

International Courts and Tribunals, Multiple Jurisdiction

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TABLE OF CONTENTS

A. Factual Background.....	1
B. Problematic Cases	4
C. Options for Solutions to Overcome Fragmentation and Overlapping Jurisdictions.....	17
D. Assessment.....	27

A. Factual Background

- 1 During the 1990s the international legal system witnessed a remarkable increase of available dispute settlement mechanisms (→ *Judicial Settlement of International Disputes*; → *Peaceful Settlement of International Disputes*). The establishment of specialized courts and tribunals such as the → *International Tribunal for the Law of The Sea (ITLOS)* or the → *International Criminal Court (ICC)* and the two ad hoc criminal tribunals for the former Yugoslavia (→ *International Criminal Tribunal for the Former Yugoslavia [ICTY]*) and for Rwanda (→ *International Criminal Tribunal for Rwanda [ICTR]*) coincided with the strengthening of the existing → *General Agreement on Tariffs and Trade (1947 and 1994) (GATT)* dispute settlement mechanism through the creation of a quasi-automatic trade dispute settlement jurisdiction in the form of the 1995 → *World Trade Organization, Dispute Settlement* and a surge of investment → *arbitration* under the → *International Centre for Settlement of Investment Disputes (ICSID)* and other institutionalized or ad hoc dispute settlement rules. At the same time, both the contentious and the advisory jurisdictions of the → *International Court of Justice (ICJ)* have been resorted to more frequently.
- 2 Such multiplication of available judicial and quasi-judicial forums has in turn produced a considerably enlarged international case law. While this increase of actual and potential dispute settlement mechanisms has been welcomed as an indication of the strengthening of the → *rule of law* in international relations (eg from GATT ‘trade diplomacy’ to → *World Trade Organization [WTO]* ‘trade adjudication’), certain concomitant risks and dangers have also become apparent. The multiplication, sometimes with a negative connotation referred to as ‘proliferation’, of international courts and tribunals may lead to the hassles of forum shopping as well as to a duplication or multiplication of proceedings before different forums, involving a waste of judicial resources (see also → *Forum non conveniens*). If litigated to the end, multiple proceedings may even result in divergent outcomes which may contribute to the (actual or perceived) → *fragmentation of international law* or, even worse, may weaken the coherence and credibility of the law as such.
- 3 These negative implications have become evident in a number of high-profile cases, such as the → *Tadić Case*, the → *MOX Plant Arbitration and Cases*, the *Swordfish Case*, the *CME/Lauder arbitration*, and the → *SGS v Pakistan and SGS v Philippines Cases*.

B. Problematic Cases

- 4 One has to distinguish between different types of dangers resulting from increased judicial and quasi-judicial activities. On the one hand, multiplication simply increases the likelihood that different courts and tribunals will reach different results when addressing

identical or similar legal issues in the course of otherwise separate proceedings. On the other hand, the broader availability of dispute settlement forums can also lead to a duplication (or even multiplication) of proceedings concerning the same dispute between the same parties. While both situations may produce conflicting outcomes, the latter type of parallel proceedings may even lead to contradictory results.

