbender "The United Nations Charter as Constitution of the International Community" 36 Colum. J. Transnat. L. (1998) 529, 584; Ernst-Ulrich Petersmann "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?" 31 N.Y.U.J. Int. L. & Pol. (1999) 753, 767. But see James Crawford "The Charter of the United Nations as a Constitutions" *The Changing Constitutions of the United Nations* (Hazel Fox, ed., 1997) 3, 9-15. It has also been suggested that in certain sub-systems, such as the European Human Rights system and the EU, constitutional norms can be identified. Joseph H.H, Weiler and Ulrich R. Haltern "Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz" *The European Courts and National Courts - Doctrine and Jurisprudence* (Ann-Marie Slaughter et al, eds., 1998) 331, 339; Alec Stone Sweet "Constitutional Dialogues in the European Community" id. at 305, 306-08.

nature of a patchwork, especially when compared to the more methodical structures found in most domestic legal systems.[76]

Another important difference between international and domestic law goes to the relations between lawmakers and the subjects of the law. In contrast with national legal systems, where legislators prescribe norms that are binding upon the entire population, international legislators (first and foremost, states) create laws which primarily bind themselves in their relations with each other.[77] The convergence between the role of states as the supreme lawmakers, interpreters and enforcers of the law, on the one hand, and as primary actors, on the other hand, has conferred upon the international legal system a unique structure, resembling, in some ways, contractual relations under domestic private law. Although the powers of the individual state in international law are on the decline,[78] international law still has even today some quintessential characteristics of an 'inter-subjective'[79] or 'horizontal' legal order.[80]

But the special mode of organisation of international law should not deny it the status of a legal system. There seems to be no reason to embrace a particular modality of relations between norms, institutions and legal subjects as an exclusive model for systemisation. On the contrary, it is submitted that differently structured systems are conceivable, as long as unifying features or certain forms of organised relations between the elements of the system, can be identified. Nonetheless, it must be acknowledged that the decentralised, largely voluntary and inter-subjective nature of the international legal system detracts from its level of uniformity, coherence and effectiveness.

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[75] Treaty Establishing the European Economic Community, art. 249 (ex-article 189), 25 March 1957, 298 U.N.T.S. 3, as revised by the Treaty of Amsterdam, 2 Oct. 1997, O.J. (C 340) 173 [hereinafter 'EC Treaty'].

[76] It ought to be remembered that not all domestic systems of law have formal constitutions or even a clear hierarchical dichotomy between primary and secondary norms. See e.g., England and Israel have fairly developed legal systems, without a formal constitution providing hierarchy between different laws.

[77] Combacau, supra note 25, at 96; Gary L. Scott and Craig L. Carr "Multilateral Treaties and the Formation of Customary International Law" 25 Denv. J.I.L.P. (1996) 71, 71; Weil, supra note 66, at 420. Furthermore, the dichotomy found in national systems between public and private lawmaking (e.g., legislation v. contract) is largely absent from international law. Id. at 89-90. Another, less important difference is the prominence of 'civil' responsibility in international law (compared with the modest role of criminal responsibility), whereas in domestic law criminal and civil responsibility are equally important.

[78] One example is the increase in the role of international organisations (IGOs) as lawmakers and actors; EC Treaty, art. 249 (ex-article 189); *Reparations for Injuries Suffered in the Service of the United Nations,* 1949 I.C.J. 174. Another example is the increased rights and duties conferred by international law upon private persons.

[79] Combacau, supra note 25, at 95-96.

Finally, there are considerable differences between the institutional structures of the international and domestic legal systems. It is undeniable that international law lacks important legal institutions that are at the heart of domestic legal systems such as a central legislator and a supreme court. Furthermore, the operations of most institutions found under international law are, at best, only loosely coordinated. Since one of the central roles of legal institutions is to maintain and promote the coherence and effectiveness of the law, the institutional weaknesses of international law, which include the lack of systematic codification of the law by a central legislative or adjudicative branch, adversely affect the normative integrity of the system. An even greater danger might materialise in the event of conflicting pronouncements as to what the law is by different international law-applying institutions.[81] Furthermore, without effective lawmaking and law-applying agencies, even the most organised system of norms might fall into desuetude or anarchy.[82]

But again, the absence of institutions such as a central legislator or a supreme court should not necessarily negate the viability of the international system.[83] One can think of national legal systems where law emanates from a number of diffused sources (e.g., legislator, courts, parties to contracts and custom),[84] and is enforced, in part, through decentralised avenues (e.g., self-help doctrines such as the contractual right to withhold compliance in response to breach and the right of self-defence). Hence, the differences between international and domestic legal systems may be viewed as quantitative (establishing a different proportion between centralised and decentralised lawmaking and law-enforcement) rather than qualitative.

At the same time, one can identify a clear process of empowerment of international institutions, which may, in turn, gradually strengthen the systematic nature of international law. For example, the recent trend towards investing international courts and tribunals with compulsory jurisdiction over a host of issues may result in more litigation aimed *inter alia* at harmonising between what might be *prima facie* incompatible legal norms. Moreover, specific legal regimes in a number of areas of

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[80] Higgins, *Problems and Process*, supra note 65, at 1; Gottlieb, supra note 23, at 336.
[81] Gottlieb, supra note 23, at 367.
[82] Hart, supra note 23, at 103-04; Hans Kelsen *General Theory of Norms* (Michael Hartney, trans., 1991) 138-39.
[83] Louis Henkin, *International Law: Politics and Value* (1995) 3.
[84] See e.g., Andrea M. Seielstad "Unwritted Laws and Customs, Local Legal Cultures and Clinical Legal Education" 6 Clinical Law Review (1999) 127, 138.

international law have undergone a process of institutionalisation and are now subject to regulation through the directives of 'legislators', which are enforced by competent courts and tribunals and executed by special organs (see e.g., WTO/GATT law, EC law, etc.). There is also an ongoing process of some improvement of inter-institutional links, which might contribute to greater normative harmonisation (e.g., through the practice of consultations or according 'observer status' to concurrent institutions),[85] although clearly there is still much room for improvement.

Even if one regards international law, on account of its institutional and other deficiencies, as a 'primitive' system of law, where enforcement of obligations is facilitated mainly by self help and social pressure,[86] this should not arguably affect its categorisation as a legal system,[87] provided that it still possesses a minimal degree of normative integrity.[88] Thus, the existence of effective institutions guaranteeing the continued development and maintenance of the coherence of the law should not be considered a *sine qua non,* without which there can be no legal system.[89] Put differently, effective institutions and sanction mechanisms should be considered as important means to ends - system coherence, enforcement, dispute resolution, etc., which can be achieved, at least in part, through other means. Put to the extreme, it may be argued that, in opposition to Romano, it would seem that legal systems might exist without institutions (albeit, this would most likely be an unhappy existence), while the reverse situation is close to impossible, since without norms (even *ad hoc* ones) law cannot achieve its social goal of guiding future conduct.

Nonetheless, it is impossible to completely divorce between the systematic welfare of norms and institutions. The existence of a normative system necessarily introduces a

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[85] See e.g., United Nations Convention on the Law of the Sea, 10 Dec. 1982, art 169, UN Doc. A/CONF.62/122 (1982), 21 I.L.M. (1982) 1261 [here in forth and hereinafter 'UNCLOS']; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, 13 Jan 1993, art. X(10), 32 I.L.M. (1993) 800; Rules of Procedure of the Human Rights Committee, 11 Aug. 1997, Rule 67, U.N. Doc. CCPR/C/3/Rev.5 (1997). For earlier examples of inter-institutional cooperation, see Constitution of the International Labour Organisation, 9 Oct. 1946, art. 12, 15 U.N.T.S. 40; Agreement establishing the International Bank for Reconstruction and Development, 27 Dec. 1945, art. V(8), 2 U.N.T.S. 134.

[86] Hans Kelsen, *General Theory of Law and State* (1949) 338; Morgenthau, supra note 22, at 312; Shaw, supra note 24, at 4. For criticism, see Grigorii I. Tunkin, *Theory of International Law* (William E. Butler, trans., 1974) 241; Abi-Saab, Cours général, supra note 38, at 124-25.

[87] The question is ultimately one of definition, since there are views that 'primitive' tribal societies also have a legal system. Max Gluckman, *Politics, Law and Ritual in Tribal Society* (1965) 182. Van de Kerchove and Ost view international law on account of its weak institutional structures as a 'semi-complex' legal system. Van de Kerchove and Ost, supra note 12, at 157.

[88] See Rosalyn Higgins "International Law in a Changing System" 58 Cambridge L.J. (1999) 78, 81.

[89] Gottlieb, supra note 23, at 357.

rudimentary level of harmonisation between the various institutions operating within that same legal system. This is because common reference to the same body of norms creates *de facto* between the different institutions. In other words, the existence of common normative/institutional links necessary implies that some of the systematic coherence that exists between legal norms will also be achieved between institutions.

IV. The relations between the various branches of international law

Having concluded that international law is a system of law (though, admittedly, a rather loosely structured one), and accepting that all systems of law enjoy a certain degree of coherence,[90] one must view the various branches and subsystems of international law as linked to each other, being parts of a bigger whole. Thus, even 'self-contained' international regimes[91] - i.e., subsystems which embrace a comprehensive set of secondary rules to the exclusion of the general rules of international law,[92] such as the EC, can be ultimately linked to general international law.[93] Support to this proposition can be found in that some so-called closed regimes do occasionally resort to legal norms originating in other international sub-systems or general international law.[94] A prominent example is found in the practice of the WTO DSB. Although the

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[90] According to Kelsen, the principle of non-contradiction is part of the basic norm of a legal system. Kelsen, *General Theory of Law and State*, supra note 86, at 406.

[91] The term 'self-contained regime' was brought to the forefront by the ICJ in the *Tehran Hostages* case, where it was held that the Vienna Conventions on Diplomatic and Consular Relations has created a 'self-contained' international regime with its own special remedies. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 40. According to the ICTY, every international court or tribunal operates within a 'self-contained' system. Case IT-94-1-AR72, *Prosecutor v. Tadic*, 35 I.L.M. (1996) 32, 39 (Interlocutory Appeal on Jurisdiction)(Appeals Chamber, 1995).

[92] Bruno Simma "Self-Contained Regimes" XVI Neth. Y.B. Int'l Law (1985) 111, 117; Abi-Saab, Fragmentation or Unification, supra note 5, at 926.

[93] According to Simma even the EC - the most developed 'self-contained' regime, preserves links to general international law and in case of a systematic breakdown (e.g., persistent violation), general remedies of international law, such as counter-measures may be sought. Simma, supra note 92, at 128-29. However, it should be noted that the case law of the ECJ seems to suggest otherwise. *Van Gend en Loos* [1963] E.C.R. at 12 ("the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights"); Case 90, 91/63, *Commission v. Luxembourg* [1964] E.C.R. 1217, 1232; Henry G. Schermers "Constituent Treaties of International Organizations" in *Essays on the Law of Treaties,* supra note 73, at 19, 29. But Simma argues that the creation of a new self-contained regime only implies a duty to exhaust all existing remedies within the subsystem. It does not negate the ultimate possibility of falling back on the general system. See also Dupuy, Danger of the Fragmentation or Unification, supra note 4, at 797 (considers the doctrine of self-contained regimes as 'misleading').

[94] See e.g., reliance upon the Vienna Convention by the I/A CHR in Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Decision of 1 Oct. 1999, para. 112-113 available at <http://corteidhoea. nu.or.cr/ci/ PUBLICAT/SERIES_A/ A_16_ING.HTM> (last visited on 20 June 2000). One may also mention the practice of the ECHR in attempting to construe the European HR Convention in light of other international obligations of the member states. See e.g., *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A)(1994), at para. 30 (Denmark's obligations under the European HR Convention must be interpreted as reconcilable with its obligations under the CERD). *But cf.* Case 71, *Grimm v. Iran*, 2 Iran-U.S. Cl. Trib.

GATT/WTO regime had been described by some as 'self-contained',[95] WTO Panels and the AB have resorted on a number of occasions to general international law (in fact, reference to principles of treaty interpretation found under general international law were specifically mandated by article 3.2 of the DSU).[96]

Therefore, it seems that there can be no real 'self-contained' regimes under international law. Each sub-system that meets international law's principle of normative integration (i.e., linked to other international norms through 'genetic' and/or 'operational' links, or can be identified by international law's rule of recognition) has necessarily been created as part thereof and derives its legitimacy from that of the international legal system. However, in order to remain part of international law, the specific regime must be able to resist pressures to break away from the main system.[97] A regime that has severed all normative links with other branches of international law might be considered as an independent legal system and no longer an international regime (this is arguably the case with the EC, which has been described as a supranational legal system, enjoying its own independent source of legitimacy, and not part of international law).[98] Therefore, dispute settlements mechanisms that normally apply domestic law (e.g., ICSID and NAFTA Chapter 19 arbitral panels) are not linked through normative relations to other

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Rep. 78 (1983) (the Iran-U.S Claims Tribunal has no jurisdiction to address general human rights law, without explicit authorisation in its constitutive instruments).

[95] See *Restrictions on Imports of Tuna* (EC v. U.S.), 16 June 1994, 33 I.L.M. (1994) 839, 890-94; Raj Bhala "The Myth about Stare Decisis and International Trade" 14 American University International Law Review (1999) 845, 859; Pieter J. Kuyper, "The Law of the GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law" XXV Neth. Y.B. Int'l Law (1994) 227, 251-52.
But see, Jackson, Fragmentation or Unification, supra note 5, at 828-29; David Palmeter and Petros C. Mavroidis "The WTO Legal System: Sources of Law" 92 A.J.I.L. (1998) 398, 413.

[96] See *U.S. - Standard for Reformulated and Conventional Gasoline and Like Products of National Origin,* 35 I.L.M. (1996) 603, 629 (Report of the AB)("... the General Agreement is not to be read in clinical isolation from public international law"). See also *E.C. - Regime for the Importation, Sale and Distribution of Bananas,* WTO Doc. WT/DS27/AB/R (1997), at para. 10 (Report of the AB); *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products,* 38 I.L.M. (1999) 118, 165 (Report of the AB, 1998)(reliance upon the genreal principles of good faith and *abus de droit*); *U.S. – Tax Treatment for "Foreign Sales Corp.",* WTO Doc. WT/DS108/AB/R (2000), at para. 166 (Report of the AB)(reliance on the good faith principle). See also Peter C. Maki "Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System" 9 Minnesota Journal of Global Trade (2000) 343, 352-60; Jeffrey Waincymer "Reformulated Gasoline under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora out of a Chapeau?" 18 Mich. J. Int'l L. (1996) 141, 165.

[97] Abi-Saab describes such pressures as the 'centrifugal effect of specialisation'. Abi-Saab, Fragmentation or Unification, supra note 5, at 925. According to Oda the creation of separate bodies of specialised areas of the laws might lead to the destruction of the very foundation of international law. Shigeru Oda "Dispute Settlement Prospects in the Law of the Sea" 44 I.C.L.Q. (1995) 863, 864.

[98] Weiler and Haltern, supra note 74, at 339. However, in the field of human rights, the ECJ draws extensively upon the case law of the ECHR.

international courts and tribunals, could probably maintain some self-contained existence.[99]

Consequently, it is possible to describe a dispute arising under a specific international regime also as an international dispute - i.e., a dispute under international law, provided that international law is the applicable law in the proceedings. As a result, it is desirable that dispute settlement bodies operating in one specific area of international law should pay heed to the viewpoint of other relevant branches. In the same vein, it seems sensible that specialised courts or tribunals would resort to general international law, to address issues that the specific regime at hand failed to regulate.[100]

International dispute settlement mechanisms that refuse to invoke rules derived from other branches of international law or general international law might fail to meet the legitimate expectations of the parties to the dispute that their entire gamut of international rights and obligations would be taken into consideration. They also risk a divorce between the 'self-contained' dispute settlement procedure and the complex and interrelated sets of interests that make up the reality of international relations. Such detachment might portray the specific court or tribunal as unduly biased towards a particular political agenda (e.g., pro-trade or pro-integration) and could, in the long run, adversely affect its legitimacy in the eyes of the international community.[101]

Thus, if one chooses to look at conflicts from a realistic point of view, he or she must acknowledge that international disputes and the policy considerations underlying them are strongly interrelated (e.g., trade issues are influenced by human rights issues and environmental concerns) and that any attempt to nicely compartmentalize disputes in accordance with a scheme of separate branches of international law is artificial, and will ultimately doom to fail.

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[99] Carolyn B. Lamm and Abby Cohen Smutney "The International Centre for Settlement of Investment Disputes: Responses to Problems and Changing Requirements" 12 Mealey's International Arbitration Report (1997) 20, 21; Christoph Schreuer "Commentary on the ICSID Convention", 12 ICSID Rev., F.I.L.J. (1997) 59, 154.

[100] See e.g., Case IT-94-A-1, *Prosecutor v. Tadic,* Judgment of 15 July 1999, para. 98 (Appeals Chamber), available at <http://www. un.org/icty/tadic/appeal/judgement/main.htm>(last visited on 15 July 2000). See also Philippe Sands "Treaty, Custom and the Cross-fertilization of International Law" 1 Yale Human Rights and Development Law Journal (1998) 85, 92.

[101] One of the main strands of criticism against the WTO dispute settlement machinery is grounded in the perception that it operates in detachment from the real needs of the international community. See e.g., G.

This means that courts and tribunals addressing international disputes should, in principle, unless instructed otherwise by the litigating parties, apply norms derived from the list of sources prescribed by general international law.[102] As a result, disputes addressed by distinct specific international dispute settlement mechanisms may clearly overlap. For instance, an ICSID arbitration tribunal authorised to apply international law[103] can consider human rights issues;[104] a WTO panel can consider questions of environmental law;[105] and the European Court of Human Rights can address questions relating to the international system of registration of patents[106] and the protection of the environment.[107] Further, all international courts and tribunals can address general issues such as treaty interpretation[108] and state responsibility[109]

Indeed, the conclusion that international law is a more or less coherent system composed of various branches and specific treaty regimes is supported by the rather rich practice of international courts and tribunals endowed with specific subject-matter jurisdiction. These judicial bodies have, on occasion, addressed questions arising under other branches of international law and general international law,[110] a point that has been recently underscored by Prof. Jonathan Charney in his Hague Lectures.[111]

Charney studied the practice of a variety of international courts and tribunals with relation to seven areas of international law, in respect of which the ICJ has made general

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Richard Shell "Trade Legalism and International Relations Theory: an Analysis of the World Trade Organization" 44 Duke L.J. (1995) 829, 922.

[102] Simma argues that the burden to show that the parties to an agreement intended to exclude other international procedures should rest with the party arguing against the applicability of general international law. Simma, supra note 92, at 133.

[103] According to the Washington Convention establishing ICSID, international law can be applied by ICSID tribunals only to the extent that it is the law selected by the parties, or the applicable law in the host state. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, art. 42(1), 575 U.N.T.S. 159 [hereinafter 'ICSID Convention']. See e.g., *Tradex Hellas S.A. v. Albania,* Award of 28 April 1999, para. 69 (ICSID), <http://www. worldbank.org/ icsid/cases/T-award.pdf> (last visited on 14 July 14, 2000).

[104] See e.g., *Azinian v. Mexico,* Award of 1 Nov. 1999, para. 103 (ICSID), available at <http://www. worldbank.org/icsid/cases/robert_award.pdf > (last visited on 27 Oct. 2000)(denial of justice had been alleged).

[105] See e.g., *EC – Measures concerning Meat and Meat Products (Hormones),* WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (1998), para. 123 (Report of the AB); *Import of Shrimp,* 38 I.L.M. 118.

[106] *British-American Tobacco Co. Ltd. V. Netherlands,* 331 Eur. Ct. H.R. (ser. A)(1995).

[107] See e.g., *Lopez Ostra v. Spain,* 20 E.H.R.R. 277 (1995); *Guerra v. Italy,* 26 E.H.R.R. 241 (1998).

[108] See e.g., *Consular Assistance,* supra note 94, at para. 112-13.

[109] *Loizidou v. Turkey,* 1998 Eur. Ct. H.R. (ser. VI).

[110] See e.g., *Reformulated Gasoline,* 35 I.L.M. at 621-24 (1996)(AB applied to the rules of treaty interpretation found in the Vienna Convention); Dean Spielmann "Human Rights case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities" *The EU and Human Rights* (Philip Alston, ed., 1999) 757-80 (application of European human rights law by the ECJ).

[111] Charney, Is Int'l Law Threatened? supra note 6, at 101-373.

and specific judicial pronunciations. His conclusions were that despite minor variances, no major challenges to the coherence of international law had been identified.[112] In other words, the practice of the different international courts and tribunals from different legal branches has developed along rather similar lines, using similar sources of law and, on many occasions, with explicit or implicit cross-reference to decisions of other international fora. The more or less uniform invocation of overarching legal principles and the practice of other judicial institutions from similar and different branches of law can be best explained by way of examining the role of international courts and tribunals from a systematic perspective. According to this view, courts and tribunals strive towards more or less consistent application of international law because they view themselves as distinct judicial elements operating within the same legal system.

This portrayal of the structure of the international legal system carries important implications for international law on both the normative and procedural level. If sub-systems, including 'self-contained' regimes are part of international law, and bound by its basic rule of recognition,[113] then a court or tribunal operating under a specific sub-system should determine disputes before it, in accordance with all relevant norms international law. Particularly pertinent to the present work are the implications of the systematic conception of international law on the applicability of jurisdiction-regulating norms. If such norms can be shown to exist under general international law, than in the absence of a specific rule of law to the contrary, it seems that they should be applied by all international courts and tribunals.

In sum, if international law is indeed a more or less viable legal system, then there surely is considerable potential for jurisdictional overlap, even between the judicial organs of specific sub-systems. As a result, an international dispute can be the subject of jurisdictional competition, between any two or more international courts and tribunals applying international law, provided that the traditional requirements for competition ('same parties' and 'same issues') have been met. The jurisdictional overlap may be total, if the competing claims raise essentially the same issues (similar facts and similar legal claims), or partial - only to the extent that common issues under 'general' international law arise (e.g., the question of conditions for statehood might arise in proceedings between the same two international actors before ITLOS and the WTO).

[112] Charney, Is Int'l Law Threatened? supra note 6, at 347-50.
[113] Hart, supra note 23, at 116-17.

Such overlaps may involve different branches of the law or be observed with respect to proceedings arising under the same branch of law, but amenable to the jurisdiction of different institutional arrangements (e.g., HRC and the ECHR).[114]

B. Can international courts and tribunals be considered a system?

The conclusion reached on the systematic nature of international law, resolves only part of the theoretical difficulties associated with the present study. For even if international law is considered a system of law, the relations between the judicial institutions operating there under, which are the main focus of this work, should still be explored.

I. The dichotomy between the normative and institutional components of a legal system

It has already been asserted that an important distinction ought to be made between the normative and institutional components of any legal system.[115] It was further posited that there are considerable differences between the level of systemisation of these normative and institutional components under international law. In other words, while the rules of international law can probably be viewed as a system of norms, due to the existence of unifying principles, it is conceivable that institutions operating within that same legal system do not display in their reciprocal relations a consequential level of coherence. Indeed, it will be shown that the various judicial bodies operating under the guise of international law generally act as independent entities and do not share among them unifying characteristics which could transform them into a coherent judicial system.

At first sight this proposition might seem extraordinary. This is because in domestic legal systems there is usually good measure of correlation between law as a body of norms, the polity over which it governs and the comprehensive nature of its institutional framework, including the jurisdictional powers of its judicial organs. Indeed, it would seem that French law, the polity called France and the French system of courts cannot have an existence separate from each other. But is it really the case? If one observes the application of foreign law in national courts, through conflict of laws rules, then it is possible to identify two different legal systems at play - a foreign normative system, whose norms are applied by a domestic judicial system (which also applies some

[114] However, it is not clear whether competition is possible in cases where two human rights regimes offer significantly different degrees of human rights protection. *Casanovas,* supra note 20.
[115] See Van de Kerchove and Ost, Supra note 12, at 25.

domestic norms, at least on questions of procedure).[116] However, the fact that French law can be applied by an English court surely does not mean that the latter has become part and parcel of the French legal system,[117] nor that French law has become part of the English legal system (unless one chooses to unduly stretch the concept of what constitutes a national legal system). What this example does establish is that parts of the normative contents of a legal system (excluding norms that directly govern the structure and operation of the system's legal institutions) may have an independent life outside the original law-applying organs of that same system.[118]

A few other examples will hopefully further demonstrate this point. The common law, as developed in England, may most probably be regarded as a normative system, since in contains a rather complete body of legal rules. However, the same body of rules is routinely applied by the courts of several other common law countries (Australia, New Zealand, Canada, etc.) whose courts do not constitute nowadays part of the English judicial system. Similarly, canonical law, also arguably a normative system, was applied during medieval times by ecclesiastical courts of different political units, who had little interaction with each other;[119] and Jewish law has survived for many centuries without any institutional framework at all.[120] However, the most glaring example seems to be international law itself. This body of norms is being applied, on a regular basis, by domestic courts of various nations (applying both treaty law and customary law). However, one cannot, in good faith, see these different domestic courts as part of one institutional system.

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[116] J.D. McClean *Morris: The Conflict of Laws* (4th ed., 1993) 385. At the very least, domestic jurisdictions apply the 'conflict of laws' norms of the domestic normative system.

[117] Hart, *Essays in Jurisprudence,* supra note 12, at 342 (application of foreign law in domestic court does not reduce the two legal systems involved into one unity).

[118] This is supported by Dworkin's proposition that a system of law contains within it a pure body of law (e.g., basic principles of law), which operates in detachment of legal institutions. Dworkin, supra note 12, at 406-07. *But cf.* Philip Allot "The Concept of International Law" 10 European Journal of International Law (1999) 31,50 ("The international legal system, like any legal system, implies and requires an idea of a society whose legal system it is..."). It is my understanding of Allot's position that a certain political and social framework is required in order to stimulate the creation and nurturing of a legal system (although the existence of international law seems to strain this notion). This does not necessary imply that the said political and social structures must conform to a specific contour (e.g., that they must include a system of courts). See Raz, supra note 34, at 188-89.

[119] Henkin, *Int'l Law,* supra note 83, at 3 fn *; van de Kerchove and Ost, supra note 12, at 145; MacCormick, supra note 13, at 1067; William Ewald "Comment on MacCormick" 82 Cornell L. Rev. (1997) 1071, 1078.

[120] See e.g., Jose Faur "Law and Hermeneutics in Rabbinic Jurisprudence: a Maimonidean Perspective" 14 Cardozo Law Review (1993) 1657, 1657. However, Santi Romano would have considered religion to represent, by definition a social institution. S. Romano, supra note 26, at 36.

Hence, it can be asserted that the fact that different courts apply the norms of the same legal system does not suffice in order to view them as participating in the same judicial system. Applying this contention to international law, one can infer that the fact that international courts and tribunals apply international law (as do their domestic counterparts) is not enough to establish that there exists an international judicial system.

Still, one could argue that international courts and tribunals share more than a common set of applicable norms. They are all constituted under international law and derive their legitimacy therefrom. Moreover, they belong to the same polity - the international community.[121] While this is true, of course, it is submitted that such common attributes do not seem sufficient to transform international courts and tribunals into a coherent judicial system. In fact, all international institutions - judicial and non-judicial, share these very same common features. There is no denying that international courts and tribunals are part of international law and consequently, of the international legal system. The question is whether these judicial bodies compose an institutional system of their own, conceived through their reciprocal relations with each other, and not through their interaction with an external normative and political umbrella under which they, and other non-judicial institutions, function.

II. Do international courts and tribunals meet the definition of a system?

It is time now to apply the aforementioned working definition as to what constitutes a system - a set of elements, arranged in order and possessing a certain degree of cohesion, with respect to international courts and tribunals. In order to be able to identify a system of international courts and tribunals, one must look for an integrating principle governing the relations between the different judicial bodies. It is submitted that the integrating principles proposed by Hart and Kelsen's are largely irrelevant for this endeavour, since both of these eminent scholars have focused on normative systematisation. Similarly, Romano and Abi-Saab's 'institutional' theories of law do not provide a clear principle of integration, which can operate exclusively between international courts and tribunals (as opposed to all other institutions of the same polity). Their theories rather examine, from a broad perspective, the interaction between institution, norms and the society in which they exist.[122] In contrast, Raz's approach,

[121] Weil, supra note 66, at 422.

[122] Abi-Saab himself seems to acknowledge that a different test should apply with regard to a 'legal order' and a 'judicial system'. Further he supports the contention that one of the main features of a judicial

which focuses on the internal relations between the various elements of the system, seems to be most appropriate in order to examine the relations between international courts and tribunals, as well.

Hence, it could be asserted that one ought to examine the network of relations between the various international judicial bodies in order to ascertain whether they form a judicial system. Such inter-relations should exhibit unity of purpose and coordinated method of operation characteristic of an order that can be regarded as one whole.[123] Otherwise, the 'international judicial system' might constitute a mere assortment of judicial institutions with somewhat similar functions and features (as are arguably the courts of England and France). In other words, the conditions for the existence of a genuine system at the institutional level must concern the structural relations between the various institutions.

Structural relations imply some form of interaction between the various courts and tribunals. A similar role, procedure or even applicable law is not enough. For example, a commercial arbitral tribunal operating in England is not normally considered part of the English court system, despite the fact that courts and arbitral tribunals share similar functions and may even apply the same law (and even though courts enjoy certain supervisory powers over arbitration).[124] This popular perception can be explained by the minimal interaction and, therefore, the paucity of integrative structural relations between arbitral tribunals and the 'ordinary' court system.

The need to find an integrating principle which is exclusive to judicial bodies means that these institutions should have additional unifying factors that are not to be found in other components of the legal system. This should come as no surprise, since a judicial system can be regarded as equivalent to a sub-system of the larger legal system under which it operates. Sub-systems typically possess both the common denominators characteristic of the overarching legal system and their own distinctive unifying features. Naturally, the sub-system's distinctive integrating principle cannot be identical to the unifying

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system is the correlative link between its components. Abi-Saab, Fragmentation or Unification, supra note 5, at 921.

[123] *Cf.* Henkin, *Int'l Law*, supra note 83, at 7. Henkin, when referring to the state 'system' has asserted that - "some measure of unity or community" is necessary for an aggregation of states to constitute a genuine system.

[124] *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [1892] 1 Q.B. 431, 437; *King v. Thomas McKenna* Ltd [1991] 1 All E.R. 653 (C.A.). See also Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG* [1982] E.C.R. 1095, 1095.

principle of the whole system, but must supplement it. As a result, it can be expected that legal sub-systems will be smaller units of greater coherence and tighter inner-structure, when compared to the general legal system to which they belong.

Applying this method of analysis to the judiciary in a domestic legal system, one can generally identify close links between different judicial bodies, which cannot be found in the relations involving non-judicial bodies. For instance, the English Court of Appeal and the High Court are not merely organic creatures of English law (as are also Parliament and various administrative agencies), but they also share jurisdictional and organisational links of such a nature, which enables to view them as part of a single operational unit - the judiciary. Further, the judicial bodies comprising the judiciary enjoy a high level of cohesion, which is not found in the relations between courts and other social institutions. While the judiciary is expected to 'speak with one voice',[125] it is not unusual that different branches of government (characterised with lower level of cohesion) would adopt conflicting positions - in fact, this is one of the premises upon which the constitutional theory of 'checks and balances' is founded.[126]

What might then be the distinctive features that grant coherence to a judicial system? At the national level, the coherence of the court system is maintained through three salient features: coordinated allocation of jurisdictions, specific rules regulating jurisdictional competition (rules of harmonisation) and, most importantly, hierarchic structures.[127] Indeed, all courts operating within national legal systems (of one state or federal unit) are typically subject to the jurisdiction of appellate courts, which safeguard the coherent development of the case law produced by different instances in different jurisdictional districts. Alternatively, other methods of judicial harmonisation (which involve implicit, rather than explicit forms of hierarchic relations) can be envisioned. For instance, within the EC, (a complete legal sub-system on both the normative and institutional level), national interpretation of EC law is monitored and harmonised by the ECJ, primarily

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[125] *Hooker v. Burson,* 960 F. Supp. 1283, 1285 (M.D. Tenn. 1996); Deanell Reece Tacha "Judges and Legislators: Enhancing the Relationship" 44 American University Law Review (1995) 1537, 1550. But see Joseph Raz "The Relevance of Coherence" 72 B.U.L. Rev. (1992) 273, 309.

[126] See e.g., Stanley M. Brand " 'To Endure for Ages to Come': a Bicentennial View of the Constitution: Battle Among the Branches: The Two Hundred Year War" 65 North Carolina Law Review (1987) 901, 901; Christine E. Burgess "When May a President Refuse to Enforce the Law?" 72 Texas Law Review (1994) 631, 636-37. However, there is body of opinion that conflicts between branches of government are impermissible in some circumstances (e.g., in respect to decisions affecting foreign states). *The Arantzazu Mendi* [1939] 1 All E.R. 719, 722 (H.L.) (Opinion of Lord Atkin).

[127] See Georges Abi-Saab "The International Court as a World Court" *Fifty Years of the International Court of Justice* (Vaughan Lowe and Malgosia Fitzmaurice eds., 1996) 3, 13.

through the mandatory reference procedure of article 234 (ex-article 177) of the EC Treaty.[128] Additionally, organisational links (e.g., avenues of professional promotion, formal and informal interaction between judges of different instances, shared professional supervisory mechanisms, use of similar facilities, common bar of attorneys, etc.) also contribute to the level of coherence of the judicial system. It seems that these jurisdictional and organisational links satisfy the need for internal integrating principles that underlie the existence of a judicial system.

Moving back to International law, the survey conducted in Part I of this study reveals that the jurisdictions of various international courts and tribunals are not neatly divided and that jurisdictional conflicts occur from time to time. While this also happens within domestic legal systems despite the prevalence of a more orderly division of jurisdiction between courts, which limits the occurrence of overlaps in the first place, national legal systems usually have in place clear rules that regulate such conflicts. But in international law, as will be subsequently shown in Part III, the positive rules regulating competition between international judicial bodies are either sporadic and rudimentary, or absent altogether. Hence, for instance, only a few of the constitutive instruments of international judicial bodies contain *lis alibi pendens* or *res judicata* rules,[129] while most domestic systems ban multiplicity of proceedings, at least in cases arising within the same legal system. Thus, it can be observed that international judicial bodies have been constituted as isolated 'islands of jurisdiction' with little, if any, attention being given to regulating the jurisdictional interaction between the various distinct 'islands'.

Furthermore, the most effective measure of inter-court integration does not exist in the international sphere. International courts and tribunals do not function in a hierarchic environment and there is no international supreme court to which all questions of law can eventually converge.[130] The ICJ, which had a certain potential of establishing itself as a supreme court, because of its position as the 'principle judicial organ of the UN' - the most important global international organisation,[131] and because of its unique

[128] Case 61/79, *Amministrazione delle finanze dello Stato v. Denkavit italiana Srl.* [1980] E.C.R. 1205, 1223; John W. Bridge "The Court of Justice of the European Communities and the Prospects for International Adjudication" *International Courts for the Twenty First Century* (Mark W. Janis, ed., 1992) 87, 100.
[129] See infra Chapter 5.
[130] Shabtai Rosenne, 2 *The Law and Practice of the International Court, 1920-1996* (3rd ed., 1998) 529.
[131] Charter of the United Nations, art. 92, 26 June 1945, XV U.N.C.I.O. Doc. 355 [hereinafter 'UN Charter']; Statute of the International Court of Justice (Annex to UN Charter), art. 1 [hereinafter 'ICJ Statute']; Rosenne, 1 *The Law and Practice of the ICJ,* supra note 130, at 139.

position as a permanent court of a universal constituency endowed with unlimited subject matter jurisdiction, has failed to assume this role. This can be explained, in part, by virtue of its lack of compulsory jurisdiction over appellate cases (with a few minor exceptions)[132] and other structural deficiencies (e.g. cumbersome procedures, inaccessibility to non-state actors, etc.).[133] As a result, while the ICJ exerts important influence over the development of international law,[134] it does not perform the role of a supreme court in a national system of law.[135]

Since the international judiciary has few, if any hierarchical structure, alternative forms of inter-fora structural relations should be looked for. However, in practice, the jurisprudential coordination between different international courts and tribunals has been, as a rule, either voluntary - subject to the good will of the judges and the parties to the case, or non-existing altogether. It is certainly feasible that different courts and tribunals would adopt different views on questions of international law, and would maintain incompatible lines of jurisprudence for an indefinite period of time. This situation is exacerbated by the scarcity of organisational links between international judicial bodies (in fact, courts and tribunals seem often not to be aware of the decisions of their counterparts).[136] As a result, the opportunities for formal or informal interaction and exchange of information between the various international fora are quite limited. Under these conditions, the level of uniformity and coherence generated from the operation of the various international courts and tribunals is expected to be poor.[137]

III. The practice of different international courts and tribunals as indicative of their level of systemisation

Charney's survey, which demonstrates only haphazard reliance by international courts and tribunals on the jurisprudence of their counterparts, [138] supports the proposition that

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[132] Rosenne, 1 *The Law and Practice of the ICJ*, supra note 130, at 141-42.

[133] See Petersmann, Int'l Trade Law and GATT/WTO Dispute Settlement, supra note 6, at 28.

[134] *Legality of the Threat or Use of Nuclear Weapons,* 1996 I.C.J. 226, 345 (Dissenting Opinion of Judges Weeramentry)(the Court is situated at the 'apex' of international tribunals).

[135] Jonathan Charney, The Impact on the International Legal System of the Growth of International Courts and Tribunals" 31 N.Y.U.J. Int. L. & Pol. (1999) 697, 705.

[136] See e.g., Samson, supra note 64, at 658.

[137] Indeed, some of the delegates to the Third United Nations Conference on the Law of the Sea objected to the creation of the proposed ITLOS because of the risk it presented to the uniformity of the law of sea from possible inconsistent decisions. Third United Nations Conference on the Law of the Sea, 4th Sess., 59th mtg., V *Third United Nations Conference on the Law of the Sea – Official Records* (United Nations, 1976) 15-48.

[138] See e.g., *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Norway v. Denmark), 1993 I.C.J. 38, 62 (ICJ relying on arbitral decisions); *Reformulated Gasoline,* 35 I.L.M. at 620-29 (Appellate Body citing judgments of the ICJ, ECHR and I/A CHR); Case USA-95-1904-02, *Gray*

the current level of inter-fora coordination is unsatisfactory. Some judicial bodies habitually cite to the work of other fora, whereas some courts and tribunals generally ignore their counterparts;[139] and decisions cited are sometimes followed and sometimes not.[140] Moreover, even when the jurisprudence of other adjudicative bodies has been cited and essentially followed, it was usually because of the persuasive weight of the legal analysis adopted by the other forum,[141] and not because of an imbedded sense of obligation to strive to follow the case law of other judicial authorities. In fact, it looks as if reliance on the case law of international courts and tribunals tends to conform with the manner of treatment accorded to other complementary sources of international law - the writings of jurists and domestic court decisions.[142] All these sources have been used as persuasive, but not authoritative statements on what the law is or should be. This implies that decisions of international judicial bodies are merely one method to establish the applicable law, among several other legitimate methods.

However, the treatment of international judicial precedents as one among equally forceful complementary sources ignores the independent importance of jurisprudential continuity and consistency in international law.[143] While the hesitancy to rely on precedents can be explained in part due to the absence of a *stare decisis* doctrine[144] from

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Portland Cement and Clinker from Mexico (Mexico v. U.S.), Report of 13 Sept. 1996, at p.23 (NAFTA binational Panel), available at < http://www.nafta-sec-alena.org/images/pdf/ ua95020e.pdf > (last visited on 26 Oct. 2000)(relying on an ICJ case); Case 157, *Esphahanian v. Bank of Tejarat,* 2 Iran-US Cl. Trib. Rep. 157, 163 (1984)(relying on ICJ and *ad hoc* arbitration cases); *Tadic* (1995), 35 I.L.M. at 61-62 (relying on an ICJ judgment); *Agrotexim v. Greece,* 21 E.H.R.R. 250, 284 (1996)(relying upon an ICJ judgment); *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* (Advisory Opinion), I/A Court H.R. (ser. A) No. 4 (1984) 96-97 (relying on decisions of the ICJ and the ECHR); *Consular Assistance,* supra note 94, at para. 113-14, 131-32 (relying upon case law of the ICJ, the ECHR and the HRC). See also Monica Pinto " Fragmentation or Unification among International Institutions: Human Rights Tribunals" 31 N.Y.U.J. Int. L. & Pol. (1999) 833, 840.

[139] For example, the ECJ has hardly ever cited decisions of other bodies (except the ECHR); and no judgment of the ICJ rendered in the Court's first 50 years of operation has cited any decision of another permanent international court or tribunal (although a few citations were made in individual opinions). Mohamed Shahabuddeen, *Precedent in the World Court* (1996) 39.

[140] See e.g., *Tadic* (1999), supra note 100, at para. 115 (citing and rejecting the holding the ICJ *Nicaragua* case on the attribution of state responsibility for acts committed by paramilitary units).

[141] Restatement of the Law, 3rd, Foreign Relations Law of the United States § 103, comment b (1987)(decisions of international courts and tribunals are persuasive evidence of what the law is). The WTO AB has further held that reasoning found in unadopted GATT panel reports may be looked at for legal guidance. *Japan – Taxes on Alcoholic Beverages,* WTO Doc. WT/DS8/AB/R (1996) at para. 5.6 (Report of the AB). This underlines the fact that the dominant consideration is the quality of the argumentation and not the need to harmonise between different valid statements of the law.

[142] See ICJ Statute, art. 38(1)(d).

[143] Palmeter and Mavroidis, supra note 95, at 402.

[144] The *Stare decisis* doctrine derives from the Latin maxim *'stare decisis et non quita movera'* (to stand firmly by things decided and not to disturb settled points). *Black's Law Dictionary* (7th ed., 1999) 1414.

international law,[145] the implications of this state of affairs for the 'systematic well-being' of international law are problematic. This is because international law lacks alternative coordination and harmonisation mechanisms found in civil law systems, such as a formal doctrine of *jurisprudence constante* (attributing binding force to a line of consistent decisions) or the availability of appellate proceedings (which, *inter alia,* pressures lower court judges to comport with anticipated decisions of the appellate courts). The lack of binding precedent under international law (even a consistent line of cases is not formally binding as such, unless it can be said to represent custom),[146] combined with the poor level of jurisdictional coordination and absence of structural harmonising devices, threatens the coherence of international law. Indeed, it is conceivable, perhaps inevitable, that different international judicial fora will reach different conclusions on similar legal questions, even pertaining to the same dispute. Since there are no available inter-fora mechanisms for averting or solving such differences of opinion, jurisprudential discrepancies might remain in place indefinitely.

Doctrinal inconsistencies have in fact already been observed in decisions of different international courts and tribunals relating to diverse questions such as the permissibility of reservations made in declarations of acceptance of the compulsory jurisdiction of international judicial bodies,[147] the use of advisory proceedings in order to address what are in essence inter-state disputes,[148] the margin of discretion accorded to the authorities

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[145] See ICJ Statute, art. 59; Bhala, Myth about Stare Decisis, supra note 95, at 863, 900; Charney, 3rd Party Dispute Settlement, supra note 4, at 72. But see, Mannely O. Hudson, *The Permanent Court of International Justice 1920-1942* (1943) 626 (nothing in the text of the Statute of the PCIJ, was intended to prevent the Court from finding guidance in previous judgments).
Exceptions to this assertion can be found in the Agreement Establishing the Caribbean Court of Justice, 15 Oct. 1999, art. IX (I), available at <http://www. caricom.org/expframes2.htm> (last visited on 4 Sept. 2000)("Judgments of the [Caribbean Court of Justice] shall be legally binding precedents for parties in proceedings before the Court"); and in article 29(8) to the Rules of Procedure of the CIS Economic Court ("rulings of the Plenum of the Economic Court and other decisions that have precedental value"). Gennady M. Danilenko "The Economic Court of the Commonwealth of Independent States" 31 N.Y.U.J. Int. L. & Pol. (1999) 893, 908-10.

[146] Chrisopher A. Ford "Judicial Discretion in International Jurisprudence: Article 38(1)(c) and 'General Principles of Law'" 5 Duke J. Comp. & Int'l L. (1994) 35, 58.

[147] *Phosphates in Morocco* (Italy v. France), 1938 P.C.I.J. (ser. A/B) No. 74 at 23-24 (reservations are permissible and jurisdiction exists only to the extent it was recognised); *Loizidou v. Turkey,* 20 E.H.R.R. 99, 136 (1995)(territorial reservation to declaration of acceptance of the ECHR's jurisdiction is invalid). For discussion, see Robert Y. Jennings "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers" 9 A.S.I.L. Bulletin (1995) 2, 5-6.

[148] *Eastern Carelia,* 1923 P.C.I.J. (ser. B) No. 5 (advisory opinions cannot be used to circumvent the need to secure state consent to adjudication); *Consular Assistance,* supra note 94, (the I/A CHR may render an advisory opinion in a case which had been in essence an inter-state dispute); Opinion No. 14/95/C-1/7-96, *Interpretation of the Agreement on Recognition and Regulation of Property Rights*, 3 (23) Sodruzhestvo Informatsionni Vestnik [CIS Information Bulletin] (1996) 82, *cited* in Danilenko, supra note 145, at 904-05 and Opinion No. 11/95/C-1/4-96, *Interpretation of Agreement on Free Trade*, 3 (23) Sodruzhestvo Informatsionni Vestnik [CIS Information Bulletin] (1996) 88, *cited* in Danilenko, supra, at

of a confiscating state in determining the level of compensation,[149] the application of the rule of proportionality in continental shelf delimitation cases,[150] the right of conscientious objectors to evade military service,[151] the right to silence during pre-trial investigation,[152] the legal effect of provisional measure orders,[153] and the applicability of the precautionary principle in environmental cases.[154] In 1999, a notable doctrine of the ICJ on state responsibility has been explicitly rejected by the ICTY,[155] and other inconsistencies might emerge in the near future. In fact, inconsistent decisions have been sometimes observed even within the jurisprudence of the same court or tribunal.[156]

While Charney seems to be right in concluding that the diverging practice of international courts and tribunals has not presented until now a major challenge to the

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905 (in both cases the CIS Economic Court issued advisory opinions relating to ongoing interstate disputes).

[149] *Lithgow v. U.K.,* 8 E.H.R.R. 329, 372-73 (1986)(the confiscating government is accorded wide 'margin of appreciation' in determining whether full compensation is due); Case 129, *SEDCO Inc. v. NIOC,* 10 Iran-US Cl. Trib. Rep. 180, 187(1987)(the normal standard for compensation is full value of the property taken).

[150] *Continental Shelf* (Tunisia v. Libya) 1982 I.C.J. 18, 61-76, 91 (the Court should precisely calculate the relations between coastline lengths and maritime areas created by equidistance); *Delineation of the Continental Shelf* (U.K. v. France), 54 I.L.R. 5 (1979)(the arbitral panel should merely take impression of the proportionality issues).

[151] See *Brinkhof v. Netherlands,* UN GAOR, 48th Sess., Annex, UN Doc. CCPR/C/48/D/402/1990 1993)(recognizing on an equal basis the right to conscientious objection on religious and non-religious grounds); *N v. Sweden,* App. No. 10410/83, Eur. Comm'n H.R. Dec. & Rep. 203 (1985)(holding that there is ground for differentiation between religious and non-religious conscientious objectors). See Helfer, supra note 20, at 331-35.

[152] Case 374/87, *Orkem v. Commission* [1989] E.C.R. 3283 (there is no right to silence during anti-competition investigation under EC law); *Funke v. France,* 256 Eur. Ct. H.R. (ser. A)(1993)(Article 6 of the European HR Convention encompasses the pre-trial stage). See discussion in Julliane Kokott and Frank Hoffmeister "Case Review - Opinion 2/94 Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms" 90 A.J.I.L. (1996) 664, 666; Spielmann, supra note 110, at 766-70.

[153] *Cruz Varas v. Sweden,* 210 Eur. Ct .H.R. (Ser. A) at 36 (1991)(provisional measures of the ECHR are non-binding); *LaGrand* (Germany v. U.S.), Judgment of 27 June 2001 (Forthcoming in 2001 I.C.J.), available in <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (last visited on 10 July 2001)(provisional measures of the ICJ are legally binding)

[154] *Meat Hormones,* supra note 105, at para. 123 (it is not clear whether the precautionary principle has been incorporated into international law); *Gabçikovo -Nagymaros* (Hungary/Slovakia), 1997 I.C.J. 3, 42-45 (scientific uncertainty as to environmental consequences precludes invocation of the doctrine of necessity by the party claiming risk to the environment); *Southern Bluefin Tuna* (New Zealand v. Japan; Australia v. Japan), order of 27 August 1999, at para. 77-80 (ITLOS), available at <http://www.un.org/Depts/ los/ITLOS/Order-tuna34.htm> (last visited on 15 July 2000)(in face of scientific uncertainty over the danger to the survival of a fish stock the parties must act with 'prudence and caution' and take steps to ensure conservation of the stock).

[155] *Tadic* (1999), supra note 100, at para. 115-137.

[156] Shaw, supra note 24, at 439 (discrepancies have been identified between the position of the ICJ in the *North Sea Continental Shelf* and the *Tunisia/Libya* cases on role of equity in marine delimitation); John R. Cook "The Iran-U.S. Claims Tribunal and the United Nations Compensation Commission: New Machinery for Resolving Claims" 9 A.S.I.L. Bulletin (1995) 28, 29 (inconsistencies have been encountered in the practice of different chambers of the Iran-U.S. Claims Tribunal).

coherence of international law,[157] there is no guarantee, or indeed considerable likelihood, that this will remain so in the future. On the contrary, with the increase in the number of fora, and the concomitant rise in the number of cases submitted to adjudication, the pressures on the integrity of the system will increase.[158] This is particularly worrisome given the fact that different sub-systems pursue incompatible idiosyncratic ideological agendas (e.g., trade-liberalisation v. promotion of labour standards or the state of the environment), which might further hinder the achievement of uniform interpretation of international law.[159] The experience of domestic systems, where conflicting decisions of lower courts are a common phenomenon, suggests that international court and tribunals, who are generally less well-informed on concurrent practice than their domestic counterparts, are at least as likely to experience similar problems, if not worse.

Therefore, one may conclude that international courts and tribunals do not at present form a coherent system, at least not under the national court system paradigm.[160] Even outside the domestic model, it would seem that given their poor levels of coordination and structural interaction, international courts and tribunals fail to meet a meaningful definition of a coherent system.[161] On the other hand, it must be recalled that international courts and tribunals form part of a bigger system - international law, and share some common attributes, which are also enjoyed by the other components of the international legal system. In other words, they are not an autonomous sub-system, but

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[157] Charney, Is Int'l Law Threatened? supra note 6, at 347. See also Treves, Recent Trends, supra note 1, at 433-34. With the increase in number of international actors and the enlargement of the community of international judges, practitioners and academic scholars, there is reason to believe that there will be more diversity in the construction of international norms.

[158] Abi-Saab, ICJ as a World Court, supra note 127, at 13; Dupuy, Danger of the Fragmentation or Unification, supra note 4, at 797-98; Jennings, Proliferation of Adjudicatory Bodies, supra note 147, at 6. Even Charney admits that in theory the increase in the number of international courts and tribunals might jeopardise the coherence of international law. Charney, 3rd Party Dispute Settlement, supra note 4, at 77. Still, he thinks that this risk is minimal. Charney, Impact of the Growth of Int'l Courts and Tribunals, supra note 135, at 700.

[159] Charney, Impact of the Growth of Int'l Courts and Tribunals, supra note 135, at 706. It has been argued that some of the decisions of the GATT/WTO dispute settlement system in trade and environment issues have been influenced by the pro-trade bias of that sub-system. Jeffery L. Dunoff "Institutional Misfits: The GATT, The ICJ and Trade-Environment Disputes" 15 Mich. J. Int'l L. (1994) 1043, 1063, 1111; Lakshman D. Guruswamy "Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes" 7 Minnesota Journal of Global Trade (1998) 287, 312.

[160] See also Abi-Saab, Fragmentation or Unification, supra note 5, at 921; Cesare P.R. Romano "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" 31 N.Y.U.J. Int. L. & Pol. (1999) 709, 723.

[161] In the alternative, international courts and tribunals may be described as a loose system of institutions. Henkin, *Int'l Law*, supra note 83, at 54. However, such characterisation is meaningless for our purposes since no real degree of coherence is required or generated from such a system.

rather a group of elements with undeniably similar characteristics, functioning within a system to which other groups of elements also belong.

Because of the evident link between the availability of a minimally harmonised judiciary and the overall coherence of the legal system, the present state of things also adversely affects the integrity of the normative dimension of international law. International legal norms are at present applied by a decentralised assortment of actors and institutions including states[162]- who often construe the law in different manner,[163] uncoordinated international judicial bodies - lacking in many cases compulsory jurisdiction, IGOs and the domestic courts of different countries. As a result, being essentially an inter-subjective system without central authoritative law-creating and law-applying organs, international law inherently enjoys rather low levels of coherence. While increased adjudication can, in principle, promote the cohesion of the system, since courts may serve as agents for unity (entrusted, *inter alia*, with the task of systemising the law),[164] the proliferation of uncoordinated international courts and tribunals threatens to rather exacerbate the problem, through the introduction of incompatible authoritative statements on what constitutes the law.[165]

IV. Which jurisdiction-regulating regime should govern international courts and tribunals?

Returning now to the research question pertaining to the identification of the model of inter-fora interaction, which should, in turn, influence the choice of jurisdiction-regulating rules that ought to govern the relations between international courts and tribunals, one must reject both the intra-systematic and inter-systematic models.[166] Since international judicial bodies do not currently form a coherent judicial system, a regulatory regime that seeks to eliminate all antinomies arising between

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[162] Koh, supra note 6, at 2631.

[163] Abi-Saab, Cours général, supra note 38, at 225-26.

[164] This is one of the most important roles of judges operating within national legal systems. Dworkin, supra note 12, at 217. But see, Gunther Teubner, *Law as an Autopoietic System* (1993) 106 (the process of the division of law into more and more specific branches and categories undermines its unity). With respect, it would seem that this trend is a side effect of the greater complexity of human activities regulated by law, which requires the promulgation of rules of greater specificity and Courts are faced with the unique challenge of coordinating and harmonising between the various specific branches of the law.

[165] J.G. Merrills, *International Dispute Settlement* (3rd ed., 1998) 310.

[166] *Cf.* Giorgos. Ténékidès "L'exception de litispendance devant les organismes internationaux" XXXVI Revue générale de droit international public (3rd Ser., 1929) 502, 503 ("On ne serait en effet lui appliquer, ni les règles du Droit interne, car la transposition des règles du Droit civil dans le Droit des gens a été condamnée de tout temps, ni celles du Droit international, car il n'y a ni similitude ni analogie entre le cas d'un litige pendant devant deux ou plusieurs juridictions internes, relevant du pays différent et celui d'un litige dont deux ou plusieurs juridictions d'ordre international se trouveraient simultanément saisis").

different independent courts and tribunals, seems to be inappropriate. Indeed, the introduction of strict jurisdiction-regulating norms comparable to those found within domestic legal systems (e.g., rules mandating reference of cases to the court or tribunal most intimately connected with the dispute) without the concurrent adoption of complementary measures of legal harmonisation would not solve the problem of coordinating between the lines of decisions rendered by the various fora. At the same time, strict jurisdiction-regulating rules would seem to unduly curtail the autonomy of the parties to litigation in circumstances where, given the presence of persistent differences between the lines of jurisprudence embraced by competing fora, the freedom to select the litigation forum has special importance.

Likewise, competition between courts from different states, belonging to different legal orders, is not analogous to competition between international courts and tribunals. The fact that all international judicial bodies belong to the same legal system creates stronger pressures in favour of maintaining normative coherence than these encountered in inter-systematic cases. Through authoritative reference to a common system of rules international courts and tribunals take part, wittingly or unwittingly,[167] in the effort to systemise international law. As a result, inconsistent application of a rule of law by two international judicial fora carries far more serious systematic implications than conflicting decisions of the English and French courts (even, regarding the same dispute). Again, simply put, international courts and tribunals pronounce law for a single legal community, while courts of different states pronounce law for different legal communities. Consequently, the rather modest level of coordination of jurisdictional competition found on the inter-state level might not commensurate with the role assumed by international courts and tribunals under international law.

It is therefore contended that a third, middle way must be trodden. Since international courts and tribunals constitute either a very loosely structured system or a group of unorganised elements operating within a larger systematic context, they are probably located somewhere in the middle of the scale between a full-fledged judicial system and an assortment of unrelated judicial bodies having some common features. It is submitted that the degree of jurisdictional regulation of the relations between international courts and tribunals should correlate to these systematic attributes. Hence, the structure of the

present international judiciary supports the introduction of jurisdiction-regulating rules that should strive not only to attain elementary coordination (as is warranted by the inter-systematic model) but also to reach moderate levels of harmonisation, without being overly intrusive. Such a compromise model will eliminate the most troublesome aspects of jurisdictional competition, while preserving some degree of beneficial competition, which may, as will be discussed later on, *inter alia,* create an incentive for courts and tribunals to do better in order to attract new business.

A possible modality for the 'middle way' approach may be found in the jurisdictional relations that exist under domestic legal systems between courts and arbitration tribunals. These two sets of institutions are not perceived as part of a unitary judicial system since there are only limited structural relations between them (courts do not normally have the power to interfere with the substantive holdings of arbitral tribunals and there are few organisational links between these sets of institutions). However, they still operate within the same polity, derive their authority from a common legal system and often apply the same law. Hence, special attention will be accorded in the survey conducted below to norms and practice relating to the jurisdictional competition between such bodies.

4. Should international law encourage rules regulating jurisdictional competition?

In line with modern approaches to international law,[168] legal research should not merely describe positive rules and procedures, but also study values and interests and seek to identify desirable courses in light of which the law should be construed and further developed. Hence, unlike positive or pure legal theories, modern legal doctrines would pose the following question - should international courts and tribunals strive to reach

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[167] Juan José Quintana "The International Court of Justice and the Formulation of General International Law: The Law of Maritime Delimitation as an Example" *The International Court of Justice – Its Future Role after Fifty Years* (A.S. Muller, D. Raic and J.M. Thuràsky eds., 1997) 367, 371-72.

[168] Two theories are particularly relevant to this method of analysis - New International Legal Process and Policy-Oriented Jurisprudence. Abram Chayes, Thomas Ehrlich and Andreas F. Lowenfeld, *International Legal Process: Materials for an Introductory Course* (1968); Harold H. Koh "Transnational Legal Process" 75 Neb. L. Rev. (1996) 181, 188; Mary Ellen O'Connell "New International Legal Process" 93 A.J.I.L. (1999) 334, 337-79; Harold D. Lasswell and Myres S. McDougal, *Jurisprudence for a Free Society and Policy* (1992); Harold D. Lasswell and Abraham Kaplan, *Power and Society: A Framework for Political Inquiry* (1950); W. Michael Reisman and Aaron M. Schreiber, *Jurisprudence: Understanding and Shaping Law* (1987); Rosalyn Higgins, *Problems and Process,* supra note 65, at 5; Higgins, Policy Considerations, supra note 65, at 58-59; Siegfried Wiessner and Andrew R. Willard "Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity" 93 A.J.I.L. (1999) 316, 317-21.

coherence in their operations through jurisdiction-regulating rules? On the basis of this examination, existing rules should be evaluated, construed and deconstructed[169] and new rules should perhaps be developed.

A. The importance of systematic coherence

As effective legal system cannot in the long run tolerate serious inherent inconsistencies.[170] The need for coherence within the legal system, in general, and within the international judiciary, in particular, is supported by values such as legitimacy, credibility, effectiveness and the perceived fairness of international law (i.e., that similar cases will be treated alike).[171] Legal certainty and the process of developing clearer normative standards are also at stake.[172] Although one can identify areas of judicial interaction where predictability and stability are particularly important (e.g., uniformity is arguably more important in international economic relations than in the human rights sphere),[173] it is safe to assert that such differences represent variations in degree and not in the very need for legal harmony.[174]

As will be demonstrated below, jurisdictional competition might compromise each of the important values underlying the need for systematic coherence, and as a result jeopardise the prospects for the long-term success of international law.[175] Hence, it

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[169] This is the unique contribution of the Critical Legal Studies (C.L.S.) or the 'new thinking/new approaches' movement. David Kennedy "When Renewal Repeats: Thinking against the Box" 32 N.Y.U. J. Int'l L. & Pol. (2000) 335, 457-461; Martti Koskenniemi "Letter to the Editors of the Symposium" 93 A.J.I.L. (1999) 351, 358.

[170] Kelsen, *Pure Theory of Law*, supra note 12, at 205; Gilbert Guillaume "The Future of International Judicial Institution" 44 I.C.L.Q. (1995) 848, 862; Laurence R. Helfer and Anne-Marie Slaughter "Toward a Theory of Effective Supranational Adjudication" 107 Yale L.J. (1997) 273, 374-75; Jennings, The ICJ and Judicial Settlement, supra note 6, at 435; van de Kerchove and Ost, supra note 12, at 51.

[171] *President of the World Court Warns of 'Overlapping Jurisdictions' in Proliferation of International Judicial Bodies*, UN Press Release GA/L/3157, 27 Oct. 2000, available at <http://www.pict-pcti.org/news/archive/months2000/october/ICJ.10.27.prolif.html (last visited on 15 Nov. 2000); Abi-Saab, Fragmentation or Unification, supra note 5, at 922; Bhala, Myth about Stare Decisis, supra note 95, at 907, 940; Charney, Impact of the Growth of Int'l Courts and Tribunals, supra note 135, at 699; Charney, 3rd Party Dispute Settlement, supra note 4, at 84; Gottlieb, supra note 23, at 374; Palmeter and Mavroidis, supra note 95, at 402.

[172] Hans Wehberg, *The Problem of an International Court of Justice* (Charles G. Fenwick trans., 1918) 46-47; Abi-Saab, Fragmentation or Unification, supra note 5, at 922; Palmeter and Mavroidis, supra note 95, at 402.

[173] Jackson, Fragmentation or Unification, supra note 5, at 825 (1999). According to Jackson, this landscape is significantly different than that found in the human rights area and in other areas of international relations. Id. at 824-26.

[174] Further, the notion of predictability itself is a relative matter, since there can never be full predictability in a genuine dispute. Robert Y. Jennings "A New Look at the Place of the Adjudication in International Relations Today" *1 Collected Writings* (1998) 450, 485-86.

[175] See e.g., Shigeru Oda "The International Court of Justice from the Bench" 244 Recueil des cours (1993) 9, 145 ("... if the development of the law of the sea were to be separated from the general rules of

would seem that anyone interested in the success of international law should support, in principle, the introduction of coherence-strengthening measures, including jurisdiction-regulating rules.[176]

Hence, one can assert with relative confidence that, as a matter of desirable policy, the coherence of international law, should be strengthened and not undermined.[177] In light of international law's unique and traditional problems of legal certainty and legitimacy, it can be argued that there is a special urgency to work towards improving the coherence of the international legal system, *inter alia,* through the harmonisation of the work of international judicial bodies.[178] Greater coherence can contribute to the reputation and legitimacy of international law,[179] encourage, as a result, better level of compliance with its norms[180] and further strengthen the international polity.[181]

The importance of coherence within a legal system and the unique role played by judicial institutions in its achievement is underlined by the operation of courts belonging to national legal systems, who often compensate for the shortcomings of other branches of government. It is commonplace for national courts, functioning within a hierarchic and coordinated system of judicial bodies, to try to identify, interpret and implement the

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international law and placed under the jurisdiction of a separate judicial authority, this could lead to the *destruction of the very foundation of international law*")(emphasis added).

[176] It should be noted that the more fundamental question - should one support the success of the international legal system, as it is presently construed, has been left unanswered. This is because the question is a meta-legal and philosophical one, which falls beyond the scope of the present study. However, it seems safe to contend that the international community, as any other society, has generally viewed the administration of international law as an important prerequisite for its efficient functioning (despite occasional rifts concerning specific rules and institutions). John A. Perkins "The Changing Foundations of International Law: From State Consent to State Responsibility"15 Boston University International Law Journal (1997) 433, 457-58, 506; Jianming Shen "The Basis of International Law: Why Nations Observe" 17 Dickinson Journal of International Law (1999) 287, 307. This is evidenced, *inter alia,* through the universal acceptance of the rules of international law.
Indeed, the international community has clearly expressed, in the past, a commitment to the progressive development of international law over time, a fact that suggests relative consensus as to the positive utility of having a viable system of international law. See e.g., UN Charter, art. 13(1)(a).

[177] Abi-Saab, Fragmentation or Unification, supra note 5, at 926; Bridge, supra note 128, at 100. See also van de Kerchove and Ost, supra note 12, at 62-63, 94; MacCormick, supra note 13, at 1061.

[178] *South West Africa (Second Phase)*(Ethiopia v. S.A., Liberia v. S.A.) 1966 I.C.J. 6, 240-41 (Dissenting Opinion of Judge Koretsky)("... the principle of immutability , of the consistency of final judicial decisions, which is so important for national courts, is still more important for international courts"); Helfer and Slaughter, supra note 170, at 285; Palmeter and Mavroidis, supra note 95, at 402.

[179] Dworkin, supra note 12, at 217 (lack of legislative or adjudicative integrity threatens the basis of legitimacy of a political community); Franck, *Legitimacy among Nations,* supra note 24, at 26; Hart, supra note 23, at 116; Charney, Is Int'l Law Threatened? supra note 6, at 360; Leila Nadya Sadat and S. Richard Carden "The New International Criminal Court: an Uneasy Revolution", 88 Geo. L.J. (2000) 381, 398.

[180] Helfer and Slaughter, supra note 170, at 319-20.

[181] Helfer and Slaughter, supra note 170, at 367, 370-71.

norms and values of the relevant legal system in a more or less harmonised manner.[182] Furthermore, incidents of antinomy - i.e., conflicting decisions rendered in the context of a single dispute or the emergence of inconsistent lines of jurisprudence, have been, as a rule, promptly dealt with by domestic courts and the challenge they present to the integrity of the system has been eventually eliminated. It should be noted that even civil law jurisdictions, which traditionally rejected the *stare decisis* doctrine, have developed alternative theories,[183] so to protect the legitimate expectation of parties to proceedings that similar cases will be treated similarly.[184]

On the basis of this empirical evidence of universal adherence to the principle of legal coherence, it is submitted that the unity of the judicial system seems to be one of the most important, perhaps indispensable characteristics of a sophisticated legal system,[185] and one of the primary conditions for its success. In other words, one can assert that the more an assortment of judicial bodies will resemble a coherent judicial system, the better are the chances that the overarching legal system will function effectively.

B. Jurisdiction-regulating rules as a method of increasing systematic coherence

It has already been demonstrated that there are close and reciprocal links between the normative and institutional components of international law. The normative integrity of international law depends upon the systemic relations between the international judicial bodies, and the strength of the relations between the various international courts and tribunals depends, *inter alia,* upon the level of cohesion of the common body of norms to which all judicial bodies refer. As a result, evaluation of the type of legal regime that is most suitable for governing the relations between the constituent elements of the international judiciary must derive from contemporary perceptions of international law in general.

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[182] According to Dworkin, this is the 'Herculean' task of the judge. Dworkin, supra note 12, at 239.

[183] For instance, the French Cour de cassation of may intervene in decisions of lower courts of appeals when these courts have rendered decisions inconsistent with earlier case law. Peter Herzog, *Civil Procedure in France* (1967) 437. However, admittedly, the development of quasi-precedental theories has also been justified by virtue of the need to promote judicial economy and not only be reason of the need to preserve systematic coherence. Christian Dadomo and Susan Farran, *The French Legal System* (2nd ed., 1996) 41-42; Bhala, Myth about Stare Decisis, supra note 95, at 938.

[184] L. Neville Brown and Francis G. Jacobs *The Court of Justice of the European Communities* (3rd ed., 1989) 311. The end result has been that the traditional differences between common law and civil law courts with regard to the attribution of persuasive weight to judicial precedents have been largely eroded, and all domestic legal systems today apply legal measures designed to harmonise judicial decisions. John H. Merryman *The Civil Law Tradition* (2nd ed., 1985) 47; Bhala, Myth about Stare Decisis, supra note 95, at 910-14.

[185] Charney, 3rd Party Dispute Settlement, supra note 4, at 84; Brigitte Stern "Concluding Remarks" 9 A.S.I.L. Bulletin (1995) 49, 52.

Keeping in mind the need to promote the systematic coherence of international law, one ought to look for ways in which the international judiciary can be reformed so to reduce the number and frequency of inconsistencies between the decisions it renders. Since hierarchical reorganisation of the existing international courts and tribunals, or reallocation of the current division of labour between the different jurisdictions is, at present, an unrealistic vision, the main viable alternatives for increasing systematic coherence through the international judiciary are to introduce stronger jurisdiction-regulating norms, to improve the organisational links between international judicial bodies and to encourage jurisprudential harmonisation through reliance on decisions of other fora.[186] Thus, in view of the need to promote the coherence of international law, the introduction of jurisdiction-regulating rules capable of preventing multiple proceedings that might result in inconsistent decisions, must be deemed commendable. Such measures, when combined with improved level of normative harmony, could also eventually transform the current assortment of international courts and tribunals into one coherent judicial system.

In addition, as will be elaborated below, jurisdictional competition can raise a host of other serious practical difficulties, essentially involving notions of procedural fairness and efficiency, both for the individual parties to the dispute at hand and for the involved courts and tribunals. The introduction of jurisdiction-regulation rules, which can mitigate these problems, may be supported from this direction as well. The norms governing jurisdictional competition should then be construed in light of these declared objects and ought to be developed to satisfy the policies of greater coherence, fairness and effectiveness.[187]

Of course, other values might also come to play and the need for coherence, procedural fairness and efficiency promoted by jurisdiction-regulating rules must to be balanced against them. Most notably, judicial consistency, an important element of legal coherence, might conflict with the requirements of justice (e.g., the need to avoid an

[186] See infra Chapter 7.

[187] The merger of *lex lata* and *lex ferenda* as a method for legal decision making is advocated by scholars of the Policy-Jurisprudence school. Higgins, Problems and Process, supra note 65, at 10. This stance is not shared by the present author, who believes that it is crucial for the future of international lawmaking that the two concepts will not be interchangeably used. However, of course, one may use teleological method of interpretation to some degree. For support, see MacCormick, supra note 13, at 1064-65.

previous unjust ruling)[188] and neat division of labour between courts might conflict with notions of party autonomy (e.g., the need to control the conduct of the proceedings).[189] Similarly, there might be cases where the plurality of international courts and tribunals, each free to pursue its own course, might promote a beneficial process of judicial dialogue (sometimes referred to as 'judicial cross-fertilisation' or 'percolation').[190] Throughout this dialogue different idea will be exchanged and existing rules will be re-examined, culminating, hopefully, in the emergence of the best possible norm.[191] This process of cross-fertilisation might be in some way desirable even with regard to a single dispute.[192] However, it is submitted that even where forum selection or multiple proceedings are justifiable, the systematic values of coherence, procedural fairness and efficiency should always be taken into consideration.

Clearly, the different competing values and interests must be balanced against each other. However, a balancing formula cannot be drafted in abstract, through a clear-cut but arbitrary sweeping rule of precedence. Rather, balancing ought to be made on a case-to-case basis, or at least with respect to specific categories of jurisdictional competition. The next Chapter will therefore address specific balance formulas between the rights and interests compromised by different potential jurisdiction-regulating rules and will offer some insights on the degree to which the existing rules accommodate the competing concerns, and what new rules, if any, are needed.

C. An alternative approach - inconsistencies as a catalyst for legal development

An alternative approach to the one just described might view the existence of short-term conflicts as beneficial to the development of international law in the long run. According to this position, legal inconsistencies bring contested questions to the international front stage and encourage public and judicial debate over sensitive issues, which might even

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[188] Dworkin, supra note 12, at 218, 404. Dworkin also points out that the adjudicative branch must sometimes implement legislation, which in itself is inconsistent with central values of the legal system. Hence, legal coherence sometimes is frustrated by democratic principles (separation of branches of government and legislative supremacy). Id. at 405-06.

[189] See infra Chapter 4, at p. 145.

[190] Charney, Impact of the Growth of Int'l Courts and Tribunal, supra note 135, at 700; Charney, 3rd Party Dispute Settlement, supra note 4, at 82-83; Theodor Meron "Norm Making and Supervision in International Human Rights: Reflections on Institutional Order" 76 A.J.I.L. (1982) 754, 776; Petersmann, Constitutionalizing the UN, supra note 74, at 778; Spielmann, supra note 110, at 779; Treves, Recent Trends, supra note 1, at 436.

[191] Charney, 3rd Party Dispute Settlement, supra note 4, at 82.

[192] This seems to be the underlying rationale behind the French rule that the decisions of the highest court of the land, the Court of Cassation, when exercising its appellate competence, do not bind lower courts who receive the case on remand (except where the cases has been decided by the Court of Cassation for the second time). Charney, 3rd Party Dispute Settlement, supra note 4, at 83.

spur legislation on the matter.[193] They also engage courts and tribunal in the process of cross-fertilisation and might compel judicial bodies to improve their methods of operation and quality of work in order to attract more business.[194]

As to the need to improve systematic coherence by way of increased judicial harmonisation, the alternative view might adopt a 'progress by catastrophe' line of reasoning. Thus, it could be argued that the problem of lack of harmonisation between various international fora would only be addressed by the international community once a major jurisdictional conflict has erupted. Hence, deterioration of judicial relations, in the short run, might inspire, in the long run, a radical solution to the problem of inter-fora relations, such as the reallocation of competencies or the introduction of clearer jurisdiction-regulating standards, which will take care of the problem of jurisdictional competition once and for all.

An historical example supposedly supporting this point of view is found in the gradual development of the English legal system in the previous millennium. In England, panoply of courts had coexisted side by side for many centuries.[195] Although the jurisdictions of these courts often overlapped, they had applied different procedures and different substantive rules.[196] It has been argued that competition over judicial business between the different courts has led to procedural improvement and to cross-fertilisation on substantive matters, which resulted in improvements in the law of England.[197]

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[193] Treves, Conflicts between ITLOS and the ICJ, supra note 7, at 810.

[194] Charney, Implications of the 1982 Convention, supra note 2, at 34; Charney, 3rd Party Dispute Settlement, supra note 4, at 87; Guruswamy, supra note 159, at 297.

[195] E.g., local and national courts, crown and common courts, courts of law and courts of equity, courts of different crown divisions (Chancery, Exchequer, etc.), courts for domestic and foreign affairs and secular and religious courts. See generally, John H. Baker, *An Introduction to English Legal History* (1990) 15-154; Radcliffe and Cross, *The English Legal System* (G.J. Hand and D.J. Bentley, eds., 6th ed., 1977) 23-24, 58-60, 122-23

[196] For instance, land ownership claims could be heard in the 18th century before Common Pleas Courts, the King's Bench and the Exchequer of Pleas (presented in the last two cases as a claim for ejectment). While litigation before courts of Common Pleas should have commenced upon the service of writs, which limited the scope of available remedies, other, more flexible techniques such as bills, actions on the case and subpoenas were employed by other courts. Baker, supra note 195, at 45-60. Another major area of overlap had been between common law courts and the Court of Chancery, where equity was applied. Radcliffe and Cross, supra note 195, at 132. Most remarkably, courts of equity could decide cases in variation from common law, after the same case had been decided by an ordinary common law court. Baker, supra, at 125.

[197] For instance, lack of business before the King's Bench had led in the 15th century to procedural innovations such as fictitious use of writs to entertain jurisdiction. Similarly, decline in the attractiveness of the courts of the Chancery and the Common Pleas has led to organisational reforms in the first half of the 19th century. Baker, supra note 195, at 60, 131; Radcliffe and Cross, supra note 195, at 155-56, 163-68.

It can be alleged that the anarchic state of the institutions comprising the international legal system and the growing competition between different international courts and tribunals might also result in procedural reforms and development of equitable and efficient legal rules, as had happened in England. According to this view, jurisdictional competition would encourage the ICJ, for example, to innovate its rules of procedures, in order to escape from being marginalized by competing, and more flexible fora.[198] Similarly, with respect to normative cross fertilisation, it could be argued that the different holdings of the ICJ in the *Nicaragua* case and the ICTY Appeals Chamber in the *Tadic* case will promote dialogue and brainstorming on the question of state responsibility over acts committed by paramilitary bodies, eventually resulting in the adoption of the best possible rule, perhaps in the framework of an international treaty. A jurisdiction-regulating regime providing for rigid allocation of competences would arguably take away the incentive for courts and tribunals to do better. In the same vein, an excessively rigid rule of judicial harmonisation, (e.g., according *stare decisis* to first in time judgments), might sterilise potential jurisprudential discourse and entrench conservative positions.[199]

Appealing as it is, the position that inconsistencies ought to be encouraged is not shared by the present author. As indicated above, legal coherence and harmony are only relative values, which should be balanced against other values such as justice, efficiency and party autonomy, sometimes, on a case-to-case basis. Thus, it is acknowledged that general policy considerations might justify the preservation of a healthy degree of inter-fora competition in order to encourage procedural improvements. Similarly, considerations of justice, the forum's public policies, the particular needs of the parties to litigation and the specific circumstances of the case at hand might justify divergences between the jurisprudence of different courts and tribunals. Thus, there clearly are cases where an unwarranted result reached by one judicial body must not be followed by a subsequent court or tribunal,[200] and the *Tadic* case might be one of these exceptional instances. Since the interest of judicial harmonisation ought not to prevail in all circumstances, ample room will be left for the promotion of other important interests of the international community.

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[198] Charney, Implications of Expanding Int'l Dispute Settlement, supra note 6, at 71-72.
[199] Raj Bhala "The Precedent Setters: *De Facto Stare Decisis* in WTO Adjudication" 9 Journal of Transnational Law and Policy (1999) 1, 130.
[200] Helfer and Slaughter, supra note 170, at 387.

Still, in all cases, courts and tribunals should accord due consideration to the interests of coherence and harmony. In other words, they ought to at least consider the possibility of following the case law of other judicial fora relating to the questions before them[201] (whether it pertains to findings of fact or law).[202]

Further, the weight accorded to such exercise of 'comity' might change in accordance with the seriousness of the potential jurisdictional conflict. Arguably, the weight of the argument in favour of judicial harmony should be overwhelming where the same matter arises between the same parties and has been referred to multiple adjudication before more than one judicial forum. In these circumstances, if conflicting judicial decisions would be rendered, the parties might be placed in an impossible situation. Thus, there is a special need in this case to apply strict jurisdiction-regulating measures. In the same vein, the weight accorded to consistency in litigation before the same body should be greater than in situations where the dispute is adjudicated by different fora.[203] This is because a high degree of uncertainty as to the direction of the case law of a particular court or tribunal, might undermine that forum's credibility, discourage from its utilisation and upset the legitimate expectations of potential litigants.[204]

But even when a similar question arises between different parties and before different fora it is sensible, as a matter of judicial policy (also supported by considerations of judicial economy), to expect that one body will, at least, accord due regard to a decision already reached by its counterpart. This means that case law of competing jurisdictions would be admissible and carry significant, though certainly not absolute, persuasive

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[201] See e.g., *EEC- Restrictions on Imports of Desert Apples,* GATT B.I.S.D. (36th Supp.) at 93, 123-24 (1989)(the Panel will take into consideration the legitimate expectation of the parties that it would follow a previous decision given in similar circumstances, although it is not bound to do so). See also Charney, Impact of the Growth of Int'l Courts and Tribunals, supra note 135, at 707-08; Charney, 3rd Party Dispute Settlement, supra note 4, at 73; Helfer, supra note 20, at 350. This might imply in some cases the allocation of the burden of persuasion on the party arguing for deviating from an established precedent. Palmeter and Mavroidis, supra note 95, at 402-03.

[202] Palmeter and Mavroidis, supra note 95, at 405.

[203] Shahabuddeen, supra note 139, at 3 (the ICJ will not lightly exercise that power to deviate from its past decisions); Palmeter and Mavroidis, supra note 95, at 401-02 (WTO panels should follow their own precedents, unless there are good reasons to do otherwise); Joined cases C-267/95 and C-268/95, *Merck & Co. Inc.* v. *Primecrown Ltd* [1996] E.C.R. I-6285, 6343-45 (Opinion of Advocate-General Fennelly)(the Court is not formally bound to follow its own decisions but will deviate from them only on the basis of 'strong reasons'); Carlton K. Allen, *Law in the Making* (6th ed., 1958) 280-81.

[204] *Japan – Taxes on Alcoholic Beverages,* WTO Doc. WT/DS8/AB/R (1996), at para. 5.4 (Report of the AB)("[adopted panel reports] create legitimate expectations among WTO members and, therefore, should be taken into account where they are relevant to any dispute").

authority.[205] Such refutable presumption implies that jurisprudential divergence ought to be tolerated only when justified by good reasons.[206] In fact, some courts and tribunals have already pursued such a course.[207]

As to the 'progress through catastrophe' argument, according to which a continued state of anarchy would contribute to the development of international law in the same manner that it contributed to the development of English law, one could say that this is a rather awkward argument. Why should the fact that the English legal system had suffered for many centuries from 'growing pains' in the form of competing uncoordinated jurisdictions[208] justify the conclusion that international law, which has encountered a similar phenomenon in the last 80 years, should continue to endure similar 'pain and suffering' in centuries to come? If English law has eventually opted for uniformity and cohesion, by way of reforming the court system throughout the 19th century,[209] why should international law not adopt the same solution now, thereby avoiding the adverse consequences of future jurisdictional conflicts?[210] While uninhibited competition might create certain unexpected benefits, there seems no reason why not to attempt and create a better legal regime, which removes the problems associated with such competition, while preserving some of the benefits of competition.

Further, it could be maintained that the unique predicaments of international law merit greater urgency in tackling jurisdictional problems than had been the case in medieval England. The absence of an international central legislator and effective executive branch means not only that the international legal system enjoys poor levels of coherence to begin with, but also that the enforcement of judicial decisions depends, to a considerable extent, on the good will of the parties. The credibility of the international

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[205] Gerald Fitzmaurice "Some Problems regarding the Formal Sources of International Law" *Symbolae Verzijl* (1958) 172. *Cf.* House of Lords, Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234.
[206] Helfer and Slaughter, supra note 170, at 377.
[207] See e.g., Comm. 470/1991, *Kindler v. Canada,* UN GAOR, 48th Sess. Supp. no. 40, Annex XII, at 138, 156, UN Doc. A/48/40 (Report of the HRC, 1993)(the HRC showed 'careful regard' to a decision of the ECHR). There are also various decisions of the I/A HR Commission that rely upon decisions of other human rights procedures. See e.g., Case 11.245, *Gimenez v. Argentina,* Report No. 12/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 33, at para. 75-103 (1996)(extensive reliance on ECHR cases); Case 11.430, *Rodríguez v. Mexico*, Report No. 43/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 485, at para. 106 (1997)(reliance on an ECHR case).
[208] It is undeniable that competition between various English courts gave rise to numerous difficulties. See e.g., Radcliffe and Cross, supra note 195, at 23.
[209] See Uniformity of Process Act, 1832; Judicature Act, 1873.
[210] Antonio Perez "WTO and UN Law: Institutional Comity in National Security" 23 Yale J. Int'l L. (1998) 362 ("There is no reason to think choice of law brinkmanship will not lead to protracted institutional conflicts...").

judicial process is therefore one of its primary assets and a central incentive for compliance with international judgments. Conflicting legal pronunciations might threaten to undermine confidence in international judicial bodies and exacerbate the adoption of auto-interpretations as to the state of the law.[211]

Finally, it should be kept in mind that 'progress through catastrophe' might imply progress, but also incur the risk of a disabling catastrophic outcome, from which international law might not be able to bounce back from for a very long time.

5. Interim conclusions

The professed observations offered so far suggest that international law constitutes a system of law. Thus, disputes of international character arising under the various branches of international law or the different specific legal regimes (which are in fact international sub-systems) can also be described as disputes under international law. This means that the so called 'self-contained' international regimes that resort from time to time to international law standards, such as the WTO (and arguably, the EC), are not really 'self-contained' and form part of the bigger picture of international law. Consequently, whenever international disputes are amenable to the jurisdiction of more than one international judicial procedure, an overlap may be identified, at least to the degree that questions of general international law are involved (provided that the case involves the 'same parties' and 'same issues'). It has also been suggested that courts and tribunals should take into consideration all rules of international law applicable to the dispute at hand, even if originating from other areas of law, unless specific norms in their constitutive instruments provide otherwise.

While international law is arguably a legal system, it has been shown that, at present, there is no real international judicial system, comparable to those found under domestic legal systems. As a result, rules harmonising domestic jurisdictional competition (the 'intra-systematic model'), which are premised upon the existence of a coherent system of adjudicative institutions, are *prima facie* inapplicable to international courts and tribunals where one finds looser forms of jurisdictional coordination and harmonisation. At the same time, the relations between international courts and tribunals are different than those found between the courts of different states (the 'inter-systematic model').

[211] Charney, 3rd Party Dispute Settlement, supra note 4, at 81; Guillaume, supra note 170, at 862; John Jackson, *The World Trade Organization* (1998) 109.

International judicial bodies belong to a single legal system and are responsible for promoting its coherence as much as possible. No similar considerations can be found to apply in relation to the putative need of regulating the jurisdictions of different national courts belonging to different legal systems.

Hence, the theoretical analysis supports the view that the present state of international law justifies the adoption of a halfway regime of jurisdictional regulation between different international courts and tribunals, comparable to that found in the relations between courts and arbitral tribunals operating within the same legal system. Such a regime would reflect the reality in which there are strong normative links between the various judicial and quasi-judicial bodies (i.e., they all refer, at some level, to a common body of norms), but only sporadic structural and jurisdictional links between the different fora. It is submitted that the nature of the international judiciary requires a jurisdictional regime which seeks to reduce, as much as it can, challenges to the coherence of international law (e.g., by preventing the existence of conflicting judicial pronunciations), but is not necessarily expected to achieve full coordination on the institutional level (e.g., by tolerating some forum shopping tactics that do not lead to conflicting judgments). In fact, allowing for the persistence of a certain level of jurisdictional competition should not be deemed to constitute a significant problem and might even be viewed as beneficial in some ways.

But in the future, given the need to strengthen the coherence of the international legal system, new methods ought to be explored in order to further unify the international judiciary and alleviate procedural problems associated with jurisdictional overlaps, *inter alia*, through introducing additional jurisdiction-regulating rules capable of providing greater level of coordination and harmonisation to the relations between the various international courts and tribunals. It is submitted that the combined effect of more organised jurisdictional inter-fora relations and a higher degree of jurisprudential consistency could transform international courts and tribunals into a judicial system, enjoying meaningful levels of inner-coherence, and result in the strengthening of the unity of international law.

Chapter Four:

Jurisdiction-regulating norms governing competition involving domestic courts: should they be introduced into international law?

This study will now proceed to examine specific rules designed to regulate particular jurisdictional conflicts. Since historically such rules had been first developed under domestic law and have undergone there considerable elaboration, it seems prudent to first introduce these rules and discuss the rationales for their creation, in the context of the domestic legal environment. Following this, Part III will deal, at length, with jurisdiction-regulating norms governing competition between international courts and tribunals, as developed by international law.

As will be shown, there are a few, if any, international standards that govern inter-fora competition involving domestic courts. As a result, instances of jurisdictional competition are subject, as a rule, to the vagaries of domestic legal system, in accordance with their idiosyncratic particularities[212]. However, some general trends and common principles, which might even qualify as general principles of law under article 38(1)(c) to the ICJ Statute,[213] may be identified. Furthermore, special attention will be given to those few international standards that have emerged in order to regulate cross-boundary jurisdictional competition (most notably, treaties such as the Brussels Convention)[214] and the to competition between international and national tribunals (most notably, the Statutes of the *ad hoc* International Criminal Tribunals).[215] This is because such standards may reflect broad international consensus as to what constitute

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[212] Jennings, Enforcement of Int'l Obligations, supra note 9, at 503 ("... there is usually no such thing as an international private international law").

[213] ICJ Statute, art. 38(1)(c)("[The Court shall apply] the general principles of law recognised by civilised nations"). See Brownlie, *Principles of Int'l Law,* supra note 14, at 15-18; Shaw, supra note 24, at 77-82; Charney, Universal Int'l Law, supra note 24, at 535-36. For the purposes of the present study it is understood that general principle of law are rules and principles found to operate in virtually all domestic legal systems with potential applicability in analogous circumstances under international law (e.g., good faith, *res judicata*, duty to compensate for damage, etc.).

[214] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 Sept. 1968, art. 16, 1972 O.J. (L 299) 32, 29 I.L.M. (1990) 1413 (updated version)[hereinafter 'Brussels Convention'].

[215] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res. 827, 25 May 1993, art. 5, U.N. Doc. S/RES/827 (1993), 32 I.L.M. (1993) 1203 [hereinafter 'ICTY Statute']; Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 Jan. 1994 and 31 Dec. 1994, S.C. Res. 955, 8 Nov. 1994, art. 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. (1994) 1598 [hereinafter 'ICTR Statute'].

just and effective competition-regulating measures, divorced from the particular sensitivities of domestic legal systems. Hence, international standards on competition may be more suitable for transposition to the relations between international fora than comparable domestic standards.

Despite conceptual and other differences between international law and national laws, the ways in which domestic systems have addressed problems associated with concurrent jurisdiction can inspire the international system in moulding its own jurisdiction-regulating regime.[216] Hence, after analysing domestic jurisdiction-regulating norms, the question of the appropriateness of regulating similar jurisdictional interactions between international courts and tribunals will be addressed.

1. Regulation of jurisdictional problems associated with forum selection

A. Unilateral forum selection

The process throughout which one of the parties to a dispute attempts to bring a claim before the forum most advantageous to him or her is normally referred to as 'forum shopping'.[217] Forum shopping has been a familiar concept in many domestic law systems and in private international law, for a long time now. Following the recent increase in the number of international courts and tribunals, parties to some international disputes may also engage in forum shopping and determine, by way of unilateral or joint action, the identity of the forum before which the dispute will be heard. The longer experience of domestic systems in addressing this phenomenon might help to evaluate whether regulation of international forum shopping is needed.

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[216] There are some scholars that question the legitimacy of extrapolating domestic law jurisdiction-regulating norms into the international sphere. J.H.W. Virzijl, *The Jurisprudence of the World Court* (1965) 24. But most jurists are of a different opinion. Dan Ciobanu "Litispendence between the International Court of Justice and the Political Organs of the United Nations" 1 *The Future of the International Court of Justice* (Leo Gross, ed., 1976) 209, 215; Megalos A. Caloyanni, 38 Recueil des cours (1931) 651, 684; Salvatore Messina "Les tribunaux mixtes et les rapports interjuridictionnels en Egypte" 52 Recueil des cours (1932) 363, 470-71.

[217] *Black's Law Dictionary* (7th ed., 1999) 666 ("The practice of choosing the most favourable jurisdiction or court in which a claim might be heard"); *Miles v. Illinois Central Railroad,* 315 U.S. 698, 706 (1942); *Covey Gas & Oil Co. v. Checketts,* 187 F. 2d 561, 563 (9th Cir. 1951); *Chaplin v. Boys,* [1971] A.C. 356, 406.

I. Forum shopping in private law

A paragon of domestic forum shopping, in the private law context, can be found in the American legal system,[218] where parties engaged in widespread commercial activity can be sued before the courts of several states, or before Federal courts,[219] under different laws. This state of things has been conducive for litigation tactics employed by parties to litigation designed to channel proceedings to a favourable forum,[220] for a variety of reasons.[221]

A particular type of forum shopping can be found in international commercial and other disputes, where parties can choose to pursue litigation before one out of several national jurisdictions.[222] In these cross-boundary situations, the incentives for forum shopping are even greater than in domestic forum shopping cases[223] because of the greater differences between national laws and procedures, the longer distances between the competing courts and the possible bias against the foreign party to litigation. So far, the most prominent cross-boundary forum shopping cases have involved attempts to seize the jurisdiction of U.S. courts in tort cases arising out of events that took place outside its territory.[224]

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[218] Gary B. Born, *International Civil Litigation in United States Courts* (3rd ed., 1996) 68; *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (1961); *Burger King Corp., v. Rudzewicz,* 471 U.S. 462 (1985).

[219] To a large extent this is due to the American diversity rule, permitting parties coming from different U.S. states (or foreign countries) to insist upon litigation before Federal courts; U.S. Constitution, art. III, § 2.

[220] See e.g., *Ferens v. John Deere, Inc.,* 494 U.S. 516 (1990); *World-Wide Volkswagen v. Woodson,* 444 U.S. 286 (1980). Forum shopping was cynically described by one writer as "a national legal pastime". Skelly Wright "The Federal Courts and the Quality of State Law" 13 Wayne L. Rev. (1967) 317, 333.

[221] Considerations applied by prospective forum shoppers may include geographic convenience, the wish to create bargaining leverage against the other party, by compelling him or her to litigate in an inconvenient forum, hospitability of the substantive or procedural law of the selected forum, perceived biases of the judge or jury towards certain categories of parties (e.g., parties who enjoy 'home court advantage' or 'hometown justice', product liability plaintiffs, members of minority groups etc.) or the size of the court's docket and its reputation for efficiency (both of which could affect the speed of justice). George D. Brown "The Ideologies of Forum Shopping - Why Doesn't a Conservative Court Protect Defendants?" 71 N.C.L. Rev. (1993) 649, 653-54; Donald C. Dowing "Forum Shopping and Other Reflections on Litigation Involving U.S. and European Businesses" 7 Pace International Law Review (1995) 465, 470; Friedrich K. Juenger "Forum Shopping, Domestic and International" 63 Tul. L. Rev. (1989) 553, 555, 558-59; Note "Forum Shopping Reconsidered", 103 Harv. L. Rev. (1990) 1677, 1678.

[222] This is explained, in part, by virtue of the expansive nature of some domestic jurisdiction statutes. See e.g., French Civil Code, art. 14 (entrusting French courts with jurisdiction over all contract claims brought by French parties) or Z.P.O. § 23 (entrusting German courts with jurisdiction over all owners of property located in Germany).

[223] The main rationales for selecting a particular national forum in cross-boundary forum shopping include, *inter alia,* the substantive and procedural laws applicable by the selected forum, its reputation for efficacy, fairness and quality of judgments, the familiarity of the plaintiffs with the forum's method of operation and the balance of conveniences to the parties. See e.g., *The Atlantic Star,* [1972] 3 ALL E.R. 705, 709 (C.A.)(Lord Denning MR).

[224] See e.g., *Laker Airways Ltd. v. Pan American World Airways,* 577 F. Supp. 348 (D.D.C. 1983), 559 F. Supp. 1124 (D.D.C. 1983), 568 F. Supp. 84 (D.D.C. 1983), 604 F. Supp. 280 (D.D.C. 1984); *Laker*

II. Policy arguments for and against forum shopping

The traditional attitude of jurists towards forum shopping has been one of hostility and many forum-shopping-associated evils have been identified.[225] First and foremost, forum shopping has been perceived as a threat to legal certainty, as it deprives parties of foreknowledge as to which set of substantive and procedural laws would eventually govern their conduct and thus unduly burdens their conduct. This state of things has been perceived to work primarily in favour of plaintiffs whose ability to forum shop is typically greater than that of respondents. Consequently, it has been perceived that respondents sued in a forum that applies a body of laws unfamiliar to them have been unfairly treated.[226] It has also been suggested that the risk of forum shopping might compel potential respondents to invest, in advance, extra costs in familiarising themselves with a multitude of potentially applicable legal standards, thus raising the 'transaction costs' of engaging in cross-jurisdiction commercial activities.[227]

Second, it has been professed that forum shopping might lead to excessive litigation costs, since the removal of trials to distant fora might oblige the parties to incur unnecessary travel and legal costs. The moving away of litigation from the 'natural surroundings' of the dispute might also make the production of witnesses and

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Airways Ltd. v. Sabena, 731 F.2d 909 (1984); *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408 (1984); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India,* 809 F.2d 195 (2d Cir. 1987); Andreas Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (1996) 52-57.
These cases have led Lord Denning to comment that "[a]s a moth is drawn to the light, so is a litigant drawn to the United States". *Smith Kline & French Labs. v. Bloch* [1983] 2 All E.R. 72, 74 (C.A.). Naturally, cross-boundary forum shopping has also been frequently practiced with relation to non-U.S. jurisdictions, such as England. See e.g., *Du Pont de Nemours & Co. v. I.C. Agnew,* [1988] 2 Lloyd's Rep. 240 (C.A.); *The Atlantic Star,* [1973] 2 All E.R. 175 (H.L.); Order of Nov. 12, 1985, Oberlandesgericht Frankfurt, 5 Praxis des Internationalen Privat und Verfahrensrechts 297 (1986)(international forum shopping before German Courts); Case 21/76, *Handelskwekerji G.J. Bier B.V. v. Mines de Potasse d'Alsace,* [1979] E.C.R. 1735 (discussing international forum shopping before Dutch courts).

[225] *Atlantic Star* [1973] 2 All E.R. at 181 (Lord Reid)("There have been many recent criticisms of 'forum shopping; and I regard it as undesirable") *Amchem Products Inc. v. British Columbia (Workers' Compensation Board),* 102 D.L.R. (4th) 96, 104 (Supreme Court of Canada, 1993)([new developments do not mean] that "forum shopping" is now to be encouraged); *Hanna v. Plummer,* 380 U.S. 460, 468 (1965); *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143, 154 (1987); *Torres v. S.S. Rosario,* 125 F. Supp. 496 (D.C.N.Y. 1954)(Federal change of venue clause is necessary to remedy the 'evils of forum shopping'); *Schultz v. Boy Scouts of America Inc.,* 480 N.E.2d 679, 686-87 (1985); *Neumeier v. Keuhner,* 31 N.Y.2d 121, 129, 286 N.E.2d 454, 458 (1972); *Brinco Mining Ltd. v. Federal Insurance Co.,* 552 F. Supp. 1233, 1242 (D.D.C. 1982)(referring to a "well-founded aversion to forum shopping on an international scale"); Brown, Ideologies of Forum Shopping, supra note 221, at 666-67.

[226] In addition, the U.S. Supreme Court held that changes in the applicable law caused by forum shopping may be viewed as a kind of unjustified discrimination between plaintiffs. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 74-76 (1938).

[227] Michael H. Gottesman "Draining the Dismal Swamp: the Case for Federal Choice of Law Statutes" 80 Geo. L.J. (1991) 1, 13.

documents more costly (if not impossible).[228] The expenditure associated with forum shopping could be particularly onerous if it results in procedural battles, sometimes in more than one jurisdiction, over where to litigate the merits of the dispute.[229]

Third, in the era of congested court dockets, leaving the choice of forum solely in the hands of the plaintiff (who might consciously select an improper one)[230] might not bring about optimal results from a systematic point of view (which favours an expedient allocation of cases between competent courts). It has also been sometimes argued that the jurisdiction most connected with the dispute has an independent interest in adjudicating the case, and that this public interest merits protection. Correspondingly, a forum only remotely connected to the dispute might be justifiably reluctant to invest scarce judicial resources (including, in some legal systems, imposition of jury service) in order to facilitate its resolution.[231]

Finally, the proliferation of lawsuits, exacerbated by forum shopping, has been regarded by some as a deleterious social phenomenon by itself.[232] On account of those and other weighty reasons,[233] forum shopping has often been viewed as a negative phenomenon, which the courts should resist.[234]

However, the view on the offensive nature of forum shopping is far from uniform.[235] It has been observed that accounts of the hardship caused to respondents by forum

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[228] Brown, Ideologies of Forum Shopping, supra note 221, at 667. See e.g. *Kepler v. ITT Sheraton Corp.*, 860 F. Supp. 393 (E.D. Mich. 1994); *Animation Station v. Chicago Bulls, LP,* 992 F. Supp. 382 (S.D.N.Y. 1998).

[229] See *South Carolina Insurance Co. v. Assurantie Maatschappij 'de Zeven Provincien' NV* [1985] 2 All E.R. 1046, 1052 (C.A.)("Litigation is expensive enough as it is, and if a party fighting a case in this country has to face the prospect of fighting procedural battles in whatever other jurisdiction his opponent may find a procedural advantage, it may impose intolerable burdens, and encourage the worst and most oppressive form of forum shopping").

[230] This might be the case if the plaintiff knowingly brought proceedings before a crowded court in order to pre-empt a counter-claim by the respondent before a more expeditious forum.

[231] *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 509 (1947).

[232] Walter K. Olson, *The Litigation Explosion - What Happened when America Unleashed the Lawsuit* (1991) 2.

[233] An additional concern, explaining some of the objections to forum shopping is the notion that this practice undermines the myth of equality of the law. If manipulative forum selection determines the outcome of the case, than the legal process in each competing forum might be viewed as inherently biased towards one of the parties. Furthermore, forum shopping emphasises some embarrassing inconsistencies of the law. Note, supra note 221, at 1684.

[234] Brown, Ideologies of Forum Shopping, supra note 221, at 668. *Oceanic Sun Line Special Shipping Co. Inc. v. Fay,* 165 C.L.R. 197, 253 (1988)(Opinion of Deane J.).

[235] *Atlantic Star* [1973] 2 All E.R. at 188 (Lord Morris of Borth-Y-Gest)("It is natural and inevitable and, indeed, is an inherent feature of the recognised system that a plaintiff will choose the place where he considers that his legitimate interests will be best advanced"); *Goad v. Celotex Corp.,* 831 F. 2d 508, 512 n.12 (4th Cir. 1987)("There is nothing inherently evil about forum shopping"); Theodore Eisenberg and

shopping were often exaggerated. This is because large multi-jurisdictional actors (who are typical respondents in forum shopping cases) are well equipped to adjust their conduct to the highest level of care and to defend themselves before a variety of courts of different jurisdictions.[236] In addition, many jurists now regard the notion that there exists a 'natural forum' for dispute settlement as antiquated.[237] Hence, plaintiff's litigation tactics may be perceived as a mere corrective measure intended to offset undue advantages to the respondent in another competent forum.[238] Moreover, the plaintiff's freedom to choose a forum should, according to some, be respected as part of his or her individual autonomy.[239] According to this line of argument, shopping for justice should not be considered more reprehensible then shopping for any other type of merchandise.[240] Finally, since lawsuits serve to promote the rule of law, forum shopping has been viewed by some as an acceptable price to pay for increased enforcement of legal norms.[241]

The actual practice of courts, especially in the U.S. and in England, in cases where forum shopping was exercised at the domestic level also evidences ambivalence towards the phenomenon. The U.S. Supreme Court has adopted a clear stance disfavouring attempts to transfer cases from state to federal courts,[242] but, at the same time, has assumed a 'hands off' position in respect of state-to-state forum shopping.[243] Similarly, in England, there is no clear jurisprudence on the matter and courts have expressed opinions for and against forum shopping.[244]

Moreover, there are some jurisdictions where forum shopping is usually permitted. In Australia, forum shopping has been generally tolerated and has often been exercised

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Lynn M. LoPucki "Shopping for Judges: an Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations" 84 Cornell L. Rev. (1999) 967, 971.

[236] Allan R. Stein "Erie and Court Access" 1 Yale L. J. (1991) 1935, 1951; Brown, Ideologies of Forum Shopping, supra note 221, at 669; Note, supra note 221, at 1691-92.

[237] *World-Wide Volkswagen*, 444 U.S. at 301 (1980)(Brennan J., dissenting).

[238] Kevin M. Clermont and Theodore Eisenberg "Exorcising the Evil of Forum Shopping" 80 Cornell L. Rev. (1995) 1507, 1511-12; Louise Weinberg "Against Comity" 80 Geo. L.J. (1991) 53, 71; Note, supra note 221, at 1688-89.

[239] Judith Resnik "Tiers" 57 S. Cal. L. Rev. (1984) 837, 847.

[240] Neil Andrews, *Principles of Civil Procedure* (1994) 101.

[241] Brown, Ideologies of Forum Shopping, supra note 221, at 671-72; Weinberg, supra note 238, at 70 (plaintiffs are 'private attorney generals'); Note, supra note 221, at 1692-93.

[242] *Erie,* 304 U.S. 64; *Younger v. Harris*, 401 U.S. 37 (1971); *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980).

[243] *Allstate Insurance Co. v. Hague,* 449 U.S. 302 (1981); *Keeton v. Hustler Magazine,* 465 U.S. 770, 779 (1984); *Sun Oil Co. v. Wortman,* 486 U.S. 717 (1988).

between different state courts[245] and between state and federal courts.[246] In Israel, civil and religious courts enjoy concurrent jurisdiction over various personal status issues and forum-shopping tactics, although heavily criticised, are permissible.[247] Finally, in Germany and other Civil Law countries, domestic forum shopping is regarded as a legitimate exercise of the right of access to the court system.[248] It thus seems that, generally speaking, domestic legal systems do not employ prohibitive rules against forum shopping in the purely domestic law context.

III. Cross-boundary forum shopping

The review of cross-boundary forum shopping cases also reveals ambivalent reactions vis-à-vis the phenomenon. Many Civil Law countries do not view cross-boundary forum shopping as a problem.[249] However, many of these legal systems have usually opted for a constricted definition of the their courts' jurisdiction, which guarantees that they only exercise jurisdiction over disputes to which they have a real connection.[250] A similar regime, which permits forum shopping, but requires that choice can only be made between courts that have substantial links to the dispute can be found under the Brussels

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[244] *The Atlantic Star,* [1972] 3 ALL ER at 709 (C.A., Lord Denning MR)("You may call this 'forum shopping', if you please, but if the forum is England, it is a good place to shop in ..."); *South Carolina Insurance* [1985] 2 All E.R. at 1052.

[245] *McKain v. R.W. Miller & Co. (S. Austl.) Pty Ltd.*, 175 C.L.R. 1 (1991); *Stevens v. Head,* 176 C.L.R. 433 (1993).

[246] The introduction of 'cross vesting' legislation, according to which all superior state courts and Federal courts are authorised to exercise the jurisdiction of all other superior and Federal courts, where appropriate, has increased the popularity of forum shopping in Australia since it has allowed the plaintiff to 'shop at home'. Jurisdiction of Courts (Cross-vesting) Act, 1987 (Austl.); Peter Nygh "Choice of Law Rules and Forum Shopping in Australia" 46 South Carolina L. Rev. (1995) 899, 905-06. However, this process has been dealt a serious set back by a decision of the Australian High Court proclaiming the Cross-Vesting legislation to be unconstitutional. *Re Wakim, ex parte McNally and others,* 163 Aust. L. Rep. (1999) 270. The Court's decision does not reveal, however, an objection to the purpose of the invalidated legislation, but rather to its formal basis of validity.

[247] Amendment of Family Laws (Alimony) Law, 1959, art. 18; Jurisdiction of Rabbinical Courts (Marriage and Divorce) Law, 1953, art.31; Mehanshe Shawa "The Relation between the Jurisdiction of the Family Court and the Jurisdiction of the Rabbinical Court" 44 Hapraklit (1998) 44 (in Hebrew).

[248] Markus Lenenbach "Antisuit Injunctions in England, Germany and the United States: Their Treatment under European Civil Procedure and the Hague Convention", 20 Loy. L.A. Int'l & Comp. L.J. (1998) 257, 297.

[249] Haimo Schack "Report on Germany" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 189, 196. Other states that do not regard international forum shopping as a problem are Argentina, Finland, Greece, New Zealand and Sweden. J.J. Fawcett "General Report" in *Declining Jurisdiction*, supra, at 1, 20-22.

[250] See e.g., Netherlands Code of Civil Procedure (WBRv), art. 429c (11) ("[a] court has no jurisdiction if the petition is insufficiently connected with the legal sphere of The Netherlands"); New Code of Civil Procedure (N.C.P.C.), art. 92 (France)(a judge may declare lack of competence "[if] the case ... cannot be decided by French courts"); Kurt Siehr "Report on Switzerland" in *Declining Jurisdiction,* supra note 249, at 381, 382-83.

Jurisdiction Convention[251] (and to some extent under the U.S. constitutional 'minimum contacts' test).[252]

Another method for addressing cross-boundary forum shopping has been the Common Law's *forum non conveniens* doctrine,[253] which enables competent courts to decide, on a case-to-case basis, whether to decline jurisdiction where another, more appropriate, foreign forum is available.[254] In this way, courts allow some degree of forum shopping (in justifiable circumstances), but minimise the parties' ability to engage in abusive forum shopping tactics. The doctrine is applied today in Common Law countries, such as England or the U.S.,[255] where the basis of jurisdiction over foreign parties is generally wide and no specific links to the dispute are required.[256]

In the application of the doctrine, courts balance between the interest of the plaintiff in controlling the conduct of the proceedings and pursuing his or her legitimate advantages, on the one hand, and the need to ensure justice to the respondent, on the other hand.[257] This requires, *inter alia,* an examination of the balance of conveniences of the parties (e.g., ease of access to evidence, availability and cost of producing witnesses, feasibility of on-site inspections and other practical considerations for an expeditious and inexpensive trial).[258] In the U.S., courts may also consider 'public factors', embodying the interests of the involved legal systems,[259] which may include

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[251] Brussels Convention, art. 16.

[252] *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945).

[253] The doctrine was however originally developed in Scotland, a Civil law country. *Sim v. Robinow,* 19 Sess. Cas. (R.) 665, 668 (1892); *La Société du Gaz de Paris v. La Société Anonyme de Navigation, "Les Armateurs Français,* [1926] Sess. Cas. 13, 22 (H.L.).

[254] In a recent report prepared by a sub-committee of the International Law Association (ILA), it has been suggested that whenever courts from one domestic legal system decline jurisdiction in favour of the courts of another state, they should confirm that referral of the case to that competing jurisdiction is feasible. Such a rule is designed to prevent situations in which the parties are left without access to any forum that can offer them effective relief (i.e., negative conflict of jurisdiction). Committee on International Civil and Commercial Litigation, *Declining and Referring Jurisdiction in International Litigation - Third Interim Report submitted to the International Law Association London Conference* (2000) 18, 26-27 (copy with author).

[255] However, some U.S. states have enacted statutes, or have adopted court decisions restricting the application of the doctrine. Louis F. Del Duca and George A. Zaphiriou "Report on the U.S.A" in *Declining Jurisdiction,* supra note 249, at 401, 405-06. A similar trend has been evidenced in the Commonwealth of Dominica. , which has adopted a law limiting the ability of domestic courts to decline jurisdiction in product liability cases that were dismissed by other jurisdictions. Zanifa McDowell "*Forum Non Conveniens:* The Caribbean and its Response to Xenophobia in American Courts" 49 I.C.L.Q. (2000) 108, 115-28.

[256] E.g., in England, the mere presence within the jurisdiction suffices as a basis for jurisdiction. This is also the law in Australia, Canada, Israel and New Zealand. Fawcett, supra note 249, at 4.

[257] See *Atlantic Star,* [1973] 2 All E.R. at 194 (Lord Wiberforce).

[258] *Atlantic Star,* [1973] 2 All E.R. at 202 (Lord Kilbrandon).

[259] *Gulf Oil,* 330 U.S. at 508-09.

the weighing of the respective sizes of the competing courts' dockets, the need to minimise jury duties in cases unrelated to the forum, difficulties in applying foreign law and exercise of comity towards the interest of foreign courts in adjudicating 'local claims'.[260] The application of this balancing test is instructive of the attitude held towards forum shopping. The more courts are ready to decline jurisdiction in favour of another more appropriate forum (necessarily, not the forum selected by the plaintiff), the less hospitable is the legal environment for forum shopping.

In earlier times, a restrictive doctrine of denial of jurisdiction has prevailed in England.[261] Its application had been reflective of the view of forum shopping as an unavoidable, and probably justifiable, practice.[262] Although this restrictive rule is still prevalent in some Common Law countries such as Australia,[263] English courts have demonstrated in recent decades greater readiness to curb lawsuits brought before them despite the availability of a more appropriate foreign forum.[264] This trend has culminated in 1987 with the formal incorporation of the *forum non-conveniens* doctrine into English law through the House of Lords decision in the *Spiliada* case.[265] Most other Common Law countries, such as Canada, New Zealand and Israel, have followed suit shortly afterwards.[266]

Although Civil Law legal systems do not, as a rule, invest domestic courts with wide discretionary powers[267] (including discretion on whether to decline jurisdiction), some

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[260] *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981); *Howe v. Goldcorp Investments, Ltd.,* 946 F.2d 944 (1st Cir. 1991); *Harrison v. Wyeth Laboratories Division of American Home Products Organization,* 510 F. Supp. 1 (E.D. Pa. 1980).

[261] This is the 'vexatious and oppressive' standard applied in England until 1973. *St. Pierre v. South American Stores (Gath & Chaves) Ltd.* [1935] All E.R. 408, 414 (C.A).

[262] *St. Pierre* [1935] All E.R. at 414; *Atlantic Star* [1973] 2 ALL E.R. at 188 (Lord Morris, Dissenting opinion)("If the law of one country is more favourable than the law of another country, is the plaintiff to be criticized for choosing the former?"); Id. at 197 (Lord Simon, Dissenting opinion)("'Forum shopping' is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.").

[263] *Oceanic Sun Line,* 165 C.L.R. 197. The 'oppressive and vexatious' standard has been interpreted by the Australian High Court as indicating the clear inappropriateness of the Australian forum. Id. at 242 (Opinion of Deane J.). See also *Voth v. Manildra Flour Mills Pty Ltd.,* 171 C.L.R. 538 (1990).

[264] *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795; *The "Abidin Daver"* [1984] A.C. 398; *Atlantic Star* [1973] 2 All E.R. 175.

[265] *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460, 476. See also *RTZ v. Connolly* [1998] A.C. 854.

[266] See *Amchem Products,* 102 D.L.R. 107, 111-12; Civil Code, art. 3135 (Quebec). See also *McConnell Dowell Constructors Ltd. v. Lloyd's Syndicate 396* [1988] 2 N.Z.L.R. 257 (New Zealand);.Civ. App. 2705/91, *Abu-Ghichla v. The East Jerusalem Electric Co.,* 48 (1) P.D. 556 (1993)(Supreme Court of Israel); *The Adhiguna Meranti* [1988] 1 Lloyd's Rep. 384 (Hong Kong C.A.); *Brinkerhoff Maritime Drilling Corp. v. PT Airfast Services Indonesia* [1992] 2 Singapore Law Reports 776.

[267] Fawcett, supra note 249, at 22-23.

Civil Law countries have in effect authorised their courts to decide whether to impede abusive forum shopping. Hence, Japan[268] and Sweden[269], for instance, have shaped their jurisdiction-conferring laws so to exclude competence over disputes that their courts view, on a balance, to be only remotely related to the forum, and now essentially follow a variation of the *forum non-conveniens* doctrine. In other Civil Law countries, substitute doctrines have developed to counter abusive forum shopping (e.g., through application of the *abus de droit* rule).[270]

Finally, the recognition and enforcement of judgments procured in a foreign country through illegitimate forum shopping might be withheld by courts of both the Common and Civil Law legal systems.[271]

In sum, the above investigation confirms the view that there is no comprehensive bar against forum shopping neither at the domestic nor the cross-boundary level.[272] However, most of the surveyed jurisdictions do apply measures designed to mitigate abusive forum shopping – i.e., referral of disputes to clearly inappropriate courts out of illegitimate motives.[273]

This conclusion as to the general permissibility of forum selection is also confirmed by the practice of different courts from different jurisdictions involved in competition over criminal cases (although, given the differences in identity of the prosecuting authorities, the alternative prosecutions do not strictly qualify as competing procedures under the working definition of the present study).[274] Such practice confirms that there are a few,

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[268] *Goto v. Malaysian Airlines System Berhad,* 26 Jap. Ann. Int'l L. (1983) 122 (Supreme Court, 1981); Masato Dogauchi "Report on Japan" in *Declining Jurisdiction,* supra note 249, at 303, 309-10.

[269] Michael Bogdan "Report on Sweden" in *Declining Jurisdiction,* supra note 249, at 371, 373-74.

[270] For instance, in France and Germany, a case can be dismissed if the plaintiff can show no legitimate interest in taking legal action Fawcett, supra note 249, at 25; Alexander Reus "Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany" 16 Loy. L.A. Int'l & Comp. L.J. (1994) 455, 491-92. A similar abuse of right doctrine can be found in Greece. Fawcett, supra, at 25.

[271] Z.P.O. § 328 (1); Code of Civil Procedure No. 6, art. 797 (1) (Quebec); Foreign Judgments Enforcement Law, 1958, art. 6(a)(3)(Israel; *Simitch,* Cass. 1e civ., 6 Feb. 1985 [1985] R.C. 369 (France). Similarly, in most U.S. states, judgments rendered by courts lacking jurisdiction (as defined by U.S. standards) will not be enforced. Uniform Foreign Money-Judgments Recognition Act, § 4 (a)(2)-(3), 13 Uniform Laws Annotated 263 (1980 & 1991 Supp.).

[272] Report of the ILA Committee, supra note 254, at 3 ("The truth is that all systems of civil jurisdiction afford the parties a wide degree of choice as to where to sue in cross-border cases of any complexity); Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963) 177-85.

[273] *Cf.* Report of the ILA Committee, supra note 254, at 24.

[274] This is the case when a crime is linked to more than one national jurisdiction (typical jurisdictional links being the location of the crime, the nationality of the perpetrator or victim and the national interest implicated by the criminal act). Brownlie, *Principles of Int'l Law,* supra note 14, at 314; Bartram S.

if any limits upon the right of national authorities to decide upon the proper trial forum.[275] In other words, national prosecution authorities may, in the absence of a specific agreement to the contrary,[276] freely determine whether to prosecute, extradite or take no measures against a suspect,[277] or in the case of multiple extradition requests - to which country to surrender him or her.[278] Thus, it can be asserted that no general principle against forum selection can be identified in situations of cross-boundary competition in the criminal law sphere either.

IV. A race to the courthouse

A particularly troublesome phenomenon associated with the availability of multiple fora might be the occurrence of a 'race to the courthouse'. Such a race may take place when the disputing parties are interested in litigating before different courts or tribunals and one or more of the competing fora gives priority to the first-seized jurisdiction. Speed of action can in these circumstances determine the identity of the competent forum.

Brown "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals" 23 Yale J. Int'l L. 383, 391-93 (1998); Gerald Fitzmaurice "The General Principles of International Law Considered from the Standpoint of the Rule of Law" 92 Recueil de cours (1957) 1, 213. It is also the case where a crime has been defined by international law as an international crime (e.g., piracy, slave trade, serious violation of international humanitarian law). *R v. Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1999] 2 All E.R. 97, 177 (H.L.)(opinion of Lord Millett); In re *Demjanjuk,* 612 F. Supp. 544, 556 (1985); *Eichmann v. Attorney-General of Israel,* 36 I.L.R. 277, 304 (1962)(Supreme Court of Israel); Restatement of the Law, 3rd, Foreign Relations Law of the United States § 404; Henkin, *Int'l Law*, supra note 83, at 240.

[275] Brown, Primacy or Complementarity, supra note 274, at 393 ("international law establishes no definite priority among [the various grounds for criminal jurisdiction]"); S.Z. Feller, *Extradition Law* (1980) 262 (in Hebrew).

[276] It should be noted that international law has not even introduced a general duty to extradite. However, some extradition laws or treaties offer guidance on the way in which the custodial state should exercise its discretionary 'forum selection'. United Nations Model Treaty on Extradition, 14 Dec. 1990, art. 4 (a),(f), G.A. Res. 45/115, U.N. Doc. A/Res/45/116 (1991), 30 I.L.M. (1991) 1407 [hereinafter 'UN Model Extradition Treaty']; European Convention on Extradition, 13 July 1957, art. 6, 7(1), E.T.S. 24 [hereinafter 'European Extradition Convention']; Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, art. VI, 78 U.N.T.S. 277; Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, G.A. 10 Dec. 1984, art. 5, G.A. Res. 39/46, annex, 39, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter 'CAT'].

[277] Restatement of the Law, 3rd, Foreign Relations Law of the United States § 475, comment a (1990); Henkin, *Int'l Law*, supra note 83, at 250; Kenneth S. Gallant "Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition" 5 Crim L.F. (1994) 557, 567. However, with regard to international crimes, one can often find an obligation to extradite or try the accused. See e.g., Third Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, art. 129, 75 U.N.T.S. 135; M. Cherif Bassiouni "Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice – The Need for Accountability" 59 Law and Contemporary Problems (1996) 9, 17; M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (2nd rev. ed., 1987) 13-24; Colleen Enache-Brown and Ari Fried "Universal Crime, Jurisdiction and Duty, the Obligation of Aut Dedere Aut Judicare in International Law" 43 McGill L.J. (1998) 613, 633.

[278] Extradition Act 1989, s. 12 (5)(England); UN Model Extradition Treaty, art. 16; European Extradition Convention, art 17 ; Feller, supra note 275, at 267. But *cf.* Inter-American Convention on Extradition, 25 Feb. 1981, art. 15, 20 I.L.M. (1981) 723 [hereinafter 'American Extradition Convention'].

Unlike 'ordinary' forum shopping which has its proponents and opponents, the objection to the practice of rushing to court seems to be ubiquitous. Indeed, it has been described by courts of different legal systems as 'embarrassing',[279] 'invitation of abuse',[280] and 'problematic'.[281] This is understandable given the adverse effects that this practice has on the propensity of the disputing parties to reach out-of-court settlements and on the tendency of litigation to polarise, rather than bridge over, the positions of the parties. It also introduces an undesirable fortuitous element into the operation of justice, since the outcome of the cases may be perceived not to depend on the strength of the parties' relative legal position, but rather on their shrewdness (the winner might be the party 'who drew first blood').

Nonetheless, no distinct legal doctrine has been developed to tackle this particular procedural evil. Instead, the problem of the 'race to the courthouse' has been addressed by domestic courts through partly effective measures such as conditioning the jurisdiction of the first seized court upon the non-availability of a more appropriate forum (e.g., through application of the *forum non conveniens* doctrine),[282] or mitigating the advantages of being first in time by allowing parallel proceedings to continue.[283] However, in that last case, a 'race to judgment' might ensue between competing sets of proceedings, in the hope of being the first to create a *res judicata* effect, which might bar the other fora from continuing to handle the case.

V. Forum selection involving international and national courts or tribunals

Beside competition between domestic judicial bodies (belonging to the same or different national legal systems), jurisdictional interaction can also be identified between international and domestic courts and tribunals. One prominent example of such interaction can be found in the prosecution of international crimes, which can take place before national courts or before international courts and tribunals such as the ICTY, the ICTR and, once established, the ICC. Unlike the only sparsely regulated interplay between different domestic courts in criminal matters, the relationships between international and domestic criminal proceedings were quite comprehensively

[279] *Laker,* 731 F.2d at 928.
[280] *Morrison Law Firm v. Clarion Co.,* 158 F.R.D. 285 (S.D.N.Y. 1994).
[281] See e.g., H.C. 1000/92, *Bavli v. High Rabbinical Court of Jerusalem,* 48 (2) P.D. 221, 235-36 (1994)(Supreme Court of Israel).
[282] See Report of the ILA Committee, supra note 254, at 23.
[283] *Laker Airways,* 731 F.2d, at 928-29.

addressed in the constitutive instruments of the two *ad hoc* tribunals established during the 1990's and in the 1998 Rome Statute.

The statutes of both the ICTY and ICTR have adopted essentially the same formula, which prescribes that the international tribunals will exercise concurrent jurisdiction with national courts, but will enjoy primacy over them when deemed necessary.[284] This means that the *ad hoc* tribunals may order national courts to defer jurisdiction in their favour if the domestic proceedings are regarded as inappropriate (i.e., if they characterise an international crime as an ordinary crime or are trying to shield the accused). Alternatively, deferral can be requested for reason of connexity (i.e., if the crime before the national court raises questions of law or fact closely related to investigations or proceedings before the international tribunal).[285] As a result of the rule of primacy, the ability of the accused person and national prosecution authorities to engage in forum shopping has been dramatically undercut,[286] while the international prosecutor's ability to influence the identity of the trial forum has correspondingly increased.

The bestowing of primacy upon the *ad hoc* tribunals may be explained in the strong interest of the international community in punishing war criminals and in creating an effective deterrent against the commission of further atrocities.[287] In addition, there existed a perception that domestic courts in the Former Yugoslavia and Rwanda would be either unwilling or unable to effectively bring war criminals into justice, or might treat the defendants in a hostile and vindictive manner.[288] The primacy accorded to the *ad hoc* tribunals was therefore meant, *inter alia,* to ensure that suspects would be

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[284] ICFY Statute, art. 9 (2); ICTR Statute, art. 8(2).

[285] Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, rule 9, U.N. Doc. IT/323/Rev.10 (1996); Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, rule 9, U.N. Doc. ITR/3/REV.1 (1995).
In the few requests for deferral made so far, special reliance had been made upon the appropriateness of trying of major war criminals before an international forum, and on the deleterious implications of simultaneous proceedings before multiple jurisdictions on the availability of evidence and the willingness of witnesses to cooperate with the international prosecution authorities. Case IT-94-1-D, *In re Tadic,* I ICTY Judicial Reports 3, 19 (1994) (application for deferral); Case IT-95-5-D.T.Ch.II, *In re Karadzic,* II ICTY Judicial Reports (1994-95) 851, 867-69 (1995)(request for deferral); Case IT-95-6-D.T.Ch. I, *In re Lasva River Valley,* II ICTY Judicial Reports (1994-95) 921, 935-37 (1995)(request for deferral); Sean D. Murphy "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" 93 A.J.I.L. (1999) 57, 65.

[286] Case IT-94-1-T, P 41, *Prosecutor v. Tadic,* I ICTY Judicial Reports 63, 95 (1995); Brown, Primacy or Complementarity, supra note 274, at 398.

[287] Brown, Primacy or Complementarity, supra note 274, at 394.

[288] Gallant, supra note 277, at 570; Jeffrey L. Dunoff and Joel Trachtman " The Law and Economics of Humanitarian Law Violations in Internal Conflict" 93 A.J.I.L. (1999) 394, 405.

brought to a fair trial and not shielded or abused through the conduct of bogus proceedings before local courts.[289]

Another possible justification for primacy has been the anticipation that multiple prosecutions would arise out of the conflicts in Former Yugoslavia and Rwanda before several national and international courts and tribunals. Consequently, there became a need to prevent multiple prosecutions of the same defendants[290] and to ensure uniformity in prosecution and sentencing policy.[291] The concentration of a large number of related trials in one jurisdiction would reduce the risks of inconsistencies between various proceedings, which might give rise to serious fairness and judicial credibility issues.

In sum, it is arguable that the prominent nature of international tribunals, representing the collective stance of the international community against war crimes, and their guarantees of procedural fairness and impartiality have made them more appropriate fora to try war criminals. This view is supported by the fact that, unlike other international courts and tribunals, both the ICTY and the ICTR have been created by the UN Security Council, without the formal agreement of the relevant governments, whose nationals may face prosecution. This unique jurisdictional setting, which derogates from the traditional 'state consent as a basis for jurisdiction' paradigm, further underlines the importance attributed by the international community to the law-enforcing role of the *ad hoc* tribunals. The Statutes of the two *ad hoc* tribunals have thus adopted what is essentially a 'most-appropriate forum selection' rule, which upholds the predominance of the international tribunals over their domestic counterparts (when it is deemed necessary by the international prosecutors).

A different jurisdictional approach than the one adopted by the *ad hoc* tribunals has been selected with regard to the prospective ICC. According to the Rome Statute, the jurisdiction of the Court will only be complementary to that of national courts and the ICC will normally defer jurisdiction in their favour, [292] except in circumstances, where the ICC is convinced that domestic courts are unwilling or unable to prosecute *bona*

[289] *Tadic* (1995), 35 I.L.M. at 52.
[290] Brown, Primacy or Complementarity, supra note 274, at 398.
[291] Id. at 408.
[292] ICC Statute, art. 1, 17 .

fide.[293] Consequently, it can be observed that the ICC Statute reflects a different view on the appropriateness of international criminal proceedings than the one taken by the two *ad hoc* tribunals. While their constitutive instruments advocate the superiority of international proceedings, the Rome Statute seems to support the proposition that national courts are normally the most appropriate fora to prosecute war criminals and that the ICC should be activated only when no credible domestic alternative exists.[294] This divergence of opinion can be explained in part through reference to the particular circumstances in the Former Yugoslavia and Rwanda (lack of functioning domestic courts and special need for deterrence), which might not be present in future cases. In any event, the legal regime adopted by the ICC Statute signifies yet another indication of the will of the international community to reduce the parties' ability to engage in forum selection and to direct proceedings to the most appropriate forum.

Outside the sphere of international criminal law, perhaps the most widespread rule governing jurisdictional interaction between international and domestic judicial organs, affecting *inter alia* the ability to engage in forum selection, has been the exhaustion of domestic (or local) remedies rule.[295] According to this rule, international proceedings brought before international courts and tribunals by natural or legal persons or by states acting on their behalf[296] must follow the conclusion of the domestic proceedings.[297] This is because disputes ought not to be unnecessarily transformed into the international level,[298] and due to the fact that domestic courts are generally better situated to

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[293] Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, at 154, U.N. Doc. A/21/22 (1996).

[294] See Brown, Primacy or Complementarity, supra note 274, at 424, 426-27, 433; Patricia A. McKeon "An International Criminal Court: Balancing the Principle of Sovereignty against the Demands for International Justice" 12 St. John's J. Legal Comment. (1997) 535, 555. Brown argues convincingly that no *a priori* determination can be made concerning the appropriateness of either an international or national forum.

[295] See e.g., Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec. 1966, art. 2, UN GA Res. 2200 A (XXI), GAOR, 21st Sess., Supp. No. 16 (A/6316) 52, UN Doc. A/CONF. 32/4 [hereinafter 'Optional Protocol to the ICCPR']; International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, art. 14(2), UN G.A. Res. 2106A (XX), GAOR, 12th Sess., Supp. No. 14 (A/6014) 47, UN Doc. A/CONF. 32/4 [hereinafter 'CERD']; CAT, art. 22(5)(b); Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, art. 35(1), E.T.S. 5, 213 U.N.T.S. 221 [hereinafter 'European HR Convention']; American Convention on Human Rights, 22 Nov. 1969, art. 46(a), O.A.S. T.S. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, Doc. 21, Rev. 6 (1979), 9 I.L.M. (1970) 673 [hereinafter 'I/A HR Convention']; African Charter on Human and People's Rights, 27 June 1981, art. 56(5), O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. (1982) 58 [hereinafter 'AHR Charter'].

[296] See e.g., ICCPR, art. 41(1)(c); CERD, art. 11(3); CAT, art. 21(1)(c); European HR Convention, art. 35(1); I/A HR Convention, art. 46(a); AHR Charter, art. 50. Traditionally, exhaustion of domestic remedies has always been one of the conditions for the application of 'diplomatic protection'. *Interhandel* (U.S. v. Switzerland), 1959 I.C.J. 6, 27.

[297] *Ambatielos* (Greece v. U.K.), 23 I.L.R. 306, 334 (1956); Brownlie, *Principles of Int'l Law,* supra note 14, at 499-500.

[298] Shaw, supra note 24, at 567.

adjudicate disputes involving private parties.[299] However, there may be circumstances in which domestic proceedings would be deemed inappropriate, and the exhaustion of local remedies, as a result, inapplicable.[300] Hence, this rule can also be described as a 'more appropriate forum' provision, limiting forum selection on behalf of the parties by directing litigation, at least initially, to the more appropriate judicial body.

B. Observations on the introduction of anti-forum shopping rules into international law

There already have been several instances where parties to international disputes seem to have engaged in forum shopping. This was made possible due to the overlap between the jurisdictions of different courts and tribunals,[301] and because most of constitutive instruments of the various judicial and quasi-judicial bodies do not preclude dispute settlement before other bodies.[302]

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 definitions 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 comprised of judges from the same region) and weighing the balance of conveniences to the parties (e.g., selection between a nearby regional procedure and a far away global procedure).[303] Illustrative of the considerations applied by forum shoppers has been the classical choice between reference of disputes to international arbitration or permanent courts.[304]

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[299] See e.g., *Murray v. United Kingdom*, 300 Eur. Ct. H.R. (ser. A) at 30 (1994); Brownlie, *Principles of Int'l Law*, supra note 14, at 497.

[300] This is for example the case where domestic proceedings are unduly prolonged or cannot provide an adequate remedy. Shaw, supra note 24, at 567-68.

[301] Helfer, supra note 20, at 302.

[302] See e.g., North American Free Trade Agreement, 17 Dec. 1992, art. 2005 (1), 32 I.L.M. (1993) 289 and 605 [hereinafter 'NAFTA']; UNCLOS, art. 280.

[303] See e.g., Helfer, supra note 20, at 303-304.

[304] Generally speaking, the degree of influence that parties to litigation may exercise over the organisation and operation of international courts is considerably lower than in arbitration. In contrast, parties to arbitration can exert almost total control over the composition of the tribunal, its procedures and the substantive law to be applied by it. Consequently, arbitration is considered to be more flexible than judicial settlement and susceptible of accommodating the peculiar needs of the parties (e.g., mitigation of costs, accessibility to non-state parties, speed, secrecy and special expertise of the arbitrators). Abi-Saab, ICJ as a World Court, supra note 127, at 7; Boyle, Settlement of Disputes, supra note 6, at 312-14;

However, to date the question of the desirability of international forum shopping was hardly ever discussed by international courts and tribunals. Instead, the question was addressed to some extent during the negotiations which led to the adoption of some jurisdiction-regulating clauses which will be reviewed in Part III of this dissertation. However, as will be shown, the history of those clauses does not elucidate any overriding policy considerations, which should govern all cases of international forum shopping.

The central conclusion which can be drawn from the above discussion on forum shopping under domestic law is that it should not be necessarily perceived as a negative phenomenon. Indeed, all surveyed jurisdictional interactions tolerate some degree of forum shopping. This outcome can be further supported by a variety of international policy considerations. The freedom to exercise forum selection is consonant with respect for party autonomy – a fundamental principle of international law.[305] Forum shopping also facilitates the effective enforcement of norms by interested parties (typically plaintiffs),[306] induces courts and tribunals to compete with each other over business by way of improving their procedure and enhances inter-fora discourse (since the persistence of jurisdictional overlaps implies that similar questions will eventually

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Christine Gray and Benedict Kingsbury, "Inter-State Arbitration since 1945: Overview and Evaluation" in *Int'l Courts for the 21st Century,* supra note 128, at 55, 63-64; P.H. Kooijmans "International Arbitration in Historical Perspective: Past and Present" *International Arbitration: Past and Prospects* (A.H.A. Soons, ed. 1990) 23, 25; Louis B. Sohn "International Arbitration in Historical Perspective: Past and Present" *International Arbitration,* id. at 9, 17.
However, there are clear advantages to the fixed procedure and permanent nature of courts. Recourse to courts obviates the need to form a *compromis,* a thing of significant practical importance when the dispute has already arisen and a detailed arbitration agreement proves to be unattainable. Moreover, courts need not be reconstituted anew for each dispute. Hence they mark a more advanced stage of institutionalisation and offer direct and immediate access to the differing parties (which may be crucial in cases involving urgent matters). The constant availability of competent courts decreases the 'transaction costs' associated with initiating proceedings, in comparison with those associated with the creation of new *ad hoc* arbitration tribunals. Rosenne, I *Law and Practice*, supra note 130, at 13. In addition, most international courts are financed by IGOs, while arbitral tribunals are mostly funded by the parties to the case (still, court proceedings might take longer and be held in a location inconvenient to some or all of the parties). Brownlie, *Principles of Int'l Law,* supra note 14, at 58. Furthermore, permanent courts are more likely to develop a body of jurisprudence over time and accumulate experience and prestige.

[305] *Report to the General Assembly on Model Rules on Arbitral Procedure,* UN Doc. A/3859, [1958] II Y.B. Int. L. Comm. 82.

[306] This rationale is particularly potent in the human rights sphere where the various enforcement mechanisms are clearly aimed at advancing the implementation of human rights standards. Maxime E. Tardu "The Protocol to the United Nations Covenant on Civil and Political Rights and the Inter-American System: A Study of Co-Existing Petition Procedures" 70 A.J.I.L. (1976) 778, 794; Secretariat Memorandum prepared by the Directorate of Human Rights of the Council of Europe, *Effects of the Various International Human Rights Instruments providing a Mechanism for Individual Communications on the Machinery of Protection established under the European Convention on Human Rights*, 1 Feb. 1985, p. 3, Doc. No. H (85) 3 (some have stressed the advantages of having double or even treble examination of human rights complaints).

be brought before different bodies). In practical terms, the ability to forum shop means that potential respondents should strive to conform their conduct to the most stringent applicable legal standards in order to comply with the law applied by all competent international fora.[307]

Nonetheless, while the experience of domestic legal systems suggests that some degree of forum selection is harmless, abusive forum shopping tactics designed to submit claims to clearly inappropriate fora, out of improper motives, are generally condemned. In fact, there are indications of opposition to abusive forum shopping exercised without any legitimate object in the practice of most surveyed domestic legal systems. The proposition that there should be limits on forum shopping also seems to conform to the position taken by the ICJ on the need to coordinate the allocation of national jurisdictions.[308]

A similar balancing act between permissible and impermissible forum shopping can also be discerned, albeit with lesser clarity, in international criminal law. While there are only a few impediments on the ability of national courts to prosecute criminals, some rules limiting forum selection and directing cases to the most appropriate forum, can be found in the constitutive instruments of the international criminal tribunals. The exhaustion of local remedies rule could also be analysed as a 'most appropriate forum' rule, restricting the freedom of choice of forum by the parties.

Thus, it could be argued on the basis of the experience of domestic legal systems and of international courts and tribunals which have interacted with them, that a line of demarcation ought to separate between legitimate and illegitimate forum shopping. This line can be drawn mainly on the basis of the appropriateness of the jurisdiction that was unilaterally seized in comparison to alternative fora and the legitimacy of the motives underlying forum selection. Appropriateness is normally to be gauged in accordance to the strengths of the links between the dispute and the forum. However, other criteria, such as the effectiveness of the competing judicial bodies (e.g., capacity to handle

[307] There might be however rare occasions where jurisdictional overlaps might result in the imposition of conflicting obligations. Helfer, supra note 20, at 357 However, this is really not a problem of coordinating jurisdictions, but rather one of coordinating a state's numerous international obligations.

[308] See *Barcelona Traction, Light and Power Co. Ltd.* (Belgium v. Spain), 1970 I.C.J. 4, 105 (Separate Opinion of Judge Fitzmaurice)("International law ... involves[s] for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid *undue encroachment on a jurisdiction more properly appertaining* to, or more *appropriately exercisable* by another state")(emphasis added).

complicated litigation) and the need to protect vital interests of the parties (such as respect of national sovereignty) and interested third parties, might also come into play. Legitimacy of object is normally examined through the principle of good faith and the abuse of rights doctrine. At the end of the day, courts should make a policy judgment on the fairness and propriety of the litigation advantages that the forum shopper seeks to achieve through his or her actions.

It seems that the principal interests which are considered in domestic forum shopping situations - i.e., the desire of the applicant party to control the course of litigation, on the one hand, and the need to protect the respondent party from being exposed to unduly burdensome litigation, on the other hand, as well as other pertinent considerations, such as the need to promote the enforcement of norms through litigation, are also *prima facie* applicable to international disputes. Hence, some parallels could be drawn between forum shopping involving domestic courts and forum shopping among international courts and tribunals, and it looks as if the rule, permitting forum shopping with the exception of abusive practices applicable in almost all of the surveyed domestic legal systems could also govern the choice between international judicial bodies.

However, certain fundamental differences between domestic and international systems of law must be emphasised. First, it would seem that institutional arguments for and against forum shopping, which are prevalent in certain domestic legal systems (such as the argument that is in the public interest that litigation would take place before courts of a specific legal system) should not be overstated under international law. While domestic courts normally have an inherent compulsory jurisdiction over certain disputes and are entrusted with a duty to enforce the law of a particular polity (sometimes in disregard of the wishes of the parties), international courts and tribunals derive their legitimacy and competence to a large extent from the consent of the parties. Hence, an argument could be sustained that most international adjudication bodies are more akin to service-providers than to law-enforcement agencies,[309] and cannot assert to have an independent interest in hearing a case, in derogation from the cumulative wishes of the parties. Moreover since all international courts and tribunals are subject to the same normative system and are intended to promote the welfare of the same polity – the international community, there seems to be no imperative, from a systematic point of

view, that one specific international forum and not the other will exercise jurisdiction (whereas in cross-boundary competition cases, national courts might be interested in maintaining jurisdiction so to promote their country's idiosyncratic public policies).

Still, it can be argued that international judicial bodies, established and maintained by the international polity (or part thereof) and applying international law, do have a special responsibility towards the legal environment in which they operate. As a result, they ought to, when construing the norms that govern the respective rights and obligations of the disputing parties, also take into account, to some degree, the rights and interest of third parties (including the international community as a whole) that might be affected by the outcome of the proceedings.[310] As a result, international judicial bodies may consider certain systematic considerations (such as the capabilities of the forum, the size of its docket or the costs for the sponsoring institution) when determining the propriety of their exercise of jurisdiction. But, again, given the consensual nature of international litigation, such consideration should be only complementary to those relating to the aggregate welfare of the parties to the proceedings.

Second, and more importantly, it is hard, albeit not impossible, to envision mammoth differences between competing international courts and tribunals in terms of the respective strength of their links to a dispute and with regard to the convenience or inconvenience of appearing before them. Unlike cross-boundary competition, where major inconveniences might be caused to private parties dragged against their will to a distant and unfamiliar forum, respondent parties to international litigation, normally, states or IGOs, have the resources to litigate before any international court or tribunal, in accordance with the applicable law before it (usually, international law). As a result, the geographical distances between the 'domicile' of the parties and the site of the events underlying the dispute, on the one hand, and the seat of the forum, on the other hand, seem to be of a less prohibitive nature in international adjudication than in private cross-boundary litigation.[311] Furthermore, given the fact that party consent underlies participation of international actors in all international judicial or quasi-judicial

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[309] This assertion does not apply with regard to international courts and tribunals engaged in criminal law (or even, arguably, with respect of those judicial bodies competent to receive non-compliance complaints). C. Romano, supra note 160, at 750.

[310] See e.g., *East Timor* (Portugal v. Australia), 1995 I.C.J. 90, 101 (refusal by the Court to hear a case predominantly involving the rights of a third country).

[311] Guruswamy, supra note 159, at 324-25.

mechanisms, the argument that such proceedings are inherently burdensome loses much of its force, since it is unlikely that states or IGOs would agree to expose themselves to litigation before highly inconvenient fora.

Nonetheless, circumstances in which litigation before one forum would be clearly more appropriate than before another are conceivable even at the international plane. For example, an attempt by a state to bring to the ICJ an outstanding regional trade or human rights dispute it has with another state subject to the regional regime, in order to evade the jurisprudence of a competent regional court or tribunal (e.g., ECJ, NAFTA, ECHR, I/A HR Court) might be considered inappropriate forum shopping. This is because the regional and specialised bodies are clearly in a better position than the ICJ to address the subject matter and the geographical particulars of the dispute. In addition, small states might be financially and logistically overwhelmed by proceedings in a distant forum, in a foreign language, especially when geographically proximate alternative proceedings conducted in the official language of both parties might be available.[312] In these extreme circumstances, limitations on the ability of the applicant to forum shop, especially if that party cannot show a legitimate purpose for his or her choice, might be justified. Thus, in those exceptional cases, it seems sensible to allow international courts and tribunals faced with reprehensible litigation tactics to adopt jurisdictional measures to protect the interests of the other parties.

As to the 'race to the courthouse' phenomenon, which might also occur in some international adjudicative context (e.g., between standing international courts and tribunals such as the ICJ and ITLOS),[313] there seems to be general consensus between domestic legal systems that rushing to court constitutes an abominable occurrence, which should, as a rule, be constrained. Because of the undesirability of settling many classes of international disputes by way of adjudication as a first resort (as opposed to a negotiated settlement), there are even stronger policy arguments against premature adjudication at the international level.

[312] For example, this would be the case if one Andean Community country brought a claim against another Andean Community country for breach of the Cartagena Agreement to the ICJ (whose official languages are English and French) and not to the Andean Court of Justice in Quito (whose official language is Spanish).

[313] 'Races to the courthouse' cannot take place in international regimes where the roles of the applicant and respondent parties have been fixed in advance (e.g., in individual petitions to human rights bodies).

However, domestic jurisdictions, while condemning the practice of 'races to the courthouse', have, by and large, applied only sporadic measures against it. While similar measures could also be introduced at the international plane (e.g., rules against abusive forum shopping) these might not appease international law's aversion from unnecessary litigation and additional measures of protection against frivolous international lawsuits should be considered.[314]

Therefore, it might be wise to introduce into the constitutive instruments of international courts and tribunals, whose premature invocation might preclude a prompt and just settlement, special measures designed to curb unsavoury races to the courthouse. Such measures may include mandatory 'cooling off' periods, during which the parties to a dispute would be expected to resort to diplomatic methods of dispute settlement, before turning to adjudication. In fact, such arrangements have already been incorporated in the texts of a number of international dispute settlement instruments, such as the WTO DSU, EC Treaty and NAFTA.[315]

Still, the real scope of the problem of 'international races to the court house' should not be overstated. So far, there has been only one prominent case where such occurrence seemed to have taken place (the EU/Chile *Swordfish* case), and in light of the out of court settlement reached there, it might be argued that the very real prospects of adjudication in that case served a useful purpose – they were a catalyst for compromise.

C. Forum selection agreements

In many cases, disputing parties are able to agree on the identity of the forum to which the dispute is to be referred. In international law, such agreements are reached in one of three principal methods - *ad hoc* agreements (*compromis*), general dispute settlement treaties or compromissory clauses found in international treaties. The policy question which arises is whether there should be any limits on the freedom of the parties to select a forum by way of agreement, even if, objectively speaking, a more appropriate forum is available. Again, reference will be made to equivalent situations that have been encountered under domestic law (including in cross-boundary contexts).

[314] Such aversion is demonstrated by the exhaustion of local remedies rule, which implies that litigation before international courts and tribunals ought to occur as a last resort only.

In the sphere of commercial law, forum selection agreements are often concluded long before disputes arise (e.g., compromissory clauses, inserted in the contract which establishes legal relations between the parties) and provide for referral of disputes to specific courts, jurisdictions or dispute settlement procedures (e.g., arbitration). Through making these agreements, the parties create a climate of greater legal certainty,[316] avert, in the event of a dispute, litigation over the jurisdiction of the seized forum and mitigate the risk of multiple proceedings.[317] The forum mutually selected by the parties may be most advantageous to their cumulative interests or may reflect their respective bargaining powers and accommodate for the most part the interests of one of the parties (perhaps in exchange to other contractual concessions). In any case, there should be a strong presumption in favour of upholding the collective free will of the parties as part of the general need to enforce contracts (*pacta sunt servanda).*[318] This conclusion is further supported by the procedural efficiency of following choice of forum agreements, thus obviating jurisdictional battles.[319]

Still, despite the clear advantages of adopting a pro-forum selection rule, many courts in England and the U.S. had viewed in the past choice of forum agreements excluding domestic jurisdiction as unenforceable.[320] This was explained by the offensiveness of the notion that parties to a contract may oust a competent court of its jurisdiction.[321] Indeed, investing the choice of forum with the parties might conflict with the independent interest of a court in hearing a case and promoting the forum's public policies. Moreover, it could be argued that giving effect to forum selection clauses might lead to a sub-optimal allocation of judicial resources since cases might be referred in this manner to overcrowded courts, while alternative fora remain relatively idle.

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[315] Understanding on the Rules and Procedures Governing the Settlements of Disputes, 15 April 1994, art. 4(3), 33 I.L.M. (1994) 1226 [hereinafter 'DSU']; EC Treaty, art. 227 (ex-article 170); NAFTA, art. 2008(1).

[316] *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 516 (1974).

[317] Born, supra note 218, at 372-73.

[318] *Breman v. Zapata Off-Shore Co.,* 407 U.S. 1, 12-13 (1972).

[319] See e.g., *Carnival Cruise Lines v. Shute,* 499 U.S. 585, 593-94 (1991); Michael M. Karayanni "The Public Policy Exception to the Enforcement of Forum Selection Clauses" 34 Duquesne University Law Review (1996) 1009, 1010

[320] *Carbon Black Export, Inc. v. The S.S. Monrosa,* 254 F.2d 297 (5th Cir. 1959); Born, supra note 218, at 373-74.

[321] *Breman,* 407 U.S., at 9; Born, supra note 218, at 375. See also *Kulukundis Shipping Co. v. Amtorg Trading Corp.,* 126 F.2d 978, 984 (2nd Cir. 1942); *Kahn v. Tazwell,* 266 P. 238, 243 (1928). This is still the position held by some developing states vis-à-vis exclusive forum selection clauses depriving their local courts of jurisdiction. Lenenbach, supra note 248, at 285.

However, in time, the legal doctrine in England and the U.S. has broken away from its hostile approach towards forum selection agreements and the present view is that domestic and international choice of forum agreements are to be enforced, provided that they are neither unfair nor unreasonable[322] (and that the agreement is explicit[323] and valid). Under this Anglo-American standard, only choice of a highly inconvenient forum, or one unlikely to provide effective relief, would not be enforced.[324] Additionally, U.S. courts will refrain from enforcing choice of forum agreements that contravene a strong domestic public policy.[325]

In practice, the question of enforceability of cross-boundary forum selection agreements has been dealt by English and U.S. courts within the theoretical framework of the *forum non-conveniens* doctrine with a strong presumption in favour of upholding the agreement of the parties.[326] This position has also been embraced by other Common Law countries.[327] However, most of these countries limit the full application of the presumption to agreements investing the selected forum with exclusive jurisdiction.[328]

In Civil Law countries, the status of forum selection agreements is even stronger. In countries such as Germany, [329] Japan,[330] the Netherlands[331] Switzerland[332] and most

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[322] *The "Fehmarn"* [1958] 1 All E.R. 333 (C.A.); *The Eleftheria* [1969] 2 All E.R. 641 (P.); *Carnival Cruise,* 499 U.S. 585; *Breman,* 407 U.S. at 10; *National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 315-16 (1964); Restatement of the Law, 2nd, *Conflict of Laws* § 80. In a few American states the old rule of non-enforceability of choice of forum agreements still prevails with regard to agreements between two American parties. Born, supra note 218, at 378-79.

[323] *New Hampshire Insurance Co. v. Starbag Bau AG* [1992] 1 Lloyd's Rep. 361, 371 (C.A.).

[324] *Breman,* 407 U.S. at 17-18; Born, supra note 218, at 406-08.

[325] *Breman,* 407 U.S. at 15. Public policy should generally be based on explicit legislation. *W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 766 (1983); Born, supra note 218, at 415-17. With regard to choice of forum agreements selecting a particular Federal court, U.S. courts have adopted a slightly different view, according to which the existence of the agreement is merely one of the factors to be balanced under the Federal *forum non-conveniens* clause. 28 U.S.C. § 1404; *Plum Tree Inc. v. Stockment,* 488 F.2d 754 (1973).