- 5 The fact that different or even the same dispute settlement institutions may reach different results when confronted with similar or identical legal issues is not remarkable as such. To a certain degree this is a necessary element of the evolution of the law. It may become a disturbing factor, however, if it happens with frequency and within a short period of time.
- 6 A much noted example of divergent judicial views is the difference between the *Prosecutor v Duško Tadić* ('*Tadić Case*') decision (*Tadić Case [Judgment]* paras 99–145) of the ICTY and the judgment of the ICJ in the → *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* (*Military and Paramilitary Activities in and against Nicaragua Case [Nicaragua v United States] [Merits]* paras 115–116). Openly rejecting the ICJ test, the ICTY adopted a different criterion to determine the application of international humanitarian law (→ *Humanitarian Law, International*). Instead of relying on the ICJ's 'effective control' test in order to determine whether an armed military or paramilitary group can be regarded as acting on behalf of a foreign power, the ICTY selected an 'overall control' test (*Tadić Case [Judgment]* para. 120). While many commentators have viewed the two decisions as an example of a normative conflict between an earlier and a later interpretation of a rule of general international law (→ *Interpretation in International Law*), one may, of course, also reconcile the two diverging approaches by stressing the different factual circumstances that have led to the decisions.
- 7 Also, in international investment dispute settlement two tribunals have sharply disagreed over similar issues of law within a short time-span (→ *Investment Disputes*). In the cases *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan (Objections to Jurisdiction)* ('*SGS v Pakistan*') and *SGS Société Générale de Surveillance SA v Republic of the Philippines (Objections to Jurisdiction)* ('*SGS v Philippines*'), two ICSID arbitrations brought by a Swiss investor against Pakistan in one case and against the Philippines in the other, the deciding tribunals came to markedly different results concerning the interpretation of jurisdictional provisions in bilateral investment treaties (BITs; → *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*; → *Investments, Bilateral Treaties*; → *Investments, International Protection*). In the 2003 *SGS v Pakistan* decision the panel held that it lacked jurisdiction to adjudicate on mere contract claims, although it based its decision on the applicable BIT which broadly provided for settlement of 'disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party' (Art. 9 (1) Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and the Reciprocal Protection of Investments). This interpretation was openly rejected by another ICSID tribunal in the 2004 *SGS v Philippines* decision on jurisdiction, where an identical dispute settlement provision in the Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and the Reciprocal Protection of Investments was interpreted to comprise both treaty and contract claims (*SGS v Philippines* paras 131–135). In addition, the two tribunals came to opposing results with regard to the meaning of so-called umbrella clauses, according to which host States stipulate that they will observe obligations assumed with regard to specific investments in their territories by investors of the other contracting parties. The *SGS v Pakistan* tribunal rejected the view that 'breaches

of a contract ... concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically “elevated” to the level of breaches of international law’ (at para. 167). Having regard to the distinction in principle between breaches of contract and breaches of treaty, contractual claims could only be brought under Art. 11 ‘under exceptional circumstances’ (ibid para. 172). The *SGS v Philippines* tribunal, however, adhered to the traditional view that an umbrella clause ‘makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law’ (*SGS v Philippines* para. 128). More important from a general point of view is the fact that the *SGS v Philippines* tribunal expressly recognized that it disagreed with the *SGS v Pakistan* tribunal and that it expressly renounced any system of binding precedent either under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID Convention’) or under international law in general (→ *Stare decisis*). According to the *SGS v Philippines* tribunal there is ‘no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. ... It must be ... in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v Pakistan* Tribunal and also in the present decision’ (*SGS v Philippines* para. 97).

- 8 Even in the absence of such outright repudiation, different tribunals may produce divergent case law when interpreting similar or even identical legal rules. An example can be found in the interpretation given to human rights provisions contained in the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* (ECHR) by the → *European Court of Human Rights (ECtHR)* (as well as formerly the European Commission of Human Rights) on the one hand and the European Court of Justice on the other (→ *European Communities, Court of Justice [ECJ] and Court of First Instance [CFI]*). While professedly adhering to the ECtHR’s interpretation, some ECJ rulings do in fact differ quite noticeably from the understanding of the Strasbourg Court. Well-known examples are the conflicting interpretations given to Arts 6 and 8 ECHR, with a clearly more restrictive approach pursued by the ECJ. For instance, while the ECJ considered that the right to privacy of Art. 8 (1) ECHR according to which ‘everyone has the right to respect for his private and family life, his home and correspondence’ ‘may not be extended to business premises’ (*Hoechst AG v Commission* 2924), the ECtHR shortly thereafter found that ‘private life’ includes professional and business activities and thus brought a lawyer’s office within the scope of protection provided for in Art. 8 (1) ECHR (*Niemietz v Germany*; → *Privacy, International Protection against Unlawful Interference with*). Similarly, the ECtHR did not share the ECJ’s assessment that Art. 6 ECHR did not uphold the right not to give evidence against oneself (*Orkem v Commission*). Instead, it held that the right to remain silent and not to contribute to incriminating oneself was inherent in Art. 6 ECHR (*Funke v France*; → *Fair Trial, Right to, International Protection*). The accession of the European Union to the ECHR, made possible according to Protocol No 14 and provided for in Art. I-9 (2) 2004 Draft Treaty Establishing a Constitution for Europe, will permit the ECtHR to have a final say in human rights matters and thus to eliminate such inconsistencies (→ *European Constitutional Treaty, Development of*).
- 9 Similarly, the fact that → *human rights, individual communications/complaints* may be consecutively brought before different human rights bodies creates a risk of diverging interpretations of similar provisions contained in the UN covenants and the European, Afri-