[326] Fawcett, supra note 249, at 47-48, 57.

[327] *Huddart Parker Ltd. v. The "Mill Hill",* 81 C.L.R. 502 (1950)(Austl.); *Compagnie des Messageries Maritimes v. Wilson,* 94 C.L.R. 577 (1954)(Austl.); *Oceanic Sun Line,* 165 C.L.R. at 224; Civ. App. 25/63, *Oneon Insurance Co. Ltd. v. Moshe,* 17 P.D. 646 (1963)(Supreme Court of Israel); P. App., 30/82 *Multi-lock Inc. v. Rav-Bariach Ltd.,* 36 (3) P.D. 272 (1983)(Supreme Court of Israel); *Apple Computer Inc. v. Apple Corp. SA* [1990] 2 N.Z.L.R. 598 (New Zealand); *The Vishva Aurva* [1992] 2 Singapore Law Reports 175; Joost Blom "Report on Canada" in *Declining Jurisdiction,* supra note 249, at 121, 137

[328] *P.W.A. Corp. v. Gemini Group Automated Distribution Systems Inc.,* 98 D.L.R. (4th) 277 (Alberta Q.B. 1992); Civ. App. 9/79, *Korpol v. Horowitz,* 34(1) P.D. 260 (1980)(Supreme Court of Israel; Judd Epstein "Report on Australia" in *Declining Jurisdiction,* supra note 249, at 79, 93.
But in England, similar effect is generally given to both exclusive and non-exclusive jurisdiction clauses. *Berisford (S&W) Plc. V. New Hampshire Insurance Co.* [1990] 2 Q.B. 631; *Standard Steamship Owners Protection & Indemnity Association (Bermuda Ltd.) v. Gann* [1992] 2 Lloyd's Rep. 528 (Q.B.).

[329] Z.P.O. § 38 (German Civil Procedure Statute).

other Civil Law countries[333] the existence of a forum selection agreement, of either domestic or international character, normally precludes all courts not selected from adjudicating the case.[334] This clear-cut solution has also been embraced by international treaties regulating the interaction between different domestic jurisdictions, such as the Brussels Convention.[335]

However, some exceptions to the pro-choice of forum rule are found even in Civil Law countries and in the international conventions that have accepted this rule. Courts should, as a rule, only enforce exclusive jurisdiction clauses[336] and may decline to enforce agreements contrary to strong public policies that mandate adjudication before a particular forum.[337] This is especially the case where the terms of the agreement had been attained by virtue of inequalities between the respective bargaining powers of the parties.[338]

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[330] Code of Civil Procedure, art 25 (Japan); *Koniglike Java China Paletvaat Lijnen BV Amsterdam v. Tokyo Marine and Fire Insurance Co.,* 20 Japanese Annual of International Law (1976) 106 (Supreme Court, 1975).

[331] *Harvest Trader,* HR, 28 Oct. 1988 [1989] NJ 765 (Netherlands).

[332] Statute of Private International Law, art. 5(1)(Switzerland).

[333] This is also the state of the law in Greece, Finland and Japan; Fawcett, supra note 249, at 48; and in China; Civil Procedure Law § 244 (China).

[334] However, some Civil Law states have adopted a far more restrictive rule. In France, choice of forum agreements involving domestic disputes are unenforceable, unless both parties are merchants. New Code of Civil Procedure, art. 48 (France). However, international forum selection agreement will normally be respected. *Cie de Signaux et d'Entreprises Electriques (CSEE) v. Soc. Sorelec,* Cass. 1e civ. [1986] D. 265, obs. Audit (France). In Italy, forum selection agreements conferring jurisdiction upon a foreign court have no validity unless concluded between two foreigners or a foreigner and a non-domiciled Italian party. Code of Civil Procedure, 1942, art. 2 (Italy). On the other hand, agreements to litigate before an Italian court are normally respected. Id. art. 4(1). In some Civil Law countries, courts may decline jurisdiction invested with them by a jurisdictional clause. Private International Law Statute, art. 5(3)(Switzerland); *Pistacor*, HR, 1 Feb. 1985, NJ 698 JCS, [1989] Netherlands International Law Reports 59.

[335] Brussels Convention, art. 17; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 Sept.1988, art. 17, 1988 O.J. (L 319) 9, 28 I.L.M. (1988) 620 [hereinafter 'Lugano Convention'].

[336] Statute of Private International Law, art. 5(1)(Switzerland); *Goto,* 26 Jap. Ann. Int'l L. 122; *Harvest Trader,* [1989] N.J. 765; Schack, supra note 249, at 200. It is also the common view that Article 17 of the Brussels Convention should be construed so to encompass exclusive jurisdiction clauses only. Fawcett, supra note 249, at 51. See also Convention on the Choice of Court, 25 Nov. 1965, art. 6(1), Hague Conference on Private International Law, Recueil des Conventions de la Haye (1970) 96 (not in force). But *cf.* the law in France, which treats all forum selection clauses as exclusive. Hélène Gaudemet-Tallon "Report on France" in *Declining Jurisdiction,* supra note 249, at 175, 184.

[337] See e.g., Z.P.O. § 40; Contract Act, s. 36 (Finland); *CSEE* [1986] D. 265 (France); *Koniglike Java,* 20 Jap. Ann. Int'l L. 106. See also Brussels Convention, art. 17.

[338] See e.g., Act No. 1429/1984, art. 4 (1)-(2) [1984] Kodex No. B 327 ff (Greece)(provisions compelling Greek employees to litigate with their employer outside Greece might be invalid); Statute of Private International Law, art. 114 (2)(Switzerland)(consumer may not waive jurisdiction in his domicile or habitual residence); *Hapimag v. Mona Martenson* [1976] A.D. 101 (Sweden)(a clause compelling Swedish employee to bring abroad suits against foreign employer, concerning work performed in

A clear manifestation of the general pro-choice of forum trend can be identified in relation to arbitration agreements (a particular category of choice of forum agreements).[339] While such agreements have also been regarded in the past as unenforceable, being an insult to the court system,[340] they are nowadays regularly enforced and encouraged by courts[341] (provided that they are valid and meet certain formal requirements, such as being made in writing).[342] The enforceability of international arbitration agreements is also sanctioned by the UNCITRAL Model Law on International Commercial Arbitration[343] and by several international treaties, the most notable of which is the 1958 New York Convention.[344]

However, as is the case with choice of adjudicative forum, there are also some exceptions to the pro-arbitration rule. Certain categories of disputes, of particular importance to the forum, are still perceived as non-arbitrable for reasons of public policy,[345] although the list of such issues is steadily declining.[346] Furthermore, in some Common Law jurisdictions, courts may exercise their discretion and decide in special

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Sweden, is invalid). See also Brussels Convention, art. 12, 15, 17 (limitation on validity of jurisdiction clauses in insurance, consumption and employment related disputes)

[339] *Scherk,* 417 U.S. at 519.

[340] Born, supra note 218, at 993. Other objections to arbitration focused on the lack of authority and expertise of the arbitrators. *Tobey v. County of Bristol,* 23 Fed. Cas. 1313, 1321-23 (C.C.D. Mass. 1845). Similarly, under traditional Muslim law, arbitration agreements were not binding. Abdul H. El-Ahdab, *Arbitration with the Arab Countries* (2nd ed., 1999) 24.

[341] Arbitration Act 1996, art. 9(4)(England); 9 U.S. § 2, 3 (Federal Arbitration Act); Z.P.O. §§ 91(1), 1027a. The British Arbitration Act and the U.S. Federal Act govern both domestic and international arbitrations. Arbitration Act 1996, art. 2; 9 U.S. § 1.
For the most part, the law in Arab countries also recognises the validity of both domestic and international arbitration agreements. El-Ahdab, supra note 340, *passim.*

[342] Fawcett, supra note 249, at 61; David St. John Sutton, John Kendall and Judith Gill, *Russell on Arbitration* (21st ed., 1997) 324-333.

[343] UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985, art. 8(1), UN Doc. A/40/17, Annex I, 24 I.L.M. (1985) 1302 [hereinafter 'UNCITRAL Model Law']. To date 34 jurisdictions (including 4 U.S. states) have adopted legislation incorporating the 1985 UN Model Law.

[344] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, art. II (3), 330 U.N.T.S. 38 [hereinafter 'New York Convention']. To date 121 states have ratified the Convention. See also Inter-American Convention on International Commercial Arbitration, 30 Jan. 1975, 14 I.L.M. (1975) 336; The Amman Arab Convention on Commercial Arbitration, 14 April 1987, art. 27, reprinted in El-Ahdab, supra note 340, at 971.

[345] New York Convention, art. II (1); UNCITRAL Model Law, art. 1 (1). Gary B. Born, *International Commercial Arbitration in the United States* (1994) 322-82, 1017-18; *Wilko v. Swan,* 346 U.S. 427 (1953)(dispute relating to the Securities Act, 1933, is non-arbitrable). Other areas of U.S. law held to be non-arbitrable include patent law and certain labour claims. See also Maureen Williams "Report on Argentina" in *Declining Jurisdiction,* supra note 249, at 71, 75 (in Argentina, only pecuniary matters are arbitrable); Civ. App. 591/73, *Baschist v. Workers in Rishon Le Zion and Zichron Yaacov Vineyards,* 28 (1) P.D. 759, 763 (1974) (Supreme Court of Israel)(only financial and business disputes are normally considered arbitrable); El-Ahdab, supra note 340, at 66 (in Algeria, certain personal status and public order matters are non-arbitrable).

[346] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985)(antitrust suits, involving foreign party, are now arbitrable).

circumstances not to stay proceedings in favour of agreed-upon arbitration for reasons of justice.[347]

D. Observations on the effects to be given to forum selection agreements under international law

The positive attitude towards forum selection and arbitration agreements demonstrated by virtually all surveyed legal systems (in both intra- and inter-systematic jurisdictional interactions), the texts of international instruments and the writing of scholars, suggests that there is broad consensus on the notion that forum selection agreements do not constitute a jurisdictional problem.[348] On the contrary, it looks as if parties should be encouraged to conclude such agreements, which adequately reflect their interests, and do away with litigation over where to litigate. It could even be argued that the ubiquitous recognition of forum selection and arbitration agreements[349] is indicative of the emergence of a general principle of law, providing that agreements on the identity of the forum before which disputes should be resolved must be generally respected.

Still, even if no general principle of law can be identified, the rationale supporting recognition of forum selection agreement applies even more forcefully in the international plane, where consent of the parties is the driving force behind the creation of legal arrangements, including jurisdictional arrangements. Another pertinent consideration is that institutional factors (i.e., the independent interest of the forum in exercising jurisdiction), which might conflict with the wishes of the parties, play a relatively minor part in the decisions of international courts and tribunals. Hence, international judicial bodies should and do generally give effect, as much as possible, to the choice of forum made by the parties. This proposition also means that international judicial bodies should, like their domestic counterparts, decline jurisdiction in cases brought before them in violation of a valid choice of forum agreement, when it is clear that the parties intended to exclude through their agreement the jurisdiction of other judicial fora.

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[347] Arbitration Act, 1908, art. 5 (New Zealand); Arbitration Law, 1968, art. 5 (c)(Israel). This is also the law in Australia and Scotland. Fawcett, supra note 249, at 60. In England, courts are nowadays under a general duty to stay proceedings in favour of arbitration. Arbitration Act 1996, art. 9.

[348] Fawcett, supra note 249, at 68.

[349] Fawcett, supra note 249, at 69 ("There is even more uniformity of approach among States when it comes to arbitration agreements").

However, there still might be circumstances in which strong policy arguments could be invoked against attempts made by the parties to evade the jurisdiction of a particular type of international procedure. This may be the case in disputes that involve significant interests of third parties or the whole international community, which can only be represented through adjudication before a specific forum. For instance, it may be argued that future deep seabed mining disputes between parties to UNCLOS should be litigated only before the sea-bed dispute settlement chamber of ITLOS and not through bilateral arbitration (even if the parties wish so), because of the third-party implications of any settlement between the disputing parties.[350] In the same vein, it had been argued that even had there been no explicit clause to this effect, disputes between EC states concerning EC law (and, necessarily, broad Community interests) should only be addressed by the competent judicial authorities of the European Community.[351]

2. Regulation of jurisdictional problems associated with multiple proceedings

Perhaps the most serious problem associated with the availability of multiple fora is the potential for multiple litigation. The ability to pursue a single claim before several jurisdictions at the same time, or to engage in 'piecemeal litigation' of a single dispute before different tribunals, either simultaneously or in consecutive order, raises significant objections.[352] Such duplicative practices draw heavily on scarce judicial resources,[353] carry the risk of legal havoc, which might be caused by inconsistent decisions,[354] and place an undue burden on some or all of the parties due to increased litigation expenses[355] and reduced legal certainty. In response to these concerns, virtually all domestic legal systems have developed some variation of the *lis alibi pendens* and *res judicata* rules, designed to reduce the occurrence of multiple proceedings.

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[350] *Cf. Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), 1991 I.C.J. 53, 121 (joint dissenting opinion of Judges Mawdsley and Ranjeva); Robert Y. Jennings "The Role of the International Court of Justice in the Development of International Protection Law" 1 *Review of European Community and International Environmental Law* (1992) 240, 241-47. W. Michael Reisman "The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication" 258 Recueil des cours (1996) 9, 52-53.

[351] See infra Chapter 5, at p. 224.

[352] *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 818 (1976); *Moses H. Cone Memorial Hosp. V. Mercury Construction Corp.*, 460 U.S. 1, 19 (1983).

[353] *Hartford Fire Insurance Co. v. Westinghouse Electric Corp.*, 725 F. Supp. 317 (S.D. Miss. 1989).

[354] *Davidson v. Exxon Corp.* 778 F. Supp. 909 (E.D. La. 1991); *Hooker,* 960 F. Supp. 1283.

[355] *South Carolina* [1985] 2 All E.R. at 1052.

However, it should be emphasised that the objections to multiple proceedings pertain to truly competing proceedings and do not encompass merely related proceedings. If two sets of proceedings involve different parties, different fact patterns or different legal claims, the arguments against multiplicity lose much of their force. This is because it is widely accepted that every party to a dispute has the right to have his or her day in court[356] and that the claimant may freely decide on the particulars of the claim (on what grounds to sue, when to file the complaint, who to name as the respondent and what remedies to request), including which competent court to seize (as long as the claimant exercises his or her rights in a non-abusive manner). Thus, an overly broad multiple litigation bar might place exorbitant limitations on this fundamental expression of party autonomy.[357]

In appreciation of these concerns, the preclusion rules commonly found in domestic systems of law (*lis alibi pendens* and *res judicata)* condition their application on a high degree of similarity between the competing multiple claims and real competition can only take place between proceedings involving the same parties[358] and raising the same issues.[359] Still, many national and international instruments deem it desirable (yet usually not obligatory) that related, though not identical, proceedings, should also be consolidated into one judicial forum (the principle of connexity).[360]

A. Parallel proceedings

This following segment will focus on one particular manifestation of multiple proceedings, namely, parallel proceedings, whereas the next segment is to address the

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[356] *Martin v. Wilks,* 490 U.S. 755, 761-62 (1989); *Richards v. Jefferson County,* 517 U.S. 793, 798 (1996); R. Jason Richards "Richards v. Jefferson County: The Supreme Court Stems the Crimson Tide of Res Judicata" 38 Santa Clara Law Review 691, 699-700 (1998).

[357] *Richards,* 517 U.S. at 711-12, 729-30, 797.

[358] The established exceptions to the application of the res judicata rule between the same parties under domestic U.S. law are privity and adequate representation of interests. *Burns v. Unemployment Compensation Board of Review,* 65 A.2d 445 (1945); *Watts v. Swiss Bank Corp.,* 265 N.E.2d 739, 743 (1970); *Southwest Airlines Co. v. Texas International Airlines, Inc.,* 546 F.2d 84 (5th Cir. 1977).

[359] See e.g., *Saif Ali v. Sydney Mitchell & Co.* [1978] 3 All ER 1033, 1045 (H.L); Am. Jur. 2d, Judgments § 514.

[360] Rules of the Supreme Court, Order 15, rule 1, 2(2), 4 (England); New Code of Civil Procedure, art. 101 (France); Code of Civil Procedure, art. 31 (Greece); Mirjam Freudenthal and Frans van der Velden "Report on the Netherlands" in *Declining Jurisdiction,* supra note 249, at 321, 337 (Dutch courts will normally refuse jurisdiction in the face of related proceedings pending before a foreign court); Williams, supra note 345, at 75 (connexity is covered under Argentinean law by the doctrine of *litispendencia).* See also Brussels Convention, art. 22; Convention on the Enforcement of Judgments in Civil and Commercial Matters (Italy-France), 3 June 1930, art. 19, 153 L.N.T.S. 135; Report of the ILA Committee, supra note 254, at 7, 23-24.

question of finality of judgments. As already had been established, there have been, to date, only a few cases where international proceedings were pending simultaneously before more than one international forum. Further, even those international courts and tribunals that have encountered the phenomenon have offered only limited discussion of the theoretical dimensions of the subject. As a result, one must refer again to jurisdictional competition within domestic legal systems and to other interactions involving domestic courts, in attempt to extrapolate considerations, which could also be applied in the international context.

The co-existence of two or more simultaneous proceedings before different fora places an unusually heavy burden on the parties to litigation, which are required to maintain two legal teams or shuttle between two or more tribunals.[361] It also entails the investment of unnecessarily duplicative judicial time and resources by courts and tribunals that are faced with similar (if not identical) tasks and yet are unable to rely on the work of each other. This problem of judicial efficiency might be further exacerbated due to the introduction of jurisdictional motions designed to determine which of the competing fora should rightfully adjudicate the dispute[362] and by the risk that the concurrence of actions will induce parties to race towards judgment, in the hope that once a judgment before one tribunal is entered, the other judicial fora will recognise and enforce it. Such a race might also involve unsavoury attempts by one or more of the parties to stall proceedings before what they deem to be the less hospitable forum.[363] Thus, the possibility of parallel proceedings may radically increase the costs of the legal process and offer apt room for manipulating it.[364] Finally, it should be reiterated that parallel proceedings might result in inconsistent judgments,[365] and some have suggested that this is the raison d'être of the rule against litispendence.[366]

In Common Law countries, courts may address related actions via the *forum non-conveniens* doctrine and limit thereby oppressive legal tactics not covered by the traditional *lis alibi pendens* rule. Fawcett, supra note 249, at 43.

[361] *The "Abidin Daver"* [1984] A.C. at 411-12; *E.I. Dupont de Nemours & Co. v. Diamond Shamrock Corp.*, 522 F. Supp. 588 (D.C. Del. 1981); Fawcett, supra note 249, at 28.

[362] Louise E. Teitz "Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings" 25 Int'l Lawyer (1992) 21, 31.

[363] *The "Abidin Daver"* [1984] A.C. at 423; *Du Pont (E.I.) de Nemours & Co. v. Agnew & Kerr* [1987] 2 Lloyd's Rep. 585, 589 (C.A.); *China Trade and Development Corp. v. MV Choong Yong,* 837 F.2d. 33, 39 (2nd Cir. 1987)(Bright J. dissenting).

[364] Teitz, supra note 362, at 29.

[365] Case 144/86, *Gubisch Maschinenfabrik KG v. Palumbo* [1987] E.C.R. 4861, 4874; *Overseas Union Insurance Ltd. v. New Hampshire Insurance Co.* [1992] 2 W.L.R. 586 (ECJ).

[366] *Certain German Interests,* 1925 P.C.I.J. (ser. C) No. 9-I, at 83 [Discours Prononcé par M. Kaufmann (Allemagne)]("La raison d'être de l'exception de litispendance est que l'on veut éviter deux sentences différentes ayant l'autorité de la chose jugée en ce qui concerne la même objet"); Report of the ILA Committee, supra note 254, at 6.

I. Parallel proceedings under domestic law

There is little support in the literature and case law in favour of multiple proceedings *per se* (as a legitimate manifestation of party autonomy), and most domestic legal systems do not appreciate being seized while the same dispute is pending elsewhere (except where the first-in-time set of proceedings is clearly inappropriate). However, from an institutional point of view, it has sometimes been submitted that domestic fora have an independent right to exercise jurisdiction on matters falling under their prescriptive powers, even if parallel proceedings would ensue from such exercise of authority.[367] This argument resonates with similar arguments introduced earlier against the parties' ability to select a forum (unilaterally or by way of agreement), and oust thereby a competent court out of jurisdiction.

Nonetheless, most of the surveyed domestic legal systems, coming from both Common and Civil Law legal systems, apply the *lis alibi pendens* rule that provides that domestic courts cannot accept jurisdiction over a case already pending before another court in the same legal system[368] (with the partial exception of the U.S., where parallel proceedings pending before the state and federal legal systems are generally permissible).[369] This is a strong indication of the almost universal opposition to the phenomenon of parallel litigation, when occurring in the intra-systematic context.

However, with regard to cross-boundary parallel litigation (i.e., pendency of cases before courts of different countries), the attitude of domestic legal systems, particularly, in Common Law systems, has been more ambivalent, reflecting what seems to be a more flexible jurisdiction-regulating standard. This is because the idea that courts in one state must not exercise their jurisdiction by reason of legal proceedings taking place before another jurisdiction has been perceived by some as incompatible with notions of state sovereignty and independence.[370]

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[367] *Laker Airways,* 731 F. 2d at 927.

[368] Supreme Court Act 1981, s. 49(2) (England); New Code of Civil Procedure, art. 100 (France); Code of Civil Procedure, art. 231 (Japan); Code of Civil Procedure, art. 222 (Greece); Z.P.O. § 261(3); Herzog, *Civil Procedure in France,* supra note 183, at 437; Harold Koch and Franck Diedrich, *Civil Procedure in Germany* (1998) 70; Williams, supra note 345, at 74 (in Argentina there exists a defence of *litispendencia,* barring parallel litigation).

[369] There is no bar against parallel proceedings before a U.S. state and a Federal court, but in 'exceptional circumstances' only. *Colorado River,* 424 U.S. 817. However, it could be argued that state-Federal competition is more akin to inter- than to intra-systematic competition. Indeed, parallel proceedings between Federal courts and between state courts are precluded by virtue of *lis alibi pendens* rules. *Landis v. North American Co.,* 299 U.S. 248 (1936); Am. Jur. 2d., Courts § 91.

[370] Donnedieu de Vabres "Le conflict des lois de competence judiciare dans les actions personnelles" 26 Recueil des cours (1929) 261.

Still, a large number of different legal systems employ one or more of the following remedies against cross-boundary parallel proceedings: (1) decline of jurisdiction by the domestic forum (not necessarily through application of the *lis alibi pendens* rule); (2) issuing of anti-suit injunctions against the foreign forum; or (3) refusal to recognise and enforce foreign judgment procured through parallel proceedings. However, these measures are, as a rule, discretionary, and sometimes, of a very exceptional nature.[371]

In Common Law countries, courts generally deal with the problem of cross-boundary parallel litigation primarily on a case-to-case basis within the legal framework of the *forum non-conveniens* doctrine.[372] The existence of another set of proceedings in another jurisdiction, with its implications for party convenience and judicial efficiency, constitutes but one of the factors that ought to be considered by the seized court. In some cases, special importance has been attributed to the order in which proceedings were initiated and to the respective stage of progress of the competing procedure in determining whether to dismiss one set of parallel proceedings.[373] Moreover, the fact that the same party initiated both sets of parallel proceedings might also be a decisive factor in dismissing the case.[374] Hence it could be asserted that while Common Law

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[371] The dominant approach in the U.S. has been one that permits parallel cross-boundary proceedings to continue. *Laker Airways,* 731 F.2d at 928. Some Japanese courts have also allowed the pendency of cross-boundary claims and refused to exercise their discretion to stay proceedings. Dogauchi, supra note 268, at 311.

[372] *The "Abidin Daver"* [1984] A.C. 398; *Du Pont (E.I.)* [1987] 2 Lloyd's Rep. 585; *Canastrand Industries Ltd. v. The 'Lara S'* [1992] 3 F.C. 398 (T.D.)(Canada); *Sentry Corp. v. Peat Marwick Mitchell & Co.,* 95 Aust. L. Rep. (1990) 11, 36 (Austl.); *McConnell Dowell* [1988] N.Z.L.R. at 275-78 (New Zealand); Steven Goldstein "Report on Israel" in *Declining Jurisdiction,* supra note 249, at 259, 261. In some cases the application of the doctrine has been grounded in statutory law. Domicile and Matrimonial Proceedings Act 1973, s. 5 (b), Schedule 1, par. 9 (1)(b)(England); Transnational Causes of Action (Product Liability) Act 1997, s. 4(3)(Dominica).
In the U.S., the *lis alibi pendens* rule, applicable in competition between Federal courts, has also been subsequently described as closely related or a particular subset of the *forum non-conveniens* doctrine. Restatement (Second) Conflict of Laws § 84 comment e (1971); Born, supra note 218, at 461. In cross-boundary cases, U.S. Federal courts have been split on whether to apply an expansive or restrictive discretionary standard. *Neuchatel Swiss General Ins. Co. v. Lufthansa Airlines,* 925 F. 2d 1193, 1195 (9th Cir. 1991); *Continental Time Corp. v. Swiss Credit Bank,* 543 F. Supp. 408 (S.D.N.Y. 1982).
An analogous rule, considering *lis pendens* as one of multiple factors to be weighed in deciding whether to decline jurisdiction can be found some Civil Law systems. See Civil Code, art. 3137 (Quebec); *Miniera di Fragne,* Cass. 1e Civ., 20 Oct. 1987 [1987] IV J.C.P. 400 (France). *Greenline Shipping Co. Ltd. v. California First Bank,* 28 Jap. Ann. Int'l L. (1985) 243.

[373] *Cleveland Museum of Art v. Capricorn Art* [1990] 2 Lloyd's Rep. 166; *McConnell Dowell* [1988] N.Z.L.R. at 275-78; *Ronar, Inc. v. Wallace,* 649 F. Supp. 310, 318 (S.D.N.Y. 1986)("comity counsels that priority generally goes to the suit first filed"). In one Japanese case, the Court decided not to decline jurisdiction, citing the fact that the foreign parallel proceedings were still in a preliminary stage. *Miyakoshi Machine Tools Co. Ltd. v. Gould Inc.,* Hanrei Jiho No. 1348 (Tokyo District Court, 1989), described in Dogauchi, supra note 268, at 313-14.

[374] *Australian Commercial Research & Development Ltd. v. ANZ McCaughan Merchant Bank* [1989] 3 All E.R. 65 (plaintiff cannot proceed in both fora).

courts seem to be displeased with cross-boundary parallel litigation, they have not embraced a comprehensive bar against the phenomenon and there could be circumstances in which the existence of parallel proceedings will be tolerated. One case, in which the High Court of New Zealand has reached the conclusion that, as a matter of discretion, the balance of considerations support a stay of proceedings simultaneously pending before an ICSID tribunal[375] suggests that the approach of common law courts vis-à-vis international courts and tribunals might be generally similar to that evidenced towards foreign courts.

In most Civil Law countries, though not in all of them, the risk of cross-boundary parallel litigation has been addressed mainly through statutory *lis alibi pendens* rules, ordering courts to decline jurisdiction if foreign proceedings are already pending on the same matter, between the same parties (usually, on condition that the foreign proceedings may lead to a recognisable judgment).[376] This 'first-seized' rule[377] has also been incorporated into the Brussels Judgments Convention[378] and other international instruments regulating division of jurisdictions between different national courts[379] or between international and national fora.[380] Such strict jurisdiction-regulating rule guarantees expeditious resort to adjudication, and mitigates the mischievous

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[375] *Attorney General v. Mobil Oil NZ Ltd.* [1987] 2 N.Z.L.R. 649, 4 ICSID Rep. 117 (1987)(New Zealand). For criticism, see Schreuer, supra note 99, at 183.

[376] Z.P.O. § 261(3); Private International Law Statute, art. 9(1)(Switzerland). This also seems to be the law in Argentina, Greece and Sweden. Fawcett, supra note 249, at 31-32.
A glaring exception to application of the *lis alibi pendens* rule in cross-boundary parallel litigation cases can be found in Italy, where the law explicitly rejects the application of the rule. Code of Civil Procedure, art. 3 (Italy). See also Marc Fallon "Report on Belgium" in *Declining Jurisdiction*, supra note 249, at 99, 109 (in Belgium, there is no statutory rule of *lis alibi pendens* in international cases).
Some Common Law jurisdictions have also excluded *lis alibi pendens* measures in some international jurisdictional competition cases relating to specific legal areas. Divorce Act, Ch. 3, s. 3 (2), Revised Statutes of Canada 1985, Ch. 3 (2nd Supp.); Admiralty Act 1973, s. 6 (2)-(3)(New Zealand).

[377] It must be realised that ascertaining the exact time in which a court is deemed seized is a very sensitive issue. According to the ECJ this matter is to be decided in accordance with the domestic law of each forum state. Case 129/83, *Zelger v. Salinitri* [1984] E.C.R. 2398. See also Fawcett, supra note 249, at 32-34.

[378] Brussels Convention, art. 21.

[379] See Convention (Italy-France), supra note 360, art. 19; Convention regarding the Recognition and Enforcement of Judicial Decisions (Italy-Switzerland), 3 Jan. 1933, art. 8, 142 L.N.T.S. 17; Convention concerning the Reciprocal Recognition and Enforcement of Judicial Decisions, Arbitral Awards and Authentic Acts in Civil and Commercial Matters (Belgium-Germany), 30 June 1958, art. 15, 387 U.N.T.S. 245; Convention concerning the Recognition and Enforcement of Judicial Decisions and Arbitral Awards (Belgium-Switzerland), 29 April 1959, art. 10, 443 U.N.T.S. 35; Convention concerning the Reciprocal Recognition and Enforcement of Judicial Decisions and other Enforceable Instruments in Civil and Commercial Matters (Belgium-Italy), 6 April 1962, art. 14, 490 U.N.T.S. 317; Convention concerning the Recognition and Enforcement of Judicial Decisions in Civil and Commercial Matters, of Judicial Settlements and of Notarial Acts (Italy-Austria), 16 Nov. 1971, art. 12, 1388 U.N.T.S. 277.

[380] See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 Jan. 1981, art. VII (2), 1 Iran-US Cl. Trib. Rep. 10, 20 I.L.M. (1981) 230.

consequences of multiple adjudication.[381] However, this mechanical solution might be viewed as unjust in particular circumstances, and increase the incentives for 'racing to court'.

The main alternative to declining jurisdiction in cross-boundary parallel litigation has been to instruct parties to withdraw from the competing procedure - i.e., issuance of anti-suit injunction. However, even jurisdictions that employ anti-suit injunctions or anti-anti-suit injunctions (directing the parties not to seek an anti-suit injunction in another court) such as England,[382]the U.S.[383] and other Common Law countries,[384] acknowledge that such measures are problematic. This is because anti-suit injunctions constitute clear interference with the legal process of other jurisdictions and carry a certain degree of offence and mistrust towards the competing courts. Hence, they might be considered to be incompatible with notions of international comity.[385] It has also been conceded that competing tribunals might resort to similar measures, thereby giving rise to a devastating 'injunctions battle'.[386] Consequently, anti-suit injunctions were only rarely issued in cross-boundary parallel litigation cases.

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[381] Lenenbach, supra note 248, at 298..

[382] In England, courts may issue anti-suit injunctions as part of their authority to protect their jurisdiction against both domestic and cross-boundary competition. *Bushby v. Munday,* 56 E.R. 908 (1821). However, in cases of cross-boundary parallel litigation, injunctions will only be issued in exceptional circumstances where England constitutes the natural forum for the lawsuit, the continuation of duplicative proceedings would be, on a balance, vexatious or oppressive, and the result would not be unjust for the plaintiff in the competing procedure (i.e., not deprive him or her of a legitimate advantage). *Smith Klein & French Labs Ltd. v. Bloch* [1983] 1 W.L.R. 730, 738, 744 (C.A.); *Midland Bank plc. v. Laker Airways Ltd.* [1986] 1 All E.R. 526, 526 (C.A.); *Société Nationale Industrielle Aerospatiale v. Lee Kui Jak* [1987] 3 All E.R. 510, 522 (P.C.). Nevertheless, English courts have been more ready to issue injunctions, where the foreign proceedings had been submitted in breach of a contractual arrangement. *Continental Bank v. Aeakos Compania Naviera* [1994] 1 Lloyd's Rep. 505, 516 (C.A.); *The Angelic Grace* [1994] 1 Lloyd's Rep. 87, 168 (C.A); *Aggeliki Charis Compania Maritime S.A. v. Pagnan S.p.A.,* [1995] 1 Lloyd's Rep. 87, 96 (C.A.).

[383] In the U.S., all courts have accepted the proposition that anti-suit injunctions should be issued only sparingly. However, difference of opinions has emerged with regard to the standard that should govern anti-suit injunction requests. Some courts have asserted the right to issue an injunction only when necessary to protect their jurisdiction or prevent evasion from important public policies of the forum. *Laker Airways,* 731 F.2d at 927-31; *China Trade,* 837 F.2d at 35-36; *Gau Shan Co. v. Banker's Trust Co.,* 956 F.2d 1349 (6th Cir. 1992). Still, some other courts have advocated a more flexible approach, taking into account the balance of convenience to the parties and the local forum's policies. *Seattle Totems Hockey Club, Inc. v. National Hockey League,* 652 F.2d 852, 856 (9th Cir. 1981); *American Home Assurance Co. v. Insurance Corp. of Ireland,* 603 F. Supp. 636, 643 (S.D.N.Y. 1984) Born, supra note 218, at 477; Richard W. Raushenbush, "Antisuit Injunctions and International Comity" 71 Va. L. (1985) 1039, 1049-50.

[384] See e.g., National Mutual Holdings Pty Ltd. v. Sentry Corp., 87 Aust. L.Rep.539 (1989); Amchem Products, 102 D.L.R. 118, 120-21; Djoni Widjaja v. Bank of America National Trust and Savings Association [1993] S.L.R. 678 (Singapore). See also Pan American World Airways v. Andrews, 1992 S.L.T. 268 (Scotland).

[385] *Amchem Products,* 102 D.L.R. at 106, 125; *Laker Airways,* 731 F.2d at 934. Fawcett, supra note 249, at 62; Lenenbach, supra note 248, at 265, 293-94; Teitz, supra note 362, at 36.

In contrast with Common Law countries, Civil Law jurisdictions do not, as a rule, attempt to restrain foreign proceedings by way of injunctions.[387] Nonetheless, there is some theoretical support to the view that courts may issue anti-suit injunctions in application of Civil Law doctrines such as *abus de droit*,[388] especially when parallel proceedings are brought in violation of a contractual arrangement.[389]

A third method aimed at producing a disincentive for parallel litigation is the adoption of rules blocking enforcement of foreign judgments procured through parallel proceedings. Although, only a few legal systems have explicitly adopted this alternative,[390] most judgment recognition instruments do bar the recognition and enforcement of judgments that are inconsistent with final domestic judgments.[391] This means that a party that conducts foreign litigation in parallel to domestic proceedings might not be able to enforce the foreign judgment in the domestic forum's territory.

B. Observations on the introduction of rules regulating parallel proceedings to international law

The theory and practice of domestic legal systems on the issue of parallel litigation leads to the inevitable conclusion that parallel proceedings ought to be considered a negative phenomenon.[392] Indeed, the case law and the literature hardly reveal any theoretical support for parallel proceedings, except in those rare instances where there is a strong public policy in maintaining jurisdiction notwithstanding the deleterious consequences of parallel litigation. Another situation, where it might be proper not to invoke the *lis alibi pendens* rule, might be where the initiation of the first-in-time proceedings had been manifestly abusive.

Nonetheless, it is possible to ascertain that all surveyed states (with the partial exception of the U.S.) view parallel litigation, when arising between courts of the same legal

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[386] *Gau Shan*, 926 F.2d at 1355.
[387] Gaudemet-Tallon, supra note 336, at 186-87; Schack, supra note 249, at 203. But *Cf. Johns-Manville Corp. v. Dominion of Canada General Insurance Co.* [1991] Recueils de jurisprudence de Québec 616 (C.A.)(a Quebec court, applying Civil Law, has issued an injunction against California proceedings).
[388] Dogauchi, supra note 268, at 318 (Japanese law may in theory support anti-suit injunctions); Lenenbach, supra note 248, at 297-301 (section 826 of the German Civil Code -wilful conduct contrary to public policy, provides a proper basis for anti-suit injunctions in cases where initiation of foreign parallel proceedings may be deemed as an unconscionable act).
[389] Lenenbach, supra note 248, at 287, 290.
[390] See e.g., Foreign Judgments Enforcement Law, 1958, art. 6(a)(4)-(5)(Israel); Code of Civil Procedure, no. 6, art. 797(1) (Italy).
[391] See infra, at n. 428.
[392] Fawcett, supra note 249, at 67.

system as an intolerable litigation tactic and apply rules to abate the situation.[393] It therefore seems possible to contend that the *lis alibi pendens* rule, when applied to intra-systematic jurisdictional conflicts, meets the conditions for being treated as a general principle of law. However, with respect to cross-boundary interaction many courts, particularly from Common Law countries, have demonstrated a considerably more flexible approach and have sometimes tolerated parallel proceedings. Hence, no common standards seem to have emerged vis-à-vis inter-systematic parallel proceedings (although most courts do apply discretionary measures designed to mitigate abusive parallel litigation).

Given the uncertainties surrounding the systematic features of international courts and tribunals, it is far from clear whether the general principle of *lis alibi pendens* applicable to intra-systematic cases should govern the relations between international fora. Yet, it looks as if the principal policy arguments against parallel litigation within the same legal system (inconvenience to the parties, judicial economy, race to judgment and the risk of inconsistent judgments) could also apply in the international sphere. Furthermore, there seem to be unique additional reasons why international courts and tribunals should be protected from parallel proceedings.

While most, though not all, international parties might be better situated than private parties to meet the costs of duplicative international litigation, multiple proceedings might put an unnecessary strain on the already under-funded budgets of most international courts and tribunals, and are thus undesirable from a systematic point of view.[394] Additionally, given the notorious problems of compliance with international norms, in general, and judgments, in particular, the adverse consequences of conflicting judgments might be more serious in the international sphere than under domestic legal systems, where third party resolution of the conflict at the enforcement stage may be obtainable.[395] One must also recall than conflicting judgments might introduce confusion over the state of the law[396] and undermine the normative coherence of the

[393] Fawcett, supra note 249, at 68.
[394] See e.g., *Chorzów Factory,* 1927 P.C.I.J. (ser. A) No. 8, at 43 (Dissenting Opinion of Judge Ehrlich)(there is a presumption in favour of diminishing the amount of litigation).
[395] See e.g., *Omnium de traitement et de Valorisation v. Hilmarton,* Judgment of 10 June 1997, 22 Yearbook of International Commercial Arbitration (1997) 696 (Cour de Cassation)(determination which of two conflicting arbitral awards should be given effect).
[396] William E. Beckett "Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale" 39 Recueil des cours (1932) 131, 265.

international legal system, in a manner akin to the effects of conflicting judgements rendered within the same domestic legal system.

It should be further noted the advantages of inter-fora cross-fertilisation, which can be cited in support of successive litigation before different fora, are largely irrelevant in cases of parallel litigation. This is because each of the competing fora cannot, as a rule, have before it the views of the other forum on the substance of the dispute during the concurrent pendency of the proceedings.[397] Finally, unlike national courts involved in cross-boundary parallel litigation, where institutional factors (i.e., the forum's independent interests in retaining jurisdiction) may override the need to curb multiple proceedings, international courts and tribunals, whose jurisdiction is consent-based, have less of an incentive to retain jurisdiction against the wishes of one or more of the parties. All of these considerations strongly support the introduction of *lis alibi pendens* type jurisdiction-regulating norm into international law in order to prevent parallel adjudication cases.

However, here too, it might be considered proper to carve out exceptions to the *lis alibi pendens* rule in order to accommodate fears that it might be exploited. For instance, if the invocation of the first-in-time tribunal had been made in an abusive manner (e.g., in breach of an agreement to litigate elsewhere) it should not to be granted precedence. Similarly, where third states or the entire international community have a paramount interest that specific matters would be addressed by a specific forum to the exclusivity of all other courts and tribunals, it might be wise to allow adjudication before that more appropriate forum to continue despite the fact that proceedings concerning the same dispute are already pending before another forum.

While application of the doctrine of connexity might also be desirable from a systematic point of view (and is supported to some extent by the Rules of Procedure of the *ad hoc* International Criminal Tribunals),[398] it has not been applied as a mandatory doctrine by many domestic legal systems. This might be explained by reason of the considerable affront to the autonomy of the litigating parties that compulsory consolidation of proceedings might represent. It should be noted that autonomy of the parties is a particularly important value in international adjudication, given the fact that many

[397] Helfer, supra note 20, at 365-66.

parties to litigation are sovereign states, and restrictions upon their freedom of action ought to be imposed only with great care.[399] As a result, there hardly seems any legal or public policy basis for the introduction of the connexity doctrine into international law.[400]

C. Finality of proceedings

The last difficulty arising from multiplicity of competent fora involves the question of finality of judicial proceedings. Unless regulated, it is not impossible to envision that, following final pronouncement on the dispute by an international court or tribunal, the losing party might try to re-litigate the same matter before another international forum.

The implications of such scenario are far reaching. The ability to reopen settled issues exposes the party which had prevailed in the first case to major inconveniences,[401] and draws heavily on deficient judicial resources.[402] More importantly, the co-existence of multiple and potentially inconsistent judgments undermines legal certainty and puts in question the authority of judicial bodies and the effectiveness and credibility of the entire dispute settlement machinery of the international legal system.[403] If parties can repeatedly challenge final decisions of competent tribunals, the dispute might remain simmering indefinitely[404] and the parties will have no incentive to comply with any judgment rendered.[405]

On the other hand, it has been pointed out that finality of judgments might lead to perpetuating judicial errors and that it may bar the path to truth and justice.[406] Hence, a choice must be made between two conflicting values - finality, with its implications for party convenience and systematic efficiency, credibility and procedural fairness, and the

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[398] ICTY Rules of Procedure and Evidence, supra note 285, rule 9; ICTR Rules of Procedure and Evidence, supra note 285, rule 9.
[399] *S.S. Lotus (France v. Turkey),* 1927 P.C.I.J. (ser A.) No. 10, at 18; Shaw, supra note 24, at 150.
[400] *Lotus,* 1927 P.C.I.J. (ser A.) No. 10, at 48 (dissenting opinion of Judge Weiss)("[Connexity] is completely foreign to international relations ... [it] is a rule of internal convenience applicable in those States which have included it in their codes of procedure; it is ineffective outside their frontiers").
[401] E.g., the need to preserve evidence for an indefinite period of time. Elihu Harnon "Res Judicata and Identity of Actions - Law and Rationale" 1 Israel L. Rev. (1966) 539, 545; Allen D. Vestal "Rationale of Preclusion" 9 St. Lou. U.L.J. (1964) 29, 34.
[402] *Federated Department Stores v. Moitie,* 452 U.S. 394, 401 (1981).
[403] Andrews, supra note 240, at 511 (1994); Raz, supra note 34, at 216; Harnon, supra note 401, at 545.
[404] *Ferrer v. Arden,* 77 E.R. 263. 266 (1599).
[405] See also *Hart Steel Co. v. Railroad Supply Co.,* 244 U.S. 294, 299 (1917); *Baldwin v. Iowa State Travelling Men's Association,* 283 U.S. 522, 525 (1931); *Montana v. U.S.,* 440 U.S. 147, 153-54 (1979).
[406] *Jeter v. Hewitt,* 63 U.S. 352, 363-64 (1859); Harnon, supra note 401, at 542; Nina Zaltzman *Res Judicata in Civil Proceedings* (1991) 4 (in Hebrew).

interests of justice, as reflected in the constant search for truth and the proper legal outcome.

I. Finality under domestic law

In domestic legal systems, it is well established that, on the balance, the interests of finality must usually prevail.[407] This can be explained, in part, by the weakness of the justice rationale - there is no certainty that the second-in-time forum (or any subsequent forum) will reach a more just decision than the first-in-time tribunal on the merits of the dispute. As a result, municipal legal systems have adopted the *res judicata* (or judgment estoppel/preclusion) rule in order to guarantee finality of proceedings.[408]

According to the *res judicata* rule, once a dispute had been settled by one competent tribunal (and all avenues of appeal have been exhausted), the parties are bound by the final judgment in their relations vis-à-vis each other and may not re-litigate the same issues before another tribunal.[409] Some have also contended that the doctrine of finality requires the consolidation of all legal claims pertaining to the same matter before one judicial forum, although there is no consensus on the topic.[410] In any event, it is clear that the *res judicata* rule stems from deeply embedded notions that it is in society's best interest that there should be an end to litigation[411] and that nobody should be harassed (or disturbed) twice in the same matter.[412] This rule also promotes a climate of greater legal certainty, protects the authority of courts, saves judicial resources and conforms to traditional notions of fairness.

The *res judicata* rule, which was originally applied in relation to identical claims, has been subsequently extended in practice to the collateral (or issue) estoppel rule, which bars the re-litigation of specific issues determined by a competent court or tribunal. In other words, the collateral estoppel rule prevents parties from challenging specific

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[407] *R v. Secretary of State for the Environment* [1983] 3 All E.R. 358, 365; *State R. v. Harrington Middle Quarter (Inhabitants)* [1855] E.R. 288, 293 (C.A.); *Federal Department Stores v. Moitie,* 452 U.S. 394, 398-99 (1981); *Medina v. Chase Manhattan Bank Ltd.,* 737 F.2d 140, 143-44 (1984).

[408] *Sambasivianm v. Public Prosecutor, Federation of Malaya* [1950] A.C. 458, 479 (P.C.); .Allen D. Vestal, *Res Judicata/Preclusion* (1969) V17-19.

[409] *Cromwell v. County of Sac,* 94 U.S. 351 (1877); Restatement (Second) of Judgements § 27 (1982).

[410] See e.g., G. Richard Shell "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration" 35 U.C.L.A. L. Rev. (1988) 623, 640-41.

[411] *The Ampthill Peerage Case* [1977] A.C. 547, 575-76 (opinion of Lord Simon of Glaisdale); C.A. 440/70, *Ganem v. Ganem,* 26 (2) P.D. 829, 838 (Supreme Court of Israel); Restatement (Second) Conflict of Laws §98, comment b (1971); Zaltzman, supra note 406, at 14.

[412] C.A. 718/75, *Amram v. Scornik,* 31 (1) P.D. 29, 35 (Supreme Court of Israel): Andrews, supra note 240, at 503.

judicial findings, even in the context of subsequent proceedings on a different subject matter.[413] This, in turn, enables judicial bodies to save valuable judicial time and rely on the work of previous courts and tribunals that have reviewed the same question.[414] However, estoppel is normally granted on condition that the parties have had an adequate opportunity to raise their arguments before the first-seized tribunal.[415]

The *res judicata* rule is today found in all domestic systems of law in respect of local judgments and has a preclusive effect upon subsequent domestic litigation.[416] Similar rules, albeit of slightly less absolute nature,[417] govern the status of domestic arbitral awards. Such awards may be challenged before courts (typically on much narrower basis than ordinary appeals),[418] but once recognised (sometimes through award confirmation proceedings) they bar subsequent claims. Hence, in terms of finality, the status of a final arbitral award is now generally equated to that of a local court's judgment and most disputes settled by awards cannot be re-litigated.[419] As has been suggested above, one may draw an analogy between the rules governing the relations among domestic courts of law and arbitration and the rules that ought to regulate relations among the various international courts and tribunals. This is because in both

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[413] *Arnold v. National Westminster Bank plc* [1991] 2 A.C. 93, 105; Restatement (Second) Judgments §§ 18-19 (1980).

[414] Shell, supra note 410, at 626. In the U.S. and Canada, the doctrine of *res judicata* is sometimes extended upon this rationale to third parties, who may use adverse findings reached in cases to which they were not parties in their litigation with parties to these earlier cases (i.e., non-mutual offensive estoppel). Andrews, supra note 240, at 511-12.

[415] *Allen v. McCurry,* 449 U.S. 90, 95 (1980).

[416] Supreme Court Act 1981, s. 49(2)(England); Civil Jurisdiction and Judgments Act 1982, s. 34 (England). A legal action brought in violation of the *res judicata* principle is to be deemed an abuse of process, and the courts are expected to strike it out. Rules of the Supreme Court, Order 18, rule 11 (1)(England); Andrews, supra note 240, at 259. See also, for example, U.S. Constitution, art. IV, §1; Code Civil § 1351 (France); Harold Koch and Franck Diedrich, *Civil Procedure in Germany* (1998) 70.

[417] Some domestic arbitration awards do not bar subsequent litigation. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 53 (1974)(arbitration proceedings are deemed inadequate to resolve disputes over Federally guaranteed rights). The reasons for this are lack of authority of the arbitrators to issue certain remedies and procedural inequities (informality of proceedings, methods of gathering of evidence and insufficient record and reasoning). Susan Hurt "Res Judicata Effects of State Agency Decisions in Title VII Actions" 70 Cornell L. Rev. (1985) 695, 700.

[418] Traditionally, courts in most Civil Law countries have had limited control over the merits of an arbitral award and could only intervene in cases of procedural irregularity or where public policy has been breached. Pieter Sanders "Arbitration" XVI *International Encyclopaedia of Comparative Law* (Mauro Cappelletti, vol. ed., 1996) 34. This is essentially the situation nowadays in most Common Law systems as well. Arbitration Act 1996, s. 67-69 (England)(parties may exclude substantive review of awards); 9 U.S.C. § 10. Still there are some recognized exceptions to this rule. Arbitration Act 1979 s. 4 (1)(c) (England) (allowing court review of awards in shipping, insurance and commodity disputes); *Wilko v. Swan,* 346 U.S. at 436-37 (courts may decline to enforce awards containing manifest disregard of the law). There are also some Common Law jurisdictions (e.g., some Canadian Provinces, India and Pakistan), which still permit broad substantive review of arbitration.

[419] Arbitration Act 1996, s. 58 (England); 9 U.S.C. § 13; Arbitration Law 1968, art. 23 (Israel); El-Ahdab, supra note 385, at 49 (Moslem law recognises the finality of arbitral awards); Shell, supra note 410, at 643-44. For criticism, see id. at 651-52, 660.

cases the competing fora do not form a coherent judicial structure, but yet operate within the same legal universe.

With regard to recognition of foreign judgments, the situation is more complex. Recognition and enforcement of such judgments are normally regulated on a reciprocal basis through international treaties,[420] but in their absence domestic legal standards apply. In this latter case, most countries, but certainly not all of them,[421] have adopted legislation or judge-made law granting recognition to foreign judgments.[422] The rationale offered for the adoption of pro-recognition rules has been that such practice is consistent not only with the traditional justifications for the principle of finality, but also with the notion of international comity.[423] It would seem that the later notion might also support the recognition of judgments of international courts and tribunals.[424]

However, there is some understandable reluctance on the part of courts to automatically abide by the decisions of all foreign courts, since some of them might fall short of local perceptions of procedural and substantive justice and may be oblivious to the domestic forum's sensitivities. Further, some have felt that recognition and enforcement of a foreign judgment by domestic courts constitutes a form of relinquishment of national sovereignty, which merits reciprocal concessions from the foreign state. As a result of these misgivings, recognition and enforcement of final foreign judgments have normally been subject to certain qualifications (which do not apply with regard to domestic

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[420] Brussels Convention, art. 25-30. The Brussels Convention, which is applicable in EC states, was extended in 1988, following the conclusion of the Lugano Convention, into the territory of EFTA states. There are many additional bilateral judgment recognition conventions. See e.g., Convention Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (Canada-U.K.), 24 April 1984, art. III, 1988 Gr. Brit. T.S. No. 74 (Cmd. 519)

[421] See e.g., Sweden and Finland, which do not recognise foreign judgments (unless bound to do so by an international treaty). Fawcett, supra note 249, at 67.

[422] Foreign Judgments (Reciprocal Enforcement) Act 1933, s. 2 (England); Civil Jurisdiction and Judgments Act 1982, s. 34 (England); Uniform Foreign Money-Judgments Recognition Act, 13 Uniform Laws Annotated 263 (1980 & 1991 Supp.)(in force in over 20 American states). Z.P.O. § 328; Foreign Judgments Enforcement Law, 1958, art. 2, 11 (Israel).
In England, most foreign judgments are recognised and enforced on the basis of the Common Law, and not in pursuance to statutory law (which has limited application). *Godard v. Gray* [1870] Q.B. 139, 147-50; *Henry v. Geoprosco International Ltd* [1976] Q.B. 726, 751. Andrews, supra note 240, at 536. In Israel, too, a prevailing party may choose whether to proceed on the basis of a statute or the Common Law recognition rule. C.A. 221/78, *Ovadia v. Cohen,* 33 (1) P.D. 293 (Supreme Court of Israel).

[423] *Hilton v. Guyot,* 159 U.S. 113, 163-64 (1895); McClean, *Morris: Conflict of Laws,* supra note 116, at 104.

[424] *Dallal v. Bank Mellat* [1986] 1 Q.B. 441, at 461-62 (Hobhouse J.)("... International comity requires that the courts of England should recognise the validity of the decisions of [the Iran-U.S Claims Tribunal]"); Brownlie, *Principles of Int'l Law,* supra note 14, at 53-54.

judgments or awards).[425] The most notable of these limitations have been made in relation to due process in the foreign proceedings, the validity of the jurisdictional title of the foreign court,[426] domestic public policy and reciprocity in recognition of judgments.[427] Some legal systems have also refused to recognise judgments conflicting with previously rendered judgments on the same matter.[428] However, it is commonly held that courts, which had been requested to recognise and enforce a foreign judgment, should refuse to re-examine *de novo* the merits of the case, as a court of appeal would have done.[429]

Similar considerations of judicial economy and procedural fairness towards the parties have also warranted the recognition and enforcement of foreign arbitral awards. Under the 1958 New York Convention, which is in force for more than 120 countries, awards rendered in the territory of signatory states must be given effect in the domestic systems of all other contracting states. But again, the obligation to recognise and enforce awards is subject to several exceptions.[430] This pro-recognition approach, resulting in a bar

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[425] In the U.S., foreign judgments are normally recognised out of notions of comity and fairness, subject to condition of reciprocity. *Hilton,* 159 U.S. 113; Restatement (Second) Conflict of Laws §98, comment b (1971); Hans Smit, International Res Judicata and Collateral Estoppel in the United States, 9 U.C.L.A. L. Rev. (1962) 44. The main exceptions to the recognition rule are lack of fairness of the foreign system of law, lack of jurisdiction and the 'public policy' exception. Uniform Foreign Money-Judgments Recognition Act, § 4. In England, foreign judgments are normally recognised subject to qualifications such as absence of fraud, overriding public policy considerations and jurisdiction of the foreign court. Foreign Judgments (Reciprocal Enforcement) Act 1933, s. 4; Administration of Justice Act 1920, s. 9; Andrews, supra note 240, at 536-37; Born, supra note 218, at 943; D. Cambell *International Execution Against Debtors - England* 5 (1993); McClean, *Morris: Conflict of Laws,* supra note 116, at 107-14. In Germany, the Civil Procedure Code prescribes the recognition of foreign judgments except where foreign courts did not have jurisdiction over the claim, defendant was not properly served with notice, another inconsistent judgments exists, recognition would be contrary to fundamental public policy or if there is no reciprocity. Z.P.O. § 328. A similar legal standard can be found under Japanese law. Japanese Code of Civil Procedure (Minji soshoho) Minsoho § 200.

[426] See e.g., H. Batiffol and P. Lagarde, *Droit International Privé,* (7th ed., 1981-83) para. 720, 726 (French courts will not recognize a foreign judgment procured under conditions that would not have given rise to jurisdiction under French law).

[427] *Hilton,* 159 U.S. at 228.

[428] See Uniform Foreign Money-Judgments Recognition Act, § 4 (b)(4), 13 Uniform Laws Annotated 263 (1980 & 1991 Supp); Foreign Judgments Enforcement Law, 1958, art. 6(a)(4)-(5)(Israel); *Vervaeke v. Smith* [1983] 1 A.C. 145; *Showlag v. Mansour* [1994] 2 All E.R. 129 (P.C.); Freudenthal and van der Velden, supra note 360, at 338 (In the Netherlands, attempts to recognize and enforce judgments irreconcilable with domestic judgments are deemed contrary to public order). The same rule is embodied in the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations to Children, 15 April 1958, 539 U.N.T.S. 29; Brussels Convention, art. 27(3),(5); European Convention on State Immunity, 16 May 1972, art. 20(2)(c), E.T.S. 74; Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, 2 Oct. 1973, 1021 U.N.T.S. 209.

[429] *Ferdinand Wagner v. Laubscher Bros. & Co.* [1970] 2 Q.B. 313, 318; *Henderson v. Henderson,* 6 Q.B. 288, 298 (1844).

[430] New York Convention, art. III, V. These include, *inter alia,* lack of competence, serious irregularities and incompatibility with the public policies of the forum where recognition and enforcement is sought.

against re-litigation, has also been adopted by several other arbitration treaties[431] and by national arbitration laws[432] (including the UNCITRAL Model Law, in force in more than 30 jurisdictions).[433]

For the sake of competition, one may note that a rule of finality similar to the *res judicata* rule is also found in the criminal law sphere - the *non bis in idem* principle[434] (also known as the double jeopardy[435] or *'autrefois convict or autrefois acqui'* rule). This principle provides that a person may not be put to criminal trial for an act[436] for which he or she has already been tried before a competent court, if the previous trial has resulted in a verdict (either guilty or not guilty), and if any sentence imposed upon that person had been served. This rule is found, with some variations, in virtually all systems of law, with regard to domestic judgments,[437] and can also be identified in international instruments governing multi-jurisdictional criminal prosecution.[438] However, it should be observed that some jurisdiction allow exceptions to the rule, both with regard to domestic[439] and, more commonly, foreign judgments.[440] This last state of things

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[431] See e.g., Inter-American Convention on International Commercial Arbitration, supra note 344, art. 5-6.
[432] Such are the laws of states such as Australia, Hong Kong, Singapore, Egypt and Tunisia. Sanders, supra note 418, at 33, 44.
[433] UNCITRAL Model Law, art. 34-35.
[434] This Latin maxim means – "not twice for the same thing". *Black's Law Dictionary* (7th ed., 1999) 1665.
[435] *Black's Law Dictionary* (7th ed., 1999) 506.
[436] There is some confusion as to whether the *non bis in idem* rule covers similar offences or similar facts. In the first case, the rule only has narrow application since prosecution of the same act or omission under a different head of charge is permissible. However, it seems that most (but not all) legal systems have opted for the 'similar facts' test, at least in respect of domestic criminal judgments. Christine van den Wyngaert and Guy Stessens "The International *Non Bis In Idem* Principle: Resolving some of the Unanswered Questions" 48 I.C.L.Q. (1999) 779, 788-90. Still, it should be noted that the language used by the relevant human rights instruments points towards the 'offence' test. ICCPR, art 14 (7); European HR Convention, protocol 7, art. 4 (1); I/A HR Convention, art. 8 (4). But see, *Gradinger v. Austria,* Eur. Ct. H.R., (ser. A), No. 328, par. 55 (application of the 'same conduct' test); Van den Wyngaert and Stessens, supra, at 791-92.
[437] Van den Wyngaert and Stessens, supra note 436, at 780. In fact, more than 50 national constitutions prohibit double jeopardy or *non bis in idem.* Cherif Bassiouni "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections And Equivalent Protections in National Constitutions" 3 Duke J. Comp. & Int'l L. (1993) 235, 289. See e.g., U.S. Constitution, amend V; . Extradition Act 1989, s. 6(3)(England); Extradition Law, 1954, art. 8 (Israel); *Wemyss v. Hopkins* [1875] L.R. 10; 11 (2) *Halsbury's Laws of England* 817 (4th ed., 1990 reissue).
[438] Convention applying the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at Common Borders, 19 June 1990, art. 54, 30 I.L.M. (1991) 84 [hereinafter 'Schengen Convention']; European Extradition Convention, art. 9; UN Model Extradition Treaty, art. 3 (d)-(e); American Extradition Convention, art. 4(1).
See also ICCPR, art 14 (7); European HR Convention, protocol 7, art. 4 (1); I/A HR Conv., art. 8 (4)(covering acquittals only); ICTY Statute, art. 10; ICTR Statute, art. 9; ICC Statute, art. 20.
An analogous rule has also been applied by the ECJ with respect to the quasi-prosecutorial powers of the Commission to investigate alleged violations of the EC competition law. Case 7/72, *Boehringer Mannheim* v *Commission* [1972] E.C.R. 1281, 1294; Joined Cases T-305-07, 313-16, 318, 325, 328-29 and 335/94, *Limburgse Vinyl Maatschappij NV v. Commission,* [1999] E.C.R. II-931, 975.
[439] In the U.S., the principle of double jeopardy does not fully apply between state and Federal courts. *U.S. v. Lanza,* 260 U.S. 227 (1922); *U.S. v. Bartkus,* 359 U.S. 121 (1959); *U.S. v. Wheeler, Arizona,* 435

conforms to the general attitude of some states towards inter-systematic jurisdictional interaction, as reflected in rules on recognition of foreign judgments and awards in commercial matters.[441]

D. Observations on finality in international law

Review of the positions of domestic legal systems and the balance of considerations applied by them leads to the conclusion that there is wide acceptance of the idea that judgments should be considered final and not open to subsequent contest (outside the appellate process). The consensus in national courts over the finality of domestic judgments seems to be indicative of the existence of a general principle of law to that effect.[442] However, again, with respect to inter-systematic interaction, jurisdiction-regulation is less stringent, and a more flexible version of the finality principle applies in most jurisdictions.

Notwithstanding the precise systematic categorisation of international courts and tribunals (which can perhaps be best equated to the status of final domestic arbitral awards), there are strong policy arguments in favour of incorporating the *res judicata* rule into international law. In fact, the same factors that have supported the introduction of the finality doctrine into the various facets of domestic law provide even greater support to its adoption in the relations between international courts and tribunals.

Parties to international proceedings have, like their domestic counterparts, a legitimate interest in being able to rely on final judgments and not being exposed to endless

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U.S. 313 (1978); 22 C.J.S. § 258. However, as was already observed with relation to parallel proceedings, the relations between U.S. state and Federal courts do not fully comport to the intra-systematic model.

[440] See e.g., Code of Criminal Procedure, art. 65 (Austria); *Chua Han Mow v. U.S.*, 730 F.2d 1308 (1984); Van den Wyngaert and Stessens, supra note 436, at 781 n. 9, 783, 789-90. But *cf.* Penal Code, art. 68 (Netherlands); Preliminary Title to Criminal Procedure Code, art. 13 (Belgium)(*non bis in idem* effect to foreign judgments pertaining to offences committed outside Belgium); 11 (1) *Halsbury's Laws of England* (4th ed., 1990) 473.
It further seems that most international human rights treaties embracing the *non bid in idem* principle were not designed to prohibit successive prosecution in multiple national jurisdictions. Van den Wyngaert and Stessens, supra note 436, at 781.

[441] Still, in most situations where domestic courts would put a suspect on trial despite the fact that he or she had been tried abroad, they will consider any foreign sentence already imposed upon the suspect as a mitigating factor in the decision on sentencing. Criminal Law, 1977, art. 14 (b)(3)(Israel); Schengen Convention, art. 56; Feller, supra note 275, at 265; Van den Wyngaert and Stessens, supra note 436, at 793.

[442] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) 336-39.

litigation.[443] International courts and tribunals, faced with rapidly growing dockets, must also enjoy the benefits of a rule which enables them not to re-open settled matters. However, the most appealing argument in favour of adopting a rule of finality in international law goes to the issue of legal certainty. Since strong enforcement mechanisms are absent from international law, parties to international disputes might not have an incentive to carry out judgments without a *res judicata* rule. Instead, they might attempt to refer the settled dispute to another dispute settlement forum, in the hope that a more favourable outcome would emerge. This, in turn, might introduce conflicting judgments, entailing a disruptive effect on the normative coherence of international law.[444] It might also undermine the authority and credibility of judicial bodies, since their decisions will in effect lose their binding nature.[445]

Hence, the need for a rule of preclusion seems to be a real necessity in international law, without which the system would be handicapped, in the long run. Given these policy arguments, it is not surprising that the *res judicata* rule is a well-established principle of international law, reaffirmed in numerous legal decisions[446] and in the writing of legal experts.[447] However, as will be explained in the Part III of this study, international law has introduced certain exceptions to the principle of finality covering mainly cases in which the first set of proceedings was somehow faulty and, therefore, unworthy of recognition.

I. The finality principle in human rights proceedings

While there is a general consensus over the need to apply the principle of finality in international law, it was suggested that human rights proceedings brought by individual petitioners should be exempted from the application of the *res judicata* rule, given the

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[443] Note, "A Comparative and Critical Assessment of Estoppel in International Law", 50 U. Miami L. Rev. (1996) 369, 399.

[444] *Cf.* Theodor Meron, *Human Rights Law Making in the United Nations* (1986) 236.

[445] So far, the question has most vividly arisen with respect of the possibility to institute human rights proceedings before the HRC after proceedings before the Strasbourg bodies have been concluded. See e.g., Marc-Andre Eissen "The European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights: Problems of Coexistence" 22 Buff. L. Rev. (1972) 181 189; Arthur .H. Robertson "The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights" 43 B.Y.I.L. (1968-69) 21, 46; *Report on the Protection of Human Rights in the United Nations Covenant on Civil and Political Rights*, European Parliament Doc. 3773 (1976) at para. 19.

[446] See infra Chapter 6, at pp. 259-60.

[447] See e.g., Cheng, supra note 442, at 336-39; Shaw, supra note 24, at 80; Philippe Couvreur "The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes" *The International Court of Justice: It's Future Role after Fifty Years* (A.S. Muller, D. Raic and J.M. Thuränszky, eds., 1997) 83, 100-05

unique characteristics of the parties to disputes in that area of international law.[448] According to one American scholar, Laurence Helfer, the overarching raison d'être of human rights compliance monitoring bodies – the improvement of human conditions and the inferior status of private human rights litigants when compared to state parties to litigation (who have greater resources at their disposal and more experience accumulated in repeated participation in litigation), justify granting individuals maximum procedural opportunities.[449] Helfer also maintained that the differences in the scope of protection offered by the various treaty regimes and the discrepancies in the authoritative nature of their decisions also support carving out an exception to the principle of finality. Finally, he argued that successive applications before different judicial or quasi-judicial bodies may encourage jurisprudential interaction between human rights courts and tribunals which could increase the coherence of international human rights law.[450] As a result, he has advocated reform of some existing preclusion regimes and supported entrusting courts and tribunals with discretion to decide successive applications on a case-to-case basis.[451]

While there are some merits to Helfer's positions, it seems that his conclusion that the rule of finality should be excluded from the human rights sphere altogether is misplaced. The interests of the individual in having a 'second day in court' must be balanced against the interests of the state not to be dragged to multiple litigation. This is especially since alleged human rights violations affecting a large number of individuals may already give rise to numerous similar proceedings against the state concerned (if brought by different plaintiffs). Overburdening human rights monitoring bodies with cases already addressed by alternative jurisdictions might also leave less time and resources to address violations which had never litigated before. It is therefore more sensible and cost efficient that the admitted inequality between the parties be addressed through more hospitable rules of procedure and perhaps legal assistance schemes, than through facilitating the repeat performance of the same litigation (probably resulting in a similar outcome given the unchanged balance of power between the parties).

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[448] Helfer, supra note 20, at 346-49.
[449] This, according to Helfer, comports with English and American *Habeas Corpus* traditions, which permit repeated applications where fundamental constitutional rights are involved. *Ex parte Partington*, 153 Eng. Rep. 284 (Ex. 1845); *Sanders v. U.S.*, 373 U.S. 1, 8 (1963).
[450] Helfer, supra note 20, at 349-52.
[451] Id. at 380, 383-84.

The coherence argument raised by Helfer is particularly disturbing. It seems that the deleterious potential of a rule which promotes diverging results over the same set of facts and legal issues on the coherence of international human rights law exceeds by far, any indirect advantage attained by greater cross-fertilisation. It is probably more sensible to augment the coherence of the international legal system through a rule of recognition, giving effect to decisions of judicial bodies in other jurisdictions, rather than through a rule that perpetuates the ability to contest settled judgments. In any event, the logic behind Helfer's coherence argument is not reserved to the human rights sphere and its adoption would carry far-reaching consequences for other branches of international law as well.

Still, it is true that human rights bodies operate under only partially overlapping normative bases and they may not, as a rule, address issues which arise under the instruments of different human rights regimes. In this context, Helfer's proposed test of the impossibility of vindicating the plaintiff's right before the first-seized tribunal as a criterion for permissibility of parallel or successive applications seems reasonable. [452] However, it would have been perhaps more accurate to hold that multiple proceedings based on the same factual basis, but raising different legal questions, that the first-seized jurisdiction could not have addressed, are not in direct competition with one another - an idea which is supported by the case law of the HRC.[453] In addition, there does not seem to be a bar in place against re-litigating petitions with different factual bases, especially where the scope of competence of the first-in-time tribunal did not permit the admissibility or legal relevance of the said facts.[454]

Finally, given the differences in the binding nature of the decisions of various human rights courts and tribunals, it should be recognised that quasi-judicial procedures cannot create a 'real' *res judicata* effect vis-à-vis another procedure, because they do not produce binding decisions in the first place. However, in reality, decisions of quasi-judicial bodies are treated very much like international judgments. Indeed, several treaty provisions found in the constitutive instruments of international courts and tribunals (applying judicial or quasi judicial procedures) confer upon the decisions of the quasi-judicial human rights procedures a preclusive effect.[455]

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[452] Id. at 369-70.
[453] See supra Chapter 1, at pp. 37-38.
[454] Helfer, supra note 20, at 377-78.
[455] European HR Convention, art 35; AHR Charter, art. 56(7); CAT, art 22(5)(a).

3. Interim conclusions

Discussion of the theoretical underpinning and practical application of various jurisdiction-regulating rules, in the context of competition involving domestic courts, enables one to draw some conclusions regarding the suitability of introducing similar rules into international law. However, such analogy must take into account the precise nature of the inter-fora interactions that the various competition-regulating rules govern (intra-systematic or inter-systematic), in light of the observations offered in the previous Chapter on the systematic nature of international law. Unique policy considerations found in international law might also influence the judgment on whether rules developed under domestic law should be transformed into the international level.

With regard to the issue of forum selection, there seem to be little justification in intervening in the parties' ability to engage in most types of forum shopping. It has been demonstrated that many domestic systems of law tolerate some level of forum shopping, in regard to both intra and inter-systematic jurisdictional competition, in both civil law and criminal law disputes. Hence, it would seem that forum shopping, despite its pejorative sound and potential for manipulation, is not an inherently negative phenomenon. On the contrary, freedom of choice of forum is consonant with notions of party autonomy, and with the need to encourage recourse to litigation, as a way to uphold the rule of law. Since both interests are of special importance to the international legal system, it would seem reasonable to expect that international law too would permit forum shopping. The same rationales of party autonomy and promotion of pacific dispute settlement apply with even greater force in respect to forum selection agreements, which all domestic systems of law seem to generally recognise. In fact, it was suggested that the recognition of the parties' right to jointly select a forum had become a general principle of law.

However, three exceptions ought to be carved out of the proposed pro-international forum shopping rule. First, there might be situations in which special policy considerations would justify retention of jurisdiction in a particular forum despites the wishes of the applicant, or even both the applicant and the respondent. This is for example the case where a dispute has arisen under the law of a 'self-contained' regime. Courts and tribunals outside the specific regime would be arguably unsuitable to settle

such disputes and to adequately take into account the systematic interests of the implicated sub-system (including its need for inner-coherence).

A second exception to the pro-forum shopping stance is the unique phenomenon of a 'race to the courthouse'. It is feared that where each of the disputing parties wants to influence forum selection by being the first to seize a competent judicial body, cases would be unnecessarily rushed to adjudication before more appropriate diplomatic avenues had been exhausted. Although domestic courts do not directly address this problem, it has been suggested that as a matter of desirable public policy, the constitutive instruments of international courts and tribunals ought to introduce measures such as mandatory 'cooling off' periods during which diplomatic methods of dispute settlement should be attempted.

The third, and perhaps most important exception to the pro-forum shopping rule is the case of abusive forum shopping. It looks as if all of the surveyed domestic legal systems apply certain jurisdictional rules or at least have the capacity to apply general principles of law designed to curb abusive forum shopping practices (particularly, on the inter-systematic level), such as the *forum non-conveniens* and *abus de droit* principles. Further, a line of demarcation between legitimate and illegitimate forum shopping has been drawn by domestic legal systems in light of the appropriateness of the jurisdiction that was unilaterally seized, in comparison to alternative fora, and the legitimacy of the applicant's motives. Additional support to this notion can be found in the restrictions upon the parties' freedom to choose to litigate before an inappropriate forum found in the constitutive instruments of international criminal courts and tribunals (jurisdictional primacy or complementarity) and in international law's exhaustion of local remedies rule.

Although international courts and tribunals whose jurisdiction had been accepted by international actors should enjoy a presumption in favour of their appropriateness, there might be circumstances in which litigation before one forum would be clearly more appropriate than before the other (e.g., referral of dispute to a court or tribunal in violation of an exclusive jurisdiction clause). It would seem that the *abus de droit* principle, which, as will be shown below, constitutes a general principle of international law, could apply to circumscribe forum shopping which creates 'oppressive and vexatious' results and serves no legitimate purpose.

Parallels between domestic and international courts and tribunals could also be drawn with regard to rules that govern multiple proceedings. At the domestic level, it seems that while intra-systematic competition is strictly regulated, there is greater degree of tolerance towards inter-systematic multiple litigation. The first type of interaction is almost uniformly addressed through *lis alibi pendens* and *res judicata* rules. In fact, these rules seem to have graduated into general principles of law, at least to the extent that they apply vis-à-vis intra-systematic jurisdictional competition. At the same time, more flexible rules govern cross-boundary multiple proceedings.

It would seem that strong policy considerations support the conclusion that international courts and tribunals should apply the intra-systematic model of jurisdictional regulation in cases of multiple proceedings. This is because the main challenge presented by multiplicity of proceedings – conflicting judgments, undermines the systematic normative coherence of international law in a manner similar to its effect on the coherence of domestic legal systems.

It is perhaps educating to observe that domestic arbitral tribunals, which are not part of the domestic court system, but apply, as a rule, the same legal norms as courts (thus, they can be viewed as subject to same system of legal norms), are also subject to a strict jurisdictional regime. Given the considerable pressures against the coherence of the international legal system, and given the similarities between the jurisdictional and structural relations existing amongst domestic courts and arbitral tribunals and amongst international courts and tribunals, it only seems sensible that the latter should embrace a similar jurisdiction-regulating policy.

Part III

The Regulation of Competition between Jurisdictions of International Courts and Tribunals: *Lex Lata* and *Lex Ferenda*

Chapter Five:
Existing competition-regulating jurisdictional provisions in international instruments

In previous Chapters, it was demonstrated that there are significant overlaps between the jurisdictions of international courts and tribunals and that such overlaps have already resulted in forum shopping and in a few disputes being subjected to multiple proceedings. In addition, it was established that jurisdictional competition carries with it certain positive and negative consequences. As a result, it has been suggested that the negative aspects of jurisdictional competition should, as a rule, be mitigated, taking into consideration the current stage of development of international law and the benefits of the proliferation of judicial bodies. In this vein, it has been suggested that the current level of interaction between existing judicial bodies supports the adoption of *lis alibi pendens* and *res judicata* doctrines (which are designed to prevent conflicting judgments), but does not support strict anti-forum shopping rules (which, *inter alia,* promote constructive inter-fora interaction) or the introduction of a *stare decisis* rule.

It is now time to examine the existing rules governing jurisdictional competition between different international courts and tribunals. This will be a critical examination exploring both the strengths and weaknesses of current norms, and suggesting a legal construction corresponding to the level of cross-institutional coordination and harmonisation regime that should apply at the international level. The discussion will encompass not only existing jurisdiction regulating provisions but also areas of inter-fora interaction where regulation is absent altogether.

The following survey of positive law will include both the exposition of a number of rules found in the constitutive instruments of the different international courts and tribunals and the practice of these bodies in applying them. The next Chapter will try to identify complementary rules of customary law and applicable general principles of law. After analysing *lex lata,* the third and last Chapter of this Part will concisely examine

several suggestions for future reform. In other words, it will evaluate both the contents of *lex ferenda* and the desirability and feasibility of introducing it into international law.

1. Forum selection provisions

Several provisions found in the constitutive instruments of different international courts and tribunals address the right of parties to a dispute to choose a forum. Additional forum selection provisions can be found in other instruments such as general dispute settlement treaties, compromissory clauses found in international treaties, instruments of ratification of international agreements (including the constitutive instruments of judicial bodies), and declarations accepting the jurisdiction of judicial fora.

Generally speaking, there are two modes of regulating forum selection: the introduction of an exclusive jurisdiction clause that bars litigation before any forum other than the one designated under the jurisdiction-granting instrument, or a non-exclusive jurisdiction clause, permitting the parties to engage in forum selection. Further, exclusive jurisdiction clauses can be divided into two sub-categories - flexible and inflexible provisions, in correspondence to the ability of the parties to derogate, by way of agreement, from the jurisdiction of the exclusively designated forum. Finally, some unique halfway arrangements allowing limited choice of forum can also be identified.

A. Exclusive jurisdiction provisions

I. Inflexible provisions

Regional economic integration regimes

The archetype inflexible exclusive jurisdiction clause is found in article 292 (ex-article 219) of the EC Treaty. At the time when the Treaty of Rome was concluded the six founding members of the Community were parties, or contemplated becoming parties, to several international agreements which provided for referral of disputes to judicial bodies such as the ICJ, the ECHR or arbitration tribunals.[1] The drafters felt that referral

[1] See e.g., General Act for the Settlement of International Disputes, 26 Sept. 1928, 93 L.N.T.S. 344; Revised General Act for the Settlement of International Disputes, 28 April 1949, 912 U.N.T.S. 101 (one or both of these instruments were signed by all of the founding countries of the EEC except Germany) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, E.T.S. 5, 213 U.N.T.S. 221 hereinafter 'European HR Convention'](signed by all 6 founding countries).
Shortly after the conclusion of the Treaty of Rome several other treaties containing compulsory dispute settlement provisions, some of which negotiated in parallel to the EC Treaties, were concluded. See e.g., the European Convention for the Peaceful Settlement of Disputes, 29 April 1957, 320 U.N.T.S. 243 (signed by all 6 founding EEC states, and ratified by one of them); Treaty instituting the Benelux Economic Union, 3 Feb. 1958, 381 U.N.T.S. 165 [hereinafter 'Benelux Treaty']; Optional Protocol of

of disputes concerning the operation of the Community and the interpretation of its constitutive instruments to 'external' judicial institutions would be counter-productive. This is because the latter bodies might not be sufficiently familiar with Community law and might not accord due weight to the broader interests of the Community, especially since they lack the special procedures available before the ECJ (e.g., involvement of the EC Commission in the litigation).[2] In addition, it was feared that the possibility of recourse to external judicial bodies might result in non-uniform application of Community law, thus detracting from its effectiveness.[3] To curtail these concerns, the drafters concluded article 292, which provides that:

> "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."

Identical language can also be found in Euratom Treaty[4] and similar language is found in the ECSC Treaty.[5] Exclusive jurisdiction provisions, drafted along similar lines to article 292 of the EC Treaty were also adopted by the Andean Community and the Central American Integration System, protecting the jurisdiction of their respective Courts of Justice,[6] and by the Benelux Economic Union, granting exclusive jurisdiction

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Signature to the Conventions on the Law of the Sea Concerning the Compulsory Settlement of Disputes, 29 April 1958, 450 U.N.T.S. 172 (3 founding countries have ratified this Protocol).

[2] The EC Commission has been indeed viewed as the 'guardian' of the broader Community interests. Koen Lenaerts "Federalism: Essential Concepts in Evolution - The Case of the European Union" 21 Fordham Int'l L.J. (1998) 746, 762.

[3] Peter E. Herzog "Article 219" 5 *The Law of the European Community - A Commentary* (Dennis Campbell, ed., 35th ed., 1998) 6-170.1; Dennis Campbell "Preliminary Observations on Article 219", id. at 6-169.

[4] Treaty Establishing the European Atomic Energy Community, 25 March 1957, art. 193, 298 U.N.T.S. 167 [hereinafter 'Euratom Treaty'].

[5] Treaty Establishing the European Coal and Steel Community, 20 Apr. 1951, art. 87, 261 U.N.T.S. 140 [hereinafter 'ECSC Treaty']. Article 87 reads: "The High Contracting Parties undertake not to avail themselves of any treaties, conventions or declarations made between them for the purpose of submitting a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein." Unlike Article 219 of the EC Treaty, Article 87 of the ECSC Treaty does not seem to encompass recourse to dispute settlement procedures, which are not treaty-based (e.g., *ad hoc* arbitration). Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3., as revised in 10 Nov. 1997, 1997 O.J. (C340) 173 [herein forth and hereinafter 'EC Treaty']; Herzog, supra note 3, at 6-170.2.

[6] Treaty Creating the Court of Justice of the Cartagena Agreement, 28 May 1979, art. 42, 18 I.L.M. (1979) 1203 as revised by the Protocol Modifying the Treaty Creating the Court of Justice of the Cartagena Agreement, 10 March 1996, available at < http://www.comunidadandina.org/english/ andean/ ande_trie2.htm> (last visited on 24 June 2000)("The member states shall not submit any controversy which may arise from the application of the norms which comprise the judicial structure of the Cartagena Agreement to any court. Arbitration system or any other procedure not contemplated by this Treaty..."); Protocol of Tegucigalpa of Reforms to the Charter of the Organization of the Central American States, 13 Dec. 1991, art. 35, available at < http://www.ccj.org.ni/doc_base/ normjurd/prottegu.htm>. However, the CCJ Statute also addresses its interaction with the I/A HRC, excluding from the jurisdiction of the CCJ

to its independent dispute settlement procedures (with the exception of disputes also falling under the jurisdiction of the ECJ).[7]

These exclusive jurisdiction arrangements can be best explained through reference to the self-contained nature of regional economic integration regimes.[8] Regimes constituted as sophisticated legal arrangements with ambitious common goals cannot allow external bodies with little understanding of the regime's nature and complexities, and lacking genuine commitment to its success, to 'meddle' with their affairs by way of interpreting and applying their norms. Indeed, courts and tribunals operating within such sub-systems perform a dual role. Like other judicial bodies, they settle specific disputes. But they are also entrusted with the unique task of serving as engines of regional integration, contributing through judicial pronouncements to the achievement of the regime's goals. Naturally, external bodies are ill equipped to perform the second of the two functions. Finally, interference by external courts and tribunals might have a disruptive effect over the smooth operation of the regional legal entity. The EC (and to slightly lesser extent, the other regional integration frameworks as well) has viewed itself as a new sub-system of international law,[9] with its own internal coherent normative and institutional structures. Referral of questions of regional law to external judicial institutions could result in inconsistent legal approaches and, eventually, in a break down of the sub-system's coherence.

However, it should be noted that not all economic integration regimes have adopted exclusive jurisdiction arrangements. For example, the EFTA and CIS Economic Courts are not subject to any forum selection provision. This variance in the level of jurisdictional regulation conforms, more or less, to the notion that some of economic integration regimes are characterised by greater independence than the others.[10]

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any issue that falls under the jurisdiction of the latter body. Agreement on the Statute of the Central American Court of Justice, 10 Dec. 1992, art. 25, translated in 34 I.L.M. (1995) 921.

[7] Benelux Treaty, art. 51(1)("The High Contracting Parties shall undertake not to settle the category of disputes referred to in Article 41 [i.e., disputes over the application of the Benelux Treaty and related agreements] in any way not covered in the present Treaty").

[8] See Jean-Pierre Quéneudec "Article 95" *La Charte Des Nations Unies: Commentaire article par article* (Jean Pierre Cot and Alain Pellet, eds., 1985) 1280.

[9] This sub-system has been described by the ECJ as a new legal order. See Case 6/64, *Costa v. ENEL,* 10 E.C.R. 585, 593 (1964); Case 26/62, *Van Gend en Loos v. Administratie der Belastingen,* 1963 E.C.R. 1, 12.

[10] Opinion 1/91, *Draft Agreement Relating to the Creation of the EEA,* [1991] E.C.R. I-6079, 6102 .

The ECJ had the opportunity of applying article 292 (at the time, still article 219) in one prominent case, which involved a proposal to create a joint EC-EFTA court as part of the planned EEA. That court (referred to as the EEA Court) would have addressed questions relating to the EEA Agreements and could have been utilised *inter alia* by the Community (represented by the Commission) and, in appropriate cases, also by EC member states (in addition or *in lieu* of the Community). The ECJ held that the latter proposed arrangement would confer upon the EEA Court the power to determine whether the proper party before it is the Commission or the EC member states. This, in turn, would necessarily require a ruling on the allocation of powers between the Community and its member states, which is exclusively a matter of Community law. Hence, referral of such a question to the EEA court would be in breach of article 292. [11] In addition, the empowerment of the EEA Court to interpret EEA law, which is largely identical to EC law, was also deemed incompatible with the role of the ECJ in the Community as the ultimate judge on EC law.[12] For these and other reasons, the ECJ held that the proposed agreement was in conflict with EC law.

Finally, it may be observed that the scope of article 292 is limited to matters falling under the EC Treaties. No parallel provision had been introduced with regard to adjudication of disputes concerning other EU pillars (over which the ECJ only has limited jurisdiction).[13]

The WTO

Another, less absolute, exclusive-jurisdiction arrangement can be found in the DSU, annexed to the WTO Agreement. Article 23 of the DSU provides that -

> "1) When members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they *shall* have recourse to, and abide by, the rules of procedures of this Understanding.
> 2) In such cases, Members shall:
> (i) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered

[11] *Draft EEA Agreement*, [1991] E.C.R. at I-6105. See also Opinion 1/76, *Draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels,* [1977] E.C.R. 741 (the establishment of a joint institution between the EC and Switzerlandinvested with judicial powers is incompatible with the scheme of Community unity).
[12] *Draft EEA Agreement*, 1991 E.C.R. at I-6107.

agreement has been impeded, *except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding ...*" (emphasis added).

At first sight, the language used in article 23 (the term 'shall' and the prohibition against utilisation of alternative procedures) appears to indicate an inflexible exclusive jurisdiction regime, barring referral of cases arising under the GATT/WTO legal system to any outside judicial forum.[14] Indeed, the exclusive nature of article 23.1 has recently been confirmed by a WTO panel.[15] However, several caveats to this proposition should be noted.

First, it should be realised that the DSU permits disputing parties to agree to settle their dispute by way of arbitration - i.e., outside the ordinary structure of WTO dispute settlement institutions (but still subject to control by the DSB).[16] Hence, the DSU itself allows for some measure of flexibility in forum selection. Second, the language used in article 23.2 is somewhat ambiguous since it only bars '*determinations*' by external dispute settlement procedures concerning breach of GATT law, loss of benefits thereunder or defeat of its object. The article does not explicitly close off the possibility of referring disputes over the *interpretation* of the GATT/WTO agreements to external courts and tribunals (the same observation is valid under article 23.1, as well, since it only seems to address violation-related disputes).[17] Third, it is not clear whether dispute settlement under regional trade arrangements involving the application of provisions which provide for identical trade benefits to these granted under the GATT and its related agreement, are precluded. On the contrary, it is at least arguable that the

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[13] Herzog, supra note 3, at 6-170.5.

[14] John Jackson *The World Trading System* (2nd ed., 1997) 124; Raj Bhala "The Myth about *Stare Decisis* and International Trade" 14 American University International Law Review (1999) 845, 901.

[15] *U.S. – Sections 301-310 of the Trade Act of 1974*, WTO DOC. WT/DS152/R (1999), at p. 313 (Panel Report), available at <http://www.wto.org/english/tratop_e/dispu_e/wtds152r.doc> (last visited on 8 Nov. 2000)(article 23.1 is an 'exclusive jurisdiction clause').

[16] Understanding on the Rules and Procedures Governing the Settlements of Disputes, Annex 2 to the Agreement establishing the World Trade Organization, 15 April 1994, art. 25.1, 33 I.L.M. (1994) 1144 [hereinafter 'DSU']. The article suggests that arbitration may be invoked in respect of "certain disputes that concern issues that are clearly define by both parties." The thought behind this arrangement had been that some simple disputes would be more amenable to arbitration than to the more cumbersome Panel proceedings. GATT Doc. MTN.GNG/NG13/W/6 (1987), at para. 2 (Discussion Paper prepared by the US Delegation to the Negotiating Group on Dispute Settlement). In reality, principal considerations influencing the choice of arbitration are expected to be objection to intervention by third parties, greater control over the composition of the tribunal and lack of appeal. Tullio Treves "Recent Trends in the Settlement of International Disputes" I Bancaja Euromediterranean Courses of International Law (1997) 395, 409. The parties may also resort to diplomatic forms of dispute settlement (good offices, conciliation and mediation), in lieu or in parallel to panel proceedings. DSU, art. 5.

[17] *Cf. The Factory at Chorzów* (Germany v. Poland), 1927 P.C.I.J. (ser. A) No. 8, at 24-25 (claim for indemnity).

language of article 23.2 would not bar recourse to alternative procedures if the determinations were formally adopted in the context of a different legal regime,[18] as long as it is accepted that they could not produce a *res judicata* effect under GATT/WTO law. Finally, according to article 1.2 of the DSU, specific dispute-settlement rules found in the covered agreements override the provisions of the DSU. As a result, it would seem that specific jurisdiction-regulating clauses, such as article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPSM Agreement), providing for non-exclusive jurisdiction of the GATT/WTO dispute settlement machinery should prevail.[19]

All these factors strongly suggest that the exclusive nature of the jurisdiction of the DSB under the GATT/WTO dispute settlement system is far from watertight and that its *ratione materiae* reach is rather limited. This is not too surprising given the fact that the parties to the negotiations of the WTO Agreement were more concerned with the possibility of precluding unilateral determinations by member states that GATT law had been breached (especially, the U.S.), then with barring determinations by competing international procedures.[20]

It should also be observed that article 23 does not conclusively solve the problem of normative competition within the GATT framework itself. The GATT system is comprised of several agreements, addressing different, but partly overlapping issues. Hence, a single dispute may involve rights and obligations under more than one GATT related treaty. Before 1994, this could have led to recourse to more than one dispute settlement mechanism, since each treaty had its own independent dispute settlement bodies and procedures. While the WTO agreement has solved the problem of institutional competition by authorising the DSB to address all disputes under the

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[18] See e.g., Case C-53/96, *Hermès International v. FHT Marketing Choice BV*, [1998] E.C.R. I-3603 (interpretation of article 50 of TRIPS by the ECJ).

[19] Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, art. 11(3), Annex 1A to WTO Agreement, available at <http://www.wto.org/english/docs_e/legal_e/15-sps.pdf> (last visited on 8 Nov. 2000)("Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement"). It has also be argued that the a specific dispute settlement clause found in the TRIPS Agreement, which does not exclude referral of cases to non-WTO procedures such as WIPO arbitration, can perhaps be construed to override the proscription of article 23 of the WTO Agreement. Agreement establishing the World Trade Organisation, 15 April 1994, 33 I.L.M. (1994) 1263 [herein forth and hereinafter 'WTO Agreement']; Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, art. 64, 33 I.L.M. (1994) 1197 [hereinafter 'TRIPS']; Treves, Recent Trends, supra note 16, at 420.

[20] Raj Bhala and Kevin Kennedy, *World Trade Law* (1998) 43; Terence P. Stewart (ed.), II *The GATT Uruguay Round – A Negotiating History (1986-1992)* (1993) 2777.

various GATT related agreements, there still remains the question of competition over the application of different substantive and procedural rules found in the different relevant agreements.[21] Further, competition may take place between various post-award proceedings designed to assess the suitability of measures taken by the parties to the dispute to implement DSB reports.[22]

Why is it the drafters of the WTO have opted for an exclusive jurisdiction clause and why is it that so many exceptions to the principle of exclusivity can be found? It looks as if the WTO system shares some of the features of the regional integration systems. It is a complex legal arrangement that has regarded itself for some time as 'self-contained'.[23] It also shares with regional bodies a general aim of trade liberalisation and removal of trade barriers, an area of the law that particularly values legal certainty. Obviously, application of GATT/WTO law by an external judicial body, such as the ICJ, might prove to be extremely demanding, and could disturb the satisfactory operation of the regime.

However, unlike its regional counterparts, the WTO has only modest ambitions of integrating the economies of its member states and it never attempted to bring into life a new polity. Hence, the value of jurisprudential coherence in global trade relations is important, but not as crucial as it is for the regional sub-systems. Moreover, there is growing acknowledgement within the WTO that given the links between trade and other aspects of international relations it should not purport to create a watertight closed legal sub-system "in clinical isolation" from general international law[24] (a fact underscored by the use of norms originating from general international law in the work of the WTO).[25]

Another indication of the modest integrative ambitions of the WTO is found in the lack of common WTO organs responsible for representing the organisation's broader interests (comparable to the EC Commission). Instead, the protection of the rights and

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[21] Article 1.2 of the DSU prescribes that in case of conflicts between several sets of specific rules, the parties should agree which procedures apply. If they cannot agree, the decision will be taken by the Chairman of the DSB (after consulting with the parties).

[22] See discussion of the *Bananas* litigation in supra Chapter 2, at pp. 60-61.

[23] See supra Chapter 3, at pp. 110-12. See also Pieter.J. Kuyper "The Law of the GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law" XXV Neth. Y.B. Int'l Law (1994) 227, 251-52.

[24] *U.S. - Standard for Reformulated and Conventional Gasoline and Like Products of National Origin*, 35 I.L.M. (1996) 603, 629 (AB Report).

interests of state parties is left in their hands. In the same vein, adjudication before the Panel system (or arbitration) may be initiated only in non-compliance cases – that is, when practical difficulties arise, and not in respect to abstract questions of interpretation, which would have been beneficial from a legal harmonisation point of view. These signs of limited efforts to harmonise WTO law help to explain the relative flexibility of the regime's jurisdiction-regulating rules.

The European Social Charter

The only inflexible exclusive jurisdiction clause that can be found outside the field of international economic relations is the Appendix to Part III of the European Social Charter, which reads that:

> "It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof."

This means that claims based upon economic and social rights that are protected by the Charter can only be raised before the European Committee of Social Rights (ECSR), utilising the Collective Complaints Mechanism (or in the context of the contracting parties' reporting obligations). Again, as was submitted above in relation to the GATT/WTO, it seems that the language of the text cannot bar individuals or states from raising similar claims before other bodies, if relying on obligations originating in other instruments (e.g., ILO Conventions or the International Covenant on Economic, Social and Cultural Rights). A contrary construction of the text would implicitly introduce substantial limitations on the other procedures, modifying the extent of the obligations of the parties thereto, without first securing the agreement of all other parties to these treaties.[26] It would also be inconsistent with the view that parties to human rights instruments should seek to constantly improve the level of enforcement of human rights standards, and not foreclose existing avenues of supervision over state compliance.[27]

Still, the arrangement found in the Social Charter does not comport with any of the rationales proposed so far for the introduction of exclusive jurisdiction clauses. The regime is hardly complex and it is not part of a closely structured polity that prizes legal

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[25] DSU, art. 3,2.

[26] Vienna Convention on the Law of Treaties, 23 May 1969, art. 34, 1155 U.N.T.S. 331[hereinafter 'Vienna Convention']

[27] Laurence R. Helfer "Forum Shopping for Human Rights" 148 U. Pa. L. Rev. (1999) 285, 346-49.

harmony. Rather, it seems that the main reason for selecting an exclusivity clause was the desire of the parties to the Social Charter to minimise their exposure to enforcement of the obligations undertaken in the Charter. The exclusive nature of the compliance procedures under the Charter (which until 1998 did not involve any judicial or quasi-judicial features) was therefore probably designed to facilitate accession to this instrument, without placing ratifying states at the risk of being dragged against their will to adjudication over the implementation of the Charter before existing international courts or tribunals.

It is perplexing why no provision had been made that would have allowed parties to a dispute over the interpretation and application of the Social Charter to refer it by way of agreement to an external dispute settlement procedure. There does not seem to be any broad 'community' interest which would justify such inflexibility and it can be argued that the selected jurisdictional regime unnecessarily violates the freedom of choice of procedure by the parties. Indeed, such inflexible provision is not found even in the context of the European HR Convention, which preceded the Social Charter and represents a more intrusive European human rights regime. Hence, it would be probably correct to consider the inflexibility of the Social Charter as an oversight and to interpret the exclusivity regime under the Social Charter really as a flexible one. Thus, if states agree to waive their right to be shielded from litigation before external dispute settlement procedures, there is no reason to preclude them from doing so. Arguably, in this situation, the latter in time agreement to litigate should override the text of the earlier human rights instruments.

II. Flexible provisions

European Convention on Human Rights

Another model of an exclusive jurisdiction clause is found in article 55 (ex-article 62) of the European HR Convention. Unlike article 292 of the EC Treaty, which was drafted a few years later, article 55 explicitly acknowledges that the parties may, by way of agreement, decide to waive the jurisdiction of the ECHR and opt for dispute settlement before another forum. Thus, this more flexible exclusivity clause represents a shift towards greater freedom of action to the parties, at the expense of the interest in having disputes settled within the relevant sub-system.

Article 55 of the European Convention reads as follows:

> "The High Contracting Parties agree that *except by special agreement*, they shall not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the application of this Convention to a means of settlement other than those provided for in this Convention." (emphasis added)

The precise scope of this provision is unclear. It does seem that the rights and obligations enumerated in the Convention cannot be invoked in litigation between two member states before an external forum, unless specific agreement has been reached to that effect (and it is questionable whether general acceptance of the compulsory jurisdiction of a body such as the HRC or the ICJ can qualify as a 'special agreement'). At the same time, it is not clear to what extent can such states invoke before other fora rights and obligations protected by other international instruments (such as the ICCPR), or even customary international law, which are similar in substance to those found under the European HR Convention.

This precise question was confronted by a Committee of Experts, appointed by the Committee of Ministers of the Council of Europe to investigate the relations between the European Convention and the 1966 UN Covenants.[28] However, the experts could not reach agreement on the exact scope of article 55 (at the time – article 62), and specifically, on whether two proceedings involving similar rights originating from different legal sources should be considered in direct competition with each other.[29] Notwithstanding the small number of inter-state disputes referred to human rights monitoring mechanisms, the debate has, of course, considerable implications for the present study. The adoption of an overly narrow and technical definition of jurisdictional competition, as advocated by some Council of Europe experts, would have rendered most conventional and customary jurisdiction-regulating rules obsolete. This is because identical norms found in different instruments (or in treaty and customary law) would not be deemed capable of creating competing disputes. Such interpretation would fail to tackle the realities of concurrent jurisdiction, where many

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[28] Report of the Committee of Experts to the Committee of Ministers of the Council of Europe, *Problems arising from the Co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights – Part I: Problems arising from the Co-existence of the Two Systems of Control provided for by the European Convention and by the UN Covenant on Civil and Political Rights*, 29 Feb. 1968, Doc. No. CM (68) 39.

[29] Report of the Committee of Experts, id. at 4.

international obligations are often multi-sourced.[30] Thus, the alternative view, which views rights of similar substance found in different international instruments as competing with each other might be preferable, in light of the general rules of international law governing multiple proceedings elaborated in this study. Still, it needs to be ascertained whether or not the European HR Convention had intended to block such competing procedures.

Although the experts could not agree on the exact meaning of the exclusive jurisdiction clause, they nonetheless recommended that states should, as a matter of desirable policy, seek to utilise in cases of jurisdictional overlap the enforcement procedures of the Strasbourg Machinery. The use of alternative procedures should, according to the experts, only be sought in disputes with third states not parties to the European Convention or with regard to rights not covered by the European Convention.[31]

While the *travaux preparatoires* of the Convention shed interesting light on the emergence of the exclusive jurisdiction clause, they also fail to remove lingering doubts pertaining to its scope of application. Even though the exclusive jurisdiction clause was absent from the first drafts of the Convention,[32] the need for it became apparent during the deliberations on the desirability of establishing a new court of human rights. The U.K. delegate objected to the creation of the ECHR and argued that there was a need to abate the 'proliferation of organisations' that might lead to jurisdictional overlaps.[33] However, most other delegates strongly supported the creation of a court, arguing that adjudication of human rights questions before a European court would be less embarrassing than before the ICJ (e.g., on the basis of the optional clause).[34] Since ruling out all forms of judicial supervision was perceived to seriously weaken the image of the convention, a consensus emerged that the problem of conflicting jurisdictions should be addressed through excluding human rights disputes from the jurisdiction of

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[30] See e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.) 1986 I.C.J. 14, 94-95 (use of force is prohibited both by the UN Charter and customary international law).
[31] Id. at 5. This policy statement was embraced by the Committee of Ministers, which has adopted a Resolution to that effect. Committee of Ministers, Resolution (70)17, 15 May 1970, *reprinted* in Parliamentary Assembly of the Council of Europe, *Information Report on the Protection of Human Rights in the United Nations Covenant on Civil and Political Rights and its Optional Protocol and in the European Convention on Human Rights,* 27 April 1976, Doc. No. 3773, Appendix, pp. 11-12.
[32] See Draft European Convention on Human Rights prepared by the European Movement, I *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights* (Council of Europe, 1975) 296.
[33] Conference of Senior Officials, 9 June 1950, Doc. CM/WP 4 (50) 3, IV *'Travaux Préparatoires'*, id. 124-26.
[34] Id. at 126-28.

alternative procedures and three countries submitted proposed amendments to the draft convention to this effect,[35] one of which (the Italian proposal) was eventually incorporated into the text of the Convention (subject to a minor modification).[36]

Thus, after the decision to establish a new European court had been taken, the main argument supporting the introduction of an exclusive jurisdiction clause related to the need to prevent possible circumvention of the opting-in nature of the jurisdiction of the ECHR. It was feared that unless the matter were to be regulated, states reluctant to accept the optional jurisdiction of the ECHR, but subject to the compulsory jurisdiction of other international judicial bodies, might be compelled to adjudicate human rights disputes arising out of the Convention against their will.[37] This consideration highlights another problem associated with multiplicity of judicial bodies – that the availability of a number of amenable jurisdictions might discourage states from accepting new substantive obligations which they are loath to submit to judicial review. It thus seems that article 55 was drafted mainly with a view of preventing invocation of the Convention itself before other judicial bodies and there is no evidence that the drafters contemplated blocking adjudication before external judicial or quasi-judicial bodies on the basis of human rights obligations undertaken through instruments other than the European HR Convention.

It should also be noted that the exclusive jurisdiction clause, as adopted, regulates conflict of jurisdiction in inter-state cases. It did not purport to prohibit reliance on the Convention before other fora in claims presented by individuals. However, practically speaking, such scenario is unlikely since the jurisdictions of all existing human rights complaints mechanisms are closely linked to particular human rights instruments and one cannot invoke before one human rights body the provisions of instruments belonging to other human rights regimes.[38] Further, referral of the same human rights

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[35]Proposed Amendments relating to the problem of conflicting jurisdiction, 4 August 1950, Doc. CM I (50) 8, V *'Travaux Préparatoires'*, id. at 72.

[36] Meeting of the Sub-Committee on Human Rights, 7 August 1950, Doc. CM (50) 52; A I884, V *'Travaux Préparatoires'*, id. at 104; Report of Meeting of the Committee of Ministers, 5th Sess., point II, Id. at 116. Netherlands initially objected to the adopted text and sought to limit the exclusive jurisdiction clause to cases involving non-nationals, while allowing for the adjudication of disputes involving nationals after the Convention's procedures have been exhausted. However, it withdrew its objection eventually.

[37] Amendments proposed by the Swedish Delegation, 4 August 1950, Doc. CM I (50) I, A I862, V *'Travaux Préparatoires'*, id. at 58.

[38] Exceptions to this can be found with respect of the UN Human Rights Commission complaint mechanism, operating by virtue of ECOSOC Resolution 1503, which may receive (through the Sub-Commission on Promotion and Protection of Human Rights) communications alleging a consistent

violations to different human rights mechanisms had been addressed by *electa una via* and other jurisdiction-regulating prohibitions, which will be discussed below.

How can it be explained that, unlike their EC counterparts, the parties to the European HR Convention were willing to permit deviation, by way of special agreement, from the exclusive jurisdiction of the Strasbourg bodies? While the *travaux preparatoires* offer little direct guidance on this issue, one can perhaps draw some pertinent inferences from the apparent motives for introducing exclusivity into the Convention. As explained before, the drafters of the EHR Convention were less concerned with the need to preserve the self-contained nature of the new legal regime, and more worried about preserving party autonomy and not compelling states to appear before an international judicial body against their will.[39] Given this pro-party autonomy rationale, it would have been illogical to unduly restrict the freedom of choice of procedure of disputing parties, by compelling them to appear before the ECHR. In addition, given the rather uncomplicated nature of the European HR Convention and its links to the relatively loosely organised Council of Europe, the drafters did not seem to attribute special importance to the need to bar 'outsiders' from interpreting and applying the Convention. While such alternative was considered embarrassing for some states, it was not perceived as a serious threat to the systematic well being of the regime.

ICSID

Another example of a flexible exclusive jurisdiction clause, coming from a different area of international law, is found in the Convention on the Settlement of Investment Disputes between States and the National of Other States, establishing ICSID. Article 26 of the Convention provides the following:

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pattern of gross human rights violations, without limiting its mandate to the terms of a particular treaty. The future AHR Court would also be able to adjudicate claims based on any human rights instrument. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, 8 June 1998 art. 7 (copy with author)[hereinafter 'ACHR Court Protocol'].

[39] Doc. CM I (50) I A I862, V *'Travaux Préparatoires'*, supra note 32, at 58.
One indication of the non-self-contained nature of the European HR Convention is article 53 (previously, art. 60), which is a 'most favourable treatment' rule, allowing states to accept more stringent obligations than those require by the Convention. Hence, the Convention aims to improve human rights conditions even at the price of the development of non-uniform standards between the member states. Evert A. Alkema "The Enigmatic No-Pretext Clause: Article 60 of the European Convention on Human Rights" *Essays on Human Rights: a collection of essays in honour of Bert Vierdag* (Jan Klabbers and René Lefeber, eds., 1998) 41, 46.

"Consent of the parties to arbitration under this Convention shall, *unless otherwise stated*, be deemed consent to such arbitration to the exclusion of any other remedy..." (emphasis added)

While this is perhaps a typical exclusive jurisdiction clause,[40] its significance to this survey of jurisdictional-regulation is somewhat limited. First, it must be realised that the legal arrangement proffered here differs from that found in other reviewed mechanisms. Arbitration before ICSID involves a private litigant, and the jurisdiction of the Centre depends not only on accession to the Convention by the relevant states (the host state and the investor's state of nationality), but also on a specific agreement to arbitrate a dispute before ICSID, entered into by the immediate parties to the dispute. This arbitration clause or agreement is normally *lex specialis* and overrides any general dispute settlement arrangement entered by the contracting states (such as declarations under the optional clause of the ICJ Statue). Thus, if the parties to the dispute have elected to refer it to ICSID, the Centre will normally have exclusive jurisdiction regardless of the text of article 26 (provided that all other jurisdictional conditions have been met); if a forum other than ICSID had been selected, then its jurisdiction would fall under the escape clause of article 26 - a jurisdiction 'otherwise stated'. In any event, the choice of forum of the immediate parties would dictate the identity of the forum.

Furthermore, in contrast with state-to-state disputes, which are often governed by multilateral instruments, and, as a result, are often subject to a host of incompatible legal instruments containing different dispute settlement clauses, it is quite unlikely that parties to a private transaction will enter into contradictory contractual arrangements, referring disputes to more than one dispute settlement procedure.[41] Rather, the privity of the relations between the disputing parties would seem to guarantee that even where multiple fora were selected, the parties had established some ordering between them (e.g., priority to the first-seized forum).[42]

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[40] Christoph Schreuer "Commentary on the ICSID Convention" 12 ICSID Rev., F.I.L.J. (1997) 59, 154.
[41] Schreuer, id. at 163. An example, where such uncoordinated concurrency has nonetheless occurred is the *Klöckner* case in which the parties have concluded a series of agreements, referring most disputes to ICSID, but providing for one group of issues, arising under one certain instrument, to be handled by ICC arbitration. *Klöckner Industrie-Anlagen GmbH, v. Cameroon*, 2 ICSID Rep. 3, 13-14 (1983).
[42] See e.g., ICSID Model Clauses, clause 12, 4 ICSID Rep. 357 (1993)(permitting forum selection between ICSID and alternative fora, but barring litispendence between the competing procedures); North American Free Trade Agreement, 17 Dec. 1992, art. 1120, 32 I.L.M. (1993) 289 and 605 [hereinafter 'NAFTA'] (providing for selection by the investor party of ICSID, ICSID Additional Facility or UNCITRAL proceedings); Law on Foreign Investment of 1995, art. 27(Kazakhstan)(investor may choose, at his or her discretion, between litigation before the domestic courts of Kazakhstan, ICSID,

Hence, it is submitted that article 26 is of limited significance. In effect, it merely introduces a presumption in favour of the intent of the parties to attribute exclusivity to the contractual arbitration clause, and requires clear manifestation of an opposite intent.[43] It also seems that when concluding article 26 the drafters mainly had in mind the relations between ICSID proceedings and national courts (and not other international procedures).[44] Indeed, all cases, to date, in which article 26 had been raised dealt with the effect of ICISD proceedings on the ability of the parties to pursue domestic proceedings on related issues.[45]

Another arrangement, maybe of greater significant to this study, is found in article 27(1) of the ICSID Convention that addresses diplomatic protection. It provides that:

> "No Contracting State shall give diplomatic protection, or bring an international claim in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such a dispute."

ICSID Additional Facility, UNCITRAL, ICC or domestic Kazakh arbitration); Schreuer, supra note 40, at 159-6.

[43] This proposition is strongly supported by the *travaux preparatoires* of the Washington Convention - Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159 [hereinafter 'ICSID Convention']. Memorandum of General Counsel to the Committee of the Whole (A. Broches), 18 Feb. 1963, Doc. No. SID/63-2 *reprinted* in II *Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Documents concerning the Origin and the Formation of the Convention* (ICSID, 1968) 71, 84; Schreuer, supra note 40, at 159. See also Comments to First Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 9 Aug. 1963, Doc. No. SID/63-15, II *Documents concerning the Origin of ICSID,* supra, at 162-63; Report of the Executive Directors, 18 March 1965, Id. at 1041, 1079-80.
Cf., Mike Trading and Transport Ltd. v. R. Pagnan & Fratelli (The "Lisboa") [1980] 2 Lloyd's Rep 546, 549 (C.A.)(arbitration clauses are similar to exclusive jurisdiction clauses);4 Am. Jur. 2d., Alternative Dispute Resolution § 81(arbitration agreements may, by implication, preclude litigation).

[44] Schreuer, supra note 40, at 176.

[45] The decisions of ICSID tribunals on this question are somewhat contradictory, In *Atlantic Triton Co. v. Guinea,* it was held that a request for provisional measures submitted to a domestic court after ICSID proceedings were initiated cannot be considered a violation of the ICSID Convention, by virtue of the legal uncertainty of the relations between the two procedures. *Atlantic Triton Co. v. Guinea,* 3 ICSID Rep. 13, 35 (1983), However, another tribunal has subsequently held that an attempt to enforce an arbitral award issued by a private arbitration institution (AAA) relating to an issue adjudicated between the same parties before ICISD is incompatible with article 26 of the Convention. *Marine International Nominees Establishment (MINE) v. Guinea,* 4 ICSID Rep. 54, 68-69 (1988). At the same time, several domestic courts have invoked article 26 in support of their refusal to entertain motions related to proceedings submitted to ICSID arbitration. *Guinea* v. *Marine International Nominees Establishment (MINE),* Judgment of 27 Sept. 1985, 4 ICSID Rep. 32, 33-34 (Belgium, Court of First Instance); *Guinea* v. *Marine International Nominees Establishment (MINE),* Judgment of 4 Dec. 1985, 4 ICSID Rep. 35, 40 (Switzerland, Tribunal Fédéral); *Guinea v. Atlantic Triton Co.,* Judgment of 18 Nov. 1986, 3 ICSID Rep. 7, 11 (France, Cour de cassation).

In this article, the Convention bars inter-state adjudication over disputes that the parties have agreed to submit to ICSID, and regards the right of claim of the individual as exhaustive.[46] One should note that article 27 was drafted as an inflexible exclusive jurisdiction clause, not permitting derogation therefrom, even upon agreement of the parties. A draft 'saving clause', which was intended to preserve the right of a contracting state to bring inter-state claims for breach of international investment agreements other than the ICSID Convention, in parallel to the right of the individual investor to pursue proceedings before ICSID,[47] had been removed from the final version of the Convention.[48] This provides strong indication of the intent of the drafters to strengthen the exclusivity of the ICSID regime as the only forum for settling investment disputes, and to prevent thereby the rendering of conflicting judgments.[49] In the same vein, it would seem unreasonable to utilise article 64 to the ICSID Convention - a compromissory clause permitting the referral of disputes over the interpretation and ICSID Convention to the ICJ, to circumvent article 27, in order to bring before the ICJ a specific investment dispute that could have been brought to ICSID arbitration.[50]

It is interesting to observe that some of the legal experts involved in the drafting of the Convention were under the opinion that article 27 is superfluous since international law supposedly bars the invocation of dispute settlement proceedings other than ICSID once its jurisdiction had been accepted by the parties.[51] Nevertheless, there seems to be no

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[46] The purpose of this was to "remove disputes from the realm of diplomacy and bring them back to the realm of law." Consultative Meeting of Legal Experts, Summary Record of Proceedings, 16-20 Dec. 1963, Doc. No. Z7, II *Documents concerning the Origin of ICSID,* supra note 43, at 236, 273 [statement by A. Broches (Chairman of the Meeting)]. Another goal was to protect the host state from being exposed to "the risk of multiple claims"; Consultative Meeting of Legal Experts, Summary Record of Proceedings, 3-7 Feb. 1964, Doc. No. Z8, id. at 298, 348 [statement by A. Broches (Chairman of the Meeting)]; Schreuer, supra note 40, at 210. This arrangement marks a shift from the traditional rule of diplomatic protection, according to which the claims of the individual and his or her state of nationality are of a qualitatively different nature. *The Mavrommatis Palestine Concessions* (Greece v. Britain), 1924 P.C.I.J. (ser. A) No. 2 at 12.

[47] First Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 9 Aug. 1963, sec. 17(2), Doc. No. SID/63-15, II *Documents concerning the Origin of ICSID,* supra note 43, at 133, 163. The draft provision was subject to severe criticism by legal experts that reviewed it, on grounds that it might result in inconsistent judgments of different international tribunals. Id. at 236, 274, 298, 349, 367, 434.

[48] Chairman's Report on Issues raised and Suggestion made with respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 9 July 1964, Doc. No. Z11, II *Documents concerning the Origin of ICSID,* supra note 43, at 557,576-77.

[49] Schreuer, supra note 40, at 212.

[50] *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and National of Other States, 1965*, 18 March 1965, 1 ICSID Rep. 23, 33; Schreuer, supra note 40, at 215.

[51] Consultative Meeting of Legal Experts, Summary Record of Proceedings, 3-7 Feb. 1964, Doc. No. Z8, II *Documents concerning the Origin of ICSID,* supra note 43, at 298, 348-49; Schreuer, supra note 40, at 214. But see, Antonio R. Parra "Provisions on the Settlement of Investment Disputes in Modern

reason which would impede two states involved in an investment dispute with both inter-state and state-individual features to conclude a new agreement to adjudicate the dispute before any non- ICSID procedure, without abdicating the rights of the private investor to seize ICSID.[52] Such an agreement would probably qualify as *lex posteriori* and *lex specialis* and may supersede the general rule of article 27.[53]

B . Non-exclusive jurisdiction provisions

I. Parallel jurisdictions

The ICJ

At the other end of the spectrum of jurisdiction-regulating provisions are clauses permitting uninhibited forum selection. The competence of courts or tribunals governed by such provisions is merely supplementary to that of existing jurisdictions. The paradigm non-exclusive jurisdiction clause is article 95 of the UN Charter, which addresses the effect of the creation of the ICJ on the freedom of states to pursue other dispute settlement procedures. It reads:

> "Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."

This provision, which was influenced by the text of article 13(3) of the League of Nations Covenant,[54] article 1 of the old PCIJ Statute[55] and article 29 of the 1928 General Act,[56] is consistent with the decision adopted by the drafters of the 1945 San Francisco Conference not to endow the ICJ with compulsory jurisdiction and with

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Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment", 12 ICSID Rev., F.I.L.J. (1997) 287, 337, 353.

[52] However, there is no practice on the matter, Schreuer, supra note 40, at 208.

[53] Consultative Meeting of Legal Experts, Summary Record of Proceedings, 17-22 Feb. 1964, Doc. No. Z9, II *Documents concerning the Origin of ICSID,* supra note 43, at 367, 432; Schreuer, supra note 40, at 212.

[54] Covenant of the League of Nations, 17 June 1919, art. 13(3), 1 L.N.T.S. 7 [hereinafter 'League of Nations Covenant')]("For the consideration of [disputes suitable amenable to legal settlement], the court to which the case is referred shall be the [PCIJ] ... or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them").

[55] Statute of the Permanent Court of International Justice, 16 Dec. 1920, art. 1, 6 L.N.T.S. 390 ("... This Court shall be in addition to the Court of Arbitration organised by the Conventions of the Hague of 1899 and 1907, and to their special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlements).

[56] General Act for the Settlement of International Disputes, 26 Sept. 1928, 93 L.N.T.S. 344. See Quéneudec, supra note 8, at 1279-80.

article 33 of the UN Charter that preserves states' freedom of choice of dispute settlement procedures.[57]

However, it must be emphasised that article 95 and other Charter provisions do not subject the jurisdiction of the Court to that of its competitors. States may become amenable in parallel to the jurisdiction of the ICJ and other adjudicative procedures, and may freely select what forum to seize. This, in turn, raises the possibility of jurisdictional competition, in general, and forum shopping, in particular.

To minimise their exposure to jurisdictional competition, many of the states which have submitted declarations accepting the compulsory jurisdiction of the Court, in pursuance to article 36(2) of the Statute, have complemented this regime of jurisdictional concurrency with a proviso prescribing that the jurisdiction of the ICJ over them will be of a residual nature. For example, the declaration of acceptance on the part of the Belgium (which is characteristic of declarations of this kind), provides that:

> "... the Belgian Government [recognises] as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2 of the Statute of the Court, in legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, *except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement"* (emphasis added).[58]

The combined effect of article 95 and such reservation is that the ICJ can be utilised against a reserving state as a last resort only.

It would seem that declarations of the type offered by Belgium denote certain qualms concerning the suitability of the Court to address all international disputes (e.g., complicated trade issues). By giving preference to the specific dispute settlement

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[57] This provision was absent from the Dumberton Oaks draft UN charter and was introduced at a later stage following a proposed amendment to the ICJ Statute submitted by Venezuela. Proposed Drafts of Art. 1,37 Submitted by the Delegation of Venezuela, Doc. 282 IV/1/22, 14 May 1945, 13 U.N.C.I.O. Doc. 468 (1945). The relevant sub-committee entrusted primarily with addressing the transition between the ICJ and the PCIJ has recommended the introduction of the Venezuelan proposal, subject to a few minor drafting changes, into the Charter itself. 13 U.N.C.I.O. Doc. at 196-97. The recommendation was subsequently adopted unanimously by the 4th drafting Commission of the Conference.

[58] Declaration of the Government of the Belgium under article 36(2) of the ICJ Statute, 302 U.N.T.S. 251 (1958). Similar declarations were also made by more than half of the states that submitted declarations under the optional clause.

arrangements (which pursuant to the language of many declarations, though not all of them,[59] may or may not be of a binding character), the declaring countries seem to insinuate that they consider non-ICJ procedures to be usually better equipped to accommodate their needs and concerns. One can also presume that preservation of the preferential status of alternative mechanisms was designed to respect the terms of pre-existing exclusive jurisdiction regimes in which the declaring states had already participated.

UN human rights bodies

Another prototype of a non-exclusive jurisdiction clause, preserving the co-existence of parallel jurisdictions, is found in several human rights treaties concluded under the auspices of the UN. For example, article 44 of the ICCPR[60] provides the following:

> "The provisions for the implementation of the present Convention shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments of, or conventions of the United Nations and of the specialized agencies, and shall not prevent the State Parties to the present convention from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them".

Similar language can be found in article 16 of CERD, adopted a few months earlier,[61] and in the not yet in force Migrant Workers Convention (MWC).[62]As a result, parties to

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[59] Some of the declarations of acceptance of the Court's jurisdiction have limited the *ratione materiae* scope of their 'residual jurisdiction' reservation to matters amenable to the jurisdiction of competing courts or tribunals. For discussion, see Stanimir A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* (1995) 104.

[60] International Covenant on Civil and Political Rights, 16 Dec. 1966, art. 28, UN GA Res. 2200 A (XXI), GAOR, 21st Sess., Supp. No. 16 (A/6316) 52, UN Doc. A/CONF. 32/4 [hereinafter 'ICCPR'].

[61] International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, art. 16, UN G.A. Res. 2106A (XX), GAOR, 12th Sess., Supp. No. 14 (A/6014) 47, UN Doc. A/CONF. 32/4 [hereinafter 'CERD']("The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the State Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them"). It should be noted that there are slight differences between the texts of CERD and the ICCPR. Most notably, the ICCPR speaks generally of 'implementation' measures (which arguably include the system of reports) while CERD refers only to 'settlement of disputes or complaints'.

[62] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec. 1990, art. 78, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990)[hereinafter 'MWC']("The provisions of article 76 [governing inter-state complaints] shall be applied without prejudice to any procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and the specialized agencies and shall not prevent the States Parties from having

disputes falling under the inter-state jurisdiction of the HRC may choose whether to bring the case to it, to a competent regional human rights procedure, or, in cases of racial discrimination, also to CERD.[63]

It may be observed that the choice of forum clauses of the ICCPR, CERD and MWC also explicitly cover individual complaints, unlike their European HR Convention counterpart. However, this has little significance in practice, since the lack of regulation of the matter under the European HR Convention implies that there is no bar against individuals (or groups of individuals) bringing human rights complaints before the competent body of their choice.

Why is it that these three human rights procedures have adopted a non-exclusive jurisdiction clause, whereas the European mechanism had opted for exclusive jurisdiction? It would seem that part of the answer to the question is found in the chronology of events. The European HR Convention and the Social Charter were concluded before the universal UN treaties. Since the latter were open for signature *inter alia* to European states that had participated in the pre-existing regional mechanisms, the adoption of an exclusivity regime would have put these states in an intolerable position (i.e., being subject to conflicting exclusive jurisdiction provisions). That would, most probably, have resulted in their opting out of the universal conventions. It could also be argued that the fears raised during the negotiations preceding the European HR Convention, that states might sue each other before the ICJ for human rights violations, were not perceived as a serious threat by the mid 1960's – the time of conclusion of the ICCPR and CERD. An additional reason may be that the universal treaties were not regarded as a part of a political integration process (while the European instruments were concluded within the 'integrative' framework of the Council

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recourse to any procedures for settling a dispute in accordance with international agreements in force between them").

[63] Remarkably, during the drafting of CERD there was only limited discussion of the text of article 16. However, relations between competing procedures were addressed during discussions on the text of article 15 (dealing with petitions from Trust and Non-Self Governing territories). Some delegates expressed the view that the introduction of new procedures with respect to such territories is redundant since it duplicates the work of the UN bodies supervising the same situation; U.N. GAOR 3rd Comm., 20th Sess., 1363rd mtg. at 434-35, U.N. Doc. A/C.3/SR.1363 (1965)(statements by delegates of the UK and Nigeria). However, other delegates felt that such problems are of minor importance and could, in any event, be solved through cooperation between the CERD Committee and the existing mechanisms; id. at 435 (statements by delegates of India and Yugoslavia); U.N. GAOR 3rd Comm., 20th Sess., 1364th mtg. at 439, U.N. Doc. A/C.3/SR.1364 (1965)(statement by delegate of Italy). The end result, reflects a compromise which enables the Committee to exercise simultaneous power of review over petitions submitted to the competent UN bodies with respect to Trust and Non-Self Governing territories. CERD,

of Europe), and that, as a result, there was no real incentive to create a full or partial 'self-contained' regime. Finally, if one were to take seriously the idea that the UN conventions were intended to promote the observance of human rights as much as possible,[64] then it is understandable that the drafters had opted for non-preclusion of alternative remedies. This is because, the more remedial 'safety nets' are available to victims of human rights violations, the greater is the likelihood that the overarching goal of the human rights movement – the advancement of human conditions, would be achieved.[65]

It is interesting to note that other regional and universal human rights treaties that employ supervisory machinery - the Inter-American, African and Torture Conventions and the CEDAW Protocol, do not contain any choice of forum clauses, thus opting *de facto* for a non-exclusivity regime. It is not completely clear why these regimes had decided to opt for non-exclusivity, but one of the possible explanations could be reluctance to undermine the role of pre-existing universal treaties in which many of the new treaty regimes' members have participated. With respect to one more procedure - the ILO supervision mechanism, the absence of choice of forum provision is part of a general obliviousness towards other procedures, which is manifested by lack of any jurisdiction-regulating provisions whatsoever.[66] Such lack of coordination can be explained, in part, by the fact that the ILO dispute settlement mechanisms are the oldest of their kind, created at a time when jurisdictional competition was hardly conceivable.

Non-compliance procedures

An additional non-exclusive jurisdiction clause can be found in the preamble to the non-compliance procedure established by the parties to the Montreal Protocol. The preamble provides that the new procedure:

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art. 15 ("...the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies").

[64] See Philip Alston "Effective Implementation of International Instruments on Human Rights, including Reporting Obligations under International Instruments on Human Rights" U.N. GAOR, World Conference on Human Rights, Prep. Comm., 4th Sess., Annex, Agenda Item 5, para. 245, U.N. Doc. A/CONF.157/PC/ 62/Add.11/Rev.1 (1993).

[65] Theodor Meron "Norm Making and Supervision in International Human Rights: Reflections on Institutional Order" 76 A.J.I.L. (1982) 754, 777.

[66] See A.A. Cancado Trindade "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights" 202 Receuil des cours (1987) 9, 332 n. 1074.

"... [S]hall apply without prejudice to the operation of the settlement of disputes procedure laid down in Article 11 of the Vienna Convention."[67]

Article 11 includes discretionary reference to negotiation, good offices, mediation, conciliation, arbitration or the ICJ.[68] It seems that a predominant consideration influencing the introduction of a rule of non-exclusivity was the need of the drafters of the Procedure to appease some of the state parties to the Vienna Ozone Convention who were reluctant to waive the right to utilise more 'conservative' dispute settlement procedures.[69]

A slightly different formulation had been incorporated in the Chemical Weapons Convention (CWC), which also provides for dispute settlement arrangements under general international law, and for specific procedures under the Convention. Article XIV, which lists dispute settlement procedures, such as negotiations and consensual reference to the ICJ, addresses in subsection 6 the relations between these dispute settlement mechanisms and the Convention's Verification Procedure (article IX):

"This Article is without prejudice to Article IX or to the provisions on measures to redress a situation and to ensure compliance, including sanctions".

It would thus seem that the drafters of the CWC were mostly interested in protecting the special procedures under the Convention, whose permanent availability and effectiveness played an important part in securing the parties agreement to renounce Chemical weapons.[70] Further, it seems reasonable to hold that the CWC procedures could be utilised in all circumstances (even when ordinary dispute settlement proceedings have been pursued).[71] Hence, article XIV seems to represents a non-exclusive jurisdiction clause, which operates, at the same time, as a non-preclusive clause, preventing the exclusion of the Verification Procedure by the mere invocation of

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[67] Report of the 4th Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Annex IV, 25 Nov. 1992, UN Doc. UNEP/OzL.Pro.4/15 (1992).
[68] The Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, art. 11, 26 I.L.M. (1987) 1516.
[69] The preamble was absent from the original version of the Non-Compliance Procedure, adopted in the Second Meeting of the Parties, London 1990, and was added at the specific request of two delegates to the Third Meeting of the Parties, Nairobi, 1991. Report of the 3rd Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 21 June 1991, para. 34, UN Doc. UNEP/OzL.Pro.3/11 (1991).
[70] Walter Krutzsch and Ralf Trapp, *A Commentary on the Chemical Weapons Convention* (1994) 232.

an alternative procedure. In contrast, it is questionable whether a state party to the Montreal Protocol can initiate inter-state proceedings under the Non-Compliance Procedure in parallel to more traditional methods of dispute settlement for the same dispute.

Other non-exclusive jurisdictions

In some cases, the non-exclusive nature of the jurisdiction of a court or tribunal must be inferred from other provisions of the relevant constitutive instrument. For instance, article 40 of the North American Agreement on Environmental Cooperation (NAAEC) provides that:

> "Nothing in this Agreement shall be construed to effect the existing rights and obligations of the parties under other international environmental agreements, including conservation agreements, to which such Parties are party."

This text would seem to apply both to the substantive and procedural rights and obligations of the parties under the NAAEC. In other words, it could be read as permitting parties to choose whether to bring claims against other parties for breach of environmental standards under the dispute settlement mechanisms of the NAAEC or other environmental dispute settlement mechanisms (e.g., the Montreal non-compliance mechanism). It would seem that this provision also protects the right of parties to bring environmental cases (with trade implications) to NAFTA.[72]

Finally, it can be noted that the UN Claims Commission on Iraq, which enjoys overlapping jurisdiction with domestic courts, also operates under an implicit non-exclusive jurisdictional regime.[73] This proposition is underlined by the fact that the Governing Council of the Commission has adopted special provisions designed to

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[71] Krutzsch and Trapp, id. at 233; Eric P.J. Myjer "The Settlement of Disputes under the Chemical Weapons Convention and the Case of the Confidentiality Commission" *The Convention on the Prohibition and Elimination of Chemical Weapons* (Daniel Bardonnet, ed., 1997) 537, 546.

[72] It is interesting to note that the CEC Council may refer a dispute submitted to it to a more appropriate arrangement (arguably, NAFTA in trade related matters). North American Agreement on Environmental Cooperation, 14 Sept. 1993, art. 23(5), 32 I.L.M. (1993) 1480 [hereinafter 'NAAEC'].

[73] Norbert Wühler "The United Nations Compensation Commission: A New Contribution to the Process of International Claims Resolution" 2 Journal of International Economic Law (1999) 249, 259-60.

address the effects of multiple proceedings on the awarding of compensation by the Commissioners.[74]

II. Residual jurisdiction

Jurisdiction under UNCLOS

An important, and yet a different non-exclusive jurisdiction provision from those discussed so far, is article 282 of UNCLOS, which reads as follows:

> "If the state parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided in this part, unless the parties to the dispute otherwise agree."

This article differs from article 95 of the UN Charter and other non-exclusivity regimes to the extent that it does not merely permit jurisdictional co-existence, but transforms UNCLOS dispute settlement procedures into residual adjudicative mechanisms, which can be seized only if – a) no other binding procedure is available; or b) the parties have so agreed. This provision represents a clear choice of the drafters of the Convention to protect the disputing parties' freedom of choice of procedure. Indeed, the *travaux preparatoires* to UNCLOS suggest that article 292 of the EC treaty (at that time - article 219) was cited by some delegates as a desirable model for UNCLOS, but the opposite view, which envisioned an ancillary role for the Convention's procedures, ultimately prevailed.[75]

The preservation, to a considerable degree, of the freedom of the parties to engage in dispute settlement outside UNCLOS, the multiple-choice configuration of forum selection under UNCLOS itself (the so-called 'Montreaux Compromise', permitting state parties to select one or more compulsory dispute settlement procedures from a menu of four alternatives) and the preparatory works strongly indicate that the drafters of the Convention wanted to achieve compulsory dispute settlement, on the one hand, but were

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[74] Governing Council Decision 13, 25 Sept. 1992, UN Doc. S/AC.26/1992/13, available at < http://www.unog.ch/uncc/decision/dec_13.pdf > (last visited on 3 Sept. 2000)(UN Compensation Commission) [hereinafter 'UNCC Governing Council Dec. 13'].

[75] See Third United Nations Conference on the Law of the Sea, 4th Sess., V *Third United Nations Conference on the Law of the Sea – Official Records* (United Nations, 1976) 18, 37; Myron H. Nordquist et al. (eds.), 5 *United Nations Convention on the Law of the Sea 1982: A Commentary* (1988) 25-26.

willing to allow state parties to maintain flexibility in the choice of means of settlement, on the other hand.[76] Flexibility was thus perceived as a necessary price for getting the consent of all state parties to the compulsory nature of dispute settlement.[77] Furthermore, once it became clear that there would be no agreement on a single adjudication forum under UNCLOS, it made little sense to insist on entrusting the Convention's procedures with exclusive jurisdiction (since the goal of uniform application of the Convention could not have been attainted anyway).

However, it should be noted that article 282 gives priority only to dispute settlement procedures entailing a binding decision. Thus, an existing agreement to refer a question subject to the jurisdiction of UNCLOS dispute settlement bodies to negotiation or conciliation cannot normally serve as a bar against invoking the UNCLOS procedures.

Still, in a recent decision in the *Southern Bluefin Tuna* case,[78] an arbitral tribunal has construed article 281 of UNCLOS broadly[79] and held that an agreement to refer a specific type of disputes to diplomatic methods of dispute settlement could be viewed as an implicit agreement to exclude the application of Part XV to UNCLOS.[80] In the view of the present writer, the expansive approach taken by the arbitral decision towards what constitutes an excluding agreement has the potential of seriously eroding one of the main achievements of UNCLOS – the introduction of mandatory and binding dispute settlement procedures.[81] It also seems that the willingness of the tribunal to attribute exclusiveness to agreements to resort to diplomatic methods of dispute settlement

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[76] UNCLOS, 4th Sess., V *UNCLOS– Off. Rec.,* supra note 75, at 8; Nordquist, V *UNCLOS Commentary,* supra note 75, at 6, 20; A.O. Adede, *The System for Settlement of Disputes under the UN Convention on the Law of the Sea* (1987) 242ff; Alan E. Boyle "Settlement of Disputes Relating to the Law of the Sea and the Environment" *International Justice* (Kalliopi Koufa, ed., 1997) 299, 321.

[77] John G. Merrills, *International Dispute Settlement* (3rd ed., 1998) 195; Robert Y. Jennings "A New Look at the Place of the Adjudication in International Relations today" 1 *Collected Writings* (1984)(1998 reprint) 450, 460; Treves, Recent Trends, supra note 16, at 407-08.

[78] *Southern Bluefin Tuna* (Australia and New Zealand v. Japan), Award of 4 Aug. 2000 (Jurisdiction and Admissibility)(arbitration panel), available at <http://www.worldbank.org/icsid/bluefintuna/award080400.pdf> (last visited on 12 August 2000).

[79] Article 281(1) provides that: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure". United Nations Convention on the Law of the Sea, 10 Dec. 1982, art. 187, 287, 290, 292, UN Doc. A/CONF.62/122 (1982), 21 I.L.M. (1982) 1261 [hereinafter 'UNCLOS'].

[80] Such interpretation is arguable inconsistent with the Commentary to UNCLOS, which provides that non-UNCLOS procedures would be exclusive only if the parties so 'specify'. Nordquist, V *UNCLOS Commentary,* supra note 75, at 23.

[81] *Southern Bluefin Tuna* arbitration, at para. 19-23 (Separate Opinion of Justice Keith), available at < http:// www.worldbank. org/icsid/bluefintuna/opinion.pdf> (last visited on 12 August 2000). See also Nordquist, V *UNCLOS Commentary,* supra note 75, at 9-10.

renders meaningless the proviso in article 282, which permits derogation from UNCLOS procedures only if there had been an agreement of the parties to utilise a procedure that entails a *binding* decision.

In any event, one of the significant consequences of the residual nature of article 282 is that it limits the ability of disputing parties to exercise unilateral forum shopping or to engage in multiple proceedings before UNCLOS and non-UNCLOS fora. Cases which are amenable to the parallel jurisdiction of UNCLOS judicial bodies and other international courts or tribunals (whose procedure entails binding decisions) should be submitted, as a rule, only to the latter bodies. If a case were to be unilaterally brought before a UNCLOS court or tribunal in breach of this jurisdictional order of precedence, the judicial body seized would be obliged, upon request by any of the parties, to decline jurisdiction and refer the case to a competing forum.[82]

There are, however, two caveats to the proposition that UNCLOS precludes forum shopping. First, the parties to a dispute may agree to authorise ITLOS or another UNCLOS judicial body to exercise jurisdiction in derogation from the terms of article 282 (in line with the proviso – "unless the parties to the dispute otherwise agree"). Therefore, collective forum shopping may still take place. Second, if the jurisdiction of the alternative forum is also based on UNCLOS, there can be no application of article 282. In these circumstances, in which more than one UNCLOS judicial body is available (e.g., if both parties have selected more than one dispute settlement procedure under the 'choice of procedure' clause), the party initiating adjudication may forum shop between the alternative fora. In theory, the two parties could even initiate parallel proceedings before different courts or tribunals. However, in practice, given the modest number of parties that have so far announced their choice under article 287 and the even smaller number of those that have selected more than one procedure (to date, only 12 countries), it is quite unlikely that two or more judicial bodies would be competent to address a dispute by virtue of UNCLOS in the near future.

A delicate interpretative question pertaining to the text of article 282 relates to the place of the compulsory jurisdiction of the ICJ over states that have made declarations under

[82] Tullio Treves "Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice" 31 N.Y.U.J. Int. L. & Pol. (1999) 809, 811.

the optional clause [article 36(2) of the ICJ Statute] in the general scheme of things under UNCLOS. This question could arise under two possible scenarios.

First, a respondent party to dispute settlement proceedings initiated independently of UNCLOS (e.g., arbitration in pursuance to a bilateral dispute settlement treaty), but concerning a question falling under UNCLOS, might attempt to transfer the case to the ICJ, relying upon the last segment of article 282 ("the parties ... otherwise agree"). Although this contention might seem at first sight to be quite farfetched, a rather elaborated legal construction might sustain the argument (though, barely). At the outset it must be shown that UNCLOS prevails over the competing jurisdiction-creating instrument (e.g., if it is *lex specialis* and *lex posteriori*). Then it could be argued that mutual acceptance by the parties to the dispute of the optional clause of the ICJ - one of the designated fora under article 287 of UNCLOS, constitutes an agreement reached 'otherwise' to utilise a UNCLOS procedure. Under the final sentence of article 282 such 'agreement', which was reached outside UNCLOS (as would have been, for instance, an *ad hoc* agreement to resort to ITLOS), could override the normal rule according primacy to non-UNCLOS proceedings. Interestingly enough, this rather odd reading of article 282 finds some support in the *travaux preparatoires* to UNCLOS.[83]

However, there are a few problems with this interpretation. In the first place, it is questionable whether collective acceptance of the optional clause should be regarded as a jurisdiction-conferring 'agreement'.[84] Because of the general nature of optional clause declarations it is dubious whether specific intent to preclude the invocation of non-UNCLOS procedures can be attributed to states that have submitted such declarations (sometimes even before UNCLOS was concluded). In other words, it seems purely fictional to regard the intersecting declarations of acceptance as a specific 'agreement' to deviate from the default residual regime of article 282.

Additionally, it is rather unreasonable to construe UNCLOS as if it had intended to establish jurisdictional ranking between competing dispute settlement procedures operating independently of part XV of UNCLOS. ICJ proceedings based on any basis other than article 287's choice of procedure regime are in fact a non-UNCLOS procedure, as are proceedings before an arbitral panel, by virtue of a general arbitration

[83] Nordquist, V *UNCLOS Commentary,* supra note 75, at 26-27 (the term 'otherwise' in article 282 was selected so to encompass the jurisdiction of the ICJ under the optional clause).

agreement. It makes little sense to construe UNCLOS as if it meant to change the equilibrium between non-UNCLOS-based proceedings and to accord precedence to ICJ proceedings at the expense of arbitration (which is also one of the possible procedures under article 287). Actually, one could argue that the arbitration agreement and not the optional clause declarations ought to be regarded as the agreement to conduct proceedings 'otherwise'. Hence, there is illogical circularity in the proposition that UNCLOS purported to regulate non-UNCLOS procedures and it would be more sensible to address the competition between them under general international law, as if UNCLOS had not existed.[85]

Finally, it would seem that the last sentence of article 282 merely authorises UNCLOS judicial bodies to exercise jurisdiction where the parties have so agreed. It does not explicitly preclude litigation before alternative fora. Therefore, if judicial bodies outside UNCLOS are unilaterally invoked, the general rules of international law that govern conflict of jurisdictions, expounded later on in this study, should apply. In other words, it can be maintained that article 282 grants a residual status to UNCLOS procedures in the normal course of things, but once it is shown that the parties have opted for a UNCLOS based procedure in deviation from the residual principle, there is little, if any guidance in the text of UNCLOS on which forum is to enjoy priority. Thus, even if the ICJ would be willing to assume jurisdiction by virtue of article 282, despite the earlier initiation of proceedings before an arbitral tribunal, there is no guarantee that the arbitrators would be willing to halt the proceedings

The second interpretative question relating to the ICJ optional clause might arise with regard to proceedings initiated under UNCLOS before a judicial body other than the ICJ (i.e., ITLOS, arbitration or special arbitration). It is feasible, that the parties to the case will also be parties to the compulsory jurisdiction of the ICJ, and that the respondent party would try to rely upon article 282 and invoke the jurisdiction of the ICJ in order to preclude the jurisdiction of the seized forum. In other words, it can be proffered that

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[84] Shabtai Rosenne, II *The Law and Practice of the International Court of Justice* (1997) 830-31.

[85] This conclusion could be supported by the decision of the PCIJ in the jurisdictional stage of the *Electricity Company of Sofia and Bulgaria* case. *The Electricity Company of Sofia and Bulgaria* (Bulgaria v. Belgium), 1939 P.C.I.J. (ser. A/B) No. 77 (Preliminary Objections). In that case, the respondent state (Belgium) attempted to invoke the residual jurisdiction reservation to its optional clause declaration and argue that no optional clause jurisdiction can be established since the parties have concluded a specific treaty conferring upon the Court consensual jurisdiction over some of issues. The Court has held that the purpose of the latter treaty could not have been to limit recourse to adjudication and that an artificial construction of its jurisdiction-conferring instruments should be avoided.. Id. at 76.

acceptance of the compulsory jurisdiction of the ICJ might qualify as an 'external' agreement to resort to a non-UNCLOS dispute settlement procedure, which under article 282, should override the ordinary choice of procedure clause.

At the same time, the ICJ is one of the four adjudicative alternatives listed in article 287 and it is not obvious that its competence should prevail over that of other competent fora selected in pursuance to article 287. Under this view, resort to ICJ on the basis of the optional clause can be regarded as a choice of procedure technique equivalent to selection under article 287 (it is indeed conceivable that parties to the ICJ compulsory jurisdiction system would deem an additional declaration of acceptance of its jurisdiction under UNCLOS to be redundant). Therefore, it can be contended that in similarity with other instances in which both parties have selected more than one common procedure, the applicant party ought to decide which of the available competent fora to seize.

So far, at least one commentator (and now also an ITLOS judge) has expressed the view that a respondent party to a case before ITLOS brought under the jurisdictional provisions of UNCLOS may insist that the ICJ be utilised in lieu of ITLOS, by virtue of optional clause declarations made by all parties to the dispute.[86] In a recent case before ITLOS where this procedural argument could have been made, the respondent state chose not to invoke it. [87] Hence, it seems that the question is still an open matter, which waits to be resolved in the future. While the text and history of Part XV to UNCLOS seems to support the invocation of optional clause 'agreements' under article 282, such interpretation is hardly warranted as a matter of desirable judicial policy *inter alia* because of the current heavy caseload of the ICJ and the light docket of ITLOS. A request to transfer a case from ITLOS to the ICJ may therefore be tactically motivated, as part of an attempt to delay proceedings, and could perhaps in extreme cases be regarded as abusive.

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[86] Treves, Conflicts between ITLOS and the ICJ, supra note 82, at 812; Tullio Treves "The Jurisdiction of the International Tribunal for the Law of the Sea" 37 Ind. J. Int. L. (1997) 396, 407-08, 416-17.

[87] The case in question is *Southern Bluefin Tuna Cases* (Australia v. Japan; New Zealand v. Japan), Order of 27 August 1999 (ITLOS), available at <http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm> (last visited on 10 Oct. 2000). Since all of the disputing states have submitted declarations under the ICJ optional clause, the respondent state (Japan) could have insisted that the case be brought before that forum *in lieu* of arbitration (and through that try to divest ITLOS of jurisdiction to issue provisional measures). The situation had been further complicated by the fact that all three countries have appended to their declarations under the optional clause residual jurisdiction reservations. The ensuing challenge would have been whether UNCLOS, providing for arbitration also as a residual method of dispute

In any event, the interpretation adopted by the relevant judicial bodies on the interaction between article 282 and the ICJ optional clause should strive to be consistent and treat in all cases mutual declarations under article 36(2) of the ICJ Statute either as a legitimate exercise of choice of procedure under article 287 (which means that they cannot enjoy primacy over other UNCLOS and non-UNCLOS procedures) or as 'external' agreements (which enjoys precedence under article 282 only over UNCLOS procedures).[88]

A final observation with relation to jurisdictional competition involving UNCLOS bodies is that although article 282, as all other articles found in Section 1 to Part XV of UNCLOS, ought to apply *prima facie*, by virtue of article 285 of UNCLOS, vis-à-vis disputes arising under Part XI of UNCLOS (sea-bed related disputes),[89] some authors have argued that the language of article 282 suggests that it does not encompass competition with the Sea-Bed Disputes Chamber. This is because article 282 refers only to competition with procedures provided for in Part XV to UNCLOS.[90] However, this seems to be a rather minor point. Not only does the dormancy of the Sea-Bed Chamber transforms the issue into a purely academic one, it also looks as if, in most cases, the same result, provided in article 282 (according preference to a specific agreement of the parties to resort to a non-UNCLOS procedure), could be achieved through application of general rules of international law.[91]

Other residual arrangements

Residual jurisdiction arrangements can be found in some other international instruments. For example, ECOSOC Resolution 1503, establishing the complaints mechanism of the UN Human Rights Commission (utilising the Sub-Commission for Promotion and Protection of Human Rights), states that complaints alleging human rights violation will not be investigated if:

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settlement, could be considered as an agreed-upon alternative procedure to the ICJ. In any event, Japan did not attempt to transfer the case to the ICJ.

[88] Another interesting question is whether a state that has accepted the optional clause of the ICJ and a state which has selected the ICJ under article 287 should be deemed as parties which have selected the same procedure. Treves, The Jurisdiction of ITLOS, supra note 86, at 417.

[89] Article 285 of UNCLOS reads: "This Section applies to any dispute which pursuant to Part XI, section 5, is to be settled in accordance with procedures provided for in this Part ...".

[90] Treves, Conflicts between ITLOS and the ICJ, supra note 82, at 812; Merrills, supra note 77, at 172 n. 6.

"... the State concerned wishes to submit to other procedures in accordance with general or special international agreements to which it is a party".[92]

In addition, some dispute settlement provisions found in international treaties referring all or some classes of disputes to the jurisdiction of a particular judicial body contain a stipulation that priority should be given to other dispute settlement mechanisms that the parties may have agreed to empower.[93]

C. Middle ground approaches – limited choice of forum

NAFTA

Beside exclusive and non-exclusive jurisdiction provisions, one can also identify hybrid arrangements allowing for limited forum selection by the parties. The most notable of these regimes is found under NAFTA, which contains a sophisticated jurisdiction-regulating clause providing for a unique mixture of flexibility and rigidity.

The drafters of NAFTA were aware of the possibility that trade-related disputes between the three member states could give rise to concomitant proceedings under NAFTA and the GATT/WTO. This is because all three NAFTA members are also parties to the WTO and given the fact that many NAFTA provisions were modelled after GATT Provisions.[94] Consequently, the NAFTA Agreement attempted to coordinate between the jurisdictions of the two competing procedures and Article 2005

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[91] See Nordquist, V *UNCLOS Commentary,* supra note 75, at 36.

[92] ECOSOC Resolution 1503 (XLVIII), para. 6(b)(ii), 48 U.N. ESCOR (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970). However, it should be noted that the 1503 procedure represents a marriage between a quasi-judicial procedure and a general situation investigation mechanism and has not been considered by other human rights bodies as a competing dispute settlement procedure. See e.g., Comm. 1/1976, *A. v. S.*, U.N. Doc. CCPR/C/OP/1 at 17 (1984).

[93] See e.g., European Convention for the Peaceful Settlement of Disputes, art. 28(1)("The practice of this Convention shall not apply to disputes which the parties agreed or may agree to submit to another procedure of peaceful settlement. Nevertheless, in respect of disputes falling within the scope of Article 1, the High Contracting Parties shall refrain from invoking as between themselves agreements which do not provide for a procedure entailing binding decisions"). See also CERD, art. 22 (authorising the ICJ to adjudicate disputes, unless the parties agree to pursue other form of settlement); Convention on the Privileges and Immunities of the United Nations, 13 Feb. 1946, sec. 30. 1 U.N.T.S. 16 ("all differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement").

[94] Although NAFTA to the GATT 1947 and not to the WTO or GATT 1994, it seems to be the common view that the WTO structures have replaced for the purposes of NAFTA the old GATT framework. Gabrielle Marceau "The Dispute Settlement Rules of the North American Free Trade Agreement: a Thematic Comparison with the Dispute Settlement Rules of the World Trade Organization" *International Trade Law and the GATT/WTO Dispute Settlement System* (Ernst-Ulrich Petersmann, ed., 1997) 489, 535. See also *Tariffs Applied by Canada to Certain U.S. Origin Agricultural Products* (U.S. v. Canada), Report of 2 Dec. 1996, para. 166 (NAFTA Chapter 20 Panel), available at <http://www.nafta-sec-alena.org/images/pdf/cb95010e.pdf> (last visited on 15 Sept. 2000).

provides that the complaining party to a dispute falling both under the jurisdiction of NAFTA and the GATT can choose where to litigate it. However, upon selection, the chosen forum is accorded exclusive jurisdiction.[95] In the distinct case that two NAFTA parties are interested in bringing a similar claim against the third member state they must seek to agree on the identity of the forum beforehand (and in case of persistent disagreement, NAFTA should normally be selected).[96] Hence, NAFTA clearly permits plaintiffs to forum shop but limits the 'shopping' alternatives to two alternative fora only.