can or American conventions (→ *International Covenant on Civil and Political Rights [1966]* [ICCPR]; → *International Covenant on Economic, Social and Cultural Rights [1966]*; → *African Charter on Human and Peoples' Rights [1981]*; → *American Convention on Human Rights [1969]*). While Art. 35 (2) ECHR bars any re-litigation of claims already submitted to another procedure, Art. 5 (2) Optional Protocol to the ICCPR only precludes proceedings before the → *Human Rights Committee* in case of proceedings pending elsewhere (*lis pendens*). Thus, it is not excluded and it has happened in practice that complaints are first brought before the Strasbourg organs and then before the Human Rights Committee.

- 10 The absence of a clear division of jurisdictional power is also felt in the area of trade disputes where both regional and global dispute settlement mechanisms may be available at the same time. Prominent examples of this jurisdictional overlap are the numerous cases concerning the long-standing softwood lumber dispute between the United States (US) and Canada before → *North American Free Trade Agreement (1992)* (NAFTA) panels, on the one hand, and before WTO panels, on the other (→ *North American Free Trade Agreement, Dispute Settlement*). By the end of 2005 the inherent danger of contradictory outcomes had apparently materialized when a WTO panel found that certain lumber imports from Canada threatened to cause material injury to US competitors (*United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*), while a NAFTA Committee confirmed that a threat of material injury could not be ascertained (*Re Certain Softwood Lumber Products from Canada*).
- 11 More recently, it has been less a divergence of interpretations given by different tribunals in different cases but rather the simultaneous seizure of different courts with regard to the same dispute or at least aspects of one and the same dispute that has given cause for concern.
- 12 A good example is provided by the so-called ‘swordfish dispute’ between Chile and the European Community (EC) concerning fishing rights and conservation measures regarding this highly migratory fish species. This controversy led to the parallel establishment of a WTO panel (*Chile—Measures Affecting the Transit and Importation of Swordfish*) and a special ITLOS Chamber (*Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean [‘Swordfish Case’]*) in 2000. While the EC alleged a GATT violation on the part of Chile, Chile considered the European fishing practices to be contrary to provisions of the United Nations Convention on the Law of the Sea (UNCLOS; → *Law of the Sea*). Both claims did not appear without merit, and in the end potentially contradictory outcomes were averted by an agreement to suspend both proceedings in 2001.
- 13 A similar situation arose in the *MOX Plant Case (Ireland v United Kingdom)* where an arbitral tribunal according to Annex VII UNCLOS was seized by Ireland in a dispute concerning emissions from a mixed oxide fuel plant at a nuclear facility in the United Kingdom while an ad hoc arbitration under the Convention for the Protection of the Marine Environment of the North-East Atlantic (‘OSPAR Convention’) concerning the release of documents and general issues of a duty to inform was conducted (*Dispute concerning Access to Information under Article 9 OSPAR Convention [Ireland v United Kingdom]*). When concerns were raised whether the UNCLOS proceedings were permissible considering the exclusive character of the dispute settlement system under the Treaty Establishing the European Community (ECT), the arbitral tribunal suspended its proceedings until a determination could be made by the ECJ (*The MOX Plant Case [Ireland v United Kingdom] [Further Suspension of Proceedings on Jurisdiction and Merits]*). In May 2006, the ECJ ruled that Ireland had failed to fulfil its obligations under Art.