It should be noted, that certain disputes concerning the environment, conservation, health and safety are subject to a special arrangement. In these cases, the respondent state may insist that the dispute will be adjudicated before NAFTA dispute settlement bodies. The applicant is then prevented from seizing the GATT procedure and must withdraw from GATT proceedings, if already initiated.[97] Thus, article 2005 of the NAFTA represents a delicate balance between party autonomy in forum selection, on the one hand, and the protection of vital areas in which the regional organisation has particularly strong interests in having its norms applied, on the other hand.

It should also be mentioned that NAFTA adopted another limited choice of forum scheme with regard to private investment disputes.[98] Private investors from one NAFTA state investing in another NAFTA state may bring unilaterally their investment dispute with the host state either to ICSID (or the ICSID Additional Facility) or to arbitration in accordance with the UNCITRAL Rules. In doing so, they waive their rights to pursue the same matter before any dispute settlement procedure operating under domestic law.[99]

Other limited choice arrangements

Limited choice of forum arrangements can also be found in several other instruments, including some general dispute settlement treaties, providing for choice between several international disputes procedures.[100] In most cases, choice under those instruments must

[95] NAFTA, art. 2005(6).
[96] NAFTA, art. 2005(2).
[97] NAFTA, art. 2005(3)-(5).
[98] NAFTA, art. 1120.
[99] NAFTA, art. 1121.
[100] See Revised General Act, art. 17; American Treaty on Pacific Settlement, 30 April 1948, art. XXXII, 449 U.N.T.S. 83 (Pact of Bogotá); Optional Protocol to the Geneva Conventions on the Law of the Sea,

be exercised by the two parties, acting in unison, but some compromissory clauses allow for the unilateral exercise of choice.[101]

Finally, one should refer to the unique arrangement that has been introduced by the CSCE/OSCE Convention on Conciliation and Arbitration, which established the OSCE Court of Conciliation and Arbitration.[102] Article 19(1)(a) of the Convention provides that the Court will *not* have jurisdiction:

> "If the parties to the dispute have accepted in advance the exclusive jurisdiction of a jurisdictional body other than a Tribunal in accordance with this Convention, which has jurisdiction to decide, with binding force, on the dispute submitted to it, or if the parties thereto have agreed to seek to settle the dispute exclusively by other means."

The jurisdiction of the Court therefore is residual, but only if the alternative forum enjoys *exclusive* jurisdiction. In practical terms, this would mean that the Court could not address inter-state disputes subject to the jurisdiction of the ECJ or the ECHR, but could, normally, address questions which might also fall under the jurisdiction of the ICJ, the universal human rights bodies or ITLOS. However, it should be noted that some of the parties to the OSCE Convention have appended reservations, conditioning their acceptance of the Court's jurisdiction in that priority be given to competing dispute settlement procedures agreed upon in an *ad hoc* manner.[103]

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art. II; Vienna Convention on the Law of Treaties, art. 66(a) (all instruments provide for a choice between arbitration and the ICJ, the latter being the residual mechanism). An essentially similar arrangement can be found in certain compromissory clauses, which invest competence with the ICJ if the parties fail to agree upon terms of arbitration. See Convention on the Elimination of all Forms of Discrimination against Women, 18 Dec. 1979 art. 29, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46; CAT, art. 30. Another trade-related regime where limited choice of forum is permitted is the Organisation for the Harmonisation of Corporate Law in Africa. According to article 21 of the Organisation's constitutive treaty, the disputing parties have discretion whether to take the case to arbitration or adjudication. Treaty Establishing the Organization for the Harmonization of Corporate Law in Africa 17 Oct. 1993, 4 Journal Officiel de l'OHADA (1997), available at <http://www.cm.refer.org/eco/ecohada/ohada0.htm> (last visited on 16 Sept. 2000).

[101] See e.g., European Energy Charter, 12 Dec. 1994, art. 26, 34 I.L.M. (1994) 373 (choice between pre-agreed forum, domestic courts and ICSID or UNCITRAL arbitration).

[102] Convention on Conciliation and Arbitration within the CSCE, 15 Dec. 1992, 32 I.L.M. (1993) 557.

[103] Lucius Caflisch "The OSCE Court of Conciliation and Arbitration: Necessary or Redundant?" 9 A.S.I.L. Bulletin (1995) 23, 25-26.

A comparable 'lack of exclusivity' provision can also be found in the Declaration of Algiers, establishing the Iran-U.S. Claims Tribunal, albeit with respect to the exclusive jurisdiction of the domestic Iranian courts.[104]

D. Implied division of jurisdictions

Beside explicit jurisdiction-regulating clauses governing access to international courts and tribunals, it has been sometimes suggested that the very nature of certain treaty regimes would justify, by way of implication, a regime of exclusivity. The most typical candidates for this construction are the so-called 'self-contained' regimes – treaty created sub-systems that embrace a full set of secondary rules and enforcement mechanisms.[105]

It could be argued that through the establishment of closed regimes of highly complex nature the parties have demonstrated their intent to refer disputes relating to the operation of the regime exclusively, or at least primarily, to the regime's own dispute settlement bodies.[106] Some support to this view can be found in the commentary on the EC Treaty, which suggested that even had article 292 (ex-article 219) not existed, the ECJ could have deduced its existence from the general scheme of EC law.[107] Furthermore, as will be shown below, there is some support in the case law that specific dispute settlement procedures (which the 'self-contained' regimes are arguably a prototype of) ought to enjoy jurisdictional precedence over general dispute settlement procedures.

It would seem that this proposition could be employed with respect to regional economic integration mechanisms whose constitutive instruments do not explicitly address the possibility of invoking their provisions before judicial bodies operating outside the sub-system. These include the EFTA Court, COMESA Court and the Economic Court of the CIS. Indeed, it has been argued with regard to the latter body that the clause referring to the Court disputes under the CIS Economic Union Treaty

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[104] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, art. II(1), 1 Iran-US Cl. Trib. Rep.10, 20 I.L.M. (1981) 230 [hereinafter 'Declaration on Settlement of Claims']. In its practice, the Tribunal has construed the exclusive jurisdiction exception narrowly. Case 6, *Gibbs and Hill, Inc. v. Iran Power Generation and transmission Co.*, 1 Iran-U.S. Cl. Trib. Rep. 236 (1982); Case 51, *Halliburton Co. v. Doreen/IMCO*, 1 Iran-U.S. Cl. Trib. Rep. 242 (1982).

[105] Bruno Simma "Self-Contained Regimes" XVI Neth. Y.B. Int'l Law (1985) 111, 117; *Cf.* William Riphagen "Second Report on the Content, Forms and Degrees of International Responsibility", U.N. Doc A/CN.4/344 (1981), 1981 (II) Y.B. Int. L. Comm. Part 1, p. 79.

[106] Simma, supra note 105, at 113.

(which is roughly comparable to the EC Treaty)[108] should be construed as an exclusive jurisdiction clause.[109] However, given the scarcity of the case law on the subject, the suggestion that exclusive adjudicative competence is an implied condition in every regional integration regimes cannot be said to represent the current state of the law. This is especially the case, since some regimes such as NAFTA and Benelux do offer parties a right, albeit limited, to access outside procedures.[110] It is nevertheless plausible to hold that the closed nature of the regime might create a *prima facie* presumption in favour of exclusiveness. As a result, the burden to prove intent to preserve choice of forum should shift to the party arguing for the jurisdiction of an external judicial body.

2. Multiple proceedings

There are three principal methods through which jurisdiction-regulating clauses found in the constitutive instruments of international courts and tribunals address the problem of multiple proceedings. These three methods correspond to the well-known legal doctrines of *lis alibi pendens, res judicata* and *electa una via*. The first two rules are of restricted temporal and substantive scope. A *lis alibi pendens* provision bars multiple proceedings only during the pendency of the first-in-time set of proceedings. After proceedings had been exhausted the rule does not prohibit initiation of new proceedings. The *res judicata* rule serves as a bar against adjudication only after the first proceedings were concluded and a valid judgment issued. Hence, the application of each of the first two rules excludes the application of the other, and they cannot be applied simultaneously. The *electa una via* rule has, by contrast, a wider potential for application since it may inhibit multiple proceedings from the very moment in which the first proceedings were initiated and onwards - encompassing both parallel and subsequent proceedings. It therefore combines the effect of the *lis alibi pendens* and *res judicata* rules. However, the *electa una via,* which is essentially a rule of estoppel, is

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[107] Herzog, supra note 3, at 6-170.5.

[108] The Commonwealth of Independent States Treaty on Creation of an Economic Union, 24 Sept. 1993, art. 31(1), 34 I.L.M. (1995) 1298. Article 31(1) of the Treaty provides: "[t]he contracting parties pledge to resolve their disputes in respect to interpretation and implementation of the present Treaty by means of negotiations or through the Economic Court of the Commonwealth of Independent States."

[109] Gennady M. Danilenko "The Economic Court of the Commonwealth of Independent States" 31 N.Y.U.J. Int. L. & Pol. (1999) 893, 900. Danilenko acknowledges that another clause - article 31(4), permits recourse to other international judicial bodies if the disputing parties fail to resolve their dispute through the Economic Court.. However, in practice, the Court has construed article 31(4) to apply only with regard to disputes that cannot be submitted to the Economic Court. *Opinion no. C-1/19-96,* 9 Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatssi [Bulletin of the Supreme Arbitration Court of the Russian Federation] (1997) 86 (in Russian), *cited* in Danilenko, supra, at 901.

[110] NAFTA, art. 2005 (optional access to GATT); Benelux Treaty, art. 50 (right to enforce Arbitral judgments before the ICJ).

designed to bar only multiple litigation initiated by the same applicant, and not multiple claims brought by different claimants (although not all regimes insist upon this condition).

In general, the number of jurisdiction-regulating norms addressing multiple proceedings is quite small. This can be explained, in part, by the fact that such provisions are redundant for international courts and tribunals entrusted with exclusive jurisdiction (such as the ECJ or the ECHR). The exclusivity of the jurisdiction bars the parties from referring matters falling under the courts and tribunal's exclusive competence to any other international judicial body, at any time, regardless of whether proceedings have been initiated before the proper forum or of the procedural stage reached in these proceedings. Hence, there is need for regulation of parallel jurisdiction only in respect of jurisdictions susceptible to forum shopping. In addition, it often did not occur to the drafters of the constitutive instrument of veteran judicial bodies, created before the institutional proliferation of the 1980's and 1990's, that another permanent judicial body with overlapping jurisdiction might be created in the future. This explains why the architects of courts and tribunals such as the ICJ and ICSID did not feel the need to regulate the jurisdictional relations between them and other judicial bodies. Finally, the absence to date of any 'high profile' jurisdictional clash has made the question of the overlapping powers of international courts and tribunals mostly an academic curiosity. Hence, negotiations over such a difficult issue during the already arduous task of creating new judicial bodies might have been considered a futile and inefficient time and resource consuming exercise, which could be skipped over.

A. *Electa una via*

Most *electa una via* provisions can be found in human rights instruments that bar resort to dispute settlement mechanisms once another procedure had been invoked - regardless of the stage reached in the proceedings before the competing forum. The relative propensity to use jurisdiction-regulating measures in human rights regimes can be explained, in part, by the similarity of the obligations under the various treaties, which casts doubts over the utility of resorting to multiple proceedings, and through the unwillingness of state parties to human rights instruments to be compelled to respond to the same specific allegations before more than one forum. However, the most significant factors have probably been the relatively large number of bodies operating in this area with palpable jurisdictional overlaps and the wish of the drafters of the

instruments to reduce the risk of inconsistent decisions on human rights issues, which might adversely affect the authority and legitimacy of the involved courts and tribunals.

European Convention on Human Rights and other human rights regimes

Again, the prototype provision can be found in the 1950 European HR Convention. Article 35(2)[ex-article 27(1)] provides that:

> "The Court shall not deal with any application submitted under Article 34 [i.e., individual application] that -
>
> a) ...
>
> b) is substantially the same as a matter that has already been examined by the Court or has *already been submitted to another procedure* of international investigation or settlement and contains no relevant new information." (emphasis added)

This provision was introduced into the text of the Convention following a British proposal,[111] which was directed at curbing overlaps between the jurisdictions of different international institutions. In variation from the original proposal, which only addressed multiple proceedings before different judicial bodies, the drafting sub-committee decided to expand the rule, so as to encompass also parallel and repetitive recourse by the same applicant to the Strasbourg institutions.

To date, there have been only a few cases in which the *electa una via* clause had been invoked with respect to competing international courts and tribunals.[112] However, in one case before the EHR Comm'n it was held that a new legal claim, different from a previous legal claim which had been submitted to it in the past, was still the 'same matter' if the plaintiff could have raised the second claim in the first set of proceedings.[113] This suggests a broad construction of what constitutes a competing claim for the purposes of applying the *electa una via* clause, although one could perhaps attribute this expansive approach to the greater willingness of international courts and tribunals to curb successive applications to the same body (where no normative and procedural differences that might justify multiple proceedings exist). At the same time, the European Comm'n, like its UN and regional counterparts, has adopted a narrow test

[111] Amendments Proposed by the United Kingdom Delegation, August 4th, 1950, Doc. CM I (50) 6, V '*Travaux Préparatoires*', supra note 32, at 66.
[112] See supra Chapter 2, at pp. 74., n. 177.

as to what procedures are capable of generating jurisdictional competition (e.g., excluding fact finding bodies and NGO sponsored proceedings).[114]

Additional *electa una via* clauses governing jurisdictional concurrency in the area of human rights are found in the 1984 CAT, [115] the new Optional Protocol to CEDAW[116] and in the not-yet in force MWC.[117] In all cases the text closely resembles the *electa una via* provision found in the European HR Convention.

Other electa una via clauses

Another example of an *electa una via* rule, coming from a different area of international law, is article 2005 of NAFTA (which was already mentioned before). This article enables applicant parties to choose whether to bring their claims before NAFTA or GATT dispute settlement mechanism. However, once choice has been made, the selected forum enjoys exclusive jurisdiction and the other one is permanently barred. Similarly, under the CSCE/OSCE Convention on Conciliation and Arbitration, the Court of Conciliation and Arbitration is to be deprived of jurisdiction if the same case has previously been submitted to a competent court or tribunal (or in conciliation, to another conciliation-type procedure).[118]

A slightly different rule, prescribing only the effects of adjudication before a seized forum on the jurisdictions of other courts and tribunals (and not the reverse – the effect of adjudication before alternative fora on the jurisdiction of the second-in-time seized body) is found under the Algiers Declaration, establishing the Iran-U.S. Claims Tribunal. Once a claim had been referred to the Tribunal, it is excluded from the

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[113] *Ajinaja* v. U.K., App. No. 13365/87, 55 Eur. Comm'n H.R. Dec. & Rep. 294, 296 (1988).
[114] See supra Chapter 2, at pp. 76 n. 187, 188.
[115] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, art. 22(5), G.A. Res. 39/46. 39 UN GAOR Supp. (No. 51), UN Doc. A/39/51, at 197 (1984), 23 I.L.M. (1984) 1027 [hereinafter 'CAT']("The Committee shall not consider any communications from an individual ... unless it has ascertained that: (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement").
[116] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, art. 4(2)(I), UN Doc. E/CN.6/1998/WG/L.2 (1998), 39 I.L.M. (2000) 281 ("The Committee shall declare a communication inadmissible where: (a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement").
[117] MWC, art. 77(3) (" The Committee shall not consider any communication from an individual under the present article unless it has ascertained that: (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement").
[118] CSCE/OSCE Convention on Conciliation and Arbitration, art. 19(1)(a), 19(3). In cases submitted to conciliation, the Conciliation Commission will stay proceedings and give priority to judicial proceedings initiated between the parties even if they commenced after Conciliation had begun. Id. at art. 19(2).

jurisdiction of the "courts of Iran or of the United States, *or of any other court*" (emphasis added).[119] At least in one case, the Tribunal has held that the term 'any other court' does not cover arbitration tribunals.[120]

Electa una via reservations

Reservations submitted by states acceding to the jurisdiction of judicial or quasi-judicial fora, whose constitutive instruments failed to introduce an *electa una via* arrangement, could serve as an alternative source of the rule. Indeed, some 20 states parties to the ICCPR (most of them also subject to the jurisdiction of the ECHR), have stipulated upon ratifying the Optional Protocol (which contains only a *lis alibi pendens* clause), that the HRC shall be deprived of jurisdiction over complaints which had been previously addressed by another dispute settlement procedure. Most of these reservations were prompted by a recommendation of a Committee of Experts appointed by the Committee of Ministers of the Council of Europe,[121] which was not interested in having the decisions of the ECHR challenged, as if by way of appeal, before another judicial instance, thereby weakening the authority of the former and opening the way for embarrassingly inconsistent findings.[122] The HRC has explicitly accepted the legitimacy of the said reservations in a General Comment, where it held that the reservations are compatible with the object and purpose of the Optional Protocol, to the extent that another form of international supervision over the human rights practices of the reserving states is available.[123] Consequently, the HRC enforced *electa una via* reservations in a number of cases and refused to admit applications previously submitted to alternative judicial or quasi-judicial mechanisms.[124] Similar reservations were also attached to 7 declarations accepting the authority of the CERD Committee to review individual communications.

Initially, the HRC had adopted an expansive interpretation of *electa una via* reservations and did not consider disparities between the scope of protection afforded by the ICCPR and regional conventions to warrant hearing of communications previously brought

[119] Declaration on Settlement of Claims, art. VII (2).
[120] Case 333, *Flour Corp. v. Iran,* 11 Iran-U.S. Cl. Trib. Rep. 296, 297 (1986) (Interim Award); *Dallal v. Bank Mellat* [1986] 1 Q.B. 441.
[121] Report of the Committee of Experts, *Co-existence of Systems of Control,* supra note 28, at 4, 7-11.
[122] P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication - Law and Practice* (1988) 229; Helfer, supra note 27, at 344-45.
[123] Human Rights Committee, General Comment 24 (52), para. 14, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).
[124] See supra Chapter 2, at p. 72, n. 169.

before a regional procedure.[125] However, more recent case law suggests that where an alternative procedure had rejected the complaint as inadmissible *ratione materiae,* the HRC may still decide to address it because of differences in the scope of protected rights under the relevant instruments.[126] Further, unlike the EHR Comm'n, the HRC has not attributed weight to the fact that the new and separate claim could have been raised in the first set of proceedings.[127] Finally, the Committee has adopted the position that only substantive examination of the same case by the alternative judicial or quasi-judicial procedure will bar review by the HRC.[128] Hence, one might be able to observe in the HRC case law gradual erosion of the *electa una via* defence, which is arguably motivated by the wish to offer human rights protections where other procedures have been unable or unwilling to do so. This trend generally conforms to the strict standards employed by the HRC in *lis alibi pendens* cases, which have led to a limited application of the rule.

Electa una via reservations have also been submitted by some of the states that have made declarations in pursuance to the optional clause of the ICJ Statute, excluding from the jurisdiction of the Court disputes in respect of which other judicial proceedings have been initiated – regardless of whether these proceedings are pending or have been concluded.[129] However, these declarations have tended to limit their scope of application to situations where the party attempting to seize the jurisdiction of the ICJ had not made an optional clause declaration at the date when the first set of proceedings were initiated. Indeed, acceptance of the optional clause after a dispute had already been

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[125] Comm. 168/1984, *V.O v. Norway*, UN GAOR, 40th Sess., Supp. 40, at 232, 234 (Report of the HRC, 1984). For criticism, see Ghandhi , supra note 122, at 231.

[126] Comm. 44/1990, *Casanovas v. France*, U.N. GAOR, 49th Sess., Supp. 40, at 131, 133-34 (Report of the HRC, 1994); Manfred Nowak, *A Commentary on the U.N. Covenant on Civil and Political Rights* (1993) 702.

[127] Comm. 452/1991, *Glaziou v. France*, UN GAOR, 49th Sess., Supp. 40(II), at 250, at para. 7.2 (Report of the HRC, 1994); Comm. 584/1994, *Valentijn v. France*, 51st Sess, Supp. 40(II), at 253, at para. 5.4 (Report of the HRC, 1996). One explanation for the differences in approach is that the European HR Comm'n addressed successive applications to the same mechanism#, whereas the HRC has dealt with the invocation of different treaty regimes. See also Helfer, supra note 27, at 381-82.

[128] See Comm. 158/1983, *O.F. v. Norway*, UN GAOR, 40th Sess., Supp. 40, at 204, 211 (Report of the HRC, 1985); *Casanovas,* supra note 126, at 133-34.

[129] See e.g., Declaration of the Government of Malta under article 36(2) of the ICJ Statute, 580 U.N.T.S. 205 (1966): "[the Court shall have compulsory jurisdiction over disputes other than] ... disputes in respect of which arbitral or judicial proceedings are taking, or have taken place with any State which, at the date of the commencement of the proceedings, had not itself accepted the compulsory jurisdiction of the International Court of Justice." Similar declarations were also made by Mauritius and the UK.

submitted to adjudication, designed to drag the respondent state to the ICJ and subject it, against its will, to multiple proceedings, might well be viewed as abusive.[130]

Finally, several commentators have expressed the view that forum selection provisions found in bilateral and multilateral investment treaties and domestic foreign investment laws, where the investor is often granted a right to choose between various dispute settlement procedures - e.g., ICISD, UNCITRAL or domestic courts,[131] constitute in effect *electa una via* provisions. This is because the language of these agreements implicitly suggests that choice of one mechanism ought to exclude the application of all other available mechanisms.[132]

B. Lis alibi pendens

The Optional Protocol to the ICCPR

There are only a few explicit *lis alibi pendens* provisions in the constitutive instruments of international courts and tribunals. The most notable of them is article 5(2) of the Optional Protocol to the ICCPR, which provides:

> "The Committee shall not consider any communication from an individual unless it has ascertained that (a) the same matter is not being examined under another procedure of international investigation or settlement".

Unlike article 35(2) of the EHR Convention that bars any form of multiple litigation, the Optional Protocol only precludes parallel proceedings[133] and it does not prohibit

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[130] However, the ICJ has stated on several occasions that acceptance of the optional clause for the sole purpose of bringing a specific case is permissible. *Right of Passage* (Portugal v. India), 1957 I.C.J. 125, 142 (Preliminary Objections); *Legality of Use of Force* (Yugoslavia v. Belgium), Order of 2 June 1999 (forthcoming in 1999 I.C.J.)(Provisional Measures).

[131] See e.g., U.S Model Bilateral Investment Agreement, art. VI, available in Stephen Zamora & Ronald A. Brand (eds.), 1 *Basic Documents of International Economic Law* (1990) 655; NAFTA, art. 1120; European Energy Charter, supra note 101, art. 26(4); Law on Foreign Investment of 1995, art. 27 (Kazakhstan). See also Parra, supra note 51, 325, 328-30; Schreuer, supra note 40, at 171.

[132] Pamela B. Gann "The U.S. Bilateral Investment Treaty Program" 21 Stan. J. Int'l L. (1985) 373, 437-38; K. Scot Gudgeon "Arbitration Provisions of U.S. Bilateral Investment Disputes" *International Investment Disputes: Avoidance and Settlement* (Seymor J. Rubin and Richard W. Nelson, eds., 1985) 41, 51; Parra, supra note 51, at 334, 351-52; Schreuer, supra note 40, at 171; Jose Luis Siqueiros "Bilateral Treaties on the Reciprocal Protection of Foreign Investment" 24 Cal. W. Int'l L.J. (1994) 255, 265-66.

[133] Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec. 1966, UN GA Res. 2200 A (XXI), GAOR, 21st Sess., Supp. No. 16 (A/6316) 52, UN Doc. A/CONF. 32/4 [hereinafter 'Optional Protocol to the ICCPR']. It is interesting to note that the Spanish text of article 5(2)(a) implies that it precludes reexamination of disputes that had not been *examined* before by other international courts tribunals. However, the Committee, in line with the *travaux preparatoires* of the Optional Protocol, has opted to rely upon the other languages, which provide for a *lis alibi pendens* rule. Ghandhi, supra note 122, at 222.

application to the HRC after the same issue had been settled by a different human rights mechanism.

There was little discussion during the drafting of the Optional Protocol over the scope and precise meaning of the provision. This can be explained, in part, by the fact that the Protocol was discussed under strict time limits and since similar issues were discussed at some length with relation to inter-state complaints. The only serious reservation that was raised during the drafting stage pertained to the silence of the text on the question of whether the Committee may hear a case if parallel proceedings had been pending for an unreasonably long period of time.[134] This matter was not adequately clarified during the deliberations on the text of the Protocol, but it was subsequently suggested that the Committee should not refuse jurisdiction in these circumstances.[135]

As explained in Part 1 of the study, the Committee has tended to strictly construe both elements of the *lis albi pendens* clause.[136] The term 'same matter' has been read as referring to "identical parties, to the complaints advanced and facts adduced in support".[137] As a result, cases submitted to alternative procedures by unrelated third parties were not held to constitute the same matter.[138] In a subsequent General Comment, the HRC elaborated the meaning of what is the 'same complaint' and held that it implies identical 'legal rights' and 'subject-matter'.[139] Discrepancies in the scope of protection afforded by the ICCPR and competing instruments might imply that there exists a difference in the subject matter of the two claims.[140] These decisions have lead one commentator to assert that piecemeal litigation – the breaking up of claims into different legal grounds, or into numerous applications focusing on different fact patterns, before different procedures, is not precluded by the Optional Protocol. This is despite the notion that as a matter of judicial policy it would be wise to permit such a

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[134] See e.g., U.N. GAOR 3rd Comm., 21 Sess., 1441 mtg. at 382-83, U.N. Doc. A/C.3/SR. 1441 (1966)[statement of Mrs. Afnan (Iran)]

[135] Opinion of the United Nations Legal Counsel, 1977-78 Yearbook of the Human Rights Committee 130; Nowak, supra note 126, at 699; Ghandhi, supra note 122, at 235.

[136] See also Ghandhi, supra note 122, at 227; Nowak, supra note 126, at 698.

[137] *V.O. v. Norway*, supra note 125, at 235.

[138] See supra Chapter 2, at pp. 73, n. 173.

[139] HRC General Comment 24, supra note 123, at para. 14.

[140] See Helfer, supra note 27, at 315-19. The Directorate of Human Rights of the Council of Europe has expressed concerns that such decisions by the HRC might undermine the *electa una via* reservations introduced by many of its member states and limit them to situations where the competing provisions are completely identical. Secretariat Memorandum prepared by the Directorate of Human Rights of the Council of Europe, *Effects of the Various International Human Rights Instruments providing a Mechanism for Individual Communications on the Machinery of Protection established under the European Convention on Human Rights*, 1 Feb. 1985, p. 12, Doc. No. H (85) 3.

practice only when the first-seized tribunal is unable to protect all of the plaintiff's rights.[141] Finally, the Committee has construed the term 'another procedure of international investigation or settlement' so as to exclude general studies of human rights situations (undertaken by the UN Human Rights Commission and various reporting mechanisms) and investigation by NGOs.[142]

The drafting process of article 44 of the ICCPR, which affirmed the non-exclusive nature of the jurisdiction of the HRC over inter-state cases, is of particular interest to this study despite its practical irrelevancy (to date, there had been no inter-state cases before the HRC). The negotiating parties had considered introducing into the Covenant *electa una via* or *lis pendens* provisions, but had eventually decided to leave the matter unregulated. Hence, the lack of regulation of multiple inter-state proceedings had been deliberate, and is therefore instructive.

During the drafting of the Covenant, some of the delegates (mostly from Western European countries), expressed concern at the possibility that the same inter-states disputes would be simultaneously brought before various international human rights bodies. To prevent this, they proposed an *electa una via* rule – that the HRC would have no jurisdiction once a matter had been referred to any other implementation mechanism.[143] The representatives of Denmark and France, even suggested that whenever a dispute arises between two parties to more than one human rights instrument, the matter should be referred to the most detailed and comprehensive of the available procedures.[144]

The proposed draft was severely criticised by many delegates, mostly from developing and Communist countries, which considered it to undercut the authority and relevance of the HRC and seriously restricting the access thereto (even in situations where the alternative mechanisms had been proven to be useless).[145] It was also argued that the more remedies there are in the area of human rights, the better it is.[146] An attempt by the sponsors to limit the scope of the proposal to *lis pendens* situations (and to enable the

[141] Helfer, supra note 27, at 367, 370.
[142] See supra Chapter 2, at pp. 73-74, n. 175, 176.
[143] U.N. Doc. A/C.3/L.1399 (1966).
[144] U.N. GAOR 3rd Comm., 21 Sess., 1432 mtg. at 322-23, U.N. Doc. A/C.3/SR. 1432 (1966)[statements made by Mr. Fink (Denmark) and Mr. Paolini (France)].
[145] Nowak, supra note 126, at 696.
[146] See e.g., U.N. Doc. A/C.3/SR. 1432, at 324-25 [statement made by Mr. Hoveyda (Iran)].

HRC to receive cases if the alternative mechanism had dealt with them unsuccessfully) also met strong resistance,[147] and the proposal was withdrawn altogether. An alternative approach, proposing to endow the HRC with exclusive jurisdiction, along the lines of article 55 of the European Human Rights Convention (at the time, article 62), was also not adopted.[148] The text that was finally adopted preserved the right of states to select any dispute settlement mechanism of their choice, regardless of the existence of parallel or previous proceedings elsewhere. This outcome, which does not accord precedence to either the UN or regional procedures, nor restricts multiple inter-state proceedings, can be explained by the optional nature of the dispute settlement provisions of the Covenant[149] and the corresponding need to secure the cooperation of two opposing groups of countries - countries that supported the primacy of the new universal mechanism and countries which had greater confidence in the regional arrangements.

Other lis alibi pendens provisions in human rights instruments

In the past, the Rules of Procedure of the African Commission on Human Rights also contained a *lis alibi pendens* clause drafted along the same lines of article 5(2) of the Optional Protocol.[150] However, due to the questionable legality of such clause, which had the effect of adding a substantive ground for inadmissibility not found in the African Charter,[151] it was withdrawn from the new version of the Rules of Procedure.[152] Still, the new Protocol on the establishment of an African Court on Human and Peoples' Rights provides that the Court will not be able to render advisory opinions if the Commission concurrently deals with a similar request.[153]

Another *lis alibi pendens* arrangement is found in ECOSOC Resolution 1503, establishing a mechanism to review human rights situations. Paragraph 6(b)(ii) provides

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[147] See Doc. A/C.3/SR. 1432, at 325 [statements made by Mr. Beeby (New Zealand), Mrs. Afnan (Iraq), Mr. Hoveyda (Iran) and Mr. Kornyenko (Ukraine)].

[148] U.N. GAOR 3rd Comm., 21 Sess., 1434 mtg. at 333, U.N. Doc. A/C.3/SR. 1434 (1966)[statement made by Mrs. Afnan (Iraq)].

[149] U.N. Doc. A/C.3/SR. 1434, at 334 [statement made by Mr. Nygesse (Congo)].

[150] Rules of Procedure of the African Commission on Human and Peoples' Rights, 13 Feb. 1988, art. 114(3)(f), available at <http://www1.umn.edu/humanrts/africa/PROCRULE.htm> (last visited on 15 Sept. 2000)("[the Commission shall ensure]: ... [t]hat the same issue is not already being considered by another international investigating or settlement body ...").

[151] Fatsah Ouguergouz, *Le Charte africaine des droits de l'homme et des peuples* (1993) 337-38; Rachel Murray "Decisions of the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights" 46 I.C.L.Q. (1997) 412, 425 n. 99

[152] Rules of Procedure of the African Commission on Human and Peoples' Rights, 6 Oct. 1996, available at <http://www1.umn.edu/humanrts/africa/rules.htm> (last visited on 15 Sept. 2000).

[153] ACHR Court Protocol, art. 4.

that petitions alleging the existence of a situation in which human rights are consistently grossly violated will be admissible only if:

> "The situation does not relate to a matter *which is being dealt with under other procedures* prescribed in the constituent instruments of, or conventions adopted by, the United Nations and the specialized agencies, or in regional conventions ..." (emphasis added)

A similar clause has also been introduced into the yet not in force MWC,[154] the draft Protocol to the International Covenant on Economic, Social and Cultural Rights[155] and the rules of procedure of CERD (although there are some doubts as to the legality of that rule).[156]

Lis alibi pendens clauses outside the human rights area

Outside the human rights sphere, one can find a litispendence clause relating to overlap between international and other judicial or administrative proceedings (of either national or international nature) in the quasi-judicial mechanism operating under the NAAEC.[157] This clause has been applied in a recent case to block parallel proceedings before the CEC Secretariat and NAFTA Chapter 11 arbitration panel.[158] It is perhaps significant to note that the CEC Secretariat adopted there a rather broad construction of what constitute the 'same matter' and held that it suffices that the same legal arguments have been made in the two competing claims, notwithstanding the different object of the two proceedings.[159] It also virtually ignored the fact that one of the parties to the NAAEC

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[154] MWC, art. 77(3)(a).

[155] Draft Protocol for the Consideration of Communications concerning Non-Compliance with the International Covenant on Economic, Social and Cultural Rights, art. 3(3)(b), Annual Report of the Committee on Economic, Social and Cultural Rights on its 14th and 15 Sess., 1 Jan 1997, Annex IV, UN Doc. E/1997/22, E/C.12/1996/6, available at <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/dd78df3399d002e8802564c30056ccaf?Opendocument> (last visited on 16 Sept. 2000).

[156] CERD Rules of Procedure, Rule 84(1)(g), UN Doc. CERD/C/35/Rev. 3 (1989)(the Secretary General is authorised to inquire whether the same matter is being examined by another human rights procedure). However, the legality of such provision in the absence of explicit authorisation in the Convention itself has been questioned. Theodor Meron, *Human Rights Law Making in the United Nations* (1986) 222.

[157] NAAEC, art. 14(3)(a)("[the state complained against will inform the CEC Secretariat whether] the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further;"].

[158] *Methanex Corp. v. U.S.,* Determination of 30 June 2000, Doc. A14/SEM/99-001/06/14(3)(CEC Secretariat), available at <http://www.cec.org/files/english/99001dis.pdf >(last visited on 29 July 2000).

[159] While the NAAEC proceedings revolved around alleged inadequacies in the enforcement of Californian environmental standards relating to the protection of water facilities from underground gas storage tanks, the NAFTA proceedings were concerned with the decision of the Californian authorities to ban the use of gas products which the applicant company had imported. The CEC Secretariat based its decision that the two proceedings involve the same matter, on the fact that one of the specific claims made in the context of the NAFTA proceedings had been that the Californian authorities should have resorted to stricter enforcement of environmental standards concerning the storage of unhealthy gas products rather than outlaw its use.

proceedings was not party to the NAFTA proceedings.[160] In light of this, it seems fair to observe that that the CEC Secretariat, in contrast with the HRC, seem to have opted for an expansive interpretation of its *lis alibi pendens* clause.

Another example, relevant to the relations between domestic and international courts and tribunals can be found in the work of the UN Compensation Commission. It has been the normal practice of the Commission to suspend proceedings upon notification of the existence of parallel proceedings, until the concurrent proceedings have been completed.[161]

The ECJ constitutive instruments do not contain a *lis alibi pendens* clause, since the jurisdiction of that court is exclusive. However, the ECJ Statute contains an interesting *lis pendens* provision, which regulates the relations between the Court's two instances – the ECJ and CFI. Article 47(3) of the Statute provides that:

> "Where the Court of Justice and the Court of First Instance are seized of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the Court of First Instance *may*, after hearing the parties, stay the proceedings before it until such time as the Court of Justice shall have delivered judgment. Where applications are made for the same act to be declared void, the Court of First Instance *may* also decline jurisdiction in order that the Court of Justice may rule on such applications. In the cases referred to in this subparagraph, the Court of Justice *may* also decide to stay the proceedings before it; in that event, the proceedings before the Court of First Instance shall continue" (emphasis added). [162]

This provision was invoked in a few cases which were simultaneously pending before the two judicial institutions,[163] and priority was generally given to decisions of the ECJ

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[160] NESTE Inc. (a Canadian firm) had filed a complaint under the NAAEC that had been consolidated with Methanex's compliant. Since the text of article 14(3)(a) of the NAAEC only requires that the two parallel proceedings involve the same matter, the CEC Secretariat did not seem to attribute any significance to the fact that the two proceedings do not involve the same sets of parties.

[161] Wühler, supra note 73, at 260.

[162] Protocol on the Statute of the Court of Justice of the European Economic Community, 17 April 1957, 298 U.N.T.S. 147 [as amended by Council Decision 88/591, 1989 O.J. (C 215) 1][hereinafter 'EC Statute']; Similar language is also found in Protocol on the Code of the Court of Justice of the European Coal and Steel Community, 18 April 1951, art. 47(3), 261 U.N.T.S. 247; and in the Protocol on the Statute of the Court of Justice of the European Atomic Energy Community, 17 April 1957, art. 48(3), 298 U.N.T.S. 256.

[163] See e.g., Case T-42/91 *Koninklijke PTT Nederland NV v. Commission.* [1991] E.C.R. II-273; Case T-88/94, *Société Commerciale de Potasses et de l'Azote v. Commission)* [1995] E.C.R. II-221; Case

on whether or not to assume jurisdiction.[164] However at least in one case the President of the CFI refused to suspend an application for interim relief in a case pending concurrently before the ECJ.[165]

As will be argued below, this discretionary rule of comity, authorising stay of proceedings or dismissal of claim, if similar issues are pending before another judicial instance (notwithstanding possible differences in the identity of the parties) might serve as a model for other forms of judicial interaction.[166]

C. The principle of finality

As indicated above, exclusive jurisdiction clauses found in the constitutive instruments of international courts and tribunals also bar attempts to engage in successive litigation of disputes before excluded fora. The same result is also achieved by *electa una via* provisions. As a result, *res judicata* provisions are needed, if at all, only when the first-in-time forum did not have exclusive jurisdiction (or where one exclusive jurisdiction competes against another exclusive jurisdiction) and in the absence of an *electa una via* clause. Further, as will be shown below, unlike other discussed rules which are of controversial status, the *res judicata* rule has long been considered an established principle of international law. Hence, in some cases, drafters of constitutive instrument of international courts or tribunals might have considered the inclusion of an explicit *res judicata* rule as superfluous.

As a result, only a few *res judicata* provisions can be found in jurisdiction-conferring international instruments.[167] Perhaps the clearest example is found in the CSCE/OSCE Convention on Conciliation and Arbitration, which prescribes that the Court of Conciliation and Arbitration shall not have jurisdiction if a competent court or tribunal had previously decided the same case.[168]

T-488/93, *Hanseatische Industrie-Beteiligungen GmbH v. Commission* [1995] E.C.R. II-469; Case T-490/93, *Bremer Vulkan Verbund AG v. Commission* [1995] E.C.R. II-477.

[164] L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (4th ed., 1994) 88.

[165] Case T-76/96R, *The National Farmer's Union v. Commission* [1996] E.C.R. II-815, at para. 31-35.

[166] *Cf.* Treaty concerning the Establishment and the Statute of a Benelux Court of Justice, 31 March 1965, art. 10 (3), 924 U.N.T.S. 1 ("... [The Court] may stay its own judgment until the jurisdiction before which the dispute has been brought takes a decision in the matter").

[167] There have been, however, occasional proposals to incorporate *res judicata* provisions in additional treaty regimes. See e.g., Consultative Meeting of Legal Experts, Summary Record of Proceedings, 17-22 Feb. 1964, Doc. No. Z9, *Documents concerning the Origin of ICSID,* supra note 43, at 367, 435 [statement by Mr. Rodocanachi (France)].

[168] CSCE/OSCE Convention on Conciliation and Arbitration, art. 19(1)(a).

Regional human rights arrangements

Another provision precluding successive litigation, which is of wider potential scope than the traditional *res judicata* rule, is found in the Inter-American Human Rights Convention. The drafters of the Convention, obviously inspired by article 35(2) [ex-article 27(1)] of the European HR Convention, have adopted article 47(d), which prescribes that a petition, or communication is to be considered inadmissible if it is:

> "... [S]ubstantially the same as one previously studied by the Commission or by another international organization."

The *travaux preparatoires* of the Convention clearly show that the drafters were actually concerned with the need to avoid 'double jurisdiction'.[169]

Despite the influence of the European Convention on the text of the American Convention, there are three significant differences between the languages of the two instruments. First, the temporal application of the Inter-American rule seems to be narrower and to encompass only applications which have already been studied (in other words, no longer pending before the competing forum), while the preclusive effect of the European *electa una via* provision starts the minute the competing application was submitted. As a result, article 47(d) is more akin to a *res judicata* rule than to an *electa una via* rule, although, unlike traditional rules of finality, the term 'studied' used in the Inter-American Convention is broader than the term 'settled' which denotes a final judgment.

Second, article 35 of the European Convention covers only individual petitions and not inter-state cases, whereas the American Convention's finality clause encompasses both types of proceedings. However, this is a purely technical difference. It was unnecessary to include petitions submitted by states under the scope of article 35, since states have already been precluded from engaging in multiple litigation, by virtue of the exclusive jurisdiction clause - article 55 of the European HR Convention (which has no counterpart under the American Convention).

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[169] Minutes of the 4th Sess. Of Committee II, Nov. 14, 1969, Doc. 47, Corr. 2 (1970), reprinted in Thomas Buergenthal and Robert E. Norris (eds.), 2 *Human Rights: The Inter-American System* (1982) 193.

A final, and potentially more important difference pertains to the nature of the parallel proceedings. The term *'studied ...by another international organization'* employed by the American Convention is of wider potential applicability than the term *'submitted* to *another procedure of international investigation or settlement'* used in the European HR Convention. As a result, it could have led to employment of the Inter-American rule of preclusion to procedures engaged in the general study of human rights conditions (e.g., discussions by the UN Human Rights Commission), which the Strasbourg bodies (and the HRC) never considered as capable of generating jurisdictional competition. However, the case law of the Inter-American human rights system shows that the term *'studied'* was narrowly construed, so to encompass only proceedings of a judicial or quasi-judicial nature,[170] in conformity with the practice of the EHR Commission on the matter.

An implied *res judicata* provision is also found in article 56(7) of the African Charter on Human and Peoples' Rights, which bars the admissibility of communication from 'other sources' (e.g., private parties) if they deal with:

> "... [C]ases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter."

This provision also seems to be wider in its scope of application than a traditional *res judicata* clause, since it seems to bar litigants who were not parties to a settlement (which might arise, for instance, out of an inter-state complaint), from raising essentially the same matter before the African Commission.[171] An almost identically phrased clause is found in UNESCO's Executive Board Decision 104, which established a complaint procedure (generally similar to that operating under ECOSOC Resolution 1503) in matters falling under the jurisdiction of UNESCO.[172]

Other finality clauses

There are few other contexts where international courts and tribunals have manifested adherence to the rule of finality. The ICJ must apply the *res judicata* rule when

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[170] See supra Chapter 2, at p. 76 n. 186.

[171] But see, Ouguergouz, supra note 151, at 336.

[172] Executive Board of UNESCO, Decision 104 EX/3.3, 28 April 1978, available at <http://www.unesco.org/general/eng/legal/hrights/text.html>.

exercising jurisdiction on the basis of the optional clause with respect to Japan that has made an explicit reservation to this effect in its declaration of acceptance of the Court's compulsory jurisdiction.[173] Further, the UN Compensation Commission must also deduct, from any sum it awards, monetary compensation afforded to the same applicant for the same claim by a domestic court or tribunal, thereby giving the latter's decision a limited *res judicata* effect.[174]

For the sake of completion, it should also be acknowledged that most of the constitutive instrument of international courts and tribunals contain a finality clause prescribing that their judgments or awards should be deemed 'final and binding'.[175] Such language may be regarded as an agreement by the parties that any second-in-time judicial body ought to refrain from re-opening a dispute finally settled by a court or tribunal with binding power.[176]

3. Interim conclusions

This survey and analysis of jurisdiction-regulating provisions found in the constitutive instruments of international courts and tribunals and other dispute settlement treaties or clauses, reveals a largely disorganised picture. Inter-fora jurisdictional interaction is only partly regulated and even where regulated, the rules of regulation are often of an inconclusive nature and there is too little established practice that can provide sufficiently precise guidance on how to address jurisdictional competition. Furthermore, different courts and tribunals have adopted different jurisdictional solutions and even when similar solutions were applied, their compatibility with each other has been

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[173] See Declaration of the Government of Japan under article 36(2) of the ICJ Statute, 312 U.N.T.S 155 (1958)("... Japan recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation and on condition of reciprocity, the jurisdiction of the International Court of Justice, over all disputes which arise on and after the date of the present declaration with regard to situations or facts subsequent to the same date and *which are not settled by other means of peaceful settlement...*")(emphasis added).

[174] UNCC Governing Body Decision 13, at para. 3(b).

[175] See e.g., Charter of the United Nations, art. 94, XV U.N.C.I.O. Doc. 355 [hereinafter 'UN Charter']; Statute of the International Court of Justice, 26 June 1945, art. 60, XV U.N.C.I.O. Doc. 355 [here in forth and hereinafter 'ICJ Statute']; 1899; The Hague Convention for the Pacific Settlement of International Disputes, 29 July 1899, art 54 in *The Hague Conventions and Declarations of 1899 and 1907* (James Brown Scott, ed., 2nd ed., 1915) 41 [hereinafter '1899 Hague Convention']; The Hague Convention for the Pacific Settlement of International Disputes, 18 Oct. 1907, art. 81 in *The Hague Conventions*, id. at 41 [hereinafter '1907 Hague Convention']. Hague Convention, art. 54; UNCLOS, art. 256; European HR Convention, art. 44, 46(1); American HR Convention, art. 67; ICSID Convention, art. 53 (1); Rules of Procedure of the Court of Justice of the European Communities, art. 65, 1974 O.J. (L350) 1, as revised in 1991 O.J. (L176) 7; Governing Body Decision 10, art. 40(4), 26 June 1992, UN Doc. S/AC.26/1992/10, available at <http://www.unog.ch/ uncc/decision/dec_10.pdf> (last visited on 3 Sept. 2000)(UN Compensation Commission).

[176] See Report of the Committee of Experts, *Co-existence of Systems of Control,* supra note 28, at 4.

generally neglected (e.g., it is not clear how to reconcile between two exclusive jurisdiction clauses). The ensuing conclusion is that treaty law does not satisfactorily address the potential complications that might arise out of jurisdictional competition and that other sources of positive law – custom and general principles, must also be consulted.

Still, can any principles be deduced from the existing jurisdiction-regulating arrangements? As to the question of forum selection, it would seem that the answer is a resounding no. Clearly, there exist a variety of choice of forum regimes ranging from inflexible exclusive jurisdiction provisions (e.g., article 292 of the EC Treaty) to residual jurisdiction provisions (e.g., article 282 of UNCLOS). However, there seems to be no consistent logic behind the selection of every type of jurisdictional regime. While, generally speaking, regional economic integration tend to 'close ranks' and prohibit referral of disputes arising under their respective sub-systems to external courts and tribunals there are judicial bodies that constitute an exception to this trend and refrain from regulating forum shopping, or allow for some degree of permissible forum shopping. Given this diversity of legal solutions, one can assert that although complex and idiosyncratic regimes, such as the regional trade regimes do probably need exclusive (or almost exclusive) jurisdiction, it is not clear whether a principle of exclusivity can be read in as an implied provision inherent to those regimes.

In the human rights area the situation is even more diverse. Whereas the ECHR enjoys exclusive jurisdiction in inter-state cases, other human rights body, on the regional and universal level were endowed with non-exclusive competence. The situation of other courts and tribunals is also haphazard. The WTO and ICSID enjoy exclusive jurisdiction in varying degrees of flexibility, the ICJ and ITLOS have non-exclusive jurisdiction (the first – parallel, and the latter residual jurisdiction) and the OSCE Court of Conciliation and Arbitration operates under a unique regime of residual jurisdiction vis-à-vis exclusive procedures.

The review of the drafting process of most of these procedures reveals that choices of jurisdiction regimes were made not only out of legal considerations derived from the nature of the regime, but also, perhaps to a larger degree, from pragmatic considerations pertaining to the particularities of each negotiation (e.g., need to appease potential ratifying states through preserving their right to choose a procedure). The chronology in

which courts and tribunals were created also played a part in the decision whether to exclude reference to other judicial bodies (it had generally been easier to invest courts and tribunals created when no major competition existed with exclusive jurisdiction).

In sum, it is impossible to deduce an overarching principle that should govern choice of procedure in each and every case and there does not seem to be a 'common law' in this specific issue.[177] As a result, one can claim that no uniform international standard prohibiting or condoning forum shopping has so far emerged. In practical terms this means that positive international law leave ample room for parties to international disputes to forum shop.

This conclusion seems to comport with the current level of development of the international judicial 'system'. Since courts and tribunals operate independently of each other and often apply norms derived from different legal sources, strict allocation of competences would perhaps unduly restrict party autonomy and might perpetuate certain legal outcomes. Such a rule would clearly be inauspicious for those international actors unsatisfied with the current state of international adjudication. Further, a strict rule would undercut cross-fertilisation between different courts and tribunals, a process that serves as a vehicle for the development and harmonisation of international law. It thus seems that under the current state of the law, limited choice of forum in some areas of international adjudication (especially, in regional integration mechanisms) and broad choice of forum in all other areas represent what the law should be, for the time being, and it looks as if the current lack of comprehensive regulation of the forum selection is not a serious problem, if any at all.

The second question addressed in this Chapter has been that of the jurisdictional regulation of multiple proceedings. Here the situation is somewhat different than that found with respect to forum selection. First, there are far fewer jurisdictional provisions addressing the problem. Many international courts and tribunals do not address the issue at all (e.g., ICJ, ITLOS, WTO and the regional integration bodies) and most of the discussion on the subject is found in the human rights area, where the threat of multiple litigation is by far the most serious (especially since jurisdiction over individual applications tends not to be of an exclusive nature and given the propensity of

individuals to litigate). Second, unlike the diverse picture seen in 'choice of forum' arrangements, the jurisdiction-regulating provisions are by large compatible with other (although they are characterised by varying levels of strictness). In a nutshell, they all seek to curb multiple litigation by prohibiting parallel proceedings, subsequent proceedings or both. This arrangement clearly falls in line with the policy to improve coordination between international courts and tribunals advocated in the previous Part of the study and to prevent the emergence of inconsistent judicial decisions. The referral of the same dispute to different adjudication procedures raises a host of serious practical and doctrinal issues and should be avoided as much as possible.

However, while it can be said that in the area of human rights a general principle according to which courts and tribunals should seek to mitigate multiple adjudication can be identified (*inter alia* through application of *lis alibi pendens* or *res judicata* rules),[178] the scarcity of *lex scripta* in other areas of the law makes it impossible to expand the said principle, by virtue of existing treaty law, to the status of an established principle of international law. This, again, highlights the systematic deficiency of the international judiciary. The absence of clear and common jurisdiction-regulating rules perpetuates jurisdictional competition, which might lead to conflicting judgments and to further disharmonising of international law.

Still, solutions to the problems associated with jurisdictional competition may be found in legal sources other than treaty law. As a result, one should examine the practice of international courts and tribunals and assess whether other sources – customary law or general principles of law, may support the introduction of multiple jurisdiction-regulation rules. Such examination is the topic of the next Chapter of this study.

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[177] *Cf.* de *Merode v. World Bank*, World Bank Administrative Tribunal Reports, Decision No. 1, at para. 28 (1981); Elihu Lauterpacht "The Development of the Law of International Oraganizations by the Decisions of International Tribunals" 152 Recueil des cours (1976) 377, 402.

[178] Since the *electa una via* principle has not been adopted by some procedures (most notably, the HRC), it cannot assume the status of a general principle in the area of human rights law. However, arrangements that have adopted such a rule can be regarded as supportive of both the *lis alibi pendens* and *res judicata* rule.

Chapter Six:

General jurisdiction-regulating principles, derived from sources other than treaties, as applied by international courts and tribunals

The previous Chapter examined a variety of existing jurisdiction-regulating treaty provisions and reviewed the manner of their application by international courts and tribunals. However, there have also been some instances in which judicial bodies have applied jurisdiction-regulating norms derived from sources of international law, other than treaty law. These occasions normally involved situations where the constitutive instruments of the competing tribunals failed to address the question of jurisdictional overlap or where norms of general international law were applied to complement existing conventional provisions. Given the limited and inconclusive nature of conventional jurisdiction regulating provisions, the precedents discussed below are of considerable importance. They have the potential of being applied in all dispute settlement procedures either as default rules, in the absence of explicit regulation, or as sources of inspiration for the interpretation of jurisdiction-regulating treaty provisions, in accordance with article 31(3)(c) of the Vienna Convention on the Law of Treaties.[179]

The first section of this Chapter will address the application of traditional jurisdiction-regulating rules by international courts and tribunals. These are choice of forum principles and the rules of *lis alibi pendens* and *res judicata.* Since the *electa una via* rule (which is found in some human rights instruments)[180] does not find any meaningful support in the international jurisprudence (in the absence of explicit treaty language),[181] it will not be discussed here. The second section will examine the possibility of applying general legal doctrines to situations involving jurisdictional competition. These doctrines include the theory of abuse of rights, the principle of comity and some principles governing conflicting treaty obligations.

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[179] Philippe Sands "Treaty, Custom and the Cross-Fertilization of International Law" [1998] 1 Yale Human Rights and Development Law Journal 85, 102.

[180] See e.g., European HR Convention, art. 35(2)[ex-article 27(1)]; CAT, art. 22(5); MWC, art. 77(3).

[181] See Dan Ciobanu "Litispendence between the International Court of Justice and the Political Organs of the United Nations" 1 *The Future of the International Court of Justice* (Leo Gross, ed. 1976) 209, 231-32.

1. Application of traditional jurisdiction-regulating rules

A. Forum selection principles

I. The PCIJ precedents

The question whether any limitations should be placed upon the right of international actors to engage in forum selection between alternative competent judicial bodies has only rarely been considered by international courts or tribunals. Still, a few such cases, in which the question did arise, were heard before the PCIJ. Given the fact that none of the instruments governing the activities of the PCIJ specifically addressed forum selection, and since the PCIJ refrained from discussing whether conditions for the emergence of an international custom have been met, it would seem that the PCIJ decisions had been founded on what it perceived to be inherent powers of an international court of general jurisdiction, or, alternatively, on general principles of law.

The first PCIJ case where the allocation of jurisdictions between the Court and a different international dispute settlement procedure had been examined, was the *Mavrommatis* case, which involved a claim brought by Greece on behalf of one of its citizens whose concession was infringed by Great Britain, the mandatory power in Palestine.[182] One of the issues that were discussed had been the effect of a specific dispute settlement arrangement under a Protocol to the Treaty of Lausanne on the Court's jurisdiction over one of the heads of claim. In particular, the question was whether the jurisdiction of the PCIJ, based upon a general compromissory clause found in the Mandate for Palestine, should give way to the special procedure of the Protocol, which provided that valuation of indemnities due to concession holders would be calculated by special experts.

The Court held that the Protocol constituted *lex specialis* and *lex posteriori,* and that, as a result, its terms should override those of the Mandate, to the extent that the two instruments are incompatible.[183] While the Court found no basis to attribute to the parties an intent to exclude, across the board, the Court's general jurisdiction under the Mandate, it held that such exclusion may be implied with relation to specific matters which had been referred under the Protocol to special procedures:

However, the underlying rationale of the *electa una via* rule finds some support in the PCIJ case law on the binding nature of exclusive jurisdiction agreements. See infra, at p. 248.

[182] *The Mavrommatis Palestine Concessions* (Greece v. G.B.), 1924 P.C.I.J. (ser. A) No. 2.

[183] *Mavrommatis,* id. at 31.

> "In so far as the Protocol established in Article 5 a special jurisdiction for the assessment of indemnities, this special jurisdiction - provided that it operates under the conditions laid down – excludes as regards these matters the general jurisdiction given to the Court in disputes concerning the interpretation and application of the Mandate."[184]

Still, despite the acknowledgement of the implied limitation on its jurisdiction, the Court held that it has competence over the disputed head of claim. This was because the specific question referred to the Court by the parties had been of a preliminary nature, and could not have been presented before the alternative procedure.[185]

A second case in which similar issues have arisen was the *Chorzów Factory* case,[186] decided a few years after the *Mavrommatis* case. The case involved a German claim for indemnity against confiscation in Poland of property belonging to German companies, and the question was whether the Court should decline jurisdiction in favour of the Germano-Polish Mixed Arbitral Tribunal or the Upper Silesian Arbitration Tribunal, which were competent to review the legality of takings of property, in pursuance to claims presented by private German litigants. Poland argued, *inter alia,* that the Court should refrain from exercising its jurisdiction because the two arbitral bodies had been designated as specific procedures for recovering indemnities, which ought, in accordance with the *Mavrommatis* holding, exclude the general jurisdiction of the Court.[187] Germany countered this with the argument that the contracting states never intended that the creation of arbitral tribunals for private party claims would exclude the jurisdiction of the PCIJ in inter-state cases.[188]

While the case had really been one involving a *lis alibi pendens* claim and not just an ordinary forum selection one (a related private claim was pending before the Mixed Arbitral Tribunal during proceedings before the PCIJ), the reasoning offered by the Court concentrated on the broad topic of the division of competencies between competing fora. In rejecting the Polish motion the Court held that:

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[184] *Mavrommatis,* id. at 32.
[185] *Mavrommatis,* id. at 32.
[186] *The Factory at Chorzów* (Germany v. Poland), 1927 P.C.I.J. (ser. A) No. 9 (claim for indemnity) (jurisdiction).
[187] *Chorzów Factory,* 1927 P.C.I.J. (ser. C) No. 13-I, at 26-27 [Discours de M. Sobolewski (Pologne)].
[188] *Chorzów Factory,* id. at 69 [Discours de Dr. Kaufmann (Allemagne)].

"[T]he Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice."[189]

In the circumstances of the case, the Court was of the opinion that Germany could not obtain adequate remedies through recourse to any alternative forum, and, that, as a result, it would be impossible to attribute to the parties intent to designate the arbitral tribunals as exclusive jurisdictions.

It should be noted that although the two cases can be distinguished from each other (Greece was exercising diplomatic protection in *Mavrommatis*, while Germany seemed to be claiming its own independent rights in the *Chorzów Factory*), it looks as if the language used by the PCIJ in the *Chorzów Factory* case revealed greater reluctance on the part of the Court to decline jurisdiction. This can be perhaps explained by the fact that, as will be shown below, the Court had in the meantime ruled that Mixed Arbitral Tribunals are not part of the international legal order, and that, consequently, they do not represent a genuine jurisdictional alternative to the PCIJ.[190]

The third PCIJ decision, which is the leading authority on the issue of the right to forum selection, has been rendered in the *Rights of Minorities* case. Although the case dealt with competition between a judicial and a political organ, the language and logic of the Court's judgment would seem to apply to any case of jurisdictional competition.

This time the respondent state - Poland, objected to the Court's jurisdiction on grounds that that the relevant treaty between the parties had granted primary jurisdiction over the dispute to the Council of the League of Nations.[191] This provision constituted, according to Poland, manifestation of the will of the parties not to submit the dispute to judicial settlement in situations where a political alternative was available.

The Court rejected the Polish position and held that the treaty and the subsequent conduct of the parties had conferred consent-based jurisdiction upon the PCIJ. The

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[189] *Chorzów Factory*, 1927 P.C.I.J. (ser. A) No. 9, at 30.
[190] *Certain German Interests in Polish Upper Silesia* (Germany v. Poland), 1925 P.C.I.J. (ser. A) No. 6, at 20 (jurisdiction).
[191] *Rights of Minorities in Upper Silesia (Minority Schools)*(Germany v. Poland), 1928 P.C.I.J. (ser. C) No. 14-II, at 60-61 [Discours de M. Mrozowski (Pologne)].

Court has further added the following seminal statement, addressing the circumstances under which the Court would decline consent-based jurisdiction:

> "This principle [of consent as sufficient basis of jurisdiction] only becomes inoperative in those exceptional cases in which the dispute which States might desire to refer to the Court would fall within the *exclusive jurisdiction reserved to some other authority*" (emphasis added).[192]

This means that the court will normally exercise jurisdiction, unless a competing forum had been invested with exclusive jurisdiction. Applying this standard, the Court held that the Council of the League had not been explicitly designated as an exclusive forum and that such exclusivity could not be easily presumed given the significant differences in the nature of the two competing procedures.[193] The Court also commented that in light of the disorganised division of labour between different international jurisdictions, overlaps in jurisdiction might occur from time to time, and that, unlike their municipal counterparts, international courts confronted with such concurrency should not *ex officio* consider whether the case before them properly belongs to another forum.[194] Another contention raised by Poland, that the Court is barred from hearing the case by virtue of a Resolution adopted by the Council of the League,[195] was also rejected by the PCIJ, by reason of the inconclusive nature of the Resolution.

Analysis of the three PCIJ cases on forum selection may lead to the following conclusions. According to the PCIJ, international judicial bodies invested with competence over a certain dispute may decline jurisdiction in favour of other international courts or tribunals only if three conditions are met: (a) it is sufficiently clear that an alternative forum enjoys jurisdiction over the same dispute; (b) the alternative forum has been designated as an exclusive forum (either explicitly or implicitly); and (c) one of the parties had objected to retaining the proceedings before the first-seized forum. All three conditions seem to amount to a presumption in favour

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[192] *Rights of Minorities*, 1928 P.C.I.J. (ser. A) No. 15. at 23.

[193] *Rights of Minorities*, id. at 23 ("...the jurisdiction possessed by the Council of the League of Nations [to hear individual and collective petitions under a certain minorities treaty] is entirely distinct from, and in no respect restricts, the Court's jurisdiction to hear and determine disputes between States"). But *cf. South-West Africa* (Ethipia v. S.A.; Liberia v. S.A.), 1962 I.C.J. 319, 345 (Preliminary Objections) (although the disputes before the Court and the General Assembly may be regarded as different disputes – 'the questions at issue are identical').

[194] *Rights of Minorities*, 1928 P.C.I.J. (ser. A) No. 15. at 23

[195] *Rights of Minorities*, 1928 P.C.I.J. (ser. C) No. 14-II, at 61, 78 [Discours de M. Mrozowski (Pologne)]; id. at 218-219 (Contre-Mémoire du Gouvernement Polonais).

of retention of jurisdiction by the seized forum. It would also seem reasonable to deduce from the PCIJ case law that the greater the difference between the nature of the competing procedures is, the less inclined a seized forum would be to attribute to the parties an implicit intent to opt for exclusivity. Indeed, subsequent case law of the PCIJ and the ICJ supports the proposition that courts or tribunals are reluctant to decline jurisdiction in situations of competition with 'non-equal' bodies (e.g., when one amenable dispute settlement procedure is judicial and the other political or when two judicial bodies operate in different legal orders).[196]

However, a word of caution should be added. First, the PCIJ cases are rather old 'precedents', which might be re-examined in light of changed circumstances and modern perceptions on the role of adjudication in dispute settlement (e.g., the view that some dispute are better addressed through non-contentious procedures). It also seems that the three decisions are not authoritative on the matter of international jurisdictional competition, since all of the cases did not involve genuine competition between international judicial bodies (the body of experts under the Lausanne Protocol were to perform appraisal work and not a judicial task; the Germano-Polish arbitral tribunals essentially applied domestic law and did not belong to the international legal order; and the Council of the League was a political organ). Furthermore, the holdings in the *Chorzów Factory* and the *Mavrommatis* case seem to have been made in *obiter dicta.* Consequently, contemporary international courts and tribunals might not feel bound to apply the forum selection rules pronounced by the PCIJ. This might be particularly the case with courts and tribunals other than the PCIJ/ICJ that are subject to unique jurisdictional regimes designed to promote a specific set of policies, which might justify retention of their jurisdiction even when faced with what might seem to be a competing exclusive jurisdiction clause.[197]

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[196] *Interpretation of the Statute of Memel Territory* (U.K. v. Lithuania), 1932 P.C.I.J. (ser. A/B) No. 47, at 248-49 (since proceedings before the Court and the Council of the League were quite different, a'unity of proceedings' principle, according to which all dispute settlement proceedings should be handled by one institution only (a principle similar to the connexity rule), cannot be presumed, unless it had been shown that the parties clearly intended to introduce it); *Military and Paramilitary Activities*, 1984 I.C.J. at 434-35 (although the Charter granted the Security Council *primary* responsibility in international peace and security matters, it was not granted *exclusive* responsibility, and the Court may exercise jurisdiction). But *cf. Anglo-Iranian Co.* (U.K. v. Iran), 1952 I.C.J. 93, 116, 134 (Jurisdiction)(Dissenting Opinion of Judge Alvarez)(in cases of threat to world peace the Security Council may assume exclusive jurisdiction over the dispute).

[197] *Cf.* Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Opinion of 1 Oct. 1999, par. 54-64 available at < http:// corteidhoea.nu.or.cr/ci/ PUBLICAT/SERIES_A/A_16_ING.HTM>(last visited on 20 June 2000)(the interest of parties to the American human rights system in seeking legal guidance justifies exercise of the Court's advisory jurisdiction despite the pendency of related proceedings before the ICJ).

II. The Klöckner case

Indeed, one ICSID case – *Klöckner v. Cameroon*, supports the contention that courts operating under specific treaty regimes might not always respect choice of forum agreements concluded by the parties. In this case, the arbitral tribunal refrained from giving effect to an arbitration clause referring certain investment disputes to ICC arbitration, in derogation from an earlier-in-time agreement between the parties that referred all investment-related questions to ICSID.[198] Although the Tribunal supported its decision to ignore the specific clause in its inconclusive language (which did not explicitly preclude the jurisdiction of ICSID) and on the principle of estoppel, it seems as if it was principally guided by general policy considerations. The relevant policy embraced by the Tribunal was that the parties should not be easily deprived from the protections afforded by ICSID to their rights and interests, and that they should be spared from being compelled to engage in 'piecemeal litigation' of their reciprocal legal claims.[199]

This somewhat controversial decision (one of the arbitrators dissented;[200] and the *ad hoc* review Committee expressed some doubts over its soundness[201]), finds some support, however, in the *dicta* of the PCIJ in the *Electricity Company of Sofia* case, where the Court suggested that there should be a presumption that new jurisdictional arrangements were not designed to restrict pre-existing ones.[202] Still, it stands in marked contrast to the *Mavrommatis* judgment, where a specific later-in-time jurisdictional agreement was

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[198] *Klöckner Industrie-Analgen GmbH v. Cameroon,* 2 ICSID Rep. 3, 13-14, 17-18 (1983).

[199] *Annulment Decision of the Ad Hoc Committee on the Arbitration Between Klöckner Industrie-Analgen GmbH v. Cameroon*, 2 ICSID Rep. 95, 115 (1985)(Decision on Annulment); Schreuer, supra note 40, at 166. *Cf.* Case ARB/94/2, *Tradex Hellas S.A. v. Albania,* Decision of 24 Sept. 1996, para. 192, available at <http://www.worldbank.org/icsid/ cases/ T-decide.pdf> (last visited on 21 July 2000) (Decision on Jurisdiction) at para. 192 ("it is more plausible to the Tribunal to interpret the legislative intention of Art. 9 to the effect that after the coming into force of the 1993 law the submission of a foreign investment dispute to ICSID arbitration should cover also disputes that started earlier, rather than both the investor and Albania having possibly to engage in two parallel arbitration procedures, under the UNCITRAL Rules [in accordance with the law which was in force before 1993] and under the ICSID Rules, regarding the same investment").

[200] *Klöckner,* 2 ICSID Rep. at 92-93.

[201] *Klöckner,* 2 ICSID Rep. at 115 (Decision on Annulment).

[202] *Electricity Co. of Sofia*, 1939 P.C.I.J. (ser. A/B) No. 77, at 76 ("... the multiplicity of agreements accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain ... There is, however, no justification for holding that in [concluding additional jurisdictional agreements, the parties] intended to weaken the obligations which they had previously entered into with a similar purpose ...").

deemed to exclude a general jurisdiction-conferring instrument.[203] Further, unlike the PCIJ Germano-Polish judgments, which could be distinguished from *Mavrommatis* on the basis that they did not involve genuine jurisdictional competition, the competing cases in *Klöckner* involved the same parties, same issues and tribunals of the same legal order. Thus, the *Klöckner* case can be regarded as supportive of the view that idiosyncratic policies of specific international regimes might override the application of 'ordinary' international law governing forum selection.

III. The Southern Bluefin Tuna case

Adding to the confusion in this field of law is a recent arbitration award rendered in the *Southern Bluefin Tuna* case, where an arbitral tribunal resorted to a line of reasoning somewhat similar to that adopted by the PCIJ in the *Mavrommatis* case (without specifically relying thereupon),[204] and declined jurisdiction in favour of a more specific dispute settlement arrangement. The case involved a dispute over fishing practices between Australia and New Zealand, on the one hand, and Japan, on the other hand, and was referred to an arbitration tribunal constituted in pursuance to article 287 of UNCLOS. Japan, however, objected to the jurisdiction of the tribunal, arguing that dispute should not be addressed under UNLCOS, but rather in pursuance to specific dispute settlement procedure provisions (of a diplomatic nature) found in a regional fisheries agreement in force between the parties. The tribunal, by majority of four to one, accepted the Japanese position and held that, by virtue of article 281, one should construe the specific dispute settlement arrangements found in the regional agreement as an implicit agreement to override the general dispute settlement provisions of UNCLOS.[205] This is notwithstanding the fact that the specific agreement, concluded long after the text of UNCLOS had been finalised (but before its entry of force) did not explicitly exclude the application of Part XV to UNCLOS.

Thus, unlike their counterparts in *Klöckner*, the arbitrators in the *Southern Bluefin Tuna* case have refused to apply an interpretative presumption in favour of the intent of the

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[203] However, a subsequent ICSID tribunal had affirmed, in *dicta,* that a specific arbitration agreement between disputing parties would normally override a bilateral jurisdiction-conferring treaty, and that such a bilateral treaty would override a multilateral jurisdiction-conferring treaty. *Southern Pacific Properties (Middle East) Ltd. v. Egypt,* 3 ICSID Rep. 131, 149-50 (1988).

[204] Japan – the respondent party, did rely upon the *Mavrommatis* case. *Southern Bluefin Tuna* (Australia and New Zealand v. Japan), Memorial on Jurisdiction by Japan, 11 Feb. 2000, para. 122, available on < http://www.worldbank. org/icsid/bluefintuna/memorialonjurisdictionofjapan.PDF> (last visited on 12 August 2000).

[205] *Southern Bluefin Tuna,* supra note 78, at para. 56-59.

parties to preserve procedural protections under a general treaty regime (i.e., UNCLOS). In fact, it seems that the arbitral tribunal felt more obliged to uphold what it viewed to be the real 'meeting of minds' of the parties than to promote the overarching goals of the UNCLOS treaty, which include mandatory dispute settlement of almost all maritime disputes.[206]

It could be maintained that the *Southern Bluefin Tuna* decision has far-reaching implications. It resulted in the dismissal of the tribunal's entire jurisdiction over the case, despite significant differences in the scope of obligations of the parties under the competing instruments, to which the tribunal had alluded.[207] Although the tribunal explained its decision through the artificiality of maintaining that there exist separate disputes under the two instruments,[208] one might wonder in light of decisions of the HRC[209] and other international tribunals[210] on competition involving the application of legal standards originating from different sources of law, whether this reasoning is persuasive. This is particularly because unambiguous adoption of the tribunal's line of reasoning might result in denial of jurisdiction in many cases where a parallel, but not identical, more specific legal regime is available (e.g., in cases of competition between the WTO and regional trade arrangements).

Further, while the tribunal may be right in holding that there were no indications that the parties have intended to refer to the compulsory jurisdiction of UNCLOS judicial bodies disputes over their new sets of rights and obligations under the regional fisheries agreement, there was equally no indication that the parties have intended to exclude through the conclusion of an additional agreement, designed to increase and not decrease the normative density of their relations, judicial review of their pre-existing general rights and obligations under UNCLOS.[211]

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[206] *Southern Bluefin Tuna,* supra note 78, Separate Opinion by Justice Keith, at para. 19, 22; Boyle, supra note 76, at 305; Jennings, New Look at Adjudication, supra note 77, at 460; Nordquist, V *UNCLOS Commentary,* supra note 75, at 5, 9-10.

[207] *Southern Bluefin Tuna,* supra note 78, at para. 52.

[208] Id. at para. 54.

[209] See *Casanovas*, supra note 126, at para. 5.1; HRC General Comment 24, supra note 123, at para. 14.

[210] *Cf. Military and Paramilitary Activities,* 1986 I.C.J. at 93-94 (a reservation precluding the application of the UN Charter does not preclude the application of the same standards, as enshrined in custom). Applying this method of reasoning to the *Southern Bluefin Tuna* case, it is the position of the present author that the tribunal could have held that the regional fisheries agreement bars reliance upon it before external judicial bodies, there is nothing to preclude such bodies from applying the more or less parallel standards introduced in UNCLOS.

Finally, the outcome of the *Southern Bluefin Tuna* case is particularly troubling since the 'specific' procedures that blocked adjudication before UNCLOS judicial bodies were consent-based methods of dispute settlement (which are applicable in any international dispute, even in the absence of an agreement) that have previously failed to resolve the dispute at hand. Thus, it is doubtful whether the *Klöckner* approach of reluctance to attribute to the parties willingness to waive significant procedural guarantees (applied in *Klöckner* with regard to competition between two adjudicative mechanisms, and controlling *a fortiori* competition between judicial and non-judicial procedures!), would not have been more appropriate. This proposition also finds support in the PCIJ case law on the non-preclusive effect of jurisdictional agreements referring disputes to political settlement upon the jurisdiction of judicial bodies. Finally, it was already shown that the decision might be viewed as incompatible with the spirit and language of article 281-282 of UNCLOS.[212]

In sum, it looks as if the case law on allocation of jurisdiction between competing international courts and tribunals is too sporadic and inconsistent to enable one to draw definitive conclusions of general applicability, the exception being the willingness of international courts and tribunals to decline jurisdiction when faced with an *explicit* exclusive jurisdiction clause (which seems to be supported by all surveyed cases). Other than that, in the absence of clear guidance on the issue, it is possible to assert that traditional forum-selection rules found in domestic legal systems (e.g., *forum non conveniens*) have not been incorporated into the practice of international courts and tribunals. Still, other general principles of law, which shall be reviewed below (e.g., abuse of right and comity), might offer some relevant norms, which could help to address forum shopping between international judicial bodies

B. Parallel proceedings

I. The PCIJ cases

The question of litispendence has also been addressed only seldom by international courts and tribunals and the most notable allusion to it is found in a cursory remark made by the PCIJ in its decision on jurisdiction in the *Certain German Interests* case. In that case, Germany brought proceedings before the Court against Poland on account of acts taken by the latter which amounted in Germany's view to illegal taking of property

[211] However, technically speaking, the regional fisheries agreement, is an earlier-in-time agreement, since it entered into force before UNCLOS.

owned by German citizens. At the same time, a similar dispute over essentially the same facts was pending before the Germano-Polish Mixed Arbitral Tribunal. Consequently, Poland had objected to the jurisdiction of the Court on grounds of litispendence. In response, the German government had argued that there had been no precedent for applying the litispendence rule in international law,[213] and that in any case the traditional conditions for the application of the rule, as established under domestic law - same parties, same nature of dispute and same object of proceedings, had not been met in the case. This is because the proceedings against Poland before the Mixed Arbitral Tribunal were brought by individual litigants and not by the German state, and because the two sets of proceedings had been based on different sources of law (the arbitration concerned alleged violation of private law rights, while the PCIJ proceedings involved the interpretation of an international treaty).[214]

The Court did not deem it necessary to make a general ruling on the applicability of litispendence in international law. Rather, it accepted the German position that even if, *arguendo,* the doctrine were to be relied upon, the conditions for its application had not been satisfied since the competing cases involved different parties and different legal issues.[215] The Court also expressed the view that the apparent differences between the nature of the Mixed Tribunal, which had operated in the sphere of domestic private law, and the PCIJ, which had operated in the international plane, could not create genuine jurisdictional competition.[216] As will be discussed below, this last holding is of particular significance to the present study since it renders all courts and tribunals operating under a legal basis other than international law incapable of entering into genuine jurisdictional competition with courts and tribunals operating under international law proper.