- 292 ECT according to which ‘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’ (C-459/03 *Commission v Ireland* para. 123).
- 14 To date most cases involving multiple jurisdictions have been solved in a pragmatic fashion. But it is clear that the availability of multiple jurisdictions for one and the same dispute carries with it the risk that divergent lines of cases are developing which, in the worst case, may even lead to outright contradictory results. This in turn may contribute to an increasing fragmentation of international law.
 - 15 One of the most extreme forms of conflicting dispute settlement outcomes occurred in the *Lauder v The Czech Republic* and *CME Czech Republic BV v The Czech Republic* (*‘CME v Czech Republic’*) arbitrations where two parallel proceedings involving the same investment dispute against the Czech Republic resulted in contradictory awards. The dispute arose from a foreign investment in the Czech TV sector which led the foreign investor to claim that various acts and omissions of the Czech Media Council during the 1990s constituted violations of investment protection standards, such as fair and equitable treatment, full protection and security, and the prohibition of expropriation. In a direct arbitration between Mr Lauder and the Czech Republic according to → *United Nations Commission on International Trade Law (UNCITRAL)* rules as provided for in the United States-Czech Republic BIT (*Lauder v The Czech Republic*), the tribunal unanimously held that although the Czech Republic had committed a breach of its obligations under the United States-Czech Republic BIT in relation to some of the alleged events, this breach did not give rise to liability on the part of the Czech Republic. After the initiation of the *Lauder v The Czech Republic* proceedings, CME, a company incorporated in the Netherlands and controlled by Mr Lauder, initiated arbitration proceedings against the Czech Republic pursuant to the Netherlands-Czech Republic BIT, claiming the same violations and facts as Mr Lauder had in the London proceedings. Within days after the London Award had been rendered in September 2001, a partial award was adopted by the Tribunal in the *CME v Czech Republic* proceedings (*CME v Czech Republic [Partial Award]*). It came to conclusions diametrically opposing the London Award and made a finding of liability. The determination of the quantum of the Czech Republic’s liability was reserved to a subsequent award which was rendered in March 2003 (*CME v Czech Republic [Final Award]*) and which found the Czech Republic liable to pay US\$269,814,000 plus interest to the claimant. Attempts by the Czech Republic to set aside the Stockholm Award by challenge proceedings before Swedish courts remained unsuccessful (*CME v Czech Republic [Svea Court of Appeals]*). Both the *CME v Czech Republic* tribunal and the Swedish courts stressed the formal non-identity of the two claimants, Mr Lauder and CME, which militated against the application of the general principles of → *res judicata* and/or *lis pendens* in order to prevent the re-litigation of one investment dispute before two different investment tribunals.
 - 16 The reactions to the *Lauder v The Czech Republic* and *CME v Czech Republic* arbitrations were largely negative. Many legal commentators considered conflicting international arbitral awards a serious threat to the stability and predictability of international dispute settlement. Together with the conflicting outcomes in the two *SGS v Philippines* and *SGS v Pakistan* cases it may have been an important motivation for law-makers to consider the establishment of an appellate procedure in investment arbitration as it is currently discussed within ICSID (see Para. 20 below).