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[212] See supra Chapter 5, at pp. 215-16.

[213] *Certain German Interests,* 1925 P.C.I.J. (ser. C) No. 9-I, at 82 [Discours de M. Kaufmann (Allemagne)]("Je ne veux pas discuter ici le point de savoir si et dans quel sens l'*exceptio litis pendens* est admissible en droit international. Je n'ai d'ailleurs trouvé dans la doctrine aucun passage qui traite ce problème").

[214] *Certain German Interests,* id. at 82-83 [Discours de M. Kaufmann (Allemagne)].

[215] *Certain German Interests*, id. at 19-20.

[216] This decision seems to fall in line with the aforementioned *Rights of Minorities* case, where it was held that differences in nature between competing procedures would create a presumption against jurisdictional deference by a competent forum. *Rights of Minorities,* 1928 P.C.I.J. (ser. A) No. 12, at 23. *Cf. Anglo-Iranian Oil,* 1951 I.C.J. 89, 97 (Interim Measures)(Dissenting Opinion of Judges Winiarski and Pasha)("these [Mixed Arbitral] Tribunals, as joint organs of the two States, differ both as to their character and as to their procedure from an international tribunal ... and there is nothing to be learned from their precedents.").

In the *Chorzów Factory* case, which introduced a similar set of facts to the *Certain German Interests* case, the Court dismissed the Polish objections to jurisdiction without invoking the *lis alibi pendens* rule.[217] Instead it alluded to the principle of estoppel by conduct as a bar against the Polish position. Still, the Court observed that the different remedies available at each of the two competing judicial bodies, indicated lack of genuine jurisdictional overlap.[218] In other words, it seems that the Court was of the view that even had the *lis alibi pendens* rule been applicable, in principle, one or more of the conditions for its application (most notably - the 'same object') had not been fulfilled.

Despite the Court's willingness to examine the conditions for the application of the litispendence rule, the PCIJ (and the ICJ) have so far refrained from issuing a definite ruling on whether international law recognises this rule. Thus, the case law does not support nor repudiate the application of the *lis alibi pendens* rule in the relations between international courts and tribunals. This stands in contrast to the attitude towards the theory of connexity (i.e., that related proceedings should be joined before one tribunal), which was held to be inapplicable in international law by one of the judges of the PCIJ,[219] and to the clear practice supporting the inapplicability of the litispendence rule in the relations between the PCIJ/ICJ, on one hand, and the political organs of the League of Nations or the UN, on the other hand.[220]

II. Jurisprudence of other international courts and tribunals

The jurisprudence of international courts and tribunals other than the ICJ/PCIJ concerning the application of the *lis alibi pendens* rule in the absence of explicit treaty language shows some reluctance to recognise the rule. In a recent case, a question of interpretation of the Vienna Convention on Consular Relations had arisen in two sets of

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[217] *Chorzów Factory,* 1927 P.C.I.J. (ser. C) No. 13-I, at 154-55 (Exception Préliminaire du Gouvernement Polonais); id. at 50 [Discours de M. Politis (Pologne)].

[218] *Chorzów Factory,* 1927 P.C.I.J. (ser. A) No. 9, at 31-32. The Court also hinted that the parties in the two competing proceedings could not be regarded as the same. Id. at 26.

[219] *S.S. Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 9, at 48 (Dissenting Opinion of Judge Weiss). But see, *Holiday Inns S.A., Occidental Petroleum Corporation et al v. Government of Morocco,* (unpublished report), discussed in Schreuer, supra note 40, at 172-73,179 (the general unity of the investment operation justifies the consolidating of all related claims before the ICSID tribunal).

[220] *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran) 1980 I.C.J. 3, 22 ("Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court"); *Military and Paramilitary Activities,* 1984 I.C.J. at 435 ("The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events"). Jurisdictional concurrency was also permitted in the *Aegean Sea* dispute - *Aegean Sea Continental Shelf* (Greece v. Turkey) 1976 I.C.J. 3 (Interim Measures); SC Res. 395, UN SCOR 31st Sess., 1953d mtg. at 15, U.N. Doc. S/INF/32 (1976).

separate proceedings pending before the ICJ[221] and was also referred for advisory opinion to the I/A CHR by Mexico (which was not party to any of the ICJ proceedings). The U.S. urged the I/A CHR to refrain from heating the case, *inter alia* because of the pendency of parallel proceedings before the ICJ. Although the traditional conditions for application of the *lis alibi pendens* rule had clearly not been met (most obviously, lack of identity of parties) the Court did not allude to this in its decision to hear the case. Instead, it held that the parties to the I/A HR Convention have a 'general interest' that the Court will exercise its advisory functions and provide advice to state parties participating in the regime. This general interest cannot be restrained, according to the Court, by parallel contentious proceedings before the ICJ.[222] This line of reasoning would suggest that even had the *lis alibi pendens* rule been applicable, it ought to be balanced against the interests of the parties to the dispute and the overarching goals of the treaty regimes under which the competing judicial bodies operate.

In a few other cases, international courts and tribunals have rejected attempts to rely upon the *lis alibi pendens* rule in relation to proceedings conducted concurrently with domestic judicial fora. In several inter-war cases decided by international mixed arbitral tribunals, it was held that the *lis alibi pendens* rule could not preclude concurrent proceedings before judicial bodies of different 'quality'.[223] Thus, it can be maintained, in light of these cases and the *dicta* found in the *Certain German Interests* and other PCIJ cases, that there is ample support in the international jurisprudence to the proposition that the *lis alibi pendens* rule should not preclude parallel proceedings before tribunals of different legal orders.[224]

This last proposition finds some additional support in a recent ITLOS case concerning the prompt release of a vessel. In the *Camouco* case, [225] France, the respondent, has

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[221] *Vienna Convention on Consular Relations (Breard)*(Paraguay v. U.S.), 1998 I.C.J. 248 (Provisional Measures); *Le Grand* (Germany v. U.S.), Provisional Measures Order, 3 March 1999, available at < http://www.icj-cij.org/icjwww/idocket/igus/ igusframe.htm> (last visited on 1 Nov. 2000).
[222] *Right to Consular Assistance*, supra note 197, at para. 54-65.
[223] *Caire (France) v. Mexico,* 5 R.I.A.A. 516, 523-25 (1929); *The Santa Rosa Mining Co. (Ltd.)(U.K.) v. Mexico,* 5 R.I.A.A. 252, 252 (1931). Two other such cases are *Backer v. Philippopli* (Bulgarian-Belgian Mixed Arbitral Commission) and *Battus v. Bulgaria* (Franco-Bulgarian Mixed Arbitral Commission), both surveyed in Jackson H. Ralston, *The Law and Procedure of International Tribunals* (1936) 24-26. Further, the PCIJ in *Certain German Interest* specifically stated that it could also not be deemed to be in competition with a Polish domestic tribunal. *Certain German Interests*, 1925 P.C.I.J. (ser. A) No. 6, at 20.
[224] Giorgos Ténékidès 'L'exception de litispendance devant las organismes internationaux' XXXVI Revue générale de Droit international public (3rd Ser., 1929) 502, 505-06; Mohieddien Mabrouk, *Les Exceptions De Procédure Devant Les Juridictions Internationales* (1966) 88.
[225] *'Camouco'* (Panama v. France), Judgment of 7 Feb. 2000, par. 57-58, available at <http://www. un.org/Depts/los/ITLOS/JudgmentCamouco.htm> (last visited on 10 Oct. 2000).

invoked the *lis alibi pendens* rule and asked the Tribunal to decline jurisdiction on account of proceedings designed to release the same vessel that were already pending before domestic French courts.[226] The Tribunal rejected the French motion and held that it would be illogical to construe the relevant provisions of UNCLOS in a manner which would condition the ability of the Tribunal to issue effective remedies on the state of proceedings before national courts.

While the outcome of the case can serve as a reaffirmation of the principle that judicial bodies belonging to different legal orders cannot be deemed to compete with each other, the reasoning offered by the Tribunal suggests that the decisive factor in the decision was the interpretation of the strict time limits under article 292 of UNCLOS as an implicit bar against the application of the litispendence rule.

III. The Pyramids case

Another situation in which the relations between parallel proceedings before international and national judicial bodies had been reviewed was during proceedings before an ICSID arbitral tribunal. In *SPP v. Egypt* (the 'Pyramids case'), a motion requesting the tribunal to decline jurisdiction by reason of the pendency of domestic proceedings was rejected. Furthermore, the tribunal explicitly stated that it does not consider itself bound by a rule of litispendence:

> "When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevent either tribunal from exercising jurisdiction."[227]

Since the case involved competition between an international tribunal and a domestic court, the decision to reject the litispendence objection seems to be consistent with earlier case law on the matter. However, there is nothing in the *dicta* of the tribunal to indicate that the tribunal limited its view to that particular category of jurisdictional competition only, and it could be cited in support of the view that international law does not recognise the *lis alibi pendens* rule at all.

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[226] See *'Camouco'*, verbatim record of 27 Jan. 2000 [pleadings by Mr. Dobbel (France)], available at <http://www. un.org/Depts/los/ITLOS/PV00_1E.htm> (last visited on 10 Oct. 2000).
[227] *Southern Pacific,* 3 ICSID Rep. at 129.

It is interesting to note that an earlier ICSID Tribunal, which confronted a similar motion, in analogous circumstances to the Pyramids case, has not ruled out the potential applicability of the *lis alibi pendens* rule, but simply expressed the view that in the specific circumstances of the case before it the conditions for the rule's application were not met.[228] Furthermore, a 1993 ICSID Model Clause prepared for use in arbitration agreements has explicitly embraced the *lis alibi pendens* rule in the relations between ICSID and other alternative proceedings.[229]

Finally, it should be noted that the ECJ has applied on a few occasions a *lis pendens* rule (without reliance on any treaty language), with the purpose of precluding attempts to bring multiple proceedings before the ECJ.[230] However, one might argue that these cases are of limited relevance to the present study since they do not deal with competition between different courts or tribunals, but rather with regulation of the conduct of a single dispute before a single judicial body.[231] In these circumstances special considerations of judicial economy and preservation of a high level of harmonisation within the specific legal sub-system may support a stricter rule against multiple proceedings.

In sum, it looks as if existing case law on the question of *lis alibi pendens* is also too scarce and non-definitive to establish the existence of such a general rule or principle in international law, in the relations between two international courts and tribunals.[232] Nonetheless, as was demonstrated in the previous Chapter, one can make a plausible case that *lis alibi pendens* may qualify as a general principle of law, recognised by most legal systems, at least with respect to intra-systematic jurisdictional competition. It is therefore arguable that given the strong policy arguments in favour of a rule mitigating parallel litigation, including the need to avoid the risk of conflicting judgments over the

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[228] *Benvenuti and Bonfat Srl. v. Congo,* 1 ICSID Rep. 330, 340 (1980).
[229] ICSID Model Clauses, clause 12, 4 ICSID Rep. 357 (1993).
[230] See e.g., Cases 172, 226/83, *Hoogovens Groep v. Commission* [1985] E.C.R. 2843, 2846; Cases 358/85, 51/86, *France v. Parliament* [1988] E.C.R. 4846, 4849-50.
[231] K.P.E. Lasok, *The European Court of Justice –Practice and Procedure* (2nd ed., 1994) 218-19.
[232] See Ciobanu supra note 181, at 219, 225. The absence of a clear doctrine governing the matter was also noted by a 1929 Franco-Mexican Mixed Arbitral Tribunal, which had reviewed in *obiter dicta* the question of parallel proceedings between two international judicial bodies. *Caire,* 5 R.I.A.A. at 523 ("La pratique internationale en a fait déjà une expérience assez fréquente, qui forcera la doctrine de droit des gens à lui frayer un chemin au travers de la foret encore vierge de ce domaine inexplorée du droit international").

same dispute, international courts and tribunals should apply the *lis alibi pendens* rule.[233]

While it is not clear whether the *lis alibi pendens* rule governs the relations between international judicial bodies, there does seem to be support for the proposition that no litispendence can take place in the relations between international courts and tribunals, on the one hand, and courts and tribunals that do not belong to the international legal order proper.[234] This might imply that courts and tribunals that typically apply a body of law other than international law (e.g., ICSID, NAFTA Chapter 19 binational tribunals and the International Chamber of Commerce) cannot compete with ordinary international judicial bodies applying, as a rule, international law. Such conclusion conforms to the observation that one of the principal justifications for the application of jurisdiction-regulating rules in cases of jurisdictional competition is the promotion of systematic coherence on the normative level and the avoidance of conflicting judgments. Inconsistent decisions of different judicial bodies, grounded upon different legal bases do not represent a significant threat to the integrity of international law, and it is therefore not critical to prevent them, from a systematic point of view (although the balance of conveniences of the parties might still support some regulation of concurrent proceedings). In contrast, it looks as if competition involving international courts and tribunals coming from different international sub-systems should be viewed as competition between courts coming from the same legal (normative) order, with regard to which the litispendence rule ought to apply.

C. Res judicata

I. The legal status of the rule

Res judicata (or the principle of finality) has long been considered a well-established rule of international law.[235] The legally binding nature of the rule can be attributed to the centuries old practice of attributing a 'final and binding' effect to arbitral awards and other international judicial decisions and to the practice of recognising the validity of judgments as manifested in numerous international instruments, including the

[233] For support, see Megalos A. Caloyanni "L'organisation de la Cour permanente de justice et son avenir" 38 Receueil des cours (1931) 651, 685.
[234] Salvatore Messina "Les tribunaux mixtes et les rapports interjuridictionnels en Egypte" 52 Receuil des cours (1932) 363, 470-71; George Schwarzenberger, 1 *International Law* (3rd ed., 1957) 142.
[235] *Trail Smelter* (U.S. v. Canada) 3 R.I.A.A. 1907 (1941); *Commentaire sur le Projet de Convention sur la Procédure Arbitrale adopte par la Commission du Droit International a sa cinquième session* (ONU Secrétariat, 1955) 106; Schreuer, supra note 40, at 166-67.

constitutive instruments of most major international courts or tribunals.[236] Furthermore, one can identify a general tendency on the part of states to comply with judicial decisions (which has sometimes been described as a 'culture of compliance'),[237] or at least not to openly challenge them.[238] The existence of such widespread practice and concomitant sense of legal obligation has been noted in the writing of jurists[239] and in a number of judicial decisions.[240] All of these are strong indications that the two conditions required for conferring the status of an international custom upon the *res judicata* rule – extensive and consistent practice[241] and *opinio juris,* have been satisfied.

An alternative approach, advocated by some notable jurists, for establishing the legally binding status of the *res judicata* rule has been to characterise it as a general principle of law.[242] In fact, this possibility had been mentioned by the drafters of the PCIJ Statute, who gave the *res judicata* rule as an example of what may constitute a 'general principle of law', under article 38 of the PCIJ Statute.[243] The review of national laws undertaken in the previous Part of this study confirms the ubiquitous nature of the principle of finality. Each of the surveyed legal systems applies the *res judicata* rule vis-à-vis judgments and arbitral awards rendered within the same system. In any event, either by

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[236] See supra note 175.

[237] Louis Henkin, *International Law: Politics and Values* (1995) 49-51.

[238] There have been however a few notable instances of non-compliance. Stephen M. Schwebel "Relations Between the International Court of Justice and the United Nations" *Justice in International Law* (1994) 14, 18.

[239] See e.g., Malcolm N. Shaw, *International Law* (4th ed. 1997) 80; Philippe Couvreur "The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes" *The International Court of Justice: It's Future Role after Fifty Years* (A.S. Muller, D. Raic and J.M. Thuränszky eds. 1997) 83, 100-05.

[240] The principle of finality had been reaffirmed by several decisions of the World Court. *Société Commerciale de Belgique* (Belgium v. Greece), 1939 P.C.I.J. (ser. A/B) No. 78, at 174; *Polish Postal Service in Danzig,* 1925 P.C.I.J. (ser B.) No. 11, at 30; *Interpretation of Judgments Nos. 7 and 8 concerning the case of the Factory at Chorzów* (Germany v. Poland), 1927 P.C.I.J. (ser. A) No. 11, at 21; *Factory at Chorzów,* 1927 P.C.I.J. (ser. A) No. 17, at 75 (Merits)(dissenting opinion of Judge Ehrlich). Similar commitment to the principle of finality can be found in numerous arbitration awards. *Trail Smelter,* 3 R.I.A.A., at 1950; *Orinoco Steamship Co.* (U.S. v. Venezuela), 11 R.I.A.A. 227, 239 (1910); *Compagnie Générale de l'Orénoque* (France v. Venezuela), 10 R.I.A.A. 184, 276 (1905); *Pius Fund* (U.S. v. Mexico), 9 R.I.A.A. 11, 12 (1902).
Additional support to the *res judicata* rule is found in the case law of the European Court of Justice. C-281/89, *Italy v. Commission* [1991] E.C.R. I-347, 363; Joined Cases 79 and 82/63, *Reynier v. Commission* [1964] E.C.R. 259, 266.

[241] Oscar Schachter *International Law in Theory and Practice* (1991) 12.

[242] *Effect of Awards of the UN Administrative Tribunal,* 1954 I.C.J. 47, 53; *Chorzów Factory,* 1927 P.C.I.J. (ser. A) No. 13, at 27 (Interpretation)(dissenting opinion of Judge Anzilotti)("It appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to 'the general principles of law as recognized by civilized nations' ... that case is assuredly the [case of *res judicata*]; *Amco Asia, Pan American Development Ltd. v. Indonesia,* 1 ICSID Rep. 543, 549 (1988)(Resubmitted case); Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* 336 (1987).

[243] *Minutes of the Proceedings of the Advisory Committee of Jurists, with Annexes* (League of Nations, 1920) 335.

virtue of custom or general principle of law, the *res judicata* rule should be regarded as a binding rule of law.

II. Exceptions to the principle of finality

However, it is also well accepted that the principle of *res judicata* is not absolute and that there are instances in which a case decided by a court or tribunal can be reopened by the same or another judicial body. Bin Cheng in his seminal treatise on *General Principles of Law* listed seven potential grounds for annulling, revising or setting aside a judgment of an international court or tribunal.[244] These are: lack of competence, violation of the rule that no one should judge its own cause, violation of the right to be heard, fraud and corruption on the part of the tribunal, fraud on the part of the parties (or their witnesses),[245] manifest and essential error[246] and fresh evidence.[247] Of these grounds, the sixth - manifest and essential error seems to be most controversial in legal writing and case law, since unlike the other grounds, which primarily address procedural defects, it pertains to the merits of the judgment and amounts to a *de facto* right of appeal.[248] The lack of consensus as to the ability to reopen a judgment on the ground of material error of fact or law is reflected in the conspicuous absence of this stipulation from the lists of grounds for revision or setting aside of judgments found in the constitutive instruments of some international courts and tribunals.[249] Therefore, it would seem fair to argue that the sixth ground has failed to assume the level of consistency of practice and wide acceptability required in order to qualify as a customary norm of law, which constitutes an exception to the already established principle of finality. It is also apparent that under municipal law it is generally impossible to challenge the merits of an erroneous final judgment of a competent domestic court (except by way of an appeal) and that, similarly, most jurisdictions do

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[244] Cheng, supra note 242, at 357-72; *Commentaire sur le Projet de Procédure Arbitrale,* supra note 235, at 107-11.

[245] *Leigh Valley Railroad Co. v. Germany,* 8 R.I.A.A. 160, 190 (1933).

[246] *Drier v. Germany,* 8 R.I.A.A. 127, 157-58 (1935); *Leigh Valley,* 8 R.I.A.A. at 188; *Trail Smelter,* 3 R.I.A.A., at 1957.

[247] *Moore* (U.S. v. Mexico) (1871), in John B. Moore, 2 *History and Digest of International Arbitrations to which the U.S. has been a Party* (1898) 1357.
Revision of judgments on the grounds of the discovery of a new fact, unknown to the judicial body and to the party seeking revision at the time of judgment, is provided for in the constitutive instruments of most international courts and tribunals (usually, on condition that no negligence on the part of the party seeking revision has taken place). See e.g.. ICJ Statute, art. 61; 1899 Hague Convention, art. 55; 1907 Hague Convention, art. 83; ICSID Convention, art. 51(1); EC Statute, art. 41; Rome Statute of the International Criminal Court, 17 July 1998, art. 84(1), UN Doc. A/Conf.183/9, 37 I.L.M. (1998) 999 [hereinafter 'ICC Statute'].

[248] *Trail Smelter,* 3 R.I.A.A., at 1957; *Commentaire sur le Projet de Procédure Arbitrale,* supra note 235, at 112.

[249] See e.g., NAFTA, art. 1904(13); ICSID Convention, art. 52(1).

not permit the review of alleged errors of fact or law found in foreign judgments or arbitral awards, of either domestic or foreign origin.[250] As a result, it can hardly be argued that recourse to substantive review of judicial errors can be viewed as a general principle of law

III. Case law of the PCIJ and the ICJ

So far, the most prominent attempts to reopen disputes settled by one judicial body in proceedings initiated before another judicial or quasi-judicial forum cases have been three cases submitted to the ICJ and the PCIJ for judicial review. In effect, the Court was asked in these cases to re-litigate disputes already settled by arbitration. As a result these cases can be viewed, to a certain extent, as jurisdictional-competition cases.

In the *Société Belgique* case, the PCIJ had been confronted with an attempt by Belgium to enforce an arbitral award rendered in favour of a Belgian corporation against Greece. Greece did not challenge the validity of the award but merely claimed that the award should be considered as part of its foreign debt (which could be paid over a prolonged period of time). The Court commented that the arbitration clause between the Greek government and the Belgian company, in which the parties undertook that the award would be 'final and without appeal', bars the Court from reviewing it. As a result it may neither confirm nor annul the award, in part or in whole, under its existing mandate (which derives from a general agreement between Belgium and Greece to refer all of their differences to the PCIJ).[251] In other words, the Court had seemed to favour the view that explicit authorisation is required in order to reopen a decision which enjoys a *res judicata* status in light of specific contractual language.[252].

In his Hague Lectures, Prof. Michael Reisman was critical of part of the Court's decision and expressed the view that the Court was unjustified in rejecting the Greek position that it may seek postponement in the execution of the award, on grounds that it is inconsistent with the *res judicata* force of the award.[253] Indeed, the conflict over the

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[250] It is perhaps instructive that the 1958 New York Convention does not include substantive mistakes as a ground for refusal to recognise and enforce arbitral awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, art. V, 330 U.N.T.S. 38 [here in forth and hereinafter 'New York Convention']. See also Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 29, 1972 O.J. (L 299) 32, 29 I.L.M. (1990) 1413 [hereinafter 'Brussels Convention'].

[251] *Société Belgique,* 1939 P.C.I.J. (ser. A/B) No. 78, at 174.

[252] See W. Michael Reisman " The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication" 258 Recueil des Cours (1996) 9, 244-5.

[253] *Société Belgique,* 1939 P.C.I.J. (ser. A/B) No. 78, at 176; Reisman, supra note 252, at 247, 251-52.

method of execution of the award could have been regarded as a novel and distinct issue, separable from the dispute that had been the subject of the arbitration proceedings.

The first time the ICJ was directly confronted with an attempt to re-litigate a case already settled by arbitration had been in the *King of Spain* case,[254] which involved a challenge by Nicaragua to the validity of an arbitral award that had been rendered in favour of Honduras more than 50 years earlier. The Court rejected the challenge and held that Nicaragua was barred in the circumstances of the case from challenging an award whose validity it had recognised on several occasions.[255]

However, the Court also held, in *obiter dicta,* that even if there had not been estoppel by conduct, it would still have confirmed the award. According to the Court, since the award is not subject to an appeal it may not "pronounce on whether the arbitrator's decision was right or wrong".[256] Still, the Court held that it could decide whether the award was null and void and has consequently engaged in examination of the Nicaraguan claims that the arbitrator overstepped its authority and that there was an essential error in the award. Both contentions were rejected by the Court for lack of merit.

How can the position of the ICJ in the *King of Spain* case be explained in light of the *Société Belgique* precedent, in which the PCIJ had seemed to rule out the possibility of review of final awards? One possible explanation is the specific language used in the *compromis* between Nicaragua and Honduras, which authorised the Court to adjudicate the parties' 'disagreement with respect of the arbitral award'.[257] Such wording could suggest a waiver of some of the *res judicata* effects of the award. Another possible explanation is that the *Société Belgique* case, where no challenge against the validity of the award had been raised, cannot be regarded as a persuasive authority against the power of the Court to engage in supervision of arbitral decisions.

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[254] *Arbitral Award made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua), 1960 I.C.J. 192.
[255] *King of Spain,* id. at 213.
[256] *King of Spain,* id. at 214. The Court also held that: "[t]he appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator and is not open to question." id. at 215-16.
[257] *King of Spain,* 1960 (I) I.C.J. Pleadings 28-29 (Annex 3)(Application instituting proceedings). But see Reisman, supra note 252, at 272 (argues that the *compromis* was too vague to constitute specific authorisation).

In any event, one should perhaps emphasise that the *King of Spain* Court has embraced a non-intrusive approach towards the award - acting as a court of cassation and not as a court of appeal *de novo.* This means that substantial parts of the arbitral process and the final award had been insulated altogether from judicial review. Even when the Court had engaged in review of alleged grounds for nullity of the award it refrained from examining the arbitrator's discretion. This standard of review has rendered the Court's perceived willingness to examine whether the award reveals an 'essential error' into a largely meaningless gesture.

Prof. Reisman criticised the decision of the Court for failing to attribute sufficient *res judicata* weight to the award.[258] In his view, the Court should have refrained from re-examining challenges to the validity of the award, which had already been rejected by the arbitrator.[259] While Reisman seems to be right, in principle, since the *res judicata* rule can certainly encompass decisions on jurisdiction,[260] there is no reason to believe that the parties to arbitration cannot authorise the Court (or any other judicial body) to re-examine the validity of the award. As a result, if one were to construe the *compromis* in the *King of Spain* as specific authorisation to reopen a final award, the Court's approach would seem justified. Under these conditions, the standard of review adopted by the Court seems to carefully balance between the need to respect the agreement of the parties to submit to it differences concerning the validity of the award and the principle of finality.

The *1989 Arbitral Award* case[261] is perhaps the most important of the Court's decisions on the question of successive proceedings. In that case, the jurisdiction of the ICJ to hear a challenge on the validity of the arbitral award was based on Article 36(2) of the Statute.[262] Still, the Court held that it may re-examine the award since the dispute before

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[258] Reisman, supra note 252, at 285.

[259] Reisman, supra note 252, at 281-82. According to Reisman, the Court should not have reviewed this question anew, but should have given decisive weight to the fact that the award settled this issue (though he concedes that this was an issue extrinsic to the award itself). Id. at 283.

[260] Cheng, supra note 242, at 353.

[261] *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), 1991 I.C.J. 53

[262] The fact that Guinea-Bissau - the applicant state, has made the optional clause declaration only 16 days before presenting the claim underlines the potential for abuse of the principle of finality if the Court were to adopt an excessively intrusive approach. Interestingly enough, Senegal could have, but failed to object to the Court's jurisdiction on the basis of its 1985 optional clause declaration that excluded from the jurisdiction of the Court disputes "in regard to which the parties have agreed to have recourse to some other method of settlement." Declaration of Senegal under article 36(2) of the ICJ Statute, 1984-85 I.C.J.

it - a dispute over the validity of the award, raised a separate issue from the original dispute referred to arbitration - a maritime delimitation dispute.[263]

Although the decision can be explained, in part, by the fact that the respondent state (Senegal) did not explicitly contest its jurisdiction to review the validity of the award,[264] the reasoning employed by the Court would seem to be of wide applicability, so as to enable it to review future challenges to any settled judicial decision, even without specific waiver of the effects of the *res judicata* rule (provided that the Court enjoys compulsory jurisdiction over the parties). As a result, one can assert that the *1989 Arbitral Award* case has in effect reversed the *dicta* of the PCIJ in the *Société Belgique* case.

On the question of the proper standard of judicial review, the ICJ adopted an approach generally similar to the one taken in the *King of Spain* case. The Court refused to explore a challenge made by Guinea-Bissau against the interpretation adopted by the arbitral tribunal to its powers under the arbitration *compromis,* and noted that it is cannot review *de novo* the decision of the arbitrators:

> "By proceeding in that way the Court would be treating the request as an appeal and not as a *recours en nullité.* The Court could not act in that way in the present case. It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction."[265].

It should be noted that some of the judges in the case appended to the judgment separate or dissenting opinions indicating willingness to engage in a more intrusive review of the arbitral award.[266]

Y.B. 93-94 (1985). Arguably, this *electa una via* reservation could block adjudication of the merits of the dispute before the ICJ by virtue of the prior resort to arbitration.

[263] *1989 Arbitral Award,* 1991 I.C.J. at 62.

[264] *1989 Arbitral Award,* 1991 I.C.J. at 80 (declaration by Judge Mbaye).

[265] *1989 Arbitral Award,* 1991 I.C.J. at 69.

[266] *1989 Arbitral Award,* 1991 I.C.J. at 77 (Declaration by Judge Tarassov); id. at 92 (Separate Opinion of Judge Lachs); id. at 106, 112-13 (Separate Opinion by Judge Shahabuddeen)(advocating a potentially more intrusive standard of review of decisions concerning the arbitral tribunal's competence – a showing of a compelling, clear and substantial error, as opposed to the standard set by the majority - manifest breach of competence); id. at 120, 124 (Joint Dissenting Opinion by Judges Aguilar Mawdsley and Ranjeva); id. at 131 (Dissenting Opinion of Judge Weeramantry). Reisman points out that two other

The case law of the ICJ/PCIJ on the relationship between the court and arbitral awards is important to the present study. It establishes the proposition that an agreement to settle a dispute in a final and binding manner by way of arbitration will be respected, as a rule, by another tribunal. Indeed, the Court has regarded itself unable to re-adjudicate the merits of a case previously settled by way of arbitration (in the absence of specific authorisation by the parties). While the Court has tended to be show greater willingness to exercise jurisdiction in disputes over the validity of the award (which it now views as separate from the underlying conflict), it has construed its position as that of a court of cassation entrusted with limited powers of review, and not as an appellate instance with power to review the merits of the dispute *de novo*.[267] This outcome strongly endorses an international rule of *res judicata*, which prescribes that international courts tribunals must give legal effect to decisions of other international tribunal. However, as mentioned above, this rule has a few exceptions and a competent court or tribunal may review some alleged grounds for invalidity of a 'final' decision, provided that it will apply a non-intrusive standard of review.

In a similar manner, it is conceivable, on the basis of the *1989 Arbitral Award* ruling, that the ICJ would be willing to review the regularity of conduct of proceedings conducted in parallel to ICJ proceedings, even while they are still pending before the competing forum (e.g., a legal challenge against the competing forum's decision to exercise jurisdiction). Such a request for review of an interim decision, would qualify under the *1989 Arbitral Award* as a question separate from the substantive dispute referred to arbitration, and thus not barred by rules designed to abate multiple litigation of the 'same matter'. Still, as a matter of judicial economy and comity, it is arguable that this proposed procedural path is extremely undesirable.[268]

IV. Case law of other international courts and tribunals

There have been only a few other cases in which permanent international courts and tribunals other than the ICJ have addressed the issue of finality of decisions of competing judicial bodies. In one case, the EHR Comm'n reviewed a complaint that Article 6 of the European HR Convention (the right to due process) had been violated

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majority judges also resorted, in effect, to appellate-style examination of the award. Reisman, supra note 252, at 355-56.

[267] *Cf.* Case 589/1994, *Tomlin v, Jamaica,* U.N. Doc. CCPR/C/57/D/589/1994, at Para. 6.3 (Report of the HRC, 1996) (power of review of the Committee over domestic courts should be strictly construed).

[268] For instance, interlocutory motions might be unnecessary if one of the parties has prevailed on the merits before another judicial forum.

by the EC Commission, after the same claim was dismissed by the ECJ. Instead of invoking article 35(2) [ex article 27(1)(b)] of the European HR Convention (the *electa una via* clause), the Commission held that it does not have *ratione materiae* jurisdiction to examine the complaint after it had been addressed by the ECJ.[269] According to the Commission, acceptance on the part of the institutions of the EC of the standards of the European HR Convention implied that the ECJ has assumed the role of supervising the observance of these rights in cases subject to its jurisdiction. Thus, states may execute judgments of the ECJ, without examining their conformity with the Convention.[270] This decision could mean that the Commission was of the opinion that through agreement to authorise the ECJ to review compliance with human rights standards, the EC member states have intended to invest ECJ judgments concerning human rights issues with a *res judicata* effect, which would bar their review on the merits by human rights mechanisms.[271]

In another case, the ECHR held that a state party owes damages to a private party for delays in implementing domestic and ECJ judgments.[272] This seems to reflect recognition by the ECHR of the *res judicata* effect of relevant ECJ judgments. Still, it is interesting to note that one of the judges, in a dissenting opinion, protested the conferring of *res judicata* status to the ECJ judgment, arguing that differences in the nature of the ECJ and the ECHR, in the legal basis of their decisions and defects in the merits of the ECJ judgment, should have prevented reliance thereupon.[273] However, the findings in Part II of the present study do justify treating the ECJ and the ECHR as courts belonging to the same legal system, and thus capable of producing *res judicata* effects vis-à-vis each other.

In contrast, in the Pyramids case, an ICSID tribunal refused to adopt findings of fact reached by ICC arbitration in earlier litigation of the same dispute. Although this decision can be justified in light of the fact that the ICC award had been nullified by the domestic courts of the *situs,* the reasoning employed by the tribunal were that the ICSID rules of procedure require tribunals to make their own findings of fact and law.[274] Taken

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[269] *Melchers & Co. v. Germany*, App. 13258/87, 1990 Y.B. Eur. Conv. on H.R. 138 (EHR Comm'n).
[270] *Melchers,* id. at 145-46.
[271] Although, technically speaking, the two sets of proceedings did not involve the same parties, one might argue that the interests of Germany and the EC Commission were essentially the same.
[272] *Hornsby v. Greece,* 24 E.H.R.R. 250 (1997).
[273] *Hornsby* (Just Satisfaction), 1998 (II) Eur. Ct. H.R. 727, 738 (Dissenting Opinion of Judge Valticos; joined by Judges Pettiti and Morenilla).
[274] *Southern Pacific,* 3 ICSID Rep. at 162-63.

to its full logical extent, this rationale might imply that ICSID tribunals are barred from applying the *res judicata* rule. Such an illogical outcome is clearly inconsistent with earlier ICSID case law, which has clearly shown willingness to apply the *res judicata* rule (vis-à-vis another ICSID award rendered in an earlier stage of the proceedings).[275]

With regard to the scope of the *res judicata* rule, the case law of the ECJ demonstrates a particularly broad conception of what constitute successive claims. Thus, in a number of decisions, the Court has applied rules of preclusion in order to block re-litigation of settled issues,[276] even in situations which are not traditionally covered by the *res judicata* rule – such as related proceedings[277] (which do not strictly involve the 'same matter') and declarations of invalidity of EC measures in annulment cases, which have *erga omnes* effect and bind unrelated third parties (thus, deviating from the 'same parties' standard).[278] However, as was the case before, these precedents are of limited utility for the present work since they involve successive applications to the same judicial body (where consideration of legal economy, not found in litigation before different bodies with different jurisdictional structure, support that parties raise all of their related claims in one set of proceedings).

Further, there are other examples suggesting a more restrictive approach. For example, an ICSID tribunal, which was confronted with a situation where an ICSID *ad hoc* Committee has previously annulled an ICSID award rendered in an earlier stage of the same proceedings, accorded limited *res judicata* effect to the decision of the Committee (recognising the nullification of the first award, but refusing to follow the reasoning adopted by the Committee during re-litigation).[279] However, the position of the second-in-time ICSID arbitral tribunal could perhaps be explained by the unique position of *ad hoc* Committees in the institutional framework of ICSID – they act as

[275] *Amco Asia*, 1 ICSID Rep. at 548-49, 552.
[276] Lasok, supra note 231, at 138-39.
[277] Where a party has tried to resubmit to the Court a claim previously rejected by it, through dressing it up in a different form (e.g., an action for damages instead of action for annulment), the Court, if it deemed the new set of proceedings to amount to a disguised attempt to circumvent a binding decision, applied a discretionary connexity rule. See Case 59/65, *Schreckenberg v. Euratom Commission* [1966] E.C.R. 543, 550; Lasok, supra note 231, at 219-220. The connexity rule has also been applied by the ECJ to block parallel related claims and claims which have been designed to circumvent a peremptory rule of admissibility (such as time-limits). Lasok, supra, at 214-15.
[278] Lasok, supra note 231, at 220. At the same time, a finding of validity of a challenged measure does not bind third parties.
[279] *Amco Asia*, 1 ICSID Rep. at 543.

courts of cassation and not as courts of appeal.[280] Hence, the merits of their judgments are of different nature than those of ordinary judicial fora.

In sum, there is little doubt as to the validity of the *res judicata* rule in international law and the rule of finality should generally apply to the relations between different international courts and tribunals. However, in practice, the application of the principle of finality by international courts and tribunals has been sporadic and somewhat inconsistent. Consequently, it is not utterly clear what is the precise preclusive nature of decisions rendered by one competent forum on matters brought before competing judicial bodies (e.g., what level of review is permissible? which aspects of a decision can be re-opened?).[281] In contrast, it seems well established that the decisions of domestic courts cannot constitute *res judicata* vis-à-vis international courts and tribunals that belong to a different legal order.[282]

The proven existence of an international law rule of *res judicata* means that it can be applied by international courts and tribunals even in the absence of express treaty language. This is unless the relevant constitutive instruments body indicate clear intent to negate the application of the rule. Thus, for instance, it could be argued that the HRC, which is precluded under the ICCPR Optional Protocol only from reviewing communications pending simultaneously before other international courts or tribunals, should nevertheless apply the *res judicata* rule in relation to findings of fact and law made by competing binding procedures. According to this view, it is plausible that article 5(2)(a) of the Optional Protocol (the *lis alibi pendens* clause) did not create a negative arrangement as to the application of the *res judicata* rule, but rather failed to address the question of finality. Hence, the *res judicata* rule may be relied upon in order

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[280] *Amco Asia*, 1 ICSID Rep. at 552.

[281] The position of the WTO Dispute Settlement system on the scope and effect of the principle of finality is still unclear. John Jackson *The World Trading System* (2nd ed., 1997) 126; Raj Bhala "The Myth about Stare Decisis and International Trade" 14 American University International Law Review (1999) 845, 878; William J. Davey "The WTO/GATT World Trading System: An Overview" I *Handbook of WTO/GATT Dispute Settlement* (Pierre Pescatore ed. 1997) 20 (though not formally binding upon future, DSB reports will in effect constitute stable precedents); Ernst-Ulrich Petersmann "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction" *International Trade Law and the GATT/WTO Dispute Settlement System* (Ernst-Ulrich Petersmann ed. 1997) 5, 84.

[282] *Certain German Interests*, 1925 P.C.I.J. (ser. A) No. 6, at 20; *Amco Asia,* 1 ICSID Rep. 389, 460 (1983)(Jurisdiction)("... an international arbitral tribunal enjoys the right to evaluate and examine [the legal position of the parties] without accepting any *res judicata* effect of a national court"); Ian Brownlie, *Principles of Public International Law* (5th ed., 1998) 52; Ciobanu, supra note 199, at 229; Henry Donnedieu de Vabres "Le conflit des lois de compétence judiciaire dans les actions personnelles" 26 Recueil des cours (1929) 261. The separate existence of domestic and international legal proceedings is also confirmed by the exhaustion of local remedies rule, which permits international courts and tribunals to reopen cases already decided by their domestic counterparts.

to fill this *lacuna*. Although this outcome can be supported by policy arguments peculiar to the field of human rights,[283] the practice of the HRC has not followed this course, and no rule of preclusion had been applied with regard to previously settled matters.[284] While this position might comport with the original intent of the drafters of the ICCPR,[285] it seems to ignore the interpretative rule according to which international agreements should be read in line with the parties' other obligations under international law[286](which include the principle of finality).

Of course, the principle of finality could only be applied in relation to final and binding decisions - namely, decisions rendered by full-fledged judicial bodies (e.g., European or Inter-American Human Rights Courts). Recommendations of quasi-judicial bodies (e.g., HRC and the African Human Rights Comm'n), can only be given due consideration. This is because to hold otherwise without explicit authorisation would give non-binding recommendations a binding effect, against the wishes of the parties to the relevant constitutive instruments.

2. Other potentially applicable general rules and principles of international law

Besides specific rules such as *lis alibi pendens* or *res judicata,* developed to address some of the particular problems associated with jurisdictional competition, general principles of international law may also assist in formulating the law governing situations of conflicting jurisdictions. Although such principles have only rarely been applied by international courts and tribunals with relation to jurisdictional questions, it is submitted that they have potential applicability in these circumstances, which may be deduced from the manner in which they have been applied in other areas of international law.

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[283] It could be maintained that in the field of human rights there is special need to strengthen the authority of the various human rights judicial and quasi-judicial bodies. Scott Davidson "The Procedure and Practice of the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights" 4 Canterbury L. Rev. (1991) 337, 348. There also seems to be in that area of law a problem of judicial economy on a unique scale, given the overburdening of existing procedures.

[284] See supra Chapter 2, at pp. 271-72.

[285] The *travaux preparatoires* of the ICCPR show that proposals to introduce stricter jurisdictional regulating standards (including a *res judicata* rule) had been explicitly rejected. See supra Chapter 5, at pp. 233-34.

[286] Vienna Convention on the Law of Treaties, 23 May 1969, art. 31(3)(c), 1155 U.N.T.S. 331 [here in forth and hereinafter 'Vienna Convention'].

A. The theory of abuse of rights

Perhaps the general principle most relevant to the present study is the 'abuse of right' doctrine *(abus de droit),* which had originated in civil law countries[287] but can also be found today in many common law jurisdictions.[288] The doctrine has been relied upon on several occasions by the PCIJ[289] and the ICJ[290] and has been affirmed by numerous arbitration proceedings.[291] It was also listed by Bin Cheng as one of the general principles of law recognised and applied by international courts and tribunals, which may derive from the *bona fide* principle.[292]

Still, there are some lingering doubts on the accuracy of the assertion that the theory reflects a general principle of law. At least one major legal system – English law, had in the past explicitly repudiated the doctrine *en bloc.*[293] However, even English law has long accepted the idea that abuse of rights should be proscribed in specific situations, including the exercise of rights in the framework of the legal process. [294] Therefore, one can assert, for the purposes of the present thesis, that all main systems apply or, at least

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[287] New Civil Code (NBW), art. 1-2 (Netherlands); Civil Code, art. 2 (Switzerland); Civil Code, art. 1071 (Argentina); Cour d'appel, Colmar, May 2, 1985, D.P. II 1856, at 9 (France); Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (2nd ed., 1999) 573 (Moslem law forbids any abuse of right); Alexander Reus "Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany" 16 Loy. L.A. Int'l & Comp. L.J. (1994) 455, 498-99. In addition, the principle of good faith has been embraced by the laws of many other countries. See e.g., B.G.B. §. 242 (Germany); Contract Law (General Part), 1973, art. 12 (Israel); Civil Code, art. 18 (Turkey). See generally, Saul Litvinoff "Good Faith" 71 Tul. L. Rev. (1997) 1645.

[288] Joseph M. Perillo "Abuse of Right: A Pervasive Legal Concept" 27 Pacific Law Review (1995) 37.

[289] *Certain German Interests* 1926 P.C.I.J. (ser. A) No. 7, at 30; *Free Zones of Upper Savoy and the District of Gex* (France/ Switzerland) 1932 P.C.I.J. (ser. A/B) No. 46, at 167; *Oscar Chinn* (U.K./Belgium), 1934 P.C.I.J. (ser. A/B) No. 63, at 86.

[290] *Corfu Channel* (U.K. v. Albania), 1949 I.C.J. 4, 46 (Individual Opinion of Judge Alvarez)("... condemnation of the misuse of a right should be transported into international law"); *Competence of the General Assembly for the Admission of a State to the UN,* 1950 I.C.J. 4, 15 (Dissenting Opinion of Judge Alvarez)("it is necessary to-day to find a place for [the concept of abuse of right in international law]"); *Fisheries* (U.K./Norway) 1951 I.C.J. 116, 142. But see, *Certain Norwegian Loans* (France v. Norway) 1957 I.C.J. 9, 94 (Dissenting Opinion of Judge Read)("practically speaking, it is, I think, impossible for an international tribunal to examine a dispute between two sovereign States on the basis of either good faith or of abuse of law").

[291] See e.g., *Fur Sea Seal Arbitration* (G.B./U.S.)(1892) in Moore, 1 *History and Digest of International Arbitrations* (1898) 755, 889-90.

[292] Cheng, supra note 242, at 121; *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products,* 38 I.L.M. (1999) 118, 165 (Report of the Appellate Body, 1998)("The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit,* prohibits the abusive exercise of a state's rights ...").

[293] *Mayor of Bradford v. Pickles* [1895] A.C. 587, 601; *Allen v. Flood* [1898] A.C. 1, 46; W.V.H. Rogers et al, *On Tort* (1984) 49.

[294] See Civil Procedure Rules, Rule 3.4 (2)(b)(England); *The Atlantic Star* [1973] 2 All E.R. 175, 183 (H.L., Opinion of Lord Morris of Borth-Y-Gest). Two relevant torts under English law are abuse of process and malicious persecution. *Grainger v. Hill,* 132 E. R. 769 (1838). See also *Lonrho Plc v. Fayed (No. 5)* [1993] 1 W.L.R. 1489, 1502 (C.A.); *Dallal* [1986] 1 Q.B. at 452.

are willing to recognise some kind of 'abuse of right' rule in relation to the exercise of rights during adjudication.

In addition, there is repeated reference in international treaties and case law to the abuse of right doctrine, most notably in articles 294 and 300 of UNCLOS (the first of the two articles explicitly authorises a competent court or tribunal to dismiss abusive proceedings), and in the constitutive instruments of some major human rights complaint procedures.[295] One can also find ample support for the wide-acceptability of the overarching principle of good faith, from which the abuse of right theory has been developed (the most conspicuous of these authorities can be found in article 26 of the Vienna Convention on the Law of Treaties).[296] These indications lend an alternative basis of support to the binding status of the abuse of right theory in international law.[297] Given the extensive practice of international bodies and the near consensus in the writing of jurists on the matter, the theory can probably be viewed as part and parcel of customary international law or as a general principle of law.

According to the abuse of right theory, right-holders must exercise their rights, while taking into account the rights and interests of those affected by their conduct. Hence, it is generally accepted that a right cannot be exercised (a) in a malicious manner, with the

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[295] Optional Protocol to the ICCPR, art. 3; CAT, art. 22(2); ECHR, art. 35(3)[ex-article 27(2)].

[296] The principle of good faith has been reaffirmed by UN Charter, art. 2(2); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1970); Final Act of the Conference on Security and Co-Operation in Europe, 1 Aug. 1975, 14 I.L.M. (1975) 1292.
There is also ample support for the principle in the case law of the ICJ - *Nuclear Tests* (Australia v. France), 1974 I.C.J. 253, 268; *Legality of the Threat or Use of Nuclear Weapons,* 1996 I.C.J. 226, 264; *Certain Phosphate Lands in Nauru* (Nauru v. Australia), 1992 I.C.J. 240, 324 (Preliminary Objections)(Dissenting Opinion of Judge Oda)("For Nauru to bring a claim now can only lead one to doubt its good faith"). One can also find reference to the principle of good faith and estoppel in GATT/WTO law: *Measures Affecting Imports of Softwood Lumber from Canada* (Canada v. U.S.), GATT B.I.S.D. (40th Supp.) at 358, 480-86 (1993); *U.S. – Sections 301-310 of the Trade Act of 1974,* WTO DOC. WT/DS152/R (1999), at p. 319 (Panel Report). See also the relevant case law of the Iran-U.S. Claims Tribunal: Case 56 *Amoco International Finance Corp. v. Iran,* 15 Iran-US Cl. Trib. Rep. 189, 233 (1987); Case 39, *Philipps Petroleum Co. v. Iran,* 21 Iran-US Cl. Trib. Rep. 79, 155 (1989); Case 43, *Oil Fields of Texas, Inc. v. Iran,* 1 Iran-US Cl. Trib. Rep. 347, 376 (1982)(Concurring Opinion of Mosk); Case A/2, *Iran v. U.S.,* 1 Iran-US Cl. Trib. Rep. 101, 109 (1982)(Dissenting Opinion of Kashani, Shafeiei & Enayat); Case 7, *Tippets et al v. TAMSEFTA,* 6 Iran-US Cl. Trib. Rep. 219, 270 (1984)(Comments by Shafeiei); Case 33, *Sea-Land Services Inc. v. Iran,* 6 Iran-US Cl. Trib. Rep. 149, 209-16 (1984)(Dissenting and Concurring Opinion of Holtzman). And see also Lord McNair, *The Law of Treaties* (1961)(1998 reprint) 550, 764; Shaw, supra note 239, at 81-82 (good faith is perhaps the most important general principle of international law).

[297] See e.g., Wolfgang Friedmann "General Course in Public International Law" 127 Receuil des cours (1969) 37, 153. But see, Adolfo M. De La Muela "Les Principes Directeurs des Règles de Compétence Territoriale des Tribunaux Internes en Matière de Litiges Comportant un élément International" 135 Recueil des cours (1973) 1, 39-40.

sole intent of causing injury to another; (b) in a 'fictitious' way - for a purpose utterly different than that for which the right was originally granted; or (c) in an wholly unreasonable manner- causing harm disproportionate to the right holder's interests.[298]

In addition, several precedents have established that one set of rights cannot be exercised in disregard of other sets of rights and obligations.[299] Therefore, the theory calls for a proper balance to be struck between states' rights and obligations.[300] Similarly, in cases involving discretionary exercise of rights, support can be found to the proposition that such discretion must be exercised in a good faith manner,[301] that is, in a way which is not arbitrary and does not entail undue hardship for other parties.[302]

I. Application of the abuse of rights theory to forum selection and multiple proceedings

Since unilateral resort to adjudication most certainly constitutes an exercise of right, it would seem that the abuse of right doctrine should govern its operation. In cases of jurisdictional competition, the abuse of right doctrine, if applicable, would not permit referral of disputes to an international forum in violation of a binding instrument mandating that the case be adjudicated before a different forum (e.g., an exclusive or residual jurisdiction clause). Exercise of the right to initiate proceedings in breach of treaty obligations should therefore be considered abusive, and jurisdiction under these circumstances ought to be declined.[303] This conclusion conforms to the dicta of the PCIJ in the *Rights of Minorities* case, which suggests that the Court' should decline

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[298] Cheng, supra note 242, at 121-23. See *U.S. - Standard for Reformulated and Conventional Gasoline and Like Products of National Origin*, 35 I.L.M. (1996) 603, 626 (Report of the AB)("... while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions *must be applied reasonably*, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned")(emphasis added).

[299] *Reformulated Gasoline,* 35 I.L.M. at 626; *Import of Shrimp,* 38 I.L.M. at 626; *North Atlantic Coast Fisheries* (G.B./U.S.), 1 Hague Court Reports 141, 169-71 (1910); *Trail Smelter,* 3 R.I.A.A., at 1965. *Cf.* Convention on the High Seas, 29 Apr. 1958, art. 2, 450 U.N.T.S. 82.

[300] Cheng, supra note 242, at 130-32.

[301] *Fisheries,* 1951 I.C.J. at 141-42; Rights of *Nationals of the United States of America in Morocco* (France v. U.S.), 1952 I.C.J. 176, 212; *Admission to the UN,* 1950 I.C.J. at 15 (Dissenting Opinion of Judge Alvarez). It had been argued that even the decision to invoke what is clearly a self-judging provision must be exercised in good faith. Antonio Perez "WTO and UN Law: Institutional Comity in National Security" 23 Yale J. Int'l L. (1998) 301, 332.

[302] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter),* 1947-48 I.C.J. 57, 80 (Separate opinion of Judge Azevedo); Cheng, supra note 242, at 133.

[303] *Cf. Marine International Nominees Establishment (MINE) v. Guinea,* 4 ICSID Rep. 45, 51 (1986) (Supervisory Authority of the Office des Poursuites of Geneva)("In resorting to ICSID arbitration proceedings, MINE waived the ability to request provisional measures against the Republic of Guinea in Switzerland. Therefore, MINE is committing a manifest abuse of the law in invoking these ICSID proceedings to attempt to obtain the maintenance of an attachment ...").

jurisdiction once faced with a competing exclusive jurisdiction clause, and with the language of the *Southern Bluefin Tuna* arbitral tribunal's decision on jurisdiction, which suggests that proceedings brought in breach of an implicit exclusive jurisdictional clause might, in some circumstances, be regarded as abusive.[304]

Where no exclusive or residual jurisdiction clause has been breached, a more complex application of the doctrine might be required. If one perceives adjudication before a specific forum and not before other competent courts or tribunals to be excessively burdensome, without there being a legitimate interest justifying litigation before the selected forum, insistence by the applicant upon his or her unilateral choice of forum might be regarded as wholly unreasonable and therefore - an abuse of right. A situation where such balance of interests might clearly be in place is when the same case is pending or has already been decided by another tribunal.[305] In these circumstances, compelling the respondent party to litigate the same matter before another court or tribunal would certainly cause significant hardship. At the same time, the applicant does not seem to have a legitimate interest in multiple adjudication since he or she could already have their 'day in court'. In other words, the abuse of rights doctrine can serve as an additional justification for the adoption of *lis alibi pendens* and *res judicata* (and *electa una via*) rules, and perhaps even support a liberal construction of their scope of application, so to encompass closely related multiple proceedings, which are extremely onerous for one party and of little relative utility to the other party.[306]

Finally, there is the need to confront difficult cases where it could be argued that a certain forum is more suitable to address certain disputes than the other. The question is whether the abuse of rights theory should justify the introduction of a *forum non-conveniens* doctrine to international law? While adjudication before an inconvenient forum (e.g., unduly distant or expensive) could be regarded as burdensome for an unwilling respondent, there seem to be mitigating factors that probably negate the application of the theory to most forum shopping situations. First, the fact that a

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[304] *Southern Bluefin Tuna,* supra note 78, at 105-06 (still, no such abuse had been found in the circumstances of the case).

[305] Trevor C. Hartley "Antisuit Injunctions and the Brussels Jurisdiction and Judgments Convention" 49 I.C.L.Q. (2000) 166, 167.

[306] The experience of English courts in this context is instructive. There is consistent case law that has applied the doctrine of abuse of process to closely related proceedings, not encompassed by the *res judicata* rule. *Greenhalgh v. Mallard* [1947] 2 All E.R. 255, 259 (C.A.)(Evershed L.J.); *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] A.C. 581, 590 (Lord Kilbrandon); *Dallal* [1986] 1 Q.B. at 452 (Hobhouse J.).

respondent party has at some stage accepted the jurisdiction of the seized forum raises serious doubts on whether adjudication there is in fact excessively burdensome. In other words, the respondent might be estopped by virtue of acceptance of the forum's jurisdiction from arguing that it is exceptionally inconvenient. Second, it could be reasonably argued that the applicant has a legitimate interest in pursuing litigation where he or she may enjoy procedural, tactical or other advantages. Third, most international actors have greater capabilities than ordinary private litigants to conduct even 'inconvenient' litigation. Nonetheless, where it can be shown that the discretion of the applicant in selecting a forum has been exercised in arbitrary or malicious manner - e.g., with the sole purpose of causing undue hardship to the respondent, the abuse of right doctrine should probably enable the seized court or tribunal to decline jurisdiction.

Needless to say, the abuse of rights theory should also apply in respect of litigation tactics exercised by the respondent party to litigation. Where such a party objects to jurisdiction conflicting jurisdiction cases in a malicious or fictitious manner, or if the respondent argues that another forum is more appropriate after it had previously declined to resort to it, the theory would support dismissal of such objections to jurisdiction. This is also the case when the objection is inconsistent with a valid treaty, conferring jurisdiction upon the seized forum.

B. Comity

Another general legal principle, which might be applicable in cases of jurisdictional competition, is the principle of comity applied to judicial matters.[307] According to this principle, which is found in the domestic conflict of laws norms of many countries (mostly from common law systems),[308] courts in one jurisdiction should show respect and demonstrate a degree of deference to the laws of other jurisdictions, including to the decisions of judicial bodies operating in these jurisdictions. For instance, comity might justify recognition of foreign judgments even in the absence of a formal judgment recognition treaty and may support reliance upon foreign court decisions as evidence of

[307] However, it should be noted that the term 'comity' had been used in various different contexts – including as a synonym to public or private international law. Brownlie, *Principles of Int'l Law*, supra note 282, at 29.

[308] *Hilton v, Guyot,* 159 U.S. 113, 163-64 (1895); *The "Abidin Daver"* [1984] A.C. 398, 412 (Lord Diplock); *Dallal* [1986] 1 Q.B. at 461-62. But see Joined Cases 89, 104, 116, 117 and 125-129/85, *Ahlström Osakeytiö v. Commission* [1988] E.C.R. 5193, 5244; Markus Lenenbach "Antisuit Injunctions in England, Germany and the United States: Their Treatment Under European Civil Procedure and the Hague Convention" 20 Loy. L.A. Int'l & Comp. L.J. (1998) 257, 295.

the law of their respective jurisdiction.[309] The same principle may also warrant other manifestations of courtesy towards foreign judicial bodies engaged in adjudicating issues also pending before domestic courts. Indeed, it had been invoked in multiple proceedings situations to justify restraint in the exercise of jurisdiction[310] and in the issuance of extraterritorial remedies, in order to minimise jurisdictional conflicts.[311]

There does not seem to be a compelling reason to restrict the application of the principle of comity to jurisdictional interactions involving domestic courts only. On the contrary, the same consideration supporting the application of the doctrine that can be found in the domestic level (e.g., courtesy, reciprocity, need to coordinate multiple proceedings and reluctance to facilitate evasion from applicable legal standards), apply, perhaps with greater force, in the international sphere, where courts and tribunals function under a common legal umbrella. Indeed, there have been a number of situations in which the doctrine was relied upon directly or indirectly by international institutions,[312] or at least its invocation was considered or advocated.[313] Principles of deference by international bodies to the jurisdiction of other bodies (including national courts) have also introduced into some international agreements.[314]

I. Application of comity to jurisdictional conflicts

Comity should arguably be acknowledged as a positive device in the promotion of the systematic nature of international law. It encourages greater inter-institutional harmony and creates a disincentive to exploit the availability of multiple fora.[315] Further, the principle can be said to create a framework for jurisdictional interaction that will enable courts and tribunals to apply rules originating in other judicial institutions.[316] This, in turn, will encourage cross-fertilisation and may result in increased legitimacy of

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[309] See e.g., *Hilton,* 159 U.S. at 163-64; *Ramsay v. Boeing Co.,* 432 F.2d 592 (5th Cir. 1970); Michael D. Ramsey "Escaping 'International Comity'" 83 Iowa L. Rev. (1998) 893, 901-02.

[310] See e.g., Brussels Convention, art. 22.

[311] This is reflected in reluctance on the part of courts to issue anti-suit injunctions. *Laker Airways Ltd. v. Sabena,* 731 F.2d 909, 934 (1984); *Amchem Products Inc. v. British Columbia (Workers' Compensation Board),* 102 D.L.R. (4th) 96, 125 (Supreme Court of Canada, 1993). Further, some common law courts have used the same rationale to defer jurisdiction where a foreign court has already been seized. *Ronar, Inc. v. Wallace,* 649 F. Supp. 310, 318 (S.D.N.Y. 1986).

[312] See e.g., infra note 320 (review of relations between UN political and legal organs).

[313] See e.g., Perez, supra note 301, at 364-65.

[314] E.g., In the GATT Anti-dumping Code, GATT/WTO Panels are instructed to accord deference to determinations issued by national administrative agencies, where such measures comport with one of the permissible interpretations of the Code. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 15 April 1994, art. 17(6)(i), available at < http://www.wto.org/english/docs_e/legal_e/19-adp.pdf > (last visited on 15 Nov. 2000).

[315] Meron, Norm Making, supra note 65, at 775; Perez, supra note 301, at 372..

international judgments (through utilising the authority of other international courts and tribunals),[317] and in the application of the 'best available rule', reflecting not merely the narrow interests of the parties and the law-applying regime at hand, but also those of the international community at large.[318] For example, a trade tribunal addressing a trade and human rights issue would arguably be better off if it could take into consideration relevant decisions of human rights bodies on the same matter, and if it could, for this purpose, stay proceedings until parallel proceedings already pending before the competing human rights body are brought into completion. Similarly, a court or tribunal exercising discretionary jurisdiction (e.g., the ICJ in the exercise of its advisory functions) might be justified in deciding to defer jurisdiction in favour of another judicial body, which is better situated to address the particular dispute at hand and to take into consideration the various rights and interests of the parties before it.[319]

However, while a rule of comity is certainly desirable, it is far from clear whether such rule can be regarded as part of existing international law. There is far too little relevant judicial practice and not enough international agreements to enable one to treat the principle as amply supported by customary or treaty law. Even in the relations between the ICJ and the political organs of the UN, where some indications of inter-institutional comity exist,[320] the practice has been inconsistent,[321] and it is not clear whether any

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[316] Cheng, supra note 242, at 341-42.

[317] Laurence R. Helfer and Anne-Marie Slaughter "Toward a Theory of Effective Supranational Adjudication" 107 Yale L.J. (1997) 273, 323, 325-26.

[318] Perez, supra note 301, at 364.

[319] E.g., in cases involving private interests, it would be sensible if the ICJ would defer jurisdiction in favour of a forum which enables private litigants to appear before it. See Perez, supra note 301, at 376. In the recent I/A HRC *Consular Assistance* case, the U.S. had argued that the I/A HRC should have exercised comity towards the ICJ, which was better situated to interpret the Vienna Convention on Consular Relations, a general and not a human rights treaty. *Consular Assistance,* supra note 197, (excerpts from U.S Brief of 1 June 1998).

[320] The political organs of the League of Nations have refused on a few occasions (sometimes after seeking the advice of a commission of jurists), to entertain questions which were pending before international judicial bodies. 5 League of Nations O.J. No. 4, at 524-25 (1924)(the Council should not interfere with a dispute pending before another judicial body or another jurisdiction that was accepted by the parties); 8 League of Nations O.J. No. 10, at 1145 (1927)(the Council should not interfere with a dispute pending before the Greco-German Mixed Arbitral Tribunal); Ciobanu, supra note 199, at 221; Ténékidès, supra note 224, at 506-22. There have also been a few occasions in which the Security Council was inclined not to address matters while pending before the Court. U.N. SCOR, 6th Sess., 561st mtg., at 17 (1951)(the representative of India said during the debate over the Anglo-Iranian crisis that "it may not, therefore, be wise or proper for us to pronounce on this question while the same question is sub judice before the ICJ"); Rosenne, 1 *ICJ Law & Practice,* supra note 84, at 155.
This practice can be indicative of the political bodies' support of an international *sub judice* rule, or at least of a rule of institutional comity (i.e., discretionary denial or suspension of jurisdiction. Ciobanu, supra note 199, at 222; Leo Gross "The International Court of Justice and the United Nations" *Essays on International Law and Organization* (1984) 845, 852-53; Ténékidès, supra, at 526-27.
In the same vein, there have also been a few indications of comity exercised by the ICJ towards the Security Council. *Legal Consequences for States of the Continued Presence of South Africa in Namibia*

general rule can be deduced (and even so, it is far from certain whether it could apply by way of analogy to the relations between different judicial bodies). There are also serious problems with incorporating the rule as a general principle of law under article 38(1)(c) of the ICJ Statute. For example, some countries do not exercise comity towards foreign judgments and refuse to grant them any effect at all in the absence of a judgments recognition convention.[322] Similarly, while some countries exercise comity towards foreign judicial proceedings, most legal systems do not prohibit the conduct of cross-boundary parallel proceedings. Therefore, even if one can show that there is ubiquitous acceptance of some notion of comity by all legal systems (e.g., according some consideration to foreign decisions), such common notion seems to be weak-natured and cannot provide a comprehensive solution, or even a significant remedy, to the problem of conflicting jurisdictions.

II. The Pyramids case

So far there has only been one major case where the doctrine of comity has been explicitly invoked by an international tribunal. In *Southern Pacific v. Egypt* (the 'Pyramids case'), an ICSID tribunal was seized with a dispute while related proceedings were already pending before the French Court of Cassation. The arbitral tribunal held that international tribunals have an inherent power to exercise comity towards other tribunals engaged in parallel proceedings and suspended the proceedings:

> "When the jurisdictions of two unrelated and independent tribunals extend to the same dispute ... in the interest of international judicial order, either of the tribunals may, in its

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(South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 12, 22-23 (the ICJ considered itself bound with the SC characterisation of the situation); *Aegean Sea,* 1976 I.C.J. at 13 (the involvement of the Security Council has prompted the Court to refrain from issuing provisional measures, in implicit deference to the Council); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. U.K.) 1992 I.C.J. 3 (Provisional Measures); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. U.S.) 1992 I.C.J. 114 (Provisional Measures)[in both cases the Court gave effect to Security Council Resolution 748 (1992)].

[321] The PCIJ has been typically disinclined to stay proceedings by reason of comity towards the political organs of the League of Nations. This can perhaps be explained by text of the League's Covenant, which may be read as negating the invocation of political organs while judicial proceedings are pending (but not *vice versa*). League of Nations Covenant, art. 15(1); Ténékidès, supra note 224, at 513.
There have also been some instance in which UN political organs have refused to exercise comity vis-à-vis the ICJ. E.g., the refusal of the UNGA in 1960 to adjourn discussion on the question of South West Africa, despite a *sub judice* petition made by South Africa; the issuance of Resolution 748 (1992) by the SC while proceedings in the *Lockerbie* case were pending. See Rosenne, I *ICJ Law & Practice,* supra note 84, at 151-53; Ciobanu, supra note 199, at 223-24.

[322] See e.g., Sweden and Finland. J.J. Fawcett "General Report" Declining Jurisdiction in Private International Law (J.J. Fawcett ed. 1995) 1, 67.

discretion and as a matter of *comity*, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal"(emphasis added).[323]

The decision to suspend proceedings rather than to decline jurisdiction altogether resonates well with an observation made earlier by the tribunal, according to which one of the problems of parallel proceedings might be that both competing fora would end up declining jurisdictions, leaving the applicant without effective remedy ('negative conflict of jurisdictions').[324] Further, it is dubious whether the tribunal could have refused to exercise jurisdiction, despite the agreement of the parties to invest ICSID with jurisdiction over the dispute, solely on the basis of the doctrine of comity.

At a subsequent stage of the proceedings, after the Court of Cassation had issued its decision (refusing to enforce a previous ICC award rendered between the same parties, by reason of lack of jurisdiction), Egypt argued that the ICSID tribunal should also decline jurisdiction over the case by virtue of the French Court decision. In response, the tribunal stated that it could not construe that decision as a bar against its exercise of jurisdiction since that would be inconsistent with the ICSID Convention, which provides that the tribunal should be the ultimate judge of its own competence.[325] However it conceded that "it should give *due consideration* to the pronouncements of other courts and tribunals which involve the same parties and subject matter as the present dispute" (emphasis added).[326] In any event, the tribunal did not find the merits of the decision of the French Court of Cassation to be inconsistent with its assumption of jurisdiction over the case.

While the need to accord due consideration to the domestic court decision has not been explained by the tribunal, it would seem that the same comity rationale that supported the decision in the first jurisdictional phase also supported the decision reached in the second stage of the proceedings. In fact, the purpose of staying the proceedings was to enable the tribunal to consider the position of the domestic court after it had been rendered. Hence, the two decisions seem to be compatible with each other.

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[323] *Southern Pacific*, 3 ICSID Rep. at 129.
[324] *Southern Pacific*, id. at 129. *Cf. Chorzów Factory*, 1927 P.C.I.J. (ser. A) No. 9, at 30.
[325] ICSID Convention, art. 41(1).
[326] *Southern Pacific*, 3 ICSID Rep. at 144. *Cf. Amco Asia*, 1 ICSID Rep. at 460 ("... the judgment of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal").

Although the Pyramids case has dealt with competition between international and domestic tribunals, the ICSID tribunal has adopted a general line of reasoning – alluding to the need to preserve the international legal order, which would seem to apply, *a fortiori*, in cases involving jurisdictional conflicts between international judicial bodies. Further, the legal ground on which the tribunal has based the application of the doctrine of comity – the *inherent powers* of a judicial body, could enable other courts and tribunals, at least those entrusted with some discretion on the manner and timetable in which proceedings are to be conducted,[327] to adopt the same doctrine.[328] At the same time, it is questionable whether courts and tribunals operating under strict procedures and deadlines such as the panels of the WTO DSB could exercise comity in a similar manner, since they appear to lack sufficient discretion to stay proceedings.[329]

III. Exercise of comity by other international courts and tribunals

One can find evidence of implicit application of comity considerations in other decisions of international bodies as well. In the *Melchers* case,[330] the EHR Comm'n held that the law applied by EC institutions contains sufficient human rights protections, and that as a result, the exercise of powers by the EC Commission, which is checked by the ECJ, is shielded from review by the Strasbourg bodies. This vote of confidence as to the ability of the EC to protect human rights can be considered an exercise of comity by the Commission towards the ECJ (especially since it is questionable whether the conditions for regarding the ECJ judgment as *res judicata* have been met).

In fact, every instance in which one court or tribunal relies on the decisions of other judicial or quasi-judicial bodies can be regarded as a grant of 'due consideration' to such decisions, and therefore extension of some degree of comity. However, in contrast to these pro-comity precedents, a request for declining jurisdiction out of comity has been implicitly rejected by the I/A CHR in the recent *Right to Consular Assistance* case, where it was held that the legitimate interest of the states participating in the American human rights system to seek guidance from the Court justifies exercise of the latter's

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[327] See e.g., Rules of the Court of Conciliation and Arbitration within the OSCE, 1 Feb. 1997, art. 27(7); Statute of the International Tribunal for the Law of the Sea, art. 27, Annex VI, UNCLOS; ECJ Rules of Procedure, supra note 175, Rule 31.

[328] *Cf.* the inherent powers of tribunals to apply the doctrine of non-justiciability. Vera Gowland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case" 88 A.J.I.L. (1994) 643, 649; Robert Y. Jennings "The International Court of Justice and the Judicial Settlement of Disputes" *1 Collected Writings* (1974)(1998 reprint) 433, 438-39.

[329] Under the procedure applied by the WTO DSU and NAFTA, arbitral panels must deliver judgments within a fixed period of time. DSU, art. 12.8-12.9, 20.1; NAFTA, art. 2016(2), 2017(1).

discretionary advisory powers notwithstanding the pendency of proceedings on the same question (albeit between different parties) before the ICJ.[331]

In sum, greater exercise of comity by international courts and tribunals might mitigate or, at times, even resolve problems of competing jurisdictions. If parallel proceedings are already pending, courts and tribunals should be allowed to stay proceedings, and where exercise of jurisdiction is discretionary - perhaps even decline jurisdiction, in deference to the first-seized or more appropriate jurisdiction (assuming that the most appropriate jurisdiction can be identified). In cases where a judgment had been rendered by another judicial body, international courts and tribunals should, even if unable to apply the *res judicata* rule (for example, if the conditions - identity of parties and issues, are not fully met), give due consideration to first-in-time decision, with a view of upholding it, unless faced with strong arguments to the contrary.[332] In all of these circumstances, exercise of comity seems to be a desirable course to take, which adequately balances between the need for consistency and coherence on the one hand, and the duty of international courts and tribunals to exercise their powers in an equitable and independent manner, on the other hand.[333] However, desirable as it is, there does not seem to be sufficient authority under contemporary international law to require international courts and tribunals to employ the doctrine.

C. Conflicting treaty obligations

Another approach to the question of conflicting jurisdictions is to analyse the phenomenon in accordance with the law of treaties, as specified in the Vienna Convention on the Law of Treaties.[334] While the Vienna Convention only regulates inter-state treaties, its principal rules are considered also to apply in circumstances involving non-state parties.[335] Under the proposed legal edifice, acceptance of a forum's

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[330] *Melchers*, 1990 Y.B. Eur. Conv. on H.R. at 138.

[331] *Consular Assistance,* supra note 197, at par. 54-64.

[332] There is clear precedent under domestic law for such an approach. See e.g., *Dallal* [1986] 1 Q.B. at 455-56, 461-62; Ramsey, supra note 309, at 900.

[333] Jonathan Charney "The Impact on the International Legal System of the Growth of International Courts and Tribunals" 31 N.Y.U.J. Int. L. & Pol. (1999) 697, 707; Meron, Norm Making, supra note 65, at 775.

[334] Rosenne, II *ICJ Law and Practice,* supra note 84, at 531. But see, Meron, Norm Making, supra note 65, at 758.

[335] Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations, 21 March 1986, 25 I.L.M. (1986) 543. The provisions of 1986 Convention were based on the 1969 Vienna Convention. Catherine Brölmann "The 1986 Vienna Convention on the Law of Treaties: The History of Draft Article 36bis" *Essays on the Law of Treaties* (Jan Klabbers and René Lefeber eds. 1998) 121, 122-23.

jurisdiction by state or non-state actors should be treated as any other treaty obligation, and jurisdictional conflicts - as any other conflicting treaty obligations.

But, before reconciling inconsistent treaty provisions, one must first assert that a genuine conflict exists. This will be possible only after all interpretative attempts to construe the two or more separate treaty obligations as compatible with each other had failed.[336]

Hence, to the extent that competing jurisdiction-regulating provisions specifically address the relations between them, the question of conflict does not arise and the express treaty language would prevail.[337] This is for example the case where an instrument providing for residual jurisdiction 'competes' with an exclusive jurisdiction clause, and where competition involves an instrument contains a 'saving clause' preserving the authority of pre-existing arrangements[338] or an 'overriding clause' granting preferential status to obligations undertaken thereby.[339]

Similarly, where invocation of one provision does not necessarily imply a breach of the other jurisdictional provisions, there is no genuine conflict. This is for instance the case when two non-exclusive and non-residual jurisdictional provisions compete. Since resort of the parties to non-exclusive arrangements is always discretionary, a choice of one particular procedure does not violate the text or spirit of the other non-exclusive arrangement. However, in circumstances where non-flexible and flexible jurisdictional provisions compete (e.g., exclusive and non-exclusive jurisdiction clauses), the invocation of the non-flexible jurisdictional regime would not necessitate a breach of the flexible one, whereas the invocation of the flexible jurisdiction might be inconsistent with the non-flexible treaty obligation. In these circumstances, the requirement of reconciling treaty obligations would seem to justify granting preference to the first and more exacting arrangement.

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[336] Vienna Convention, art. 31(3)(c)(Treaty interpretation shall take into account "any relevant rules of international law applicable in the relations between the parties"); Sands, Treaty, Custom and Cross-Fertilization, supra note 179, at 87. This proposition is supported by the *travaux preparatoires* of the Vienna Convention. *United Nations Conference on the Law of Treaties, Official Records*, 2nd Sess., 13th Plenary mtg., 6 May 1969 (1970) p. 56 [statement by Mr. Kearney (U.S.)].