C. Options for Solutions to Overcome Fragmentation and Overlapping Jurisdictions

- 17 On the domestic level, the traditional judicial approach to secure uniformity in the interpretation and application of the law lies in the establishment of appellate review exercised by higher courts coupled with a formal or informal obligation to follow appellate decisions on the part of lower courts, and possibly even by courts on the same level. For a number of reasons, this domestic law model is, however, largely unavailable on the international level.
- 18 On the one hand, there is hardly any system of appellate review in international law (→ *International Courts and Tribunals, Appeals*). On the other hand, → *international courts and tribunals* are almost routinely excluded from any form of binding precedent or *stare decisis* as known in various common law jurisdictions.
- 19 Nevertheless, it is remarkable that the 1995 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) has introduced an Appellate Body to whom questions of law may be appealed from WTO panels. This procedure is effectively working and has contributed to establishing a coherent body of WTO law. Also the ad hoc criminal tribunals as well as the ICC provide for appeals chambers competent to review judgments of the trial chambers. In addition to securing coherence, another policy rationale for their establishment lies in the fundamental right of individuals to have their convictions reviewed by a higher tribunal, as guaranteed in the ICCPR.
- 20 The model of WTO appellate review is currently debated in the discussions on the establishment of an appellate institution within the ICSID system. The present ICSID Convention only provides for the annulment of awards by special ad hoc committees. The grounds of annulment are, however, limited to extreme procedural defects of the arbitration proceedings and do not give rise to wide powers of substantive review.
- 21 Another practical step in order to avoid the risk of diverging dispute settlement outcomes in investment arbitration is the consolidation of proceedings that are related to each other. This has happened in a number of NAFTA Chapter 11 cases, such as the softwood lumber cases brought by individual firms (*Re The North American Free Trade Agreement [NAFTA] and a Request for Consolidation by the USA of the Claims in Canfor Corp v USA & Tembec v USA & Terminal Forest Products Ltd v USA [Order]*). The high number of investment claims brought against Argentina in the aftermath of the latter's currency crisis has prompted another pragmatic move to secure the consistency of results by trying to obtain an identical or at least a similar composition of ICSID tribunals (→ *Argentine Debt Crisis*).
- 22 International courts and tribunals are usually not subject to a system of *stare decisis*. Quite to the contrary, many of their statutes and rules of procedure expressly exclude any binding precedent effect of their judgments by affirming that their decisions have no binding force except between the parties and in respect of a particular case as laid down in Art. 59 Statute of the ICJ ('ICJ Statute') and a number of other instruments. At the same time and despite this theoretical insistence, it is apparent that international courts and tribunals, including the ICJ, tend to adhere closely to their own precedents. While this is sometimes described as a system of de facto precedents, it is also clear that the prevailing (both scholarly and judicial) opinion still rejects the idea of a formally binding case law.
- 23 In practice, the ICJ constantly and almost exclusively cites its own precedents and also other international courts and tribunals show a high deference to ICJ opinions. Thus, decisions like the one in the *Prosecutor v Dusko Tadić* Case stand for the exception rather

than the rule. The general and wide-spread adherence of courts and tribunals to ICJ decisions has led some commentators to ascribe to the ICJ the role of an ultimate judicial authority in international law, a concept implicit in its unofficial name as World Court. It is clear, however, that this role as *primus inter pares* is nowhere asserted by the law, but rather stems from the substantive authority of its decisions.