[337] Vienna Convention, art. 30(2). See Anthony Aust, *Modern Treaty Law and Practice* (2000) 174-77; Arthur Watts, *The International Law Commission 1949-1998* (1999) 675-76.

[338] See e.g., EC Treaty, art. 307 (ex-article 234).

In cases where true conflicts arise,[340] one should try to accommodate them utilising traditional rules for settling normative conflicts. The most important of these can be found in article 30(3) of the Vienna Convention which provides that where different treaties to which the same two or more states are parties contain incompatible provisions, the provisions of the treaty concluded later in time shall prevail in the relations between these state parties. In other words, where two or more inconsistent treaty obligations, containing jurisdiction-regulating clauses, are in force between the same parties, the clause that came later into effect in the legal relations between the parties should, as a rule, govern.[341] This means, for example, that an *ad hoc* compromis to refer a specific dispute after it had arisen to a certain judicial body will generally overcome any other earlier-in- time general jurisdiction provision.[342] Indeed, the PCIJ in the *Mavrommatis* case has reached the conclusion that a specific jurisdiction-conferring instrument should override an earlier in time general jurisdiction-conferring instrument.[343] However, it can also be maintained that unless the language of the later instruments suggests otherwise, the parties have intended to create only concurrent jurisdictions and that the exclusivity of the later-in time arrangement should not be necessarily presumed.[344] Thus, it is not clear whether the conclusion of a new *compromis* creates an irreconcilable conflict with a pre-existing jurisdictional regime.

It should also be noted that it is not clear whether article 30(3) intended to negate the application of the traditional *lex specialis* rule,[345] in all cases where the specific

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[339] Article 103 of the UN Charter, which gives an overriding force to obligations under the Charter, is a provision of this type. However, it has no bearing upon the jurisdiction of the ICJ.

[340] *Cf.* the Supreme Court of the U.S. has defined a true jurisdictional conflict in very narrow terms so as to exclude situations where an act prohibited by one jurisdiction is not compelled by the other. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 799 (1993).

[341] For example, in the *Lockerbie* cases, Libya had argued that the Montreal Convention dispute settlement provisions are *lex specialis* and *lex posterior* with relation to the dispute settlement provisions found in the UN Charter. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. U.K.) 1998 I.C.J. 9, 18 (Jurisdiction); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. U.S.) 1998 I.C.J. 115, 123 (Jurisdiction).

[342] *Cf.* Rosenne, I *ICJ Law and Practice,* supra note 84, at 156. For support, see *Southern Pacific*, 3 ICSID Rep. at 149-50; Schreuer, supra note 40, at 170.

[343] *Mavrommatis,* 1924 P.C.I.J. (ser A) No. 2, at 32. *Cf.* International Law Commission, *Summary Records of the 421st Meeting* [1957] Y.B. Int. L. Comm. 191(statement by Sir Gerald Fitzmaurice)("... if two States which were bound by their acceptance of the optional clause in the Statute of the International Court of Justice had concluded a special treaty stipulating that disputes on the specific matters dealt with in that treaty should be referred to arbitration, it might well be that the latter jurisdiction would prevail").

[344] *Klöckner v. Cameroon,* 2 ICSID Rep. at 13-14, 17-18, 68-70. See also *Chorzów Factory*, 1927 P.C.I.J. (ser. A) No. 8. at 30.

[345] Sinclair believes that the failure of the Vienna Convention to address this issue should not be construed as the abolition of the *lex specialis* rule, which remains "widely supported in doctrine" and can be applied as a rule of interpretation. Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984) 96-98.

jurisdiction clause was concluded before the more general one. However, a reasonable reading of the Vienna Convention would suggest that unless intent to preserve the validity of the specific and earlier undertaking had been shown, the latter in time provision would prevail.[346]

Nevertheless, it is submitted that law of treaties norms regulating conflicting jurisdictional provisions are of limited value to the present study. True conflicts can be identified in two principal situations – when two exclusive jurisdiction clauses compete (positive conflict) or when two residual jurisdiction clauses compete (negative conflict). But given the scarcity of exclusive and residual jurisdiction arrangements, the number of situations in which a conflict between two such arrangements will take place is bound to be very limited.[347] In almost all other cases, the application of conventional provisions could arguably be reconciled with each other. To these jurisdictional interactions the Vienna Convention offers little guidance and the parties may, in effect, choose which jurisdiction to invoke (with the aforementioned exception of situations where the parties must prefer an inflexible jurisdictional clause over a flexible one).

As to the question of multiple proceedings, again, the paucity of treaty language on the subject renders the text of the Vienna Convention largely irrelevant. However, it can probably be contended that invocation of a jurisdictional clause in the face of a co-existing or previous set of proceedings should be regarded as a case of exercise of a treaty right in bad faith, in breach of article 26 of the Convention.

3. Interim conclusions

What can one learn from the range of legal principles explored in this Chapter on the norms that presently govern jurisdictional competition between different international courts and tribunals? The answer to this question can best be presented if one were to divide it into three parts, addressing separately choice of forum, parallel proceedings and successive litigation.

Choice of forum

[346] This is supported by the *travaux preparatoires* of the Convention. *UN Law of Treaties Conf., Off. Rec.*, supra note 336, at 253 (1970)[statement made in 91st mtg. of the Committee of the Whole, 16 April 1969 - by Mr. Yasseen (Chairman of the Drafting Committee)]. See also McNair, supra note 298, at 218. But see, Aust, supra note 337, at 183.

[347] Even then, specific 'saving clauses', might defuse the conflict and sustain jurisdictional concurrency.

There has not been so far any consistent practice that substantiates a general principle of law restricting choice of forum by parties to an international dispute in a meaningful manner. This proposition is confirmed both by the practice of the PCIJ, which has been reluctant to decline jurisdiction unless clear manifestation of an intent to invest exclusive jurisdiction with another forum had been shown, and by the absence of a general principle of law that can be derived from municipal law, supporting such a restrictive effect (as is demonstrated by the widespread resort to forum shopping under domestic law). Further, given the legitimacy of forum selection as a manifestation of party autonomy, limitations on the power to choose cannot be derived from general notions of abuse of right (or good faith) nor comity, since both principles permit reliance upon legitimate considerations.

However, there could be certain situations where a specific exercise of choice of forum could be deemed illegal. This is arguably the case where proceedings had been initiated in breach of a valid jurisdictional arrangement (e.g., one investing exclusive competence with a different judicial body). In these circumstances, the act in question would be precluded both by the law of treaties and by the international theory of abuse of rights. As a result, the improperly seized court or tribunal should decline jurisdiction over the dispute,[348] an outcome supported by general policy considerations of legal certainty and promoting the goals of the exclusively designated forum.

Similarly, some extremely burdensome litigation tactics, which do not serve a legitimate purpose, can be deemed abusive and thus proscribed. However, there is no known precedent under international law for finding a specific act of forum shopping to fall under this category, and it is quite hard to imagine a case where this ground will be applied (except perhaps in the context of multiple proceedings).

Parallel proceedings

The question of parallel proceedings does seem to be regulated only to some extent by current international law and there is no sufficient judicial practice to warrant definitive conclusions. While judicial bodies, including the ICJ, have not ruled out the existence of a *lis pendens* rule, one ICSID tribunal has explicitly rejected this possibility (although it did apply a rule of comity instead).

[348] Alexandrov, supra note 59, at 104-05.

However, the assertion that one can find some recognition of the *lis alibi pendens* rule in every domestic law does appear plausible. As a result, this rule may probably qualify as a general principle of law. Further, it would also seem that in the absence of strong legitimate interests which would justify the invocation of parallel proceedings, such conduct might be characterised as an abuse of right and thus prohibited by general international law.

Finally, it has been suggested that a principle of inter-institutional comity might be emerging, as demonstrated in the practice of several international courts and tribunals. The adoption of such a principle in the future might encourage courts and tribunals in parallel proceedings situations to use their discretion in order to stay, or even refuse jurisdiction in the face of proceedings already invoked before a competing forum.

Successive proceedings

The last, and perhaps most detailed-regulated interaction between proceedings before different international courts and tribunals can be found in situations of successive proceedings. Here, there is clear case law that suggests that international law recognises a binding rule of *res judicata* precluding the re-litigation of settled disputes. The same conclusion may also be supported through application of the abuse of right theory (re-litigation serves no legitimate interest and is, at the same time, excessively burdensome for the unwilling respondent).

Even where the strict conditions for application of the *res judicata* rule (same parties, same issues) had not met, the principle of comity might, and arguably should, justify giving due consideration to the reasoning employed by the first in time jurisdiction, with a view of promoting the harmonisation of international law. This might create in effect a presumption in favour of issue-estoppel and *stare decisis*, which may be rebutted only upon a showing of strong reasons of justice.

Chapter Seven:
Possibilities for future improvement

The last Chapter of the study will concisely survey possible solutions to some of the problems that might arise out of jurisdictional competition, in light of the findings reached so far on the nature of international law, in general, and the international judiciary, in particular. Some of these ideas are modest reforms, which can be introduced with relative ease, whereas others challenge the very foundations of international law, as we know it. For the sake of brevity, the discussion below will mainly concentrate on examining the more 'realistic' proposed measures, towards the realisation of which this dissertation hopes to contribute, and will only cursorily mention more 'utopian' alternatives, which will most probably not be executed in the foreseeable future.

1. Structural reform

As was already elaborated at some length, international courts and tribunals do not constitute at present a real judicial system (i.e., a structured or organised institutional order). Consequently, the level of co-ordination and harmonisation found between the various existing judicial bodies is minimal and it is conceivable that different courts and tribunals might render inconsistent decisions, even in the context of a single dispute. This state of things might create incentives for parties to exploit jurisdictional competition - to engage in abusive forum shopping, to initiate multiple proceedings and to try and challenge final judgements. It is submitted that better inter-judicial structures, aimed at improving co-ordination and harmonisation between competing fora, will remove a principal impetus for exploiting jurisdictional concurrency, which now occurs with increased frequency. Arguably, if parties to a dispute will expect that a more or less similar outcome would to be reached in all amenable jurisdictions, they will be less keen on forum shopping and more inclined to litigate all claims arising out of a single international dispute before one forum only.

A. Jurisdictional re-organisation

Structural reforms should thus aim to re-organise the correlative jurisdictional links in place between different judicial bodies, with the view of improving their coherence. Theoretically speaking, one such possible reform could have been undertaken through the introduction of international legislation seeking to redefine the existing jurisdictional

ambits of judicial bodies, in order to minimise conflicts (e.g., through a general treaty according preference to specific or regional jurisdictions over general ones), which will be complemented through the enumeration of 'conflict of jurisdictions' rules.

An even more ambitious scheme would have created a universal appellate court, similar to a national supreme court, and invest it with mandatory jurisdiction.[349] Clearly, by channelling appeals from different jurisdictions into one central entity, greater uniformity could be introduced into the law. The ICJ would obviously be a leading candidate to serve as such a global supreme court. This is because it is placed in a unique position as the only permanent court of universal and general subject matter jurisdiction, and the principal judicial organ of the UN - the leading international organisation.[350] Further, a claim to the potentially superior status of the ICJ could also be supported on the basis of the quality of the Court's work, its widely representative composition,[351] its longevity and the *de facto* acceptance of the Court's seniority by some of its counterpart institutions and by many jurists.[352] However, clearly, the rules of procedure of the ICJ, most importantly - its rules of standing, will have to be radically changed for it to assume the responsibilities of a truly supreme court.[353] Another dramatic change will be needed in the pace in which the ICJ handles its caseload, in order to accommodate new adjudicative business.[354]

A more modest proposal would invest the ICJ with mandatory universal jurisdiction to arbitrate jurisdictional disputes over which competent jurisdiction should hear the merits

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[349] See e.g., Jennings, The ICJ and Judicial Settlement, supra note 328, at 437. Jennings proposed to invest the ICJ with powers to examine appeals on questions of law arising from proceedings before non-binding procedures, along the lines of the relations that had existed between the ECHR and the EHR Comm'n. He also suggested to channel first instance ICJ cases to Chambers and to authorise the plenary Court to sit in appeal over these decisions.

[350] *Legality of Nuclear Weapons,* 1996 I.C.J. at 345 (Dissenting Opinion of Judges Weeramentry)(ICJ is at the apex of international tribunals); Robert Y. Jennings "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers" 9 A.S.I.L. Bulletin (1995) 2, 6.

[351] However, there is at least one tribunal – ITLOS, which is even more representative than the ICJ.

[352] *President of the World Court Warns of 'Overlapping Jurisdictions' in Proliferation of International Judicial Bodies*, UN Press Release GA/L/3157, 27 Oct. 2000, available at <http://www. pict-pcti.org/ news/archive/months2000/october/ICJ.10.27.prolif.html> (last visited on 15 Nov. 2000) ("[the ICJ is] the only court with a universal general jurisdiction, and in addition, its age endowed it with special authority"); Georges Abi-Saab "Fragmentation or Unification: Some Concluding Remarks" 31 N.Y.U.J. Int. L. & Pol. (1999) 919, 929; Rosenne, 3 *ICJ Law and Practice,* supra note 84, at 1609; Jonathan Charney "Third Party Dispute Settlement and International Law" 36 Colum. J. Transnat. L. 65, 73; Shigeru Oda "The International Court of Justice from the Bench" 244(VII) Recueil des cours (1993) 9, 145.

[353] See e.g., Ernst-Ulrich Petersmann "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?" 31 N.Y.U.J. Int. L. & Pol. (1999) 753, 787.

[354] Jonathan I. Charney "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea" 90 A.J.I.L. (1996) 69, 74.

of a specific dispute. This would put the ICJ in a position similar to that enjoyed by the ECJ in relation to disputes arising under the Brussels and Lugano Jurisdiction and Judgements Conventions as to which national court should hear a cross-boundary dispute.[355] Such allocation of jurisdiction powers would arguably improve inter-jurisdictional co-ordination and provide practical solutions to many cases of inter-fora competition.

The main shortcoming of all these alternatives is that their realisation requires a radical change of the present state of international law, which can only be achieved through the conclusion of a new international treaty or even a number thereof. At present, the prospects of such international legislation are very slim.[356] It is unlikely that states would be willing to reopen delicate and laborious agreements on the scope and nature of the jurisdiction granted to dispute settlement bodies, nor accept the empowerment of the ICJ to hear many cases, which many states have excluded from its compulsory jurisdiction for a good reason.

The unhappy fate of the ILC Model Draft on Arbitral Procedure,[357] which merely sought to strengthen the binding nature of arbitration clauses and introduce limited judicial supervision over the arbitral process, is illuminating. The failure of states to agree even upon such a modest reform suggests that states might be reluctant to improve adjudication mechanisms to the extent that such reform is perceived to hamper their freedom of procedural manoeuvring during the dispute resolution process[358] and to unduly commit them to the compulsory jurisdiction of the ICJ.[359] Although nearly half a century has passed since then, the still modest rate of acceptance of the compulsory jurisdiction of courts and tribunals invested with general jurisdiction (e.g., ICJ and the CSCE/OSCE Court of Arbitration),[360] as opposed to the wide acceptance of the compulsory jurisdiction of judicial bodies linked to a specific regime (where

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[355] Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 3 June 1971, art. 1, 1975 O.J. (L204) 28.

[356] *ICJ President Warns of Overlapping Jurisdictions*, supra note 352 (states do not seem to have the will to invest the ICJ with appellate or review jurisdiction); Charney, 3rd Party Dispute Settlement, supra note 352, at 71, 74.

[357] Model Draft on Arbitral Procedure, U.N. Doc. A/3859, 1958 (II) Y.B. Int. L. Comm. 80-88.

[358] Charney, 3rd Party Dispute Settlement, supra note 352, at 70; Stephen M. Schwebel "The Prospects for International Arbitration: Inter-State Disputes" *Justice in International Law* (1994) 223, 226-27.

[359] Schwebel, Prospects for Int'l Arbitration, supra note 358, at 227.

[360] Only some 60 of the 190 parties to the ICJ Statute have accepted the compulsory jurisdiction of the ICJ. Only 5 out of 29 state parties have accepted the compulsory jurisdiction of the CSCE/OSCE Court in arbitration cases.

compulsory adjudication is deemed an indispensable part of the regime), suggests that these policy trends are still in place.

Further, international legislation is an expensive and time-consuming process. It is improbable that states would be willing to enter into difficult questions such as the relations between various international courts and tribunals (and, as a result, into the relations between different international sub-systems) and the reallocation of dispute settlement competencies, unless the current situation is perceived to be intolerable. Arguably, since no major jurisdictional clash has occurred to date, the international community still tolerates jurisdiction competition, by and large.

B. Expansion of the advisory jurisdiction of the ICJ

Hence, less dramatic measures need to be explored. Some of the more feasible potential reforms, which have been the subject of considerable debate, have sought to augment the coordinative and harmonising role of the ICJ, in recognition of its unique position under international law, while preserving sufficient procedural flexibility for potential litigants.

One possibility contemplated of recent has been to introduce an amendment in the ICJ Statute and to open it to litigation involving IGOs as parties to contentious consent-based cases, and to increase thereby the Court's docket and sphere of influence.[361] Another proposal has been to expand the Court's advisory jurisdiction so as to enable other international courts and tribunals to access it and receive legal guidance in the form of advisory opinions.[362] This idea was recently reintroduced by the

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[361] Two recent proposals, submitted by Guatemala and Costa Rica to the UN Special Committee on the Charter of the United Nations, sought to open the jurisdiction of the Court to public IGO. Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, 52 GAOR Sup. 33, para. 101-116, U.N. Doc. A/52/33 (1997).

[362] See e.g., V *UNCLOS– Off. Rec.*, supra note 75, at 38 [summary record of statement made Mr. Driss (Tunisia)](the new ITLOS should be able to request advisory opinions from the ICJ). Similarly, on a few occasions it was offered to allow other international actors to request such opinions with respect of some or all issues of international law. The actors so identified had been:
a) national courts - Pierre-Marie Dupuy "The Danger of the Fragmentation or Unification of the International Legal System and the International Court of Justice" 31 N.Y.U.J. Int. L. & Pol. (1999) 791, 800-01; Jennings, The ICJ and Judicial Settlement, supra note 328, at 447-48; Jennings, New Look at Adjudication, supra note 77, at 464; Petersmann, Constitutionalism and Int'l Adjudication, supra note 353, at 787; Schwebel, Relations Between the ICJ and the UN, supra note 238, at 18-19; Ignaz Seidl-Hohenveldern "Access of International Organizations to the International Court of Justice", in *ICJ Future Role After 50 Years*, supra note 239, at 189-203; Louis B. Sohn "Broadening the Advisory Jurisdiction of the International Court of Justice" 77 A.J.I.L. (1983) 124, 126-29; b) the Secretary-General of the UN - Gilbert Guillaume "The Future of International Judicial Institutions" 44 I.C.L.Q. (1995) 848, 853; Stephen M. Schwebel "Authorizing the Secretary-General of the UN to Request Advisory Opinions of the ICJ" *Justice in International Law* (1994) 72, 82; and c) individuals -

outgoing President of the ICJ, Stephen Schwebel in a speech before the UN General Assembly.[363] It was proposed that such requests may take the form of an appeal (as is the case with the ILO Administrative Tribunal) or that of a reference for preliminary ruling [along the model of article 234 (ex-article 177) of the EC Treaty].[364]

Allegedly, this last proposed reform would enable the ICJ to influence substantive decisions of other judicial fora and to promote greater harmonisation between the jurisprudence of international courts and tribunals. Moreover, this reform seems to be relatively practicable because it necessitates only minor changes in existing law. In order for it to materialise, the UN General Assembly should directly authorise the concerned judicial bodies to request advisory opinions, or create and authorise a new special UN committee to review requests for advisory opinions and forward them, when deemed necessary, to the Court.[365] In fact, it could be argued that even at present, UN judicial bodies such as the two *ad hoc* Criminal Tribunals could request advisory opinions through the Security Council. However, there might be courts and tribunals whose statutes, or at least, rules of procedure, will need to be amended in order to facilitate referral of requests for advisory opinion to another judicial body. At least with regard to 'self-contained' judicial bodies such as the ECJ, which might be reluctant to give up their independence in favour of review by an outside judicial body, a change of their constitutive instruments along these proposed lines seems unrealistic.[366]

Attractive as those proposals may be seen on a theoretical level, it is quite unlikely that they will be embraced anywhere in the near future.[367] One of the reasons for the recent

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Mark W. Janis "Individuals and the International Court" in *ICJ Future Role After 50 Years,* supra note 239, at 205, 210-15.

[363] Stephen M. Schwebel, Address to the Plenary Session of the General Assembly of the UN, 26 Oct. 1999 available at < http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA54_19991026.htm >(last visited on 1 Oct. 2000). See also Dupuy, supra note 362, at 800; Guillaume, supra note 362, at 862; Jennings, Proliferation of Adjudicatory Bodies, supra note 350, at 7.

[364] Abi-Saab, Fragmentation or Unification, supra note 352, at 928. A similar idea was raised by the German delegate to UNCLOS who proposed to enable *ad hoc arbitral* tribunals operating under Chapter XV of the Convention to request advisory opinions on questions of law from either the ICJ or ITLOS. V *UNCLOS– Off. Rec.,* supra note 75, at 12. An echo to this idea is found in article 188(2)(b)-(c) which permits arbitration tribunals established under Chapter XI of UNCLOS to request interpretative rulings from the Sea-Bed Disputes Chamber.

[365] Schwebel, Address to the Plenary Session, supra note 363, at para. 19.
A similar arrangement was proposed with relation to the stillborn ITO. Charter for an International Trade Organisation, art. 96, *United Nations Conference on Trade and Employment - Final Act and Related Documents*, 24 March 1948, U.N. Doc. ICITO/1/4 (1948).

[366] See *Draft EEA Agreement,* supra note 10, at 6100-05. *Cf.* Opinion 2/94, *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms,* [1996] E.C.R. I-1759 (holding that the Community does not have competence to accede to the European Human Rights Convention).

[367] Treves, Recent Trends, supra note 16, at 435.

proliferation of international courts and tribunals has been the perception that the ICJ is ill equipped to address certain categories of disputes and that it is an inhospitable forum to some states. Reintroducing the ICJ as a mandatory global jurisdiction in the backdoor will therefore raise numerous objections. Furthermore, the anachronistic procedure employed by the ICJ makes it inaccessible to important international actors (IGOs and private parties) and not a very attractive option in terms of time and cost-efficiency even for states subject to its jurisdiction. Finally, the introduction of another onerous procedural stage, to what is already considered as an excessively long process, would further prolong the duration of international adjudication and might turn it into a wholly unattractive avenue. These stark observations are particularly timely given the manifest inability of the ICJ to keep up even with its current docket (i.e., the rate of submission of cases to the Court exceeds the rate of judgements).[368] In these circumstances, the proposal to open up the doors of the Court to a flood of additional cases seems to be both impractical and unwise.[369]

C. The desirability of creating new courts and tribunals

Another structural issue, which ought to be briefly addressed, is the effect of the problem of competing jurisdictions on the inclination of the international community to create new courts and tribunals. As already observed, little attention has been given until now to this potential systematic problem. However, this study has shown that the current situation, while advantageous in some aspects, might also generate increasingly dangerous inter-jurisdictional tensions with the potential of fragmentising international law and undermining its credibility. Hence, the utility of creating more courts and tribunals should be carefully balanced against the disruptive systematic effect generated thereby.[370] Even where the factors supporting the creation of a new procedure outweigh these amassed against it (after considering, *inter alia,* the alternative of referring disputes to a pre-existing forum),[371] the drafters of the constitutive instruments of new bodies should seek to introduce into these texts jurisdiction-regulating provisions designed primarily to prevent multiple adjudication of the same dispute and intended to improve, as far as possible, inter-fora co-ordination and harmonisation.

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[368] Charney, Implications of Expanding Int'l Dispute Settlement, supra note 354, at 74.
[369] See Hugh Thirlway "Comment" 9 A.S.I.L. Bulletin (1995) 47, 48.
[370] *ICJ President Warns of Overlapping Jurisdictions*, supra note 352; Schwebel, Address to the Plenary Session, supra note 363, at para. 20. Indeed, the decision not to create the Sea-Bed Disputes Chamber as an independent tribunal, but rather to incorporate it in ITLOS, was influenced to some degree by the desire to save expenses and to reduce the proliferation of jurisdictions, with all of the entailed complexities. V *UNCLOS– Off. Rec.*, supra note 75, at 12.
[371] See e.g., Jennings, The ICJ and Judicial Settlement, supra note 328, at 438.

2. Increased judicial co-operation

Given the vast difficulties in introducing structural reform, a first and perhaps more realistic step in addressing the problems arising out of the multiplication of international courts and tribunals is to increase the existing level of co-operation between the various judicial bodies. Such improvement can take various forms. However, all possible methods should aim to encourage increased jurisprudential consistency and strive to contribute towards the development of a more coherent 'community of law'.[372] As already observed, greater similitude between the prospective decisions of different fora (especially in relation to issues that might influence the parties' choice of forum - e.g., scope of state responsibility, binding nature of interim measures, etc.) would remove a major incentive for abusive forum shopping, pursuing parallel proceedings and challenging final decisions.[373]

A. Exercise of comity

There are several practical ways through which judicial co-operation and co-ordination may be enhanced. One major avenue is for international courts and tribunals to exercise comity towards each other. This would mean that international judicial bodies would generally defer to pre-existing judicial pronouncements of other international courts and tribunals, on disputes pending before the seized forum, unless overriding considerations mandate otherwise.[374] Thus, adjudicating a case which is pending or already had been decided by another international forum, might be viewed as inconsistent with judicial propriety,[375] even if the strict conditions for the application of the *lis alibi pendens* and *res judicata* rules have not been met. The same rationale may also warrant procedural decisions designed to facilitate such cross-fertilisation (e.g., stay of proceedings until the concurrent jurisdiction has produced a decision).[376] Discretionary decline of jurisdiction should, however, be exercised only when it is obvious that no serious injustice has been inflicted upon the parties to litigation (i.e., that they have no legitimate interest in multiple proceedings).

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[372] Ronald Dworkin, *Law's Empire* (1986) 243-44.

[373] See e.g., Helfer, supra note 27, at 308.

[374] See *Southern Pacific*, 3 ICSID Rep. at 144. Abi-Saab, Fragmentation or Unification, supra note 352, at 929.

[375] Gowland-Debbas, supra note 328, at 652. See also *Northern Cameroons*, 1963 I.C.J. at 29 ("There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore"). It is at least arguable that abusive and unjust litigation tactics may fall within these 'Inherent limitations' by which 'courts of justice' are bound.

[376] See *Southern Pacific*, 3 ICSID at 129.

This notion of collegiate respect can operate not only in the context of a single dispute or related questions, but it may also warrant due amount of deference towards the jurisprudence developed by judicial bodies in their area of specialty, or under general international law, whenever a similar legal issue is brought to litigation before another forum (i.e., a relative *stare decisis* rule). Being a rule of discretion, which can be deemed inherent to the proper function of judicial bodies, it can be argued that rule of comity could be developed by international courts and tribunals even at present, without any formal act of international legislation.

The combination of the exercise of comity with the application of the established jurisdiction-regulating rules of *lis alibi pendens* and *res judicata* (in cases which meet identity of parties and issues requirements) would resolve many of the problems associated with overlapping jurisdictions. It would also probably result in more consistent decisions, thus taking away many of the incentives for engaging in inappropriate litigation tactics.

It must however be realised that the introduction of comity would only improve inter-judicial harmonisation, if courts and tribunals with the potential ability to provide judicial guidance to their counterparts must construe their role accordingly. Hence, for example, the ICJ should perhaps put greater focus on clarifying the legal standards applicable in the cases presented before it, even at the expense of accommodating the peculiar interests of the immediate parties to the dispute at hand. The tendency of the Court in recent years to concentrate on satisfying the needs of the parties before it has resulted, according to one notable scholar, in the '*arbitralisation*' of international adjudication, at the cost of diminishing the traditional law-pronouncing function of the judiciary.[377] In other words, judicial bodies must live up to their role as *de facto* law-creating agencies in order to serve as effective agents for increased harmonisation of international law.

B. Exchange of information

Another, simple, and yet important measure that might improve inter-fora co-ordination is for courts and tribunals to engage in regular exchange of information.[378] Clearly, only

[377] Georges Abi-Saab "The International Court of Justice as a World Court" *Fifty Years of the International Court of Justice* (Vaughan Lowe and Malgosia Fitzmaurice, eds., 1996) 3, 9. See also Dupuy, supra note 362, at 806-07.

[378] Directorate of Human Rights of the Council of Europe, *Effects of the Various International Human Rights Instruments*, supra note 140, at 4; *ICJ President Warns of Overlapping Jurisdictions*, supra note

awareness to the jurisprudence of competing fora could sustain efforts to seek greater judicial harmonisation. The actual transfer of information can be promoted through *ad hoc* mechanisms such as informal meetings between judges and officials from the different courts and tribunals, better publicity to the work of the various judicial bodies and through academic work aspiring to identify potential discrepancies between the decisions of the various judicial bodies.[379] It would also be desirable if judges from one judicial institution were to be appointed, in due course, to serve in a different international court or tribunal.[380] However, such interaction can also be formalised through inter-institutional agreements providing for regular or upon-request furnishing of information, such as that concluded between the UN and ITLOS.[381]

3. Better strategic planning on the part of states

Another method to mitigate the problems associated with conflicting jurisdiction is for states to plan ahead and attempt to improve co-ordination between their various procedural obligations to submit to dispute resolution. Besides the previously mentioned possibility of introducing treaty provisions to govern jurisdictional competition, states may also act unilaterally in the same vein. One such possible course of action has been the submission of reservations to instruments of acceptance of jurisdiction, designed to create improved jurisdiction-regulating arrangements. Thus, states entering new treaty regimes can, with relatively little effort, improve upon the regime's own jurisdictional provisions and insulate themselves from excessively burdensome multiple litigation. For example, as was noted before, a substantial number of countries have entered reservations to the jurisdiction of the HRC under the Optional Protocol, thereby limiting their exposure to multiple proceedings.

Additionally, parties to a dispute, acting in unison, can attempt to create rudimentary hierarchical structures between international judicial fora. This can be done, for

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352 ("Judges must engage in constant inter-judicial dialogue and relations between the courts needed to be institutionalized").

[379] Helfer and Slaughter, supra note 317, at 372-73.

[380] Meron, Norm Making, supra note 65, at 776; Dean Spielmann "Human Rights case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities" *The EU and Human Rights* (Philip Alston ed. 1999) 757, 780. There have been some examples of this trend: Lord McNair had been a judge of the ICJ and the ECHR; Prof. George Abi-Saab has served as an *ad hoc* ICJ judge, an ITFY judge and is now a member of the WTO Appellate Body; Mohamed Shahabuddeen has served as an ICJ judge and is now a member of the ITFY/ITR Appellate chamber; and Thomas Buergenthal has served on the I/A CHR, the HRC and the ICJ.

[381] See e.g., Agreement on Cooperation and Relationship Between the United Nations and the International Tribunal for the Law of the Sea, 8 Sept. 1998, G.A. Res. 52/521, U.N. GAOR, 52nd Sess., 92nd plen. mtg., U.N. Doc. A/RES/52/521 (1998).

instance, by way of agreeing in the *compromis* or the relevant compromissory clause to invest a court or tribunal with full-fledged or partial appellate jurisdiction (e.g., appeal *de novo* or power of revision) over decisions of the forum selected to hear the merits of the case. Such course of action, which had been taken during the inter-war period with respect of some Mixed Arbitral Tribunals, could introduce greater harmonisation between the decisions of bodies subject to common judicial controls.[382]

Finally, states and other international actors can also contribute to the promotion of the process of cross-fertilisation between international courts and tribunals. Increased reliance by parties to international proceedings on decisions rendered by a wide-as-possible variety of judicial bodies would minimise the risk that courts and tribunals would inadvertently promulgate decisions inconsistent with the earlier case law of other fora.

4. Interim conclusions

Although structural reform of the current international judiciary seems to be farfetched, particularly from a political point of view, a host of measures could be taken even now to improve upon jurisdictional co-ordination and harmonisation and to mitigate some of the problems associated with jurisdictional competition.

It has been proposed that international courts and tribunals should adopt the principle of comity vis-à-vis each other and pay due consideration to the decisions of their counterparts, in general, and in disputes submitted to multiple proceedings, in particular. It was also suggested that this principle might justify procedural measures such as stay of proceedings in the face of parallel proceedings in order to promote inter-fora co-ordination. Another idea was to encourage courts and tribunals to improve their formal and informal relations and learn more on each other activities. Finally, it seems that states and other international actors may also contribute to greater inter-jurisdictional harmony through insistence upon unilateral or common jurisdiction-regulating provisions and through consistent reliance on the case law of international judicial bodies in litigation before other fora.

[382] Abi-Saab, Fragmentation or Unification, supra note 352, at 927-28.

Conclusions

The sharp increase in the number of international courts and tribunals and the coinciding trend towards broader allocation of compulsory jurisdiction, which took place in the last decade or so, has brought radical changes in the configuration of the world of international dispute settlement. While the increase in the role of international courts and tribunals necessarily implies increased resort to adjudication, and as a result, greater role for the rule of law in international relations, the uncoordinated creation of multiple judicial fora has also generated some potential problems. The present study did not profess to ascertain whether the recent developments in the area of international dispute settlement have been generally positive or negative,* but rather to examine one type of interaction between international courts and tribunals – coordination between their respective jurisdiction, an issue which had recently become of greater practical importance

This work has focused upon situations in which the same dispute (i.e., a dispute between the same parties and involving the same issues) has become amenable to the jurisdiction of more than one international court or tribunal. Such conditions may give rise to three principal kinds of jurisdictional interactions – forum selection (or forum shopping), parallel proceedings or successive proceedings. It was the purpose of the study to assess the magnitude of the phenomenon, to address its implications, to identify the applicable rules of law that may govern it and to propose methods for alleviation of some of the problems associated with it.

In the first Part of the work, it was shown that jurisdictional overlaps are possible, notwithstanding the absence of a comprehensive obligation to submit to international adjudication. Indeed, many courts and tribunals have been invested with concurrent jurisdiction over a host of issues and a significant number of parties. Such overlaps have been identified, in particular, in the relations between universal judicial bodies invested with unlimited subject matter jurisdiction, such as the ICJ, and regional or specialised courts and tribunals, such as the human rights or trade liberalisation bodies; in between trade liberalisation bodies (e.g., WTO and regional economic integration courts); and in between human rights bodies (e.g., the HRC and the regional or specialised human

* For this, see e.g., Tullio Treves "Recent Trends in the Settlement of International Disputes" I Bancaja Euromediterranean Courses of International Law (1997) 395, 436.

rights procedures). It was also demonstrated that in practice there have been several dozen instances in which multiple proceedings have actually taken place before more than one international judicial or quasi-judicial body. This serves as a strong indication of the reality of jurisdictional competition and of the practical justification for the study of this phenomenon.

The second Part of the thesis has addressed the merits of mitigating jurisdictional competition. It has been shown that although the proliferation of international courts and tribunals has positive consequences, the uncoordinated manner in which judicial bodies operate might undermine the unity of international law and challenge its credibility and legitimacy. Although international courts and tribunals function within a single legal system, they do not perform the role of coherence-generating agents, as domestic courts generally do, but rather introduce, on occasion, disharmonising tensions into international law. These tensions have most serious implication on the perceived fairness and effectiveness of the international legal system whenever different courts and tribunals reach different outcomes with respect to the same dispute. As a result, it has been suggested that, as a matter of desirable policy, international courts and tribunals should strive to improve their coordination and harmonisation with each other (but take into consideration, at the same time, the requirements of justice).

A survey of the norms applicable within domestic law systems has confirmed the conclusion that mitigation of some deleterious aspects of jurisdictional competition contributes to the welfare of the legal system. Virtually all systems of law object to abusive forum shopping, denounce races to the courthouse, prohibit parallel proceedings within the same legal order and recognise the principle of finality of judgments. In fact, some of these jurisdictional rules may qualify as general principles of law, incorporated into international law under article 38(1)(c) of the ICJ Statute. While less stringent standards have been applied to regulate multiple proceedings in cross-boundary jurisdictional settings, it has been established that the jurisdictional relations between international courts and tribunals, which apply a common body of norms that comprise a single normative system, should be influenced to a greater extent by the intra-systematic model of interaction. One specific model that could apply in this context had been that of the relations between domestic courts and arbitral tribunals, which apply the same sets of norms but share only rudimentary institutional links.

Although jurisdictional competition certainly has considerable systematic implications, additional specific policies underlie the adoption of jurisdiction-regulating rules. Thus, forum selection (or shopping) could be viewed as a legitimate manifestation of party autonomy that contributes to greater utilisation of the judiciary and it is normally tolerated by domestic legal systems, both in the intra- and inter-systematic contexts. Therefore, it would seem that it ought not be precluded by international law either, especially in light of the unique value that international law places on party autonomy and on the need to encourage resort to adjudication (unless when it is done in an abusive manner). Moreover, the rule favouring the permissibility of forum selection is particularly justified if the choice was jointly made by all parties to the dispute. In contrast to this, considerations of party convenience and the institutional needs and interests of competing courts generally support the introduction of *lis alibi pendens* and *res judicata* rules.

The third Part of the work attempted to identify rules that govern situations of jurisdictional conflicts. While a network of treaty obligation is in place, found mainly in the constitutive instruments of international courts and tribunals, it looks as if is impossible to deduce many general principles there from. While some so-called 'self-contained' regimes apply a rule of exclusivity, other regimes grant parties more latitude in forum selection. Similarly, some regimes specifically prohibit parallel and successive proceedings (through incorporating *lis alibi pendens, electa una via* or *res judicata* clauses), whereas others seem to tolerate some degree of multiple proceedings.

As a result, customary international law and general principles of law must be resorted to in order to ascertain what norms govern jurisdictional-competition in the absence of treaty norms, or alongside them. It was suggested that the case law of the PCIJ, ICJ and other international judicial bodies generally permit forum selection. However, possible exceptions may be found in situations where selection has been made in violation of a competing dispute settlement clause of an exclusive nature (either explicit, or implicit, by virtue of *lex specialis* or *lex posteriori* rules of interpretation), or abusive in some other way. In these circumstances, the improperly selected forum might have to decline jurisdiction. This conclusion seems to be supported to some extent by the laws of treaties, which require the reconciliation of concurrently applicable jurisdictional provisions and by the *abus de droit* theory, which probably qualifies as general a principle law.

With regard to parallel proceedings, no coherent principle has emerged from the case law. However, it is at least arguable that *lis alibi pendens* has become a general principle of law, applied by most national legal system, which ought to govern such proceedings. In addition, the *abus de droit* doctrine and considerations of comity may also support a prohibition on parallel proceedings. A clearer picture can be identified with regard to the *res judicata* rule, which seems to be both a rule of customary international law and a general principle of law. However, the precise manner of application of the principle of finality is still not settled and there are differences between the construction offered by different courts and tribunals as to what constitutes the 'same dispute' and in their willingness to accept exceptions to the *res judicata* rule.

Although positive rules of international law do provide some guidance as to the regulation of jurisdictional competition, the situation is far from being satisfactory. This is because the identified rules govern only some forms of jurisdictional interaction and the authoritative status of some of them is questionable. As a result, in light of the observations made on the virtues of improving the coordination and harmonisation of the international judiciary, it is deemed wise to introduce additional norms and structural reforms that may improve upon the present situation. Since redefining the jurisdictions of international courts and tribunals, introducing even modest appellate structure (e.g., grant of advisory jurisdiction to the ICJ over other international courts and tribunals) or adopting a general jurisdiction-regulating treaty, all seem to be impractical at present, it has been suggested that other, less ambitious avenues should be pursued for the time being.

In this context, three specific measures can be recommended. First, courts and tribunals should apply comity vis-à-vis each other. This principle, which has some support in the case law but has not assumed the status of an unequivocal principle of international law, would call upon judicial bodies to accord due consideration to the decisions of their counterparts in the same case, or in related or analogous circumstances. It might also justify procedural steps, such as stay of proceedings, even when the traditional conditions for the application of jurisdiction-regulating rules such as *lis alibi pendens* and *res judicata* have not been met. Second, methods of improving coordination between different international courts and tribunal should be sought. These include regular exchange of information, periodical meetings of judges and court officials and

the rotation of judges between different judicial bodies. Finally, the dangers of jurisdictional overlap should be remembered each time the international community decides upon creating new judicial bodies (instead of referring disputes to existing ones). Even when the advantages of establishing a new court of tribunal outweigh the disadvantages, it is prudent to regulate in the constitutive instrument of the new forum its jurisdictional relations vis-à-vis its counterparts. In the same vein, it is advisable that states and other international actors ought to consider their other dispute settlement obligations every time they plan to adhere to a new jurisdiction. Where possible, such new members ought to consider the unilateral introduction of reservations to their instrument of accession with the effect of coordinating between the competing jurisdictions to which they have become exposed.

International Cases

Right of Passage over Indian Territory (Portugal v. India), 1957 I.C.J. 125 (Preliminary Objection)

Interhandel (U.S. v. Switzerland), 1959 I.C.J. 6

Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), 1960 I.C.J. 192

Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6

South West Africa (Ethipia v. S.A.; Liberia v. S.A.), 1962 I.C.J. 319 and 1966 I.C.J. 6

North Sea Continental Shelf (F.G.R. v. Netherlands; F.G.R. v. Denmark), 1969 I.C.J. 3

Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain), 1970 I.C.J. 4

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 12

Fisheries Jurisdiction (U.K. v. Iceland), 1974 I.C.J. 4

Nuclear Tests (Australia v. France), 1974 I.C.J 253

Aegean Sea Continental Shelf (Greece v. Turkey), 1978 I.C.J. 3

United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3

Continental Shelf (Tunisia v. Libya) 1982 I.C.J. 18

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.) 1984 I.C.J. 392 (Jurisdiction and Admissibility) and 1986 I.C.J. 14

Continental Shelf (Libya/Malta), 1985 I.C.J. 13

Frontier Dispute (Burkina Faso/ Mali), 1986 I.C.J. 554

Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), 1992 I.C.J. 351

Passage through the Great Belt (Finland v. Denmark), 1991 I.C.J. 12

Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) 1991 I.C.J. 53

Questions of the Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3 (Provisional Measures) and 1998 I.C.J. 9 (Preliminary Objections)

Questions of the Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Provisional Measures) and 1998 I.C.J. 115 (Preliminary Objections)

Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 I.C.J. 240 (Preliminary Objections)

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), 1993 I.C.J. 3 (Provisional Measures) and 1996 I.C.J. 595 (Preliminary Objections)

Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), 1993 I.C.J. 38

East Timor (Portugal v. Australia), 1995 I.C.J. 90

Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Test (New Zealand v. France), 1995 I.C.J. 285

Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226

Gabçikovo -Nagymaros (Hungary/ Slovakia), 1997 I.C.J. 3

Vienna Convention on Consular Relations (Breard)(Paraguay v. U.S), 1998 I.C.J. 248 (Provisional Measures)

Fisheries Jurisdiction (Spain v. Canada), Judgment of 4 Dec. 1998 (forthcoming in 1998 I.C.J.)

LaGrand (Germany v. U.S.), 1999 I.C.J. 9 (Provisional Measures) and Judgment of 27 June 2001 (Forthcoming in 2001 I.C.J.)

Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62

Legality of Use of Force (Yugoslavia v. Belgium), Order of 2 June 1999 (forthcoming in 1999 I.C.J.)(Provisional Measures)

Legality of Use of Force (Yugoslavia v. Canada), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures)

Legality of Use of Force (Yugoslavia v. France), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures)

Legality of Use of Force (Yugoslavia v. Germany), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures)

Legality of Use of Force (Yugoslavia v. Italy), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures)

Legality of Use of Force (Yugoslavia v. Netherlands), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures)

Legality of Use of Force (Yugoslavia v. Portugal), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures)

Legality of Use of Force (Yugoslavia v. Spain), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures)

Legality of Use of Force (Yugoslavia v. U.K.), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures)

Legality of Use of Force (Yugoslavia v. U.S.), Order of 2 June 1999 (Forthcoming in 1999 I.C.J.)(Provisional Measures)

Arbitration

Moore (U.S. v. Mexico)(1871) in John B. Moore, 2 *History and Digest of International Arbitrations to which the U.S. has been a Party* (1898) 1357

Fur Sea Seal Arbitration (G.B./U.S.)(1892) in John B. Moore, 2 *History and Digest of International Arbitrations to which the U.S. has been a Party* (1898) 755

Pius Fund (U.S. v. Mexico), 9 R.I.A.A. 11 (1902)

Compagnie Générale de l'Orénoque (France v. Venezuela), 10 R.I.A.A. 184 (1905)

Orinoco Steamship Co. (U.S. v. Venezuela), 11 R.I.A.A. 227 (1910)

North Atlantic Coast Fisheries (G.B./U.S.), 1 Hague Court Reports 141 (1910)

China Navigation Co., Ltd. (U.K.) V. U.S. (The 'Newchwang'), VI R.I.A.A. 64 (1921)

Caire (France) v. Mexico, 5 R.I.A.A. 516 (1929)

The Santa Rosa Mining Co. (Ltd.)(U.K.) v. Mexico, 5 R.I.A.A. 252 (1931)

Leigh Valley Railroad Co. v. Germany, 8 R.I.A.A. 160 (1933)

Drier v. Germany, 8 R.I.A.A. 127 (1935)

Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1907 (1941)

Ambatielos (Greece v. U.K.), 23 I.L.R. 306 (1956)

Indo-Pakistan Western Boundary Case (*Rann of Kutch*)(India v. Pakistan) 50 I.L.R. 2 (1976)

Delimitation of the Continental Shelf (U.K./France), 18 I.L.M. (1979) 397

Rainbow Warrior (N.Z. v. France), 74 I.L.R. 256 (1987)

Dispute Concerning the Taba Area (Egypt v. Israel), 27 I.L.M. (1988) 1421

Heathrow Airport User Charges (U.S. v. U.K.), 102 I.L.R. 215 (1992)

Southern Bluefin Tuna (Australia and New Zealand v. Japan), Award of 4 Aug. 2000 (Jurisdiction and Admissibility)

ITLOS

Southern Blue Fin Tuna (Australia v. Japan; New Zealand v. Japan), Order of 27 Aug. 1999

'Camouco' (Panama v. France), Judgment of 7 Feb. 2000

IFTY

Case IT-94-1-D, *In re Tadic,* I ICTY Judicial Reports 3 (1994)(application for deferral)

Case IT-94-1-T, P 41, *Prosecutor v. Tadic,* I ICTY Judicial Reports 63 (1995)(Jurisdiction)

Case IT-94-1-AR72, *Prosecutor v. Tadic,* 35 I.L.M. (1996) 32 (Interlocutory Appeal on Jurisdiction)(Appeals Chamber, 1995)

Case IT-95-5-D.T.Ch.II, *In re Karadzic,* II ICTY Judicial Reports 851 (1995)(request for deferral)

Case IT-95-6-D.T.Ch. I, *In re Lasva River Valley,* II ICTY Judicial Reports 921 (1995)(request for deferral).

Case IT-95-5-R61, *Prosecutor v. Karadzic,* 108 I.L.R. 86, 133-135 (1996)(Rule 61)

Case IT-94-A-1, *Prosecutor v. Tadic,* Judgment of 15 July 1999 (Appeals Chamber)

ICSID

Benvenuti and Bonfat Srl. v. Congo 1 ICSID Rep. 330 (1980)

Amco Asia, Pan American Development Ltd. v. Indonesia, 1 ICSID Rep. 389 (1983)

Klöckner Industrie-Anlagen GmbH. v. Cameroon, ICSID ARB/81/2), 2 ICSID Rep. 3 (1983)

Atlantic Triton Co. v. Guinea, 3 ICSID Rep. 13 (1983)

Annulment Decision of the Ad Hoc Committee on the Arbitration Between Klöckner Industrie-Analgen GmbH v. Cameroon, 2 ICSID Rep. 95 (1985)

Southern Pacific Properties (Middle East) Ltd. v. Egypt, 3 ICSID Rep. 101 (1985)(jurisdiction) and 3 ICSID Rep. 131 (1988)

Amco Asia, Pan American Development Ltd. v. Indonesia, 1 ICSID Rep. 543 (1988)(Resubmitted case)

Marine International Nominees Establishment (MINE) v. Guinea, 4 ICSID Rep. 54 (1988)

Tradex Hellas S.A. v. Albania, Decision of 24 Sept. 1996, Award of 28 April 1999 (ICSID)

Azinian v. Mexico, Award of 1 Nov. 1999 (ICSID)

Iran-U.S. Claims Tribunal

Case A/2, *Iran v. U.S.,* 1 Iran-US Cl. Trib. Rep. 101 (1982)

Case 6, *Gibbs and Hill, Inc. v. Iran Power Generation and Transmission Co.,* 1 Iran-U.S. Cl. Trib. Rep. 236 (1982)

Case 51, *Halliburton Co. v. Doreen/IMCO,* 1 Iran-U.S. Cl. Trib. Rep. 242 (1982)

Case 43, *Oil Fields of Texas, Inc. v. Iran,* 1 Iran-US Cl. Trib. Rep. 347 (1982)

Case 28, *Reading and Bates Corp. v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 401 (1983)(Interim Award)

Case 59, *Questech, Inc. v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 96 (1983)(Interim Award) Case 71, *Grimm v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 78 (1983)

Case 93, *Ford Aerospace & Communications Corp. v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 281 (1983)(Interim Award)

Case 338, *E. Systems, Inc. v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 51 (1983)(Interim Award)

Case 370, *Watkins-Johnson Co. v. Iran,* 2 Iran-U.S. Cl. Trib. Rep. 362 (1983)

Case 480, *Touche Ross and Co. v. Iran,* 3 Iran-U.S. Cl. Trib. Rep. 59 (1983)(Interim Award)

Case 928, *CBA International Development Corp. v. Iran,* 4 Iran-U.S. Cl. Trib. Rep. 53 (1983)(Interim Award)

Case 157, *Esphahanian v. Bank of Tejarat,* 2 Iran-US Cl. Trib. Rep. 157 (1984)

Case 159, *Ford Aerospace & Communications Corp. v. Iran*, 5 Iran-U.S. Cl. Trib. Rep. 104 (1984)(Interim Award)

Case 375, *Bendone-Derossi International v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 130 (1984)(Interim Award) and 18 Iran-U.S. Cl. Trib. Rep. 115 (1988)

Case 33, *Sea-Land Services Inc. v. Iran*, 6 Iran-US Cl. Trib. Rep. 149 (1984)

Case 7, *Tippets et al v. TAMSEFTA*, 6 Iran-US Cl. Trib. Rep. 219 (1984)

Case 158, *Aeronutronic Services v. Air Force of Iran*, 7 Iran-U.S. Cl. Trib. Rep. 217 (1984)(Interim Award)

Case 395, *Component Builders, Inc. v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 216 (1985)(Interim and Interlocutory Award)

Case 458, *Marks v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 291 (1985)(Interlocutory Award)

Case 333, *Flour Corp. v. Iran*, 11 Iran-U.S. Cl. Trib. Rep. 296 (1986)(Interim Award)

Case 129, *SEDCO Inc. v. NIOC*, 10 Iran-US Cl. Trib. Rep. 180 (1987)

Case 56 *Amoco International Finance Corp. v. Iran*, 15 Iran-US Cl. Trib. Rep. 189 (1987)

Case 39, *Philipps Petroleum Co. v. Iran*, 21 Iran-US Cl. Trib. Rep. 79 (1989)

GATT/WTO

Measures Affecting Exports of Unprocessed Herring and Salmon (U.S. v. Canada), GATT B.I.S.D. (35th Supp.) at 98 (1988)

Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada (Canada v. U.S.), GATT B.I.S.D. (38th Supp.) at 30 (1991)

Measures Affecting Imports of Softwood Lumber from Canada (Canada v. U.S.), GATT B.I.S.D. (40th Supp.) at 358 (1993)

EEC Member States' Import Regimes for Bananas (Columbia et al v. EEC), GATT Doc. DS32/R (1993), 1993 GATTPD LEXIS 11

Restrictions on Imports of Tuna (EC v. U.S.), 16 June 1994, 33 I.L.M. (1994) 839

EEC- Import Regime for Bananas, 34 I.L.M. (1995) 177 (GATT Panel Report, 1994)

U.S. - Standard for Reformulated and Conventional Gasoline and Like Products of National Origin, 35 I.L.M. (1996) 603 (Report of the AB)

Japan – Taxes on Alcoholic Beverages, WTO Doc. WT/DS8/AB/R (1996)(Report of the AB)

Canada - Certain Measures Concerning Periodicals, WTO Doc. WT/DS31/AB/R (1997)(Report of the AB)

E.C. - Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/R (1997)(Panel Report)

E.C. - Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/AB/R (1997)(Report of the AB)

EC - Regime for the Importation, Sale and Distribution of Bananas - Arbitration under article 21.3(c) of the DSU, WTO Doc. WT/DS27/15 (1998)

EC – Measures concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (1998)(Report of the AB)

U.S. – Import Prohibition of Certain Shrimp and Shrimp Products, 38 I.L.M. (1999) 118 (Report of the AB, 1998)

EC - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by the EC, WTO Doc. WT/DS27/RW/EEC (1999)

EC - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador, WTO Doc. WT/DS27/RW/ECU(1999)

EC - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the EC Under Article 22.6 of the DSU, WTO Doc. WT/DS27/ARB (1999)

Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WTO Doc. WT/DS103/AB/R (1999)(Report of the AB)

U.S. – Sections 301-310 of the Trade Act of 1974, WTO DOC. WT/DS152/R (1999)(Panel Report),

Mexico-Anti Dumping Investigation of High Fructose Corn Syrup (HFCS) from the U.S., WTO Doc. WT/DS132/R (2000)(Panel Report)

Canada – Patent Protection Terms, WTO Doc. WT/DS170/R (2000)(Panel Report)

U.S. – Tax Treatment for "Foreign Sales Corp.", WTO Doc. WT/DS108/AB/R (2000)(Report of the AB)

ECJ

Case 26/62, *Van Gend en Loos v. Commission* [1963] E.C.R. 1

Joined Cases 79 and 82/63, *Reynier v. Commission* [1964] E.C.R. 259

Case 6/64, *Costa v. ENEL* [1964] E.C.R. 585

Case 90, 91/63, *Commission v. Luxembourg* [1964] E.C.R. 1217

Case 59/65, *Schreckenberg v. Euratom Commission* [1966] E.C.R. 543

Case 29/69, *Stauder v. Ulm* [1969] E.C.R. 419

Case 7/72, *Boehringer Mannheim* v *Commission* [1972] E.C.R. 1281

Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels,* [1977] E.C.R. 741

See e.g., Case 43/75, *Defrenne v. Sabena* [1978] E.C.R. 1365

Case 21/76, *Handelskwekerji G.J. Bier B.V. v. Mines de Potasse d'Alsace* [1979] E.C.R. 1735

Case 61/79, *Amministrazione delle finanze dello Stato v. Denkavit italiana Srl.* [1980] E.C.R. 1205

Joined cases 209-215 and 218/78, *Heintz van Landewyck S.a.r.i. v. Commission* [1980] E.C.R. 3125

Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG* [1982] E.C.R. 1095

Case 129/83, *Zelger v. Salinitri* [1984] E.C.R. 2398

Case 60, 61/84, *Cinéthéqe SA v. Fédération nationale des cinémas français* [1985] E.C.R. 2605

Cases 172, 226/83, *Hoogovens Groep v. Commission* [1985] E.C.R. 2843

Case 85/85, *Commission v. Belgium* [1986] E.C.R. 1149

Case 144/86, *Gubisch Maschinenfabrik* v *Palumbo* [1987] E.C.R. 4861

Joined Case 97, 99, 193 and 215/86 *Asteris v. Commission* [1988] E.C.R. 2181

Cases 358/85 and 51/86, *France v. Parliament* [1988] E.C.R. 4846

Case 236/87, *Bergemann v. Bundesanstalt für arbeit* [1988] E.C.R. 5125

Joined Cases 89, 104, 116, 117 and 125-129/85, *Ahlström Osakeytiö v. Commission* [1988] E.C.R. 5193

Case 46/87, *Hoechst AG Dow Benelux Metal v. Commission* [1989] E.C.R. 2875

Case 5/88, *Wachauf v. Bundesamt für Emährung und Forstwirtschaft* [1989] E.C.R. 2609

Case 374/87, *Orkem v. Commission* [1989] E.C.R. 3283

Case C-308/87, *Grifoni v. Commission* [1990] E.C.R. I-1203

C-281/89 *Italy* v *Commission* [1991] E.C.R. I-347

Case C-41/90, *Höfner v. Macrotron GmbH* [1991] E.C.R. I-1979

Case 351/89, *Overseas Union Insurance Ltd. v. New Hampshire Insurance Co.* [1991] E.C.R. I-3317

Case C-345/89, *France v. Stoeckel* [1991] E.C.R. I-4047

Case C-159/90, *The Society for the Protection of Unborn Children In Ireland Ltd. v. Grogan* [1991] E.C.R. I-4685

Opinion 1/91, *Draft Agreement Relating to the Creation of the EEA* [1991] E.C.R. I-6079

Case T-42/91 *Koninklijke PTT Nederland NV v. Commission.* [1991] E.C.R. II-273

Case C-228/90, 234/90, 339/90. 353/90, *Simba SpA v. Ministero delle Finanze* [1992] E.C.R. I-3713

Case T-45/90, *Speybrouk v. European Parliament* [1992] E.C.R. II-33

Case C-158/91, *France v. Levy* [1993] E.C.R. I-4287

Case C-13/93, *Office National de l'Emploi v. Minne* [1994] E.C.R. I-371

Case 404/92 P., *X v. Commission* [1994] E.C.R. I-4737

Case C-23/93, *TV10 S.A. v. Commissariaat Voor de Media* [1994] E.C.R. I-4795

Case C-280/93, *Germany v. Council* [1994] E.C.R. I-4973

Case C-406/92, *The Tatry* [1994] E.C.R. I-5439

Case C-469/93, *Administrazione delle finanze dello stato v. Chiquita Italia SpA* [1995] E.C.R I-4533

Case T-88/94, *Société Commerciale de Potasses et de l'Azote v. Commission)* [1995] E.C.R. II-221

Case T-488/93, *Hanseatische Industrie-Beteiligungen GmbH v. Commission* [1995] E.C.R. II-469

Case T-490/93, *Bremer Vulkan Verbund AG v. Commission* [1995] E.C.R. II-477

Case T-12.93, *CCE de Vittel v. Commission* [1995] E.C.R. II-1247

Case T-219/95 R, *Danielsson v. Commission* [1995] E.C.R. II-3051

Opinion 2/94, *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] E.C.R. I-1759

Case C-13/94 *P v. S.* [1996] E.C.R. I-2143

Case C-277/95 P *Lenz* v *Commission* [1996] E.C.R. I-6109

Joined cases C-267/95 and C-268/95, *Merck & Co. Inc.* v. *Primecrown Ltd* [1996] E.C.R. I-6285

Case T-76/96R, *The National Farmer's Union v. Commission* [1996] E.C.R. II-815

Case C-249/96, *Grant v. South West Trains Ltd.* [1998] E.C.R. I-621

Case C-351/96, *Drouot Assurances SA v. Consolidated Metallurgical Industries (CMI Industrial Sites)*[1998] E.C.R. I-3075

Case C-53/96, *Hermès International v. FHT Marketing Choice BV*, [1998] E.C.R. I-3603

Joined Cases T-305-07, 313-16, 318, 325, 328-29 and 335/94, *Limburgse Vinyl Maatschappij NV v. Commission* [1999] E.C.R. II-931

Cases C-174, 189/98 P, *Netherlands v. Commission,* Judgment of 11 Jan 2000 (forthcoming in 2000 E.C.R.)

FTA/NAFTA

Case CDA-89-1807-01, *Landing Requirement for Pacific Coast Salmon and Herring* (U.S. v. Canada), Report of 16 Oct. 1989 (FTA Chapter 18 Panel)

Case USA-89-1904-06, *Fresh, Chilled and Frozen Pork* (Canada v. U.S.), Report of 28 Sept.1990 (FTA binational Panel)

Case USA-92-1904-01, *Certain Softwood Lumber Products from Canada* (Canada v. U.S.), Report of 6 May 1993 (FTA binational Panel)

USA-95-1904-02, *Gray Portland Cement and Clinker from Mexico* (Mexico v. U.S.), Report of 13 Sept. 1996, at p.23 (NAFTA binational Panel)

Case CDA-95-2008-01, *Tariffs applied by Canada to Certain U.S.-Origin Agricultural Products* (U.S. v. Canada), Report of 2 Dec. 1996 (NAFTA Chapter 20 Panel)

Case USA-97-2008-01, *U.S. Safeguard Action taken on Broomcorn Brooms from Meixco* (Mexico v. U.S.), Report of 30 Jan 1998 (NAFTA binational Panel)

NAAEC

Methanex Corp. v. U.S., Determination of 30 June 2000, Doc. A14/SEM/99-001/06/14(3)(CEC Secretariat)

CCJ

Non-compliance or Violation of SICA Norms (Nicaragua v. Honduras), Decisions of 30 Nov. 1999 and 17 Jan. 2000

Revocation of laws, administrative and other acts adopted by the Republic of Nicaragua that affect and violate the law and operation of SICA (Honduras v. Nicaragua), Decision of 12 Jan. 2000 (Measures of Protection).

CIS Economic Court

Opinion No. 14/95/C-1/7-96, *Interpretation of the Agreement on Recognition and Regulation of Property Rights*, 3 (23) CIS Information Bulletin (1996) 82

Opinion No. 11/95/C-1/4-96, *Interpretation of Agreement on Free Trade*, 3 (23) CIS Information Bulletin (1996) 88

Opinion no. C-1/19-96, 9 Bulletin of the Supreme Arbitration Court of the Russian Federation (1997) 86

ECHR

Lithgow v. U.K., 8 E.H.R.R. 329 (1986)

Cruz Varas v. Sweden, 14 E.H.R.R. 1 (1991)

Open Door Counselling Ltd v. Ireland, 15 E.H.R.R. 244 (1992)

Funke v. France, 256 Eur. Ct. H.R. (ser. A)(1993)

Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A)(1994)

Murray v. United Kingdom, 300 Eur. Ct. H.R. (ser. A)(1994)

British-American Tobacco Co. Ltd. V. Netherlands, 331 Eur. Ct. H.R. (ser. A)(1995)

Loizidou v. Turkey, 20 E.H.R.R. 99, 136 (1995) and 1998 Eur. Ct. H.R. (ser. VI)

Lopez Ostra v. Spain, 20 E.H.R.R. 277 (1995)

Agrotexim v. Greece, 21 E.H.R.R. 250 (1996)

Hornsby v. Greece, 24 E.H.R.R. 250 (1997)

Guerra v. Italy, 26 E.H.R.R. 241 (1998)

EHR Comm'n

Donnelly v. U.K., App. No. 5577-5583/72, 16 Y.B. Eur. Conv. on H.R. (1973) 212

CFDT v. Council, App. 8030/77, 13 Eur. Comm'n H.R. Dec. & Rep. 231 (1978)

X v. Switzerland, App. No. 8878/79, 20 Eur. Comm'n H.R. Dec. & Rep. 240, 245 (1980)

N v. Sweden, App. No. 10410/83, Eur. Comm'n H.R. Dec. & Rep. 203 (1985)

Council of Civil Services Unions v. U.K., App. No. 11603/85, 50 Eur. Comm'n H.R. Dec. & Rep. 228, (1987)

Ajinaja v. *U.K.*, App. No. 13365/87, 55 Eur. Comm'n H.R. Dec. & Rep. 294 (1988)

Brinkhof v. the Netherlands, App. No. 14215/88, Eur. Comm'n Decision of 13 December 1989

Melchers & Co. v. Germany, App. 13258/87, 1990 Y.B. Eur. Conv. on H.R. 138

Martins v. Spain, App. No. 16358/90, 73 Eur. Comm'n H.R. Dec. & Rep. 120 (1992)

Fornieles v. Spain, App. No. 17512/90, 73 Eur. Comm'n H.R. Dec. & Rep. 214 (1992)

Pauger v. Austria, App. No. 16717/90, 80 Eur. Comm'n H.R. Dec. & Rep. 24 (1995)

Lukanov v. Bulgaria, App. No. 21915/93, 80 Eur. Comm'n H.R. Dec. & Rep. 108 (1995)

Pauger v. Austria, App. No. 24872/94, 80 Eur. Comm'n H.R. Dec. & Rep. 170 (1995)

Tauira v. France, App. No. 28204/95, 83 Eur. Comm'n H.R. Dec. & Rep. 112 (1995)

A.G.V.R. v. Netherlands, App. No. 20060/92, Decision of the EHR Comm'n of 10 April 1995

Varnava v. Turkey, App. No. 16064-66, 16068-73/90, Decision of the EHR Comm'n of 14 April 1998,

I/A CHR

Advisory Opinion OC-1/82, *"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64, American Convention on Human Rights)*, I/A Court H.R. (ser. A), No. 1 (1982)

Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica (Advisory Opinion), I/A Court H.R. (ser. A) No. 4 (1984)

Case 52, *Castillo Petruzzi v. Peru*, Judgment of 30 May 1999

Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law'*, Opinion of 1 Oct. 1999

I/A HR Comm'n

Case 10.580, *Quiñones v. Ecuador*, Inter-Am. C.H.R., Report no. 10/95, OEA/ser.L./V/II.91, Doc. 7, at 76 (1996)

Case 10.970, *Mejia v. Peru*, Inter-Am. C.H.R. Report no. 5/96, OEA/Ser.L/V/II.91, Doc. 7, at 157 (1996)

Case 11.245, *Gimenez v. Argentina,* Report No. 12/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 33 (1996)

Case 11.227, *Diaz v. Colombia*, Inter-Am. C.H.R., Report no. 5/99, OEA/ser.L/V/ II.95, Doc. 7 rev 99 (1997)

Case 11.430, *Rodríguez v. Mexico*, Report No. 43/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 485, (1997)

Case 11.381, *Nicaraguan Customs Service v. Nicaragua*, Inter-Am. C.H.R., Report no. 14/97, OEA/Ser.L/V/II.95, Doc. 7 rev. 535 (1997)

ACHR

Comm. 15/88, *Mpaka-Nsusu Andre Alphonse v. Zaire,* 7th Annual Report of the African Commission on Human and Peoples' Rights, 1993-94, 30th Sess. (1994)

Case 40/90, *Ngozi Njoku v. Egypt*, ACHR Report of 11 Nov. 1997, 11th Annual Report of the African Commission on Human and Peoples' Rights, 1997/98, 22nd and 23rd Ordinary Sessions, Annex II (1998)

HRC

Comm. R.2/8, *Lanza v. Uruguay*, UN GAOR, 35th Sess., Supp. 40, at 111 (1980)

Comm. R.1/4, *Ramirez v. Uruguay*, UN GAOR, 35th Sess., Supp. 40, at 121 (1980)

Comm. R.1/6, *Sequeira v. Uruguay*, UN GAOR, 35th Sess., Supp. 40, at 127 (1980)

Comm. R.2/11, *Motta v. Uruguay*, UN GAOR, 35th Sess., Supp. 40, at 132 (1980)

Comm. 32/1978, *Touron v. Uruguay,* UN GAOR, 36th Sess., Supp. 40, at 120 (1981).

Comm. R.2/10, *Altesor v. Uruguay*, U.N. GAOR, 37th Sess., Supp. 40, at 122 (1980)

Comm. R.7/28, *Weinberger v. Uruguay*, UN GAOR, 36th Sess., Supp. 40, at 114 (1981)

Comm. R.10/44, *Pietroroia v. Uruguay*, UN GAOR, 36th Sess., Supp. 40, at 153 (1981)

Comm. R.13/56, *Casariego v. Uruguay*, U.N. GAOR, 37th Sess., Supp. 40, at 185, (1981)

Comm. R.14/63, *Antonaccio v. Uruguay*, UN GAOR, 37th Sess., Supp. 40, at 114 (1982)

Comm. R.2/10, *Altesor v. Uruguay*, UN GAOR, 37th Sess., Supp. 40, at 122 (1980)

Comm. R.26/121, *A.M. v. Denmark*, UN GAOR, 37th Sess., Supp. 40, at 212 (1982)

Comm. 84/1981, *Barbato v. Uruguay*, UN GAOR, 38th Sess., Supp. 40, at 124 (1983);

Comm. 74/1980, *Estrella v. Uruguay*, U.N. GAOR, 38th Sess., Supp. 40, at 150, 156 (1983)

Comm. 75/1980, *Fanali v. Italy,* U.N. GAOR. 38th Sess., Supp. 40, at 160 (1983)

Comm. 85/1981, *Romero v. Uruguay*, UN GAOR, 39th Sess., Supp. 40, at 159 (1984)

Comm. 123/1982, *Lluberas v. Uruguay*, UN GAOR, 39th Sess., Supp. 40, at 175 (1984)

Comm. 146/1983 *Baboeram v. Suriname,* UN GAOR, 40th Sess., Supp. 40, at 187 (1984)

Comm. 168/1984, *V.O v. Norway*, UN GAOR, 40th Sess., Supp. 40, at 232 (1984)

Comm. 1/1976, *A. v. S.*, UN Doc. CCPR/C/OP/1 at 17 (1984)

Comm. 158/1983, *O.F. v. Norway*, UN GAOR, 40th Sess., Supp. 40, at 204 (1985)

Comm. 118/1982, *J.B. v. Canada*, UN GAOR, 41st Sess., Supp. 40, at 151 (1986).

Comm. 172/1984, *Broeks v. Netherlands*, UN GAOR, 42nd Sess., Supp. 40, at 139 (1987)

Comm. 180/1984, *Danning v. Netherlands*, UN GAOR, 42nd Sess., Supp. 40, at 151 (1987)

Comm. 182/1984, *Zwaan-de Vries v. Netherlands*, UN GAOR, 42nd Sess., Supp. 40, at 160 (1987)

Comm. 217/1986, *H.v.D.P. v. Netherlands*, UN GAOR, 42nd Sess., Supp. 40, at 185 (1987)

Comm. 191/1985, *Blom v. Sweden*, UN GAOR, 43rd Sess., Supp. 40, at 211 (1988)

Comm. 201/1985, *Hendricks v. Netherlands,* UN GAOR, 43rd Sess., Supp. 40, at 230 (1988)

Comm. 210/1986, 225/1987, *Pratt v. Jamaica*, UN GAOR, 44th Sess., Supp. 40, at 222 (1989)

Comm. 401/1990, *J.P.K v. Netherlands*, UN GAOR, 46th Sess., Supp. 40, at 405 (1991)

Comm. 403/1990, *T.W.B.M v. Netherlands*, UN GAOR, 46th Sess., Supp. 40, at 411 (1991)

Comm. 381/1989, *L.E.S.K. v. Netherlands*, UN GAOR, 47th Sess., Supp. 40, at 374 (1992)

Comm. 393/1990, *A.C. v. France*, UN GAOR, 47th Sess., Supp. 40, at 384 (1992).

Comm. 402/1990, *Brinkhof v. Netherlands,* UN GAOR, 48th Sess., Annex, UN Doc. CCPR/C/48/ D/402/1990 (1993)

Comm. 470/1991, *Kindler v. Canada,* UN GAOR, 48th Sess. Supp. no. 40, Annex XII, at 138, UN Doc. A/48/40 (1993)

Comm. 467/1991, *V.E.M. v. Spain*, UN Doc. CCPR/C/48/D/467/1991 (1993)

Comm. 321/1988, *Thomas v. Jamaica*, UN GAOR, 49th Sess., Supp. 40 (II), at 1 (1994)

Comm. 441/1990, *Blanco v. Nicaragua*, UN GAOR, 49th Sess., Supp. 40, at 12 (1994)

Comm. 44/1990, *Casanovas v. France*, U.N. GAOR, 49th Sess., Supp. 40, at 131 (1994)

Comm. 452/1991, *Glaziou v. France*, U.N. GAOR, 49th Sess., Supp. 40(II), at 250 (1994)

Comm. 421/1990, *Trebutien v. France*, UN GAOR, 49th Sess., Supp. 40(II), at 277 (1994)

Comm. 453/1991, *Coeriel v. Netherlands*, UN Doc. CCPR/C/52/D/453/1991 (1994)

Comm. 540/1993, *Atachahua v. Peru*, UN GAOR, 51st Sess., Supp. 40(II), at 112 (1995)

Comm. 575, 576/1994, *Guerra v. Trinidad and Tobago*, UN Doc. CCPR/C/53/D/575/ 1994 and 576/1994 (1995)

Comm. 584/1994, *Valentijn v. France*, 51st Sess, Supp. 40(II), at 253 (1996)

Case 589/1994, *Tomlin v, Jamaica,* U.N. Doc. CCPR/C/57/D/589/1994 (1996)

Comm. 645/1995, *Bordes v. France*, UN Doc. CCPR/C/57/D/645/1995 (Decision of the HRC, 1996)

Comm. 577/1994, *Campos v. Peru*, UN Doc. CCPR/C/61/D/577/1994 (1998)

Comm. 824/1998, *Nicolov v. Bulgaria*, UN Doc. CCPR/C/68/D/824/1998 (2000)

CAT Committee

Comm. 10/1993, *A.E.M. v. Spain*, UN GAOR, CAT, 13th Sess. Annex 5, at 43, UN Doc. A/50/44 (1994)

Comm. 26/1995, *Mbulu v. Canada*, UN Doc. CAT/C/15/D/26/1995 (1995)

ILO Procedures

Case 893, *Canadian Labour Congress v. Canada*, LXIII ILO Official Bulletin (ser. B) No. 3 (1980)(Report of the CFA)

Case 1318, *German Worker's Confederation v. Federal Republic of Germany*, LXVIII ILO Official Bulletin (ser B) No. 3 (1985)(Report of the CFA)

Observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany, LXX ILO Official Bulletin (ser. B) Supp. 1 (1987)(Report of Commission of Inquiry)

ICC (commercial arbitration)

Case 2272 (1975), A v. B, excerpts in *Collection of ICC Arbitral Awards 1974-1985* (1990) 11

Southern Pacific Properties (Middle East) Ltd. v. Egypt, 3 ICSID Rep. 45 (1993)

Inspection Panel Reports

Yacyretá Hydroelectric Project, Report of the IDB Investigation Mechanism of 15 Sept. 1997, IDB Doc. GN-1947-8

Argentina/Paraguay: Yacyretá Hydroelectric Project, Report of the Inspection Panel of 16 Sept. 1997

Administrative Tribunals

De Merode v. World Bank, World Bank Administrative Tribunal Reports, Decision No. 1 (1981)

Domestic cases

U.K.

Ferrer v. Arden, 77 E.R. 263 (1599)

Bushby v. Munday, 56 E.R. 908 (1821)

Grainger v. Hill, 132 E. R. 769 (1838)

Henderson v. Henderson 67 E.R. 313 (1843), 6 Q.B. 288 (1844)

Ex parte Partington, 153 E. R. 284 (Ex. 1845)

State R. v. Harrington Middle Quarter (Inhabitants) [1855] E.R. 288 (C.A.)

Godard v. Gray [1870] Q.B. 139

Wemyss v. Hopkins [1875] L.R. 10

Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson [1892] 1 Q.B. 431

Sim v. Robinow, 19 Sess. Cas. (R.) 665 (1892)

Mayor of Bradford v. Pickles [1895] A.C. 587

Allen v. Flood [1898] A.C. 1

Hoystead v. Commissioner of Taxation [1926] A.C. 155 (P.C.)