- 24 The special status of the ICJ is apparently used as a starting point for various proposals to add to its role as ultimate guardian of international law. Partly as a reaction to the risks inherent in the proliferation of international courts and tribunals, such as conflicting decisions, suggestions have been made to develop a kind of ‘preliminary reference’ procedure from various courts to the ICJ in order to secure the coherence and uniformity of international law. The model is provided for by the ECJ which according to Art. 234 (1) ECT, when requested by national courts, has jurisdiction to give preliminary rulings concerning the interpretation of the ECT as well as the validity and interpretation of acts of the institutions of the Community. A number of scholars and practitioners (including presidents of the ICJ) have suggested that specialized international courts and tribunals should have similar opportunities to make such ‘references’ to the ICJ with regard to questions of general public international law. In fact, these suggestions are not completely new. Already the → *Havana Charter (1948)* provided in its Art. 96 for the possibility to ask the ICJ for → *advisory opinions* with regard to various issues concerning the envisaged International Trade Organization. It is clear, however, that such a new interpretative role for the ICJ would require treaty amendments, if not of the ICJ Statute, at least of the provisions governing the courts and tribunals that should be empowered to ask for and would then be bound by interpretations of the ICJ (→ *Treaties, Amendment and Revision*). This necessity coupled with the political difficulty of receiving the required consent of the signatories makes any changes in this direction unlikely in the near future. In addition, there may be legal obstacles stemming from the fact that some regimes, such as UNCLOS, expressly provide for a choice of procedure.
- 25 Instead, it is more probable that international dispute settlement institutions will be confronted with increased calls to adhere to the persuasive authority of decisions rendered by other courts or tribunals which are not formally binding on them in order to avoid substantive conflicts. For instance, administrative tribunals, empowered to adjudicate staff disputes in international organizations (→ *Administrative Boards, Commissions and Tribunals in International Organizations*), have asserted that they are ‘free to take note of solutions worked out in sufficiently comparable conditions by other administrative tribunals’ (*De Merode v World Bank* para. 28). One important practical aspect of this call for a mutual taking-into-account is the actual availability of judicial decisions and arbitral awards. Both as a matter of law, through various publication requirements and transparency provisions, and as a matter of fact, resulting from technological innovations allowing decisions to be made available online almost instantly, this is easier today than it was a few decades ago.
- 26 Prudent judicial approaches of mutual respect and the taking-into-account of the decisions of other courts and tribunals cannot, however, solve the related but different question of the appropriate forum to decide a particular dispute. While the doctrines of *res judicata* and *lis pendens* may be considered to embody → *general principles of law*, their strict identity requirements with regard to the parties, the causes of action and the object of the proceedings imply a rather narrow scope of application. They cannot serve to prevent parallel proceedings in situations where parties base their claims on different legal grounds as in the *Swordfish Case* where a GATT violation was raised by one and a UNCLOS violation by the other party (see Para. 12 above). This possibility of disputing par-

ties basing their claims on different legal grounds equally limits the usefulness of exclusive jurisdiction clauses as they are found in Art. 292 ECT or in Art. 23 DSU. While such exclusivity provisions may prevent the litigation of EC law or WTO disputes before the ICJ or ad hoc arbitral tribunals, they are of no use in hindering a litigant from claiming that a contested action simultaneously violated different treaty obligations. Similarly, attempts to make use of the *lex specialis* principle calling for the selection of the more special and thus more appropriate forum have not proven successful because it frequently appears almost impossible to determine that dispute settlement mechanism A qualifies as a more special one than dispute settlement mechanism B.

D. Assessment

- 27 Problems concerning the multiplication of available dispute settlement forums and the related substantive issue of an increased fragmentation of international law have received heightened academic attention. This is also evidenced by the → *International Law Commission (ILC)*'s decision to include the topic of 'fragmentation of international law' in its long term work programme in 2000 after an initial feasibility study by G Hafner on 'Risks Ensuing from Fragmentation of International Law'. In 2002 an ILC study group was formed dealing with the topic 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'. Since then the ILC has commissioned and discussed a study by M Koskenniemi on the 'Function and Scope of the *lex specialis* Rule and the Question of "Self-Contained Regimes"' as well as a number of other studies, mostly focusing on treaty law issues, such as interpretation, successive treaties, modification of treaties. Although the ILC's own terms of reference concentrate on substantive problems of fragmentation and purport to exclude issues concerning the relationship among international judicial institutions, these issues do regularly surface also in connection with substantive problems.
- 28 At the same time, numerous articles and monographic works have started to address the many issues arising from a multiplication of international courts and tribunals and are likely to produce a lively scholarly debate.

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INTERNATIONAL COURTS AND TRIBUNALS, MULTIPLE JURISDICTION

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