La Société du Gaz de Paris v. La Société Anonyme de Navigation, "Les Armateurs Français [1926] Sess. Cas. 13 (H.L.)

St. Pierre v. South American Stores (Gath & Chaves) Ltd. [1935] All E.R. 408 (C.A)

The Arantzazu Mendi [1939] 1 All E.R. 719 (H.L.)

Greenhalgh v. Mallard [1947] 2 All E.R. 255 (C.A.)

Sambasivianm v. Public Prosecutor, Federation of Malaya [1950] A.C. 458 (P.C.)

The "Fehmarn" [1958] 1 All E.R. 333 (C.A.)

The Eleftheria [1969] 2 All E.R. 641 (P.)

Ferdinand Wagner v. Laubscher Bros. & Co. [1970] 2 Q.B. 313 (C.A.)

Chaplin v. Boys [1971] A.C. 356

The Atlantic Star [1972] 3 ALL E.R. 705 (C.A.)

The Atlantic Star [1973] 2 All E.R. 175 (H.L.)

Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] A.C. 581

Henry v. Geoprosco International Ltd [1976] Q.B. 726

The Ampthill Peerage Case [1977] A.C. 547
Fidelitas Shipping Co. Ltd. v. V/O Exportchleb [1977] 1 Q.B. 630
Saif Ali v. Sydney Mitchell & Co. [1978] 3 All ER 1033 (H.L)
MacShannon v. Rockware Glass Ltd. [1978] A.C. 795
Mike Trading and Transport Ltd. v. R. Pagnan & Fratelli (The "Lisboa") [1980] 2 Lloyd's Rep 546 (C.A.)
Vervaeke v. Smith [1983] 1 A.C. 145
R v. Secretary of State for the Environment [1983] 3 All E.R. 358 (Q.B.)
Smith Klein & French Labs Ltd. v. Bloch [1983] 1 W.L.R. 730 (C.A.)
The "Abidin Daver" [1984] A.C. 398
South Carolina Insurance Co. v. Assurantie Maatschappij 'de Zeven Provincien' NV [1985] 2 All E.R. 1046 (C.A.)
Midland Bank plc. v. Laker Airways Ltd. [1986] 1 All E.R. 526 (C.A.)
Dallal v. Bank Mellat [1986] 1 Q.B. 441
Spiliada Maritime Corp. v. Cansulex Ltd. [1987] A.C. 460
Société Nationale Industrielle Aerospatiale v. Lee Kui Jak [1987] 3 All E.R. 510 (P.C.)
Du Pont (E.I.) de Nemours & Co. v. Agnew & Kerr [1987] 2 Lloyd's Rep. 585 (C.A.) and [1988] 2 Lloyd's Rep. 240 (C.A.)
Maclaine Watson v. Dept. of Trade and Industry [1989] 3 All E.R. 523 (H.L.)
Australian Commercial Research & Development Ltd. v. ANZ McCaughan Merchant Bank [1989] 3 All E.R. 65 (Ch.)
Berisford (S&W) Plc. V. New Hampshire Insurance Co. [1990] 2 Q.B. 631
Cleveland Museum of Art v. Capricorn Art [1990] 2 Lloyd's Rep. 166 (Q.B.)
Arnold v. National Westminster Bank plc. [1991] 2 A.C. 93
Standard King v. Thomas McKenna Ltd [1991] 1 All E.R. 653 (C.A.)
New Hampshire Insurance Co. v. Starbag Bau AG [1992] 1 Lloyd's Rep. 361 (C.A.)
Steamship Owners Protection & Indemnity Association (Bermuda Ltd.) v. Gann [1992] 2 Lloyd's Rep. 528 (Q.B.)
Pan American World Airways v. Andrews, 1992 S.L.T. 268
Showlag v. Mansour [1994] 2 All E.R. 129 (P.C.)
Continental Bank v. Aeakos Compania Naviera [1994] 1 Lloyd's Rep. 505 (C.A.)
The Angelic Grace [1995] 1 Lloyd's Rep. 87 (C.A.)
RTZ v. Connolly [1998] A.C. 854
R v. Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [1999] 2 All E.R. 97 (H.L.)

U.S.

Tobey v. County of Bristol, 23 Fed. Cas. 1313 (C.C.D. Mass. 1845)
Jeter v. Hewitt, 63 U.S. 352 (1859)
Cromwell v. County of Sac, 94 U.S. 351 (1877)
Hilton v. Guyot, 159 U.S. 113 (1895)
Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294 (1917)
U.S. v. Lanza, 260 U.S. 227 (1922)
Kahn v. Tazwell, 266 P. 238, 243 (1928)
Baldwin v. Iowa State Travelling Men's Association, 283 U.S. 522 (1931)
Landis v. North American Co., 299 U.S. 248 (1936)
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)
Miles v. Illinois Central Railroad, 315 U.S. 698 (1942)
Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2nd Cir. 1942)

International Shoe Co. v. Washington, 326 U.S. 310 (1945)
Burns v. Unemployment Compensation Board of Review, 65 A.2d 445 (1945)
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)
Covey Gas & Oil Co. v. Checketts, 187 F. 2d 561 (9th Cir. 1951)
Wilko v. Swan, 346 U.S. 427 (1953)
Torres v. S.S. Rosario, 125 F. Supp. 496 (D.C.N.Y. 1954)
Bartkus v. Illinois, 359 U.S. 121 (1959)
Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1959)
Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (1961)
Sanders v. U.S., 373 U.S. 1 (1963)
National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964)
Hanna v. Plummer, 380 U.S. 460, 468 (1965)
Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970)
Watts v. Swiss Bank Corp., 265 N.E.2d 739 (1970)
Younger v. Harris, 401 U.S. 37 (1971)
Breman v. Zapata Off-Shore Co., 407 U.S. 1 (1972)
Neumeier v. Keuhner, 31 N.Y.2d 121, 129, 286 N.E.2d 454 (1972)
Plum Tree Inc. v. Stockment, 488 F.2d 754 (1973)
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)
Colorado River Water Conservation District v. U.S., 424 U.S. 800 (1976)
Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir. 1977)
U.S. v. Wheeler, Arizona, 435 U.S. 313 (1978)
Montana v. U.S., 440 U.S. 147, 153-54 (1979)
World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980)
Walker v. Armco Steel Corp., 446 U.S. 740 (1980)
Allen v. McCurry, 449 U.S. 90 (1980)
Harrison v. Wyeth Laboratories Division of American Home Products Organization, 510 F. Supp. 1 (E.D. Pa. 1980)
Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981)
Federated Department Stores v. Moitie, 452 U.S. 394 (1981)
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)
Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852 (9th Cir. 1981)
E.I. Dupont de Nemours & Co. v. Diamond Shamrock Corp., 522 F. Supp. 588 (D.C. Del. 1981)
Continental Time Corp. v. Swiss Credit Bank, 543 F. Supp. 408 (S.D.N.Y. 1982)
Brinco Mining Ltd. v. Federal Insurance Co., 552 F. Supp. 1233 (D.D.C. 1982)
Moses H. Cone Memorial Hosp. V. Mercury Construction Corp., 460 U.S. 1 (1983)
W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983)
Laker Airways Ltd. v. Pan American World Airways, 577 F. Supp. 348 (D.D.C. 1983), 559 F. Supp. 1124 (D.D.C. 1983), 568 F. Supp. 84 (D.D.C. 1983), 604 F. Supp. 280 (D.D.C. 1984)
Chua Han Mow v. U.S., 730 F.2d 1308 (1984)
Keeton v. Hustler Magazine, 465 U.S. 770 (1984)
Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984)
Laker Airways Ltd. v. Sabena, 731 F.2d 909 (1984)
Medina v. Chase Manhattan Bank Ltd., 737 F.2d 140 (1984)
American Home Assurance Co. v. Insurance Corp. of Ireland, 603 F. Supp. 636 (S.D.N.Y. 1984)
Burger King Corp., v. Rudzewicz, 471 U.S. 462 (1985)

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)
In re *Demjanjuk*, 612 F. Supp. 544 (1985)
Schultz v. Boy Scouts of America Inc., 480 N.E.2d 679 (1985)
Ronar, Inc. v. Wallace, 649 F. Supp. 310 (S.D.N.Y. 1986)
Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143 (1987)
In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F.2d 195 (2d Cir. 1987)
Goad v. Celotex Corp., 831 F. 2d 508 (4th Cir. 1987)
China Trade and Development Corp. v. MV Choong Yong, 837 F.2d. 33 (2nd Cir. 1987)
Martin v. Wilks, 490 U.S. 755 (1989)
Hartford Fire Insurance Co. v. Westinghouse Electric Corp., 725 F. Supp. 317 (S.D. Miss. 1989)
Ferens v. John Deere, Inc., 494 U.S. 516 (1990)
Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991)
Neuchatel Swiss General Ins. Co. v. Lufthansa Airlines, 925 F. 2d 1193 (9th Cir. 1991)
Howe v. Goldcorp Investments, Ltd., 946 F.2d 944 (1st Cir. 1991)
Davidson v. Exxon Corp. 778 F. Supp. 909 (E.D. La. 1991)
Gau Shan Co. v. Banker's Trust Co., 956 F.2d 1349 (6th Cir. 1992)
Kepler v. ITT Sheraton Corp., 860 F. Supp. 393 (E.D. Mich. 1994)
Morrison Law Firm v. Clarion Co., 158 F.R.D. 285 (S.D.N.Y. 1994)
Richards v. Jefferson County, 517 U.S. 793 (1996)
Hooker v. Burson, 960 F. Supp. 1283 (M.D. Tenn. 1996)
Animation Station v. Chicago Bulls, LP, 992 F. Supp. 382 (S.D.N.Y. 1998)

Australia
Huddart Parker Ltd. v. The "Mill Hill", 81 C.L.R. 502 (1950)
Compagnie des Messageries Maritimes v. Wilson, 94 C.L.R. 577 (1954)
Oceanic Sun Line Special Shipping Co. Inc. v. Fay, 165 C.L.R. 197 (1988)
National Mutual Holdings Pty Ltd. v. Sentry Corp., 87 Aust. L. Rep.539 (1989);
Voth v. Manildra Flour Mills Pty Ltd., 171 C.L.R. 538 (1990)
Sentry Corp. v. Peat Marwick Mitchell & Co., 95 Aust. L. Rep. (1990) 11
McKain v. R.W. Miller & Co. (S. Austl.) Pty Ltd., 175 C.L.R. 1 (1991)
Stevens v. Head, 176 C.L.R. 433 (1993)
Re Wakim, ex parte McNally and others, 163 Aust. L. Rep. (1999) 270.

Canada
Johns-Manville Corp. v. Dominion of Canada General Insurance Co. [1991] Recueils de jurisprudence de Québec 616 (C.A.)
Canastrand Industries Ltd. v. The 'Lara S' [1992] 3 F.C. 398 (T.D.)
P.W.A. Corp. v. Gemini Group Automated Distribution Systems Inc., 98 D.L.R. (4th) 277 (Alberta Q.B. 1992)
Amchem Products Inc. v. British Columbia (Workers' Compensation Board), 102 D.L.R. (4th) 96 (Supreme Court of Canada, 1993)

France
Southern Pacific Properties (Middle East) Ltd. v. Egypt, Judgment of 12 July 1984, 3 ICSID Rep. 79 (Cour d'appel)
Simitch, Cass. 1e civ., 6 Feb. 1985 [1985] R.C. 369
Cour d'appel, Colmar, May 2, 1985, D.P. II 1856

Guinea v. Atlantic Triton Co., Judgment of 18 Nov. 1986, 3 ICSID Rep. 7 (France, Cour de cassation)

Cie de Signaux et d'Entreprises Electriques (CSEE) v. Soc. Sorelec, Cass. 1e civ. [1986] D. 265, obs. Audit

Miniera di Fragne, Cass. 1e civ., 20 Oct. 1987 [1987] IV J.C.P. 400

Omnium de traitement et de Valorisation v. Hilmarton, Judgment of 10 June 1997, 22 Yearbook of International Commercial Arbitration (1997) 696 (Cour de Cassation)

Israel

Eichmann v. Attorney-General of Israel, 36 I.L.R. (1962) 277 (Supreme Court)

Civ. App. 25/63, *Oneon Insurance Co. Ltd. v. Moshe,* 17 P.D. 646 (1963)(Supreme Court)

C.A. 440/70, *Ganem v. Ganem,* 26 (2) P.D. 829 (1971)(Supreme Court)

Civ. App. 591/73, *Baschist v. Workers in Rishon Le Zion and Zichron Yaacov Vineyards,* 28 (1) P.D. 759 (1974)(Supreme Court)

Civ. App. 718/75, *Amram v. Scornik,* 31 (1) P.D. 29 (1976)(Supreme Court)

Civ. App. 221/78, *Ovadia v. Cohen,* 33 (1) P.D. 293 (1979)(Supreme Court)

Civ.App. 9/79, *Korpol v. Horowitz,* 34(1) P.D. 260 (1979)(Supreme Court)

P.App., 30/82 *Multi-lock Inc. v. Rav-Bariach Ltd.,* 36 (3) P.D. 272 (1982)(Supreme Court)

Civ. App. 2705/91, *Abu-Ghichla v. The East Jerusalem Electric Co.,* 48 (1) P.D. 556 (1993)(Supreme Court)

H.C. 1000/92, *Bavli v. High Rabbinical Court of Jerusalem,* 48 (2) P.D. 221 (1994)(Supreme Court)

Japan

Koniglike Java China Paletvaat Lijnen BV Amsterdam v. Tokyo Marine and Fire Insurance Co., 20 Japanese Annual of International Law (1976) 106 (Supreme Court, 1975)

Goto v. Malaysian Airlines System Berhad, 26 Jap. Ann. Int'l L. (1983) 122 (Supreme Court, 1981)

Greenline Shipping Co. Ltd. v. California First Bank, 28 Jap. Ann. Int'l L. (1985) 243 (Supreme Court, 1983)

Miyakoshi Machine Tools Co. Ltd. v. Gould Inc., Hanrei Jiho No. 1348 (Tokyo District Court, 1989)

Netherlands

Southern Pacific Properties (Middle East) Ltd. v. Egypt, Judgment of 12 July 1984 ICSID Rep. 92 (District Court)

Pistacor, HR, 1 Feb. 1985, NJ 698 JCS [1989] Netherlands International Law Reports 59

Harvest Trader, HR, 28 Oct. 1988 [1989] NJ 765

New Zealand

Attorney General v. Mobil Oil NZ Ltd. [1987] 2 N.Z.L.R. 649, 4 ICSID Rep. 117 (1987)

McConnell Dowell Constructors Ltd. v. Lloyd's Syndicate 396 [1988] 2 N.Z.L.R. 257

Apple Computer Inc. v. Apple Corp. SA [1990] 2 N.Z.L.R. 598

Singapore

The Vishva Aurva [1992] 2 Singapore Law Reports 175

Brinkerhoff Maritime Drilling Corp. v. PT Airfast Services Indonesia [1992] 2 S.L.R 776

Djoni Widjaja v. Bank of America National Trust and Savings Association [1993] 3 S.L.R. 678

Switzerland

Guinea v. *Marine International Nominees Establishment (MINE),* Judgment of 4 Dec. 1985, 4 ICSID Rep. 35 (Tribunal Fédéral)

Marine International Nominees Establishment (MINE) v. Guinea, 4 ICSID Rep. 45, 51 (1986)(Supervisory Authority of the Office des Poursuites of Geneva)

Other Jurisdictions

Guinea v. *Marine International Nominees Establishment (MINE),* Judgment of 27 Sept. 1985, 4 ICSID Rep. 32 (Belgium, Court of First Instance)

Order of Nov. 12, 1985, Oberlandesgericht Frankfurt, 5 Praxis des Internationalen Privat und Verfahrensrechts 297 (1986)(Germany)

The Adhiguna Meranti [1988] 1 Lloyd's Rep. 384 (Hong Kong C.A.)

Hapimag v. Mona Martenson [1976] A.D. 101 (Sweden)

Treaties

Hague Convention for the Pacific Settlement of International Disputes, 29 July 1899, *The Hague Conventions and Declarations of 1899 and 1907* (James Brown Scott, ed., 2nd ed., 1915) 41

Hague Convention for the Pacific Settlement of International Disputes, 18 Oct. 1907, *The Hague Conventions and Declarations of 1899 and 1907* (James Brown Scott, ed., 2nd ed., 1915) 41

Covenant of the League of Nations, 17 June 1919, 1 L.N.T.S. 7

Statute of the Permanent Court of International Justice, 16 Dec. 1920, 6 L.N.T.S. 390

General Act for the Settlement of International Disputes, 26 Sept. 1928, 93 L.N.T.S. 344

Convention on the Enforcement of Judgments in Civil and Commercial Matters (Italy-France), 3 June 1930, 153 L.N.T.S. 135

Convention regarding the Recognition and Enforcement of Judicial Decisions (Italy-Switzerland), 3 Jan. 1933, 142 L.N.T.S. 17

Convention on International Civil Aviation, 7 Dec. 1944, 15 UNTS 295

Charter of the United Nations and the Statute of the International Court of Justice, 26 June 1945, XV U.N.C.I.O. Doc. 355

Agreement of the International Bank for Reconstruction and Development, 27 Dec. 1945, 2 U.N.T.S. 134

Convention on the Privileges and Immunities of the United Nations, 13 Feb. 1946, 1 U.N.T.S. 15

Constitution of the International Labour Organisation, 9 Oct. 1946, 15 U.N.T.S. 40

Charter for an International Trade Organisation, *United Nations Conference on Trade and Employment - Final Act and Related Documents*, 24 March 1948, U.N. Doc. ICITO/1/4 (1948)(not in force)

American Treaty on Pacific Settlement, 30 April 1948, 449 U.N.T.S. 83

Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 U.N.T.S. 278

Revised General Act for the Settlement of International Disputes, 28 April 1949, 912 U.N.T.S. 101

Freedom of Association and Right to Organize Convention, 17 June 1948, ILO Convention no. 87

Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 75 U.N.T.S. 135

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, E.T.S. 5, 213 U.N.T.S. 221

Protocol on the Code of the Court of Justice of the European Coal and Steel Community, 18 April 1951, 261 U.N.T.S. 247

Treaty Establishing the European Coal and Steel Community, 20 Apr. 1951, 261 U.N.T.S. 140

First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, E.T.S. 9 (1952)

Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3

Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 167

Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations to Children, 15 April 1958, 539 U.N.T.S. 29

Protocol on the Statute of the Court of Justice of the European Economic Community, 17 April 1957, 298 U.N.T.S. 147

Protocol on the Statute of the Court of Justice of the European Atomic Energy Community, 17 April 1957, 298 U.N.T.S. 256

European Convention for the Peaceful Settlement of Disputes, 29 April 1957, 320 U.N.T.S. 243, E.T.S. 23

European Convention on Extradition, 13 July 1957, E.T.S. 24

Treaty instituting the Benelux Economic Union, 3 Feb. 1958, 381 U.N.T.S. 165

Convention on the High Seas, 29 Apr. 1958, 450 U.N.T.S. 82

Optional Protocol of Signature to the Conventions on the Law of the Sea Concerning the Compulsory Settlement of Disputes, 29 April 1958, 450 U.N.T.S. 172

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38

Convention concerning the Reciprocal Recognition and Enforcement of Judicial Decisions, Arbitral Awards and Authentic Acts in Civil and Commercial Matters (Belgium-Germany), 30 June 1958, 387 U.N.T.S. 245

Convention concerning the Recognition and Enforcement of Judicial Decisions and Arbitral Awards (Belgium-Switzerland), 29 April 1959, 443 U.N.T.S. 35

Convention concerning the Reciprocal Recognition and Enforcement of Judicial Decisions and other Enforceable Instruments in Civil and Commercial Matters (Belgium-Italy), 6 April 1962, 490 U.N.T.S. 317

Vienna Convention on Consular Relations, 24 April 1963, 596 U.N.T.S. 261

Protocol no. 4 to the European Convention on Human Rights and Fundamental Freedoms, 16 Sept. 1963, E.T.S. 46

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159

Treaty concerning the Establishment and the Statute of a Benelux Court of Justice, 31 March 1965, 924 U.N.T.S. 1

International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, UN G.A. Res. 2106A (XX), GAOR, 12th Sess., Supp. No. 14 (A/6014) 47, UN Doc. A/CONF. 32/4

Convention on the Choice of Court, 25 Nov. 1965, art. 6(1), Hague Conference on Private International Law, Recueil des Conventions de la Haye (1970) 96 (not in force)

International Covenant on Civil and Political Rights and Optional Protocol, 16 Dec. 1966, UN GA Res. 2200 A (XXI), GAOR, 21st Sess., Supp. No. 16 (A/6316) 52, UN Doc. A/CONF. 32/4

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 Sept. 1968, 1972 O.J. (L 299) 32, 29 I.L.M. (1990) 1413 (updated version)

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331

American Convention on Human Rights, 22 Nov. 1969, O.A.S. T.S. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, Doc. 21, Rev. 6 (1979), 9 I.L.M. (1970) 673

Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 3 June 1971, 1975 O.J. (L204) 28

Convention concerning the Recognition and Enforcement of Judicial Decisions in Civil and Commercial Matters, of Judicial Settlements and of Notarial Acts (Italy-Austria), 16 Nov. 1971, 1388 U.N.T.S. 277

European Convention on State Immunity, 16 May 1972, E.T.S. 74.

Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, 2 Oct. 1973, 1021 U.N.T.S. 209.

Inter-American Convention on International Commercial Arbitration, 30 Jan. 1975, 14 I.L.M. (1975) 336

Treaty Creating the Court of Justice of the Cartagena Agreement, 28 May 1979, 18 I.L.M. (1979) 1203

Convention on the Elimination of all Forms of Discrimination against Women, 18 Dec. 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46

Inter-American Convention on Extradition, 25 Feb. 1981, 20 I.L.M. (1981) 723

Convention concerning Occupational Safety and Health and the Working Environment, 22 June 1981, ILO Convention no. 155

African Charter on Human and People's Rights, 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. (1982) 58

United Nations Convention on the Law of the Sea and Statute of the International Tribunal for the Law of the Sea, 10 Dec. 1982, UN Doc. A/CONF.62/122 (1982), 21 I.L.M. (1982) 1261

Convention Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (Canada-U.K.), 24 April 1984, 1988 Gr. Brit. T.S. No. 74 (Cmd. 519)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, G.A. Res. 39/46. 39 UN GAOR Supp. (No. 51), UN Doc. A/39/51, at 197 (1984), 23 I.L.M. (1984) 1027

The Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 26 I.L.M. (1987) 1516

Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, 21 March 1986, 25 I.L.M. (1986) 543

The Amman Arab Convention on Commercial Arbitration, 14 April 1987

U.S- Canada Free Trade Agreement, 2 Jan. 1988, 27 I.L.M. (1988) 868

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 Sept.1988, 1988 O.J. (L 319) 9, 28 I.L.M. (1988) 620

Fourth ACP-EEC Convention, 15 Dec. 1989, 1991 O.J. (L 229) 1

Convention applying the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at Common Borders, 19 June 1990, 30 I.L.M. (1991) 84

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec. 1990, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990)(not yet in force)

Protocol of Tegucigalpa of Reforms to the Charter of the Organisation of the Central American States, 13 Dec. 1991

Treaty Establishing the European Union, 7 Feb. 1992, 1992 O.J. (C224) 6

Agreement on a European Economic Area, 2 May 1992, art. 107, 1994 O.J. (L1) 3

Agreement on the Statute of the Central American Court of Justice, 10 Dec. 1992, 34 I.L.M. (1995) 921

North American Free Trade Agreement, 17 Dec. 1992, 32 I.L.M. (1993) 289 and 605

Convention on Conciliation and Arbitration within the CSCE, 15 Dec. 1992, 32 I.L.M. (1993) 557

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, 13 Jan 1993, 32 I.L.M. (1993) 800

North American Agreement on Environmental Cooperation, 14 Sept. 1993, 32 I.L.M. (1993) 1480

Commonwealth of Independent States Treaty on Creation of an Economic Union, 24 Sept. 1993, 34 I.L.M. (1995) 1298

Treaty Establishing the Organization for the Harmonization of Corporate Law in Africa 17 Oct. 1993, 4 Journal Officiel de l'OHADA (1997)

Treaty Establishing the Common Market for Eastern and Southern Africa, 5 Nov. 1993, 33 I.L.M. 1067 (1994)

Agreement establishing the World Trade Organisation, Agreement on Trade-Related Investment Measures and Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, 33 I.L.M. (1994) 1144

Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, 33 I.L.M. (1994) 1197

Understanding on the Rules and Procedures Governing the Settlements of Disputes, 15 April 1994, 33 I.L.M. (1994) 1226

Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 11 May 1994, E.T.S. 155

Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9 Nov. 1995, E.T.S. 158

Protocol Modifying the Treaty Creating the Court of Justice of the Cartagena Agreement, 10 March 1996

Treaty of Amsterdam, 2 Oct. 1997, O.J. (C 340) 173

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, 8 June 1998 (not yet in force)

Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/Conf.183/9, 37 I.L.M. (1998) 999

Agreement on Cooperation and Relationship Between the United Nations and the International Tribunal for the Law of the Sea, 8 Sept. 1998, G.A. Res. 52/521, U.N. GAOR, 52nd Sess., 92nd plen. mtg., U.N. Doc. A/RES/52/521 (1998).

Optional Protocol to the Convention on the Elimination of Discrimination against Women, 6 Oct. 1999, UN Doc. GA Res. A/54/4 (1999), 39 I.L.M. (2000) 281 (not yet in force)

Agreement Establishing the Caribbean Court of Justice, 15 Oct. 1999 (not yet in force)

Protocol no. 12 to the European Convention on Human Rights and Fundamental Freedoms, 26 June 2000, E.T.S. 177

International instruments

Model Draft on Arbitral Procedure, U.N. Doc. A/3859 [1958] II Y.B. Int. L. Comm. 80

Declaration of the Government of Japan under article 36(2) of the ICJ Statute, 312 U.N.T.S 155 (1958)

Declaration of the Government of the Belgium under article 36(2) of the ICJ Statute, 302 U.N.T.S. 251 (1958)

Declaration of the Government of Malta under article 36(2) of the ICJ Statute, 580 U.N.T.S. 205 (1966)

Helsinki Rules on the Uses of the Waters of International Rivers (1966)

Declaration of United Kingdom under article 36(2) of the ICJ Statute, 654 U.N.T.S. 335 (1969)

Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N., GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (1970)

ECOSOC Resolution 1503 (XLVIII), 48 U.N. ESCOR (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970)

Rules of Procedure of the Court of Justice of the European Communities, 1974 O.J. (L350) 1

Final Act of the Conference on Security and Co-Operation in Europe, 1 Aug. 1975, 14 I.L.M. (1975) 1292

Executive Board of UNESCO, Decision 104 EX/3.3, 28 April 1978

Arbitration Rules of the United Nations Commission on International Trade Law, G.A. Res. 31/98 (XXXI), G.A.O.R. Supp. No. 17. UN Doc. A/31/17 (1978)

Regulations of the Inter-American Commission on Human Rights, O.A.S. Official Records OAS/Ser.L.V/II, Doc. 31, rev. 3 (1980)

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 Jan. 1981, 1 Iran-US Cl. Trib. Rep. 10 (1981-82), 20 I.L.M. (1981) 230

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of the Iranian Hostages Crisis, 19 Jan. 1981, 1 Iran-U.S. Cl. Trib. Rep. 3 (1981-82), 20 I.L.M. (1981) 224

ICSID Rules of Procedure for Arbitration Proceedings, 1 ICSID Rep. 157 (1984)

UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985, UN Doc. A/40/17, Annex I, 24 I.L.M. (1985) 1302

Declaration of Senegal under article 36(2) of the ICJ Statute, 1984-85 I.C.J. Y.B. 93-94 (1985)

GATT Doc. MTN.GNG/NG13/W/6 (1987)

Rules of Procedure of the African Commission on Human and Peoples' Rights, 13 Feb. 1988

EC Council Decision 88/591, 25 Nov. 1988, 1988 O.J. (L319) 1.

Rules of Procedure (CERD), 1 Jan. 1989, UN Doc. CERD/C/35/Rev.3 (1989)

Non-Compliance Procedure, Decision II/5, Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Annex IV, 29 June 1990, U.N. Doc. UNEP/Oz.L. Pro.2/3, as revised by U.N. Doc. UNEP/Oz.L.Pro.2/3 (1992), 32 I.L.M. (1993) 874

United Nations Model Treaty on Extradition, 14 Dec. 1990, G.A. Res. 45/115, U.N. Doc. A/Res/45/116 (1991), 30 I.L.M. (1991) 1407

Provisions for a CSCE Procedure for Peaceful Settlement of Disputes, Report of Valetta, 8 Feb. 1991, 30 I.L.M. (1991) 390

Governing Body Decision 10, art. 40(4), 26 June 1992, UN Doc. S/AC.26/1992/10

Governing Council Decision 13, 25 Sept. 1992, UN Doc. S/AC.26/1992/13 (UN Compensation Commission)

Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States (entry into force 20 Oct. 1992)

Decisions of the Stockholm Council Meeting of the CSCE Council, 15 Dec. 1992

Council Regulation (EEC) 404/93 of 13 Feb. 1993 on the Common Organisation of the Market in Bananas, 1993 O.J. (L 47) 1

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res. 827, 25 May 1993, U.N. Doc. S/RES/827 (1993), 32 I.L.M. (1993) 1203

ICSID Model Clauses, 4 ICSID Rep. 357 (1993)

Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 Jan. 1994 and 31 Dec. 1994, S.C. Res. 955, 8 Nov. 1994, U.N. Doc. S/RES/955 (1994), 33 I.L.M. (1994) 1598

Human Rights Committee, General Comment 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994)

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, U.N. Doc. ITR/3/REV.1 (1995)

Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1997/105 (1996)

Rules of Procedure of the African Commission on Human and Peoples' Rights, 6 Oct. 1996

Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/323/Rev.10 (1996)

Draft Protocol for the Consideration of Communications concerning Non-Compliance with the International Covenant on Economic, Social and Cultural Rights, Annual Report of the Committee on Economic, Social and Cultural Rights on its 14th and 15 Sess., 1 Jan 1997, Annex IV, UN Doc. E/1997/22, E/C.12/1996/6

Rules of the Court of Conciliation and Arbitration within the OSCE, 1 Feb. 1997

Rules of Procedure of the Human Rights Committee, 11 Aug. 1997, U.N. Doc. CCPR/C/3/Rev.5 (1997)

Rules of Procedure of the CIS Economic Court (1997)

ILC Draft Articles on State Responsibility, 37 I.L.M. (1998) 440

Charter of Fundamental Rights of the European Union, 18 Dec. 2000, 2000 O.J. (C364) 1

Reports

Minutes of the Proceedings of the Advisory Committee of Jurists, with Annexes (League of Nations, 1920)

Memorandum on Articles 10,11 and 16 of the Covenant Submitted to the Committee on Arbitration and Security of the Preparatory Commission for Disarmament Conference, League of Nations, IX Disarmament, 3 C.A.S. (1928) 39

Commentaire sur le Projet de Convention sur la Procédure Arbitrale adopte par la Commission du Droit International a sa cinquième session (ONU Secrétariat, 1955)

International Law Commission, *Summary Records of the 421st Meeting* [1957] Y.B. Int. L. Comm. 191

Report to the General Assembly on Model Rules on Arbitral Procedure, UN Doc. A/3859 [1958] II Y.B. Int. L. Comm. 82

International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 1 ICSID Rep. 23

Report of the Committee of Experts to the Committee of Ministers of the Council of Europe, *Problems arising from the Co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights – Part I: Problems arising from the Co-existence of the Two Systems of Control provided for by the European Convention and by the UN Covenant on Civil and Political Rights*, 29 Feb. 1968, Doc. No. CM (68) 39

Report of the Committee of Experts to the Committee of Ministers of the Council of Europe, *Problems arising from the Co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights – Differences as regards the Rights Guaranteed*, 1 Aug. 1970, Doc. No. H (70) 7

Parliamentary Assembly of the Council of Europe, *Information Report on the Protection of Human Rights in the United Nations Covenant on Civil and Political Rights and its Optional Protocol and in the European Convention on Human Rights,* 27 April 1976, Doc. No. 3773

Opinion of the United Nations Legal Counsel, 1977-78 Yearbook of the Human Rights Committee 130

Secretariat Memorandum prepared by the Directorate of Human Rights of the Council of Europe, *Effects of the Various International Human Rights Instruments providing a Mechanism for Individual Communications on the Machinery of Protection established under the European Convention on Human Rights*, 1 Feb. 1985, p. 3, Doc. No. H (85) 3

Report of the 3rd Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 21 June 1991, UN Doc. UNEP/OzL.Pro.3/11 (1991)

Report of the 4th Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 25 Nov. 1992, UN Doc. UNEP/OzL.Pro.4/15 (1992)

Memorandum from President (World Bank), Operations Inspection Function: Objectives,

Philip Alston "Effective Implementation of International Instruments on Human Rights, including Reporting Obligations under International Instruments on Human Rights" U.N. GAOR, World Conference on Human Rights, Prep. Comm., 4th Sess., Annex, Agenda Item 5, U.N. Doc. A/CONF.157/PC/ 62/Add.11/Rev.1 (1993)

Report of the International Law Commission, *Commentary on Draft Articles on State Responsibility*, UN GAOR 51 Sess., Supp. No. 10, Doc. A/51/10 (1996)

Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, at 154, U.N. Doc. A/21/22 (1996)

Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, 52 GAOR Sup. 33, U.N. Doc. A/52/33 (1997)

Annual Report of the Inspection Committee of the ADB Board 1997-98, 7 Aug. 1998, Doc. No. ICB/SR1-98

Report of the Subsidiary Body for Implementation, *Procedures and Mechanisms relating to Compliance under the Kyoto Protocol*, 17 Sept. 1999, UN Doc. FCCC/SBI/1999/7 (1999)

Committee on International Civil and Commercial Litigation, *Declining and Referring Jurisdiction in International Litigation - Third Interim Report submitted to the International Law Association London Conference* (2000)

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000),

Books

Andronico O. Adede, *The System for Settlement of Disputes under the UNCLOS* (1987)

Carlton K. Allen, *Law in the Making* (6th ed., 1958)

Stanimir A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* (1995)

Neil Andrews, *Principles of Civil Procedure* (1994)

Anthony Aust, *Modern Treaty Law and Practice* (2000)

John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble ed., 1995)

John H. Baker, *An Introduction to English Legal History* (1990)

M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (2nd rev. ed., 1987)

Henri Batiffol and Paul Lagarde, *Droit International Privé* (7th ed., 1981-83)

Raj Bhala and Kevin Kennedy, *World Trade Law* (1998)

Arie Bloed (ed.), *The Conference on Security and Cooperation in Europe — Analysis and Basic Documents, 1972-1993* (1993)

Gary B. Born, *International Civil Litigation in United States Courts* (3rd ed., 1996)

Gary B. Born, *International Commercial Arbitration in the United States* (1994)

L. Neville Brown and Francis G. Jacobs *The Court of Justice of the European Communities* (3rd ed., 1989)

L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (4th ed., 1994)

Ian Brownlie, *Principles of Public International Law* (5th ed., 1998)

Ian Brownlie, *The Rule of Law in International Affairs* (1998)

Thomas Buergenthal and Robert E. Norris (eds.), *Human Rights: The Inter-American System* (1982)(6 volumes)

Dennis Campbell (ed.) *International Execution Against Judgment Debtors* (1993)

Anthony Carty, *The Decay of International Law?* (1986)

Abram Chayes, Thomas Ehrlich and Andreas F. Lowenfeld, *International Legal Process: Materials for an Introductory Course* (1968)

Abram Chayes and Antonia Chayes, *The New Sovereignty - Compliance with International Regulatory Agreements* (1995)(1998 reprint)

Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987)

Collected Edition of the 'Travaux Préparatoirs' of the European Convention on Human Rights (Council of Europe, 1975)

Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963)

Christian Dadomo and Susan Farran, *The French Legal System* (2nd ed., 1996)

Ronald Dworkin, *Law's Empire* (1986)

Abdul H. El-Ahdab, *Arbitration with the Arab Countries* (2nd ed., 1999)

S.Z. Feller, *Extradition Law* (1980) 262 (in Hebrew).

Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990)

P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication - Law and Practice* (1988)

Max Gluckman, *Politics, Law and Ritual in Tribal Society* (1965)

Forest L. Grieves, *Supra-nationalism and International Adjudication* (1969)

H.L.A. Hart, *The Concept of Law* (2nd ed., 1994)

H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983)

Lois Henkin, *How Nations Behave* (1979)

Louis Henkin, Richard C. Pugh, Oscar Schachter and Hans Smit, *International Law Cases and Materials* (3rd ed., 1993)

Louis Henkin, *International Law: Politics and Value* (1995)

Peter Herzog, *Civil Procedure in France* (1967)

Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) (1996 reprint)

Thomas Hobbes, *Leviathan* (1651)(C.B. Macpherson, ed., 1981)

Mannely O. Hudson, *The Permanent Court of International Justice 1920-1942* (1943)

Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Documents concerning the Origin and the Formation of the Convention (ICSID, 1968)

John Jackson, *The World Trade Organization* (1998)

John Jackson *The World Trading System* (2nd ed., 1997)

Robert Y. Jennings and Arthur Watts (eds.) 1 *Oppenheim's International Law* (9th ed., 1992)

Hans Kelsen *General Theory of Norms* (Michael Hartney, trans., 1991)

Hans Kelsen, *Introduction to the Problems of Legal Theory* (1934)(1992 reprint)

Hans Kelsen, *Pure Theory of Law* (M. Knight trans., 1970)

Harold Koch and Franck Diedrich, *Civil Procedure in Germany* (1998)

Walter Krutzsch and Ralf Trapp, *A Commentary on the Chemical Weapons Convention* (1994)

K.P.E. Lasok, *The European Court of Justice: Practice and Procedure* (2nd ed., 1994)

Harold D. Lasswell and Myres S. McDougal, *Jurisprudence for a Free Society and Policy* (1992) Harold D. Lasswell and Abraham Kaplan, *Power and Society: A Framework for Political Inquiry* (1950)

Hersch Lauterpacht, *The Development of International Law by the International Court* (1958)

League of Nations Official Journal (League of Nations, 1920-45)

Andreas Lowenfeld, *International Litigation and Arbitration* (1993)

Andreas Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (1996)

Mohieddien Mabrouk, *Les Exceptions De Procédure Devant Les Juridictions Internationales* (1966)

J.D. McClean, *Morris: The Conflict of Laws* (4th ed., 1993)

Dominic McGoldrick, *The Human Rights Committee* (1991)

Lord McNair, *The Law of Treaties* (1961)(1998 reprint)

Theodor Meron, *Human Rights Law Making in the United Nations* (1986)

John G. Merrills, *International Dispute Settlement* (3rd ed., 1998)

John H. Merryman *The Civil Law Tradition* (2nd ed., 1985)

Henry Morgenthau, *Politics Amongst Nations* (6th ed., 1985)

Myron H. Nordquist et al. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (1988)(5 Volumes)

Manfred Nowak, *A Commentary on the U.N. Covenant on Civil and Political Rights* (1993)

Walter K. Olson, *The Litigation Explosion - What Happened when America Unleashed the Lawsuit* (1991)

Fatsah Ouguergouz, *Le Charte africaine des droits de l'homme et des peuples* (1993)

Radcliffe and Cross, *The English Legal System* (G.J. Hand and D.J. Bentley, eds., 6th ed., 1977)

Jackson H. Ralston, *The Law and Procedure of International Tribunals* (1936)

Joseph Raz, *The Concept of a Legal System* (2nd ed., 1980)(1990 reprint)

W. Michael Reisman and Aaron M. Schreiber, *Jurisprudence: Understanding and Shaping Law* (1987)

W.V.H. Rogers et al, *On Tort* (1984)

Santi Romano, *L'ordre juridique* (L. François and P. Gothot, trans., 2nd ed., 1975)

Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* (1997) (3 volumes)

Philippe Sands (ed.), *Manual on International Courts and Tribunals* (1999)

Philippe Sands, *Principles of International Environmental Law* (1995)

Oscar Schachter, *International Law in Theory and Practice* (1991)

George Schwarzenberger, 1 *International Law* (1945)

George Schwarzenberger, 1 *International Law* (3rd ed., 1957)

Eugene F. Scoles and Peter Hay, *Conflict of Laws* (2nd ed., 1992)

Malcolm N. Shaw, *International law* (4th ed., 1997)

Mohamed Shahabuddeen, *Precedent in the World Court* (1996)

Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984)

Terence P. Stewart (ed.), II *The GATT Uruguay Round – A Negotiating History (1986-1992)*(1993)

Alexander M. Stuyt, *Survey of International Arbitrations 1794-1989* (1990)

David St. John Sutton, John Kendall and Judith Gill, *Russell on Arbitration* (21st ed., 1997)

Gunther Teubner, *Law as an Autopoietic System* (1993)

Grigorii I. Tunkin, *Theory of International Law* (William E. Butler, trans., 1974)

Third United Nations Conference on the Law of the Sea – Official Records (United Nations, 1976)

United Nations Conference on International Organisation (United Nations, 1945)

United Nations Conference on the Law of Treaties, Official Records (United Nations, 1969-71)(3 volumes)

United Nations General Assembly Official Records (UN, 1945-99)

United Nations Security Council Official Records (UN, 1945-99)

Michel van de Kerchove and François Ost, *Legal System Between Order and Disorder* (Ian Stewart trans., 1994)

Allen D. Vestal, *Res Judicata/Preclusion* (1969)

J.H.W. Virzijl, *The Jurisprudence of the World Court* (1965)

Arthur Watts, *The International Law Commission 1949-1998* (1999)

Hans Wehberg, *The Problem of an International Court of Justice* (Charles G. Fenwick trans., 1918)

Nina Zaltzman, *Res judicata in Civil Proceedings* (1991)(in Hebrew)

Stephen Zamora & Ronald A. Brand (eds.), 1 *Basic Documents of International Economic Law* (1990)

Tom Zwart, *The Admissibility of Human Rights Petitions* (1994)

Articles

Georges Abi-Saab "Cours général de droit international public" 207 *Recueil des cours* (1987) 9

Georges Abi-Saab "Fragmentation or Unification: Some Concluding Remarks" 31 N.Y.U.J. Int. L. & Pol. (1999) 919

Georges Abi-Saab "The International Court of Justice as a World Court" *Fifty Years of the International Court of Justice* (Vaughan Lowe and Malgosia Fitzmaurice, eds., 1996) 3

Evert A. Alkema "The Enigmatic No-Pretext Clause: Article 60 of the European Convention on Human Rights" *Essays on Human Rights: a collection of essays in honour of Bert Vierdag* (Jan Klabbers and René Lefeber, eds., 1998) 41

Philip Allot "The Concept of International Law" 10 European Journal of International Law (1999) 31

Tom Barkhuysen and Michiel van Emmerik "Improving the Implementation of Strasbourg and Geneva Decisions in the Dutch Legal Order: Reopening of Closed Cases or Claims of Damages against the State" *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (T. Barkhuysen et al, eds., 1999)

M. Cherif Bassiouni "Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice – The Need for Accountability" 59 Law and Contemporary Problems (1996) 9

M. Cherif Bassiouni "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections And Equivalent Protections in National Constitutions" 3 Duke J. Comp. & Int'l L. (1993) 235

Carl Baudenbacher "Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area" 3 Columbia Journal of European Law (1997) 169

Richard Baxter "Introduction to Symposium on the International Court of Justice" 11 Va. J. Int'l L. (1971) 291

William E. Beckett "Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale" 39 Recueil des cours (1932) 131

Raj Bhala "The Myth about Stare Decisis and International Trade" 14 American University International Law Review (1999) 845

Raj Bhala "The Precedent Setters: *De Facto Stare Decisis* in WTO Adjudication" 9 Journal of Transnational Law and Policy (1999) 1

Richard E. Bissel "Recent Practice of the Inspection Panel of the World Bank" 91 A.J.I.L. (1997) 741

Joost Blom "Report on Canada" *Declining Jurisdiction, Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 121

Michael Bogdan "Report on Sweden" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 371

Alan E. Boyle "Settlement of Disputes Relating to the Law of the Sea and the Environment" *International Justice* (Kalliopi Koufa, ed., 1997) 295

Daniel D. Bradlow "International Organisations and Private Complaints: The Case of the World Bank Inspection Panel" 34 Va. J. Int'l L. (1994) 553

Stanley M. Brand " 'To Endure for Ages to Come': a Bicentennial View of the Constitution: Battle Among the Branches: The Two Hundred Year War" 65 North Carolina Law Review (1987) 901

Harry C. Bredemeier "Law as an Integrative Mechanism" *Law and Sociology* (W.M. Evan, ed., 1962) 73

John W. Bridge "The Court of Justice of the European Communities and the Prospects for International Adjudication" *International Courts for the Twenty First Century* (Mark W. Janis, ed., 1992) 87

Catherine Brölmann "The 1986 Vienna Convention on the Law of Treaties: The History of Draft Article 36bis" *Essays on the Law of Treaties* (Jan Klabbers and René Lefeber eds. 1998) 121

Bruce Broomhall "Looking Forwards to the Establishment of an International Criminal Court: Between State Consent and the Rule of Law" 8 Crim L.F. (1997) 317

Bartram S. Brown "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals" 23 Yale J. Int'l L. (1998) 383

George D. Brown "The Ideologies of Forum Shopping - Why Doesn't a Conservative Court Protect Defendants?" 71 N.C.L. Rev. (1993) 649

A.S.I.L./N.V.I.R., Proceedings of the 4th Hague Joint Conference (1997) 364

Christine E. Burgess "When May a President Refuse to Enforce the Law?" 72 Texas Law Review (1994) 631

Lucius Caflisch "The OSCE Court of Conciliation and Arbitration: Necessary or Redundant?" 9 A.S.I.L. Bulletin (1995) 23

Megalos A. Caloyanni "L'organisation de la Cour permanente de justice et son avenir" 38 Recueil des cours (1931) 651

Dennis Campbell "Preliminary Observations on Article 219" 5 *The Law of the European Community - A Commentary* (Dennis Campbell, ed., 35th ed., 1998) 6-169

Christina Cerna "The Inter-American Commission on Human Rights: its Organization and Examination of Petitions and Communications" *The Inter-American System of Human Rights* (David J. Harris and Stephen Livingstone, eds. 1998) 65

Jonathan I. Charney "The Implications of the International Dispute Settlement System of the 1982 Convention on the Law of the Sea on International Law" 9 A.S.I.L. Bulletin (1985) 33

Jonathan Charney "The Impact on the International Legal System of the Growth of International Courts and Tribunals" 31 N.Y.U.J. Int. L. & Pol. (1999) 697

Jonathan I. Charney "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea" 90 A.J.I.L. (1996) 69

Jonathan I. Charney "Is International Law Threatened by Multiple International Tribunals" 271 Recueil des cours (1998) 101

Jonathan Charney "Third Party Dispute Settlement and International Law"36 Colum. J. Transnat. L. (1997) 65

Jonathan Charney "Universal International Law" 87 A.J.I.L. (1993) 529

Dan Ciobanu "Litispendence between the International Court of Justice and the Political Organs of the United Nations" 1 *The Future of the International Court of Justice* (Leo Gross, ed., 1976) 209

Kevin M. Clermont and Theodore Eisenberg "Exorcising the Evil of Forum Shopping" 80 Cornell L. Rev. (1995) 1507

Jean Combacau "Le Droit International: Bric-à-Brac ou Système?" 31 Archives de Philosophie du Droit (1996) 85

John R. Cook "The Iran-U.S. Claims Tribunal and the United Nations Compensation Commission: New Machinery for Resolving Claims" 9 A.S.I.L. Bulletin (1995) 28

Philippe Couvreur "The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes" *The International Court of Justice – Its Future Role after Fifty Years* (A.S. Muller, D. Raic and J.M. Thuràsky eds., 1997) 83

James Crawford "The Charter of the United Nations as a Constitutions" *The Changing Constitutions of the United Nations* (Hazel Fox, ed., 1997) 3

Steven P. Croley and John H. Jackson "WTO Dispute Procedures, Standard of Review, and Deference to National Governments" 90 A.J.I.L. (1996) 193

Gennady M. Danilenko "The Economic Court of the Commonwealth of Independent States" 31 N.Y.U.J. Int. L. & Pol. (1999) 893

William J. Davey "The WTO/GATT World Trading System: An Overview" I *Handbook of WTO/GATT Dispute Settlement* (Pierre Pescatore, ed., 1997) 75

Scott Davidson "The Procedure and Practice of the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights" 4 Canterbury L. Rev. (1991) 337

Bruno De Witte "The Past and Future Role of the European Court of Justice in the Protection of Human Rights" *The EU and Human Rights* (Philip Alston, ed., 1999) 859

Vera Gowland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case" 88 A.J.I.L. (1994) 643

Adolfo M. De La Muela "Les Principes Directeurs des Règles de Compétence Territoriale des Tribunaux Internes en Matière de Litiges Comportant un élément International" 135 Recueil des cours (1973) 1

Louis F. Del Duca and George A. Zaphiriou "Report on the U.S.A" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 401

Joseph F. Dimento and Pamela M. Doughman "Soft Teeth in the Back of the Mouth: the NAFTA Environmental Side Agreement Implemented" 10 Geo. Int'l Envtl. L. Rev. (1998) 651

Masato Dogauchi "Report on Japan" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 303

Henry Donnedieu de Vabres "Le conflict des lois de competence judiciare dans les actions personnelles" 26 Recueil des cours (1929) 261

Donald C. Dowing "Forum Shopping and Other Reflections on Litigation Involving U.S. and European Businesses" 7 Pace International Law Review (1995) 465

Jeffrey L. Dunoff "Institutional Misfits: the GATT, the ICJ and Trade-Environment Disputes" 15 Mich. J. Int'l L. (1994) 1043

Jeffrey L. Dunoff and Joel Trachtman " The Law and Economics of Humanitarian Law Violations in Internal Conflict" 93 A.J.I.L. (1999) 394

Pierre-Marie Dupuy, "The Constitutional Dimension of the UN Charter Revisited" 1 Max Planck Year Book of UN Law (1997) 30

Pierre-Marie Dupuy "The Danger of the Fragmentation or Unification of the International Legal System and the International Court of Justice" 31 N.Y.U.J. Int. L. & Pol. (1999) 791

Theodore Eisenberg and Lynn M. LoPucki "Shopping for Judges: an Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations" 84 Cornell L. Rev. (1999) 967

Marc-Andre Eissen "The European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights: Problems of Coexistence" 22 Buff. L. Rev. (1972) 181

Colleen Enache-Brown and Ari Fried "Universal Crime, Jurisdiction and Duty, the Obligation of Aut Dedere Aut Judicare in International Law" 43 McGill L.J. (1998) 613

Judd Epstein "Report on Australia" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 79

William Ewald "Comment on MacCormick" 82 Cornell L. Rev. (1997) 1071

Marc Fallon "Report on Belgium" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 99

Bardo Fassenbender "The United Nations Charter as Constitution of the International Community" 36 Colum. J. Transnat. L. (1998) 529

Jose Faur "Law and Hermeneutics in Rabbinic Jurisprudence: a Maimonidean Perspective" 14 Cardozo Law Review (1993) 1657

J. J. Fawcett "General Report" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 1

Gerald Fitzmaurice "The General Principles of International Law Considered from the Standpoint of the Rule of Law" 92 Receuil de cours (1957) 1

Gerald Fitzmaurice "Some Problems regarding the Formal Sources of International Law" *Symbolae Verzijl* (1958) 172

Chrisopher A. Ford "Judicial Discretion in International Jurisprudence: Article 38(1)(c) and 'General Principles of Law'" 5 Duke J. Comp. & Int'l L. (1994) 35

Mirjam Freudenthal and Frans van der Velden "Report on the Netherlands" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 321

Wolfgang Friedmann "General Course in Public International Law" 127 Receuil des cours (1969) 37

Girogio Gaja "New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe?" *The EU and Human Rights* (Philip Alston, ed., 1999) 781

Kenneth S. Gallant "Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition" 5 Crim L.F. (1994) 557

Pamela B. Gann "The U.S. Bilateral Investment Treaty Program" 21 Stan. J. Int'l L. (1985) 373

Hélène Gaudemet-Tallon "Report on France" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 175

P.R. Ghandhi "The Human Rights Committee and the Right of Individual Communication" 57 B.Y.I.L. (1986) 201

Steven Goldstein "Report on Israel" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 259

Gidon Gottlieb "The Nature of International Law: Toward a Second Concept of Law", IV *The Future of the International Legal Order – The Structure of the International Environment* (Cyril E. Black and Richard A. Falk, eds., 1972) 331

Michael H. Gottesman "Draining the Dismal Swamp: the Case for Federal Choice of Law Statutes" 80 Geo. L.J. (1991) 1

Christine Gray and Benedict Kingsbury "Inter-State Arbitration since 1945: Overview and Evaluation" *International Courts for the Twenty First Century* (Mark W. Janis, ed., 1992) 55

Robert A. Green "Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes" 23 Yale J. Int'l L. (1998) 79

Leo Gross "The International Court of Justice and the United Nations" *Essays on International Law and Organization* (1984) 845

K. Scot Gudgeon "Arbitration Provisions of U.S. Bilateral Investment Disputes" *International Investment Disputes: Avoidance and Settlement* (Seymor J. Rubin and Richard W. Nelson, eds., 1985) 41

Gilbert Guillaume "The Future of International Judicial Institutions" 44 I.C.L.Q. (1995) 848

Lakshman D. Guruswamy "Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes" 7 Minnesota Journal of Global Trade (1998) 287

Elihu Harnon "Res Judicata and Identity of Actions - Law and Rationale" 1 Israel L. Rev. (1966) 539

Trevor C. Hartley "Antisuit Injunctions and the Brussels Jurisdiction and Judgments Convention" 49 I.C.L.Q. (2000) 166

John W. Head " Supranational Law: How the Move toward Multilateral Solutions is Changing the Character of 'International' Law" 42 Kan. L. Rev. (1994) 605

Laurence R. Helfer "Forum Shopping for Human Rights" 148 U. Pa. L. Rev. (1999) 285

Laurence R. Helfer and Anne-Marie Slaughter "Toward a Theory of Effective Supranational Adjudication" 107 Yale L.J. (1997) 273

Peter E. Herzog "Article 219" 5 *The Law of the European Community - A Commentary* (Dennis Campbell, ed., 35th ed., 1998) 6-170.

Rosalyn Higgins "International Law in a Changing System" 58 Cambridge L.J. (1999) 78

Rosalyn Higgins, "Policy Considerations and the International Judicial Process" 17 I.C.L.Q. (1968) 58

Susan Hurt "Res Judicata Effects of State Agency Decisions in Title VII Actions" 70 Cornell L. Rev. (1985) 695

John H. Jackson "Fragmentation or Unification among International Institutions: The World Trade Organization" 31 N.Y.U.J. Int. L. & Pol. (1999) 823

Francis G. Jacobs "The Protection of Human Rights in the Member States of the European Community - the Impact of the Case Law of the Court of Justice" *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (James O'Reilly, ed., 1992) 243

Mark W. Janis "Individuals and the International Court" *The International Court of Justice – Its Future Role after Fifty Years* (A.S. Muller, D. Raic and J.M. Thuràsky eds., 1997) 205

Robert Y. Jennings "The Discipline of International Law" *1 Collected Writings* (1998) 314

Robert Y. Jennings "The International Court of Justice and the Judicial Settlement of Disputes" *1 Collected Writings* (1998) 433

Robert Y. Jennings "The Judicial Enforcement of International Obligations" *1 Collected Writings* (1998) 494

Robert Y. Jennings "A New Look at the Place of the Adjudication in International Relations today" *1 Collected Writings* (1998) 450

Robert Y. Jennings "The Progress of International Law" *1 Collected Writings* (1998) 271

Robert Y. Jennings "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers" 9 A.S.I.L. Bulletin (1995) 2

Robert Y. Jennings "The Role of the International Court of Justice in the Development of International Protection Law" 1 *Review of European Community and International Environmental Law* (1992) 240

Leslie E. John "Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort" 74 Calif. L. Rev. (1986) 2033

Friedrich K. Juenger "Forum Shopping, Domestic and International" 63 Tul. L. Rev. (1989) 553

Immanuel Kant "Eternal Peace" *The Philosophy of Kant* (Carl J, Friedrich, ed., 1993)(1795)

Michael M. Karayanni "The Public Policy Exception to the Enforcement of Forum Selection Clauses" 34 Duquesne University Law Review (1996) 1009

J. Patrick Kelly "The International Court of Justice: Crisis and Reformation" 12 Yale J. Int'l L. (1987) 342

David Kennedy "When Renewal Repeats: Thinking against the Box" 32 N.Y.U. J. Int'l L. & Pol. (2000) 335

Benedict Kingsbury "The Concept of Compliance as a Function of Competing Conceptions of International Law" 19 Mich. J. Int'l L. (1998) 345

Benedict Kingsbury "Forward: Is the Proliferation of International Courts and Tribunals a Systematic Problem" 31 N.Y.U.J. Int. L. & Pol. (1999) 679

Harold H. Koh "Transnational Legal Process" 75 Neb. L. Rev. (1996) 181

Harold H. Koh "Why Do Nations Obey International Law?"106 Yale L.J. (1997) 2599

Juliane Kokott and Frank Hoffmeister, "Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms" 90 A.J.I.L. (1996) 664

Pieter H. Kooijmans "International Arbitration in Historical Perspective: Past and Present" *International Arbitration: Past and Prospects* (A.H.A. Soons, ed. 1990) 23

Martti Koskenniemi "Letter to the Editors of the Symposium" 93 A.J.I.L. (1999) 351

Pieter J. Kuyper, "The Law of the GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law" XXV Neth. Y.B. Int'l Law (1994) 227

Carolyn B. Lamm and Abby Cohen Smutney "The International Centre for Settlement of Investment Disputes: Responses to Problems and Changing Requirements" 12 Mealey's International Arbitration Report (1997) 20

Elihu Lauterpacht "The Development of the Law of International Oraganizations by the Decisions of International Tribunals" 152 Recueil des cours (1976) 377

Koen Lenaerts "Federalism: Essential Concepts in Evolution - The Case of the European Union" 21 Fordham Int'l L.J. (1998) 746

Markus Lenenbach "Antisuit Injunctions in England, Germany and the United States: Their Treatment under European Civil Procedure and the Hague Convention", 20 Loy. L.A. Int'l & Comp. L.J. (1998) 257

Saul Litvinoff "Good Faith" 71 Tul. L. Rev. (1997) 1645

Neil MacCormick "Institutional Normative Order: A Conception of Law" 82 Cornell L. Rev. (1997) 1051

Peter C. Maki "Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System" 9 Minnesota Journal of Global Trade (2000) 343

Gabrielle Marceau "NAFTA and WTO Dispute Settlement Rules – A Thematic Comparison" *International Trade Law and the GATT/WTO Dispute Settlement System* (Ernst-Ulrich Petersmann, ed., 1997) 489

Gabrielle Marceau "Review Essays of Dispute Settlement Mechanisms – Regional or Multilateral: Which One is Better" 31 J. World Trade (1997) 167

Zanifa McDowell "*Forum Non Conveniens:* The Caribbean and its Response to Xenophobia in American Courts" 49 I.C.L.Q. (2000) 108

Patricia A. McKeon "An International Criminal Court: Balancing the Principle of Sovereignty against the Demands for International Justice" 12 St. John's J. Legal Comment. (1997) 535

Theodor Meron "The Ad Hoc International Criminal Tribunals and the Proposed International Criminal Court" 9 A.S.I.L. Bulletin (1995) 15

Theodor Meron "Norm Making and Supervision in International Human Rights: Reflections on Institutional Order" 76 A.J.I.L. (1982) 754,

Salvatore Messina "Les tribunaux mixtes et les rapports interjuridictionnels en Egypte" 52 Receuil des cours (1932) 363

Sean D. Murphy "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" 93 A.J.I.L. (1999) 57

Rachel Murray "Decisions by the African Commission on Individual Communications under the African Charter in Human and People's Rights" 46 I.C.L.Q. (1997) 412

Eric P. Myjer "The Settlement of Disputes Under the Chemical Weapons Convention and the Case of the Confidentiality Commission" *The Convention on the Prohibition and Elimination of Chemical Weapons: A Breakthrough in Multilateral Disarmament* (Daniel Bardonnet, ed., 1997) 537

Note "A Comparative and Critical Assessment of Estoppel in International Law", 50 U. Miami L. Rev. (1996) 369

Note "Forum Shopping Reconsidered", 103 Harv. L. Rev. (1990) 1677

Peter Nygh "Choice of Law Rules and Forum Shopping in Australia" 46 South Carolina L. Rev. (1995) 899

Mary Ellen O'Connell "New International Legal Process" 93 A.J.I.L. (1999) 334

Shigeru Oda "Dispute Settlement Prospects in the Law of the Sea" 44 I.C.L.Q. (1995) 863

Shigeru Oda "The International Court of Justice from the Bench" 244 Recueil de cours (1993) 9

Bernard H. Oxman " The Rule of Law and the United Nations Convention on the Law of the Sea" 7 European Journal of International Law (1996) 353

David Palmeter and Petros C. Mavroidis "The WTO Legal System: Sources of Law" 92 A.J.I.L. (1998) 398

Antonio R. Parra "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment", 12 ICSID Rev., F.I.L.J. (1997) 287

Kevin W. Patton "Dispute Resolution under the North American Commission on Environmental Co-operation" 5 Duke J. Comp. & Int'l L. 87 (1994)

Antonio Perez "WTO and UN Law: Institutional Comity in National Security" 23 Yale J. Int'l L. (1998) 301

Joseph M. Perillo "Abuse of Right: A Pervasive Legal Concept" 27 Pacific Law Review (1995) 37

John A. Perkins "The Changing Foundations of International Law: From State Consent to State Responsibility"15 Boston University International Law Journal (1997) 433

Ernst-Ulrich Petersmann "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?" 31 N.Y.U.J. Int. L. & Pol. (1999) 753

Ernst-Ulrich Petersmann "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction" *International Trade Law and the GATT/WTO Dispute Settlement System* (Ernst-Ulrich Petersmann, ed., 1997) 5

Monica Pinto " Fragmentation or Unification among International Institutions: Human Rights Tribunals" 31 N.Y.U.J. Int. L. & Pol. (1999) 833

Jean-Pierre Quéneudec "Article 95" *La Charte Des Nations Unies: Commentaire article par article* (Jean Pierre Cot and Alain Pellet, eds., 1985) 1280

Juan José Quintana "The International Court of Justice and the Formulation of General International Law: The Law of Maritime Delimitation as an Example" *The International Court of Justice – Its Future Role after Fifty Years* (A.S. Muller, D. Raic and J.M. Thuràsky eds., 1997) 367

Michael D. Ramsey "Escaping 'International Comity'" 83 Iowa L. Rev. (1998) 893

Richard W. Raushenbush, "Antisuit Injunctions and International Comity" 71 Va. L. (1985) 1039

Joseph Raz "The Relevance of Coherence" 72 B.U.L. Rev. (1992) 273

W. Michael Reisman "Creating, Adapting and Designing Dispute Resolution Mechanisms for the International Protection of Human Rights" 9 A.S.I.L. Bulletin (1995) 8

W. Michael Reisman "Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication" 258 Recueil des cours (1996) 9

Judith Resnik "Tiers" 57 S. Cal. L. Rev. (1984) 837

Alexander Reus "Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany" 16 Loy. L.A. Int'l & Comp. L.J. (1994) 455

R. Jason Richards "Richards v. Jefferson County: The Supreme Court Stems the Crimson Tide of Res Judicata" 38 Santa Clara Law Review 691 (1998)

Arthur H. Robertson "The Implementation System: International Measures" *The International Bill of Rights - the Covenant on Civil and Political Rights* (Louis Henkin, ed., 1981) 332

Arthur .H. Robertson "The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights" 43 B.Y.I.L. (1968-69) 21

Cesare P.R. Romano "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" 31 N.Y.U.J. Int. L. & Pol. (1999) 709

Leila Nadya Sadat and S. Richard Carden "The New International Criminal Court: an Uneasy Revolution", 88 Geo. L.J. (2000) 381

Klaus T. Samson "Human Rights Coordination within the UN System" *The United National and Human Rights: A Critical Appraisal* (Philip Alston, ed., 1992) 620

Pieter Sanders "Arbitration" XVI *International Encyclopaedia of Comparative Law* (Mauro Cappelletti vol. ed., 1996) 34

Philippe Sands "Treaty, Custom and the Cross-fertilization of International Law" 1 Yale Human Rights and Development Law Journal (1998) 85

Haimo Schack "Report on Germany" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 189

Egon Schewlb "The International Convention on the Elimination of All forms of Racial Discrimination" 15 I.C.L.Q. (1966) 996

Henry G. Schermers "Constituent Treaties of International Organizations" *Essays on the Law of Treaties: a collection of essays in honour of Bert Vierdag* (Jan Klabbers and René Lefeber, eds., 1998) 19

Christoph Schreuer "Commentary on the ICSID Convention", 12 ICSID Rev., F.I.L.J. (1997) 59

Stephen M. Schwebel "Authorizing the Secretary-General of the UN to Request Advisory Opinions of the ICJ" *Justice in International Law* (1994) 72

Stephen M. Schwebel "The Prospects for International Arbitration: Inter-State Disputes: Comments on a Paper by Ambassador M.C.W. Pinto" *Justice in International Law* (1994) 223

Stephen M. Schwebel "Reflections on the Role of the International Court of Justice" *Justice in International Law* (1994) 3

Stephen M. Schwebel "Relations Between the International Court of Justice and the United Nations" *Justice in International Law* (1994) 14

Gary L. Scott and Craig L. Carr "Multilateral Treaties and the Formation of Customary International Law" 25 Denv. J.I.L.P. (1996) 71

Ignaz Seidl-Hohenveldern "Access of International Organizations to the International Court of Justice", *The International Court of Justice – Its Future Role after Fifty Years* (A.S. Muller, D. Raic and J.M. Thuràsky eds., 1997) 189

Andrea M. Seielstad "Unwritted Laws and Customs, Local Legal Cultures and Clinical Legal Education" 6 Clinical Law Review (1999) 127

Mehanshe Shawa "The Relation between the Jurisdiction of the Family Court and the Jurisdiction of the Rabbinical Court" 44 Hapraklit (1998) 44 (in Hebrew)

G. Richard Shell "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration" 35 U.C.L.A. L. Rev. (1988) 623

G. Richard Shell "Trade Legalism and International Relations Theory: an Analysis of the World Trade Organization" 44 Duke L.J. (1995) 829

Jianming Shen "The Basis of International Law: Why Nations Observe" 17 Dickinson Journal of International Law (1999) 287

Kurt Siehr "Report on Switzerland" *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 381

Bruno Simma "Self-Contained Regimes" XVI Neth. Y.B. Int'l Law (1985) 111

Jose Luis Siqueiros "Bilateral Treaties on the Reciprocal Protection of Foreign Investment" 24 Cal. W. Int'l L.J. (1994) 255

Hans Smit, International Res Judicata and Collateral Estoppel in the United States, 9 U.C.L.A. L. Rev. (1962) 44

Louis B. Sohn "Broadening the Advisory Jurisdiction of the International Court of Justice" 77 A.J.I.L. (1983) 124

Louis B. Sohn "International Arbitration in Historical Perspective: Past and Present" *International Arbitration: Past and Prospects* (A.H.A. Soons, ed. 1990) 9

Dean Spielmann "Human Rights case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities" *The EU and Human Rights* (Philip Alston, ed., 1999) 757

Allan R. Stein "Erie and Court Access" 1 Yale L. J. (1991) 1935

Richard H. Steinberg "Trade-Environment Negotiations in the EU, NAFTA and WTO: Regional Trajectories of Rule Development" 91 A.J.I.L (1997) 231

Brigitte Stern "Concluding Remarks" 9 A.S.I.L. Bulletin (1995) 49

A.J. Stone, III "Consti-Tortion: Tort Law as an End-Run around Abortion Rights after Planned Parenthood v. Casey" 8 American University Journal of Gender, Social Policy & the Law (2000) 471

Alec Stone Sweet "Constitutional Dialogues in the European Community" *The European Courts and National Courts - Doctrine and Jurisprudence* (Ann-Marie Slaughter et al, eds., 1998) 305

Paul Szasz "General Law-Making Process" 1 *United Nations Legal Order* (Oscar Schachter and Christopher C. Joyner, eds., 1995) 35

Deanell Reece Tacha "Judges and Legislators: Enhancing the Relationship" 44 American University Law Review (1995) 1537

Maxime E. Tardu "The Protocol to the United Nations Covenant on Civil and Political Rights and the Inter-American System: A Study of Co-Existing Petition Procedures" 70 A.J.I.L. (1976) 778

Louise E. Teitz "Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings" 25 Int'l Lawyer (1992) 21

Giorgos Ténékidès "L'exception de litispendance devant les organisms internationaux" XXXVI *Revue générale de droit international public* (1929) 502

Gunther Teubner "'Global Bukowina': Legal Pluralism in the World Society" *Global Law Without a State* (Gunther Teubner ed., 1996) 3

Hugh Thirlway "Comment" 9 A.S.I.L. Bulletin (1995) 47

Christian Tomuschat "International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction" *Judicial Settlement of International Disputes: The International Court of Justice, Other Courts and Tribunal, Arbitration and Conciliation* (Max Planck Institute for Comparative Public Law and International Law, 1974) 285

Tullio Treves "Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice" 31 N.Y.U.J. Int. L. & Pol. (1999) 809

Tullio Treves "The Jurisdiction of the International Tribunal for the Law of the Sea" 37 Ind. J. Int. L. (1997) 396

Tullio Treves "Recent Trends in the Settlement of International Disputes" I Bancaja Euromediterranean Courses of International Law (1997) 395

A.A. Cancado Trinidade "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights" 202 Receuil des cours (1987) 9

Nicolas Valticos "Activités Normatives et Quasi Normative: Contrôle" *A Handbook on International Organizations* (René Jean Dupuy, ed., 2nd ed., 1998) 461

Christine van den Wyngaert and Guy Stessens "The International *Non Bis In Idem* Principle: Resolving some of the Unanswered Questions" 48 I.C.L.Q. (1999) 779

Allen D. Vestal "Rationale of Preclusion" 9 St. Lou. U.L.J. (1964) 29

Jeffrey Waincymer "Reformulated Gasoline under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora out of a Chapeau?" 18 Mich. J. Int'l L. (1996) 141

Prosper Weil "Cours général de droit international public" 237 Recueil des cours (1992) 9

Prosper Weil "Towards Relative Normativity in International Law?" 77 A.J.I.L. (1983) 413

Joseph H.H, Weiler and Ulrich R. Haltern "Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz" *The European Courts and National Courts - Doctrine and Jurisprudence* (Ann-Marie Slaughter et al, eds., 1998) 331

Louise Weinberg "Against Comity" 80 Geo. L.J. (1991) 53

Siegfried Wiessner and Andrew R. Williard "Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity" 93 A.J.I.L. (1999) 316

Maureen Williams "Report on Argentina" *Declining Jurisdiction, Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 71

Skelly Wright "The Federal Courts and the Quality of State Law" 13 Wayne L. Rev. (1967) 317

Norbert Wühler "The United Nations Compensation Commission: A New Contribution to the Process of International Claims Resolution" 2 Journal of International Economic Law (1999) 249

Domestic Laws

U.K.

Uniformity of Process Act, 1832

Judicature Act, 1873

Administration of Justice Act 1920, s. 9

Foreign Judgments (Reciprocal Enforcement) Act 1933, s. 2, 4
Domicile and Matrimonial Proceedings Act 1973, s. 5, Schedule 1
Arbitration Act 1979, s. 4
Supreme Court Act 1981, s. 49
Civil Jurisdiction and Judgments Act 1982, s. 34
Extradition Act, 1989, s. 6, 12
Arbitration Act 1996, s. 2, 9, 21, 58, 67-69
Civil Procedure Rules, Rule 3.4
Rules of the Supreme Court, Order 15, rules 1, 2, 4
Rules of the Supreme Court, Order 18, rule 11

U.S.
U.S. Constitution, art. III, § 2, art. IV, §1, amend. V
9 U.S. § 1, 2, 3, 10, 13
22 U.S.C. §§ 6021-91
28 U.S.C. §§ 1404
Uniform Foreign Money-Judgments Recognition Act, § 4, 13 Uniform Laws Annotated 263 (1980 & 1991 Supp.)

Canada
Divorce Act, 1985, Ch. 3, s. 3 (2),
Civil Code, art. 3135, 3137 (Quebec)
Code of Civil Procedure No. 6, art. 797 (Quebec)

France
Civil Code, art. 14, 1351
New Code of Civil Procedure (N.C.P.C.), art. 48, 92, 100, 101

Germany
B.G.B. §. 242
Z.P.O. §§ 23, 28, 38, 40, 91, 261, 328, 1027a

Greece
Code of Civil Procedure, art. 31, 222
Act No. 1429/1984, art. 4 [1984] Kodex No. B 327 ff (Greece)

Israel
Jurisdiction of Rabbinical Courts (Marriage and Divorce) Law, 1953, art.31
Foreign Judgments Enforcement Law, 1958, art. 2, 6, 11
Amendment of Family Laws (Alimony) Law, 1959, art. 18
Arbitration Law, 1968, art. 5, 23
Contract Law (General Part), 1973, art. 12
Criminal Law, 1977, art. 14

Netherlands
Code of Civil Procedure (WBRv), art. 429c
New Civil Code (NBW), art. 1-2
Penal Code, art. 68

New Zealand
Arbitration Act, 1908, art. 5
Admiralty Act, 1973, s. 6

Switzerland
Civil Code, art. 2
Statute of Private International Law, art. 5, 9, 114

Other Jurisdictions
Civil Code, art. 1071 (Argentina)
Jurisdiction of Courts (Cross-vesting) Act, 1987, art. 5 (Australia)
Code of Criminal Procedure, art. 65 (Austria)
Preliminary Title to Criminal Procedure Code, art. 13 (Belgium
Civil Procedure Law § 244 (China)
Transnational Causes of Action (Product Liability) Act 1997, s. 4 (Dominica)
Contract Act, s. 36 (Finland)
Code of Civil Procedure, 1942, art. 2, 3, 4, 797 (Italy)
Code of Civil Procedure, art 25, 200, 231 (Japan)
Law on Foreign Investment of 1995, art. 27 (Kazakhstan)
Civil Code, art. 18 (Turkey)

Miscellaneous
Am. Jur. 2d., Alternative Dispute Resolution § 81
Am. Jur. 2d., Courts § 91
Am. Jur. 2d., Judgments §§ 514, 661, 664
Black's Law Dictionary (7th ed., 1999)
22 C.J.S. § 258
Halsbury's Laws of England (4th ed., 1990)(reissue)
House of Lords, Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234
Restatement of the Law, 2nd, *Conflict of Laws* § 84 comment c, e (1971), §98 comment b (1971)
Restatement of the Law, 2nd, *Conflict of Laws* § 80
Restatement of the Law, 2nd, Judgments §§ 17-19, 24, 27
Restatement of the Law, 3rd, Foreign Relations Law of the United States § 404
Restatement of the Law, 3rd, Foreign Relations Law of the United States § 103, comment b (1987) and § 475, comment a (1990)
Stephen M. Schwebel, *Address to the Plenary Session of the General Assembly of the UN*, 26 Oct. 1999
President of the World Court Warns of 'Overlapping Jurisdictions' in Proliferation of International Judicial Bodies, UN Press Release GA/L/3157, 27 Oct. 2000