The Competing Jurisdictions of International Courts and Tribunals

Libros

Yuval Shany
Oxford, Oxford University Press, 2003; 348 págs.

This book is a re-edited and updated version of the author's Ph. D. thesis submitted in 2001 as a result of a doctorate programme completed at the School of Oriental and African Studies of the University of London.

This remarkable text is the outcome of several years of arduous work carried out by the originator. Mr. Shany undertakes a major task in this volume: to review the scope of the overlaps produced due to the increasing proliferation of Courts and Tribunals throughout the international system, focusing on those areas where interaction is most likely to occur. The book contains an exhaustive analysis of this phenomenon quoting abundant casuistical data. At the same time, it applies a pedagogic approach to the subject allowing a clear understanding of the topic dealt with by the author.

As the author states in the Introduction, every domestic system of law is designed to accomplish two basic needs: the regulation of human conduct and the peaceful settlement of disputes. The same needs are present in the international sphere. Thus, the twentieth century brought an explosive rise on international legis-

lation, by means of treaties, state practice and soft law legislation. Over the last few years, interdependence among countries has accelerated the transformation of perspectives about settlement in international disputes. Nations have abandoned their traditional mistrust in submitting themselves in advance to judicial or quasi-judicial dispute-settlements mechanisms. This fact is reflected in two important achievements: a growing number of international courts have been invested with compulsory jurisdiction and considerable progress has been made in order to institutionalize dispute-settlement mechanisms, moving from ad-hoc to new and permanent procedures. According to the author, the combination of these two factors allows the advancement of international law into higher levels of effectiveness. However, the emergence of new courts and tribunals has been rather disorganized and has paid little attention to the existence of previous dispute-settlement mechanisms. Thus, the International Court of Justice (ICJ), which has jurisdiction to adjudicate any legal dispute between states, may have concurrent jurisdiction with some specialized international tribunals such as the International Tribunal for the Law of the Sea (ITLOS) and the World Trade Organization (WTO). In human rights affairs, the United Nations Human Rights Committee (HRC), a universal human rights quasi-judicial procedure, may have concurrent jurisdiction with regional procedures like the European or the Inter-American Courts of Human Rights. Furthermore, some complex disputes may fall under the jurisdiction of more than one branch of international law. This is the case of some conflicts over the expropriation of foreign investment that can involve investors' protection and human right issues. Thus, it is possible to identify a growing number of disputes submitted to more than one international court or tribunal in recent years. Such a scenario leads the author to state that the question of the division of labour between international courts and tribunals poses a challenge regarding the very nature of the international legal system in terms of determining whether it is coordinated or consists simply in an accumulation of independent self-contained regimes.

The author sets himself three goals: to determine areas of overlapping between compulsory jurisdictions of international courts and tribunals; to discuss the potential consequences of the current situation and the advisability of its mitigation and, finally, to identify

and study rules of international law which might govern this phenomenon. The book also examines quasi-judicial procedures which are increasingly being invoked and presents a feasible alternative to formal adjudication.

The volume is divided into three sections. Part I is entitled «Overlaps between the Jurisdictions of International Courts and Tribunals», deals with the traditional jurisdiction-regulating rules. These are the *lis alibi pendens* rule; the *res judicata* rule and the *electa una via* rule. The first embodies the litispendence doctrine; the second one bars the alternative of relitigation once a final decision is made; and the third implies preclusion of intervention of other settlement bodies when the party has already opted for a certain procedure for dispute resolution. Subsequently, the author deals with the meaning of «competing procedures». On the basis of the main sources of international law, the author states that the concept necessarily, requires same parties («virtual identity» or «essentially the same parties») and same issues («same fact pattern and same legal claims»). In order to detect jurisdictional overlaps, the work distinguishes four areas: a) conflicts between courts and tribunals of general personal and subject-matter jurisdiction; b) conflicts between courts and tribunals of general personal and subject-matter jurisdiction and universal courts and tribunals of specialized competence; c) conflicts between courts and tribunals of general personal and subject-matter jurisdiction and regional courts and tribunals with unlimited jurisdiction *ratione materiae*; d) conflicts between courts and tribunals of general personal and subject-matter jurisdiction and regional courts and tribunals of specialized competence.

The most typical cases of competing procedures can be recognized in the jurisdictional relations between courts and tribunals invested with unlimited subject-matter jurisdiction either on the global or on the regional level, or between these institutions and all other specialized courts and tribunals, especially in the area of human rights. Moreover, partial overlap has been identified in some other areas of international law. These overlaps are more acute in trade-related agreements, such as WTO-NAFTA and other regional trade arrangements.

The above implies that, jurisdictional overlaps are not only a hypothetical scenario but a present reality. This conclusion prompts

the author to move forward to examining, in the section mentioned below, whether this fact is a problem for the international legal community and whether it would be advisable to regulate it.

Part II of the book is entitled «Legal and Policy Issues Concerning the Competition between the Jurisdictions of International Courts and Tribunals».

This section focuses on the question of concurrency of jurisdiction over a single dispute or multiple fora. At this point, the author examines whether there is a system of international courts and tribunals. In the first place, the issue is analyzed in connection with international law as a system of law. A system is described as a «purposeful arrangement or constellation of inter-related elements or components, which cannot accurately be described and understood in isolation from one another». Thus, a system consists of three main elements: a set of elements arranged in a certain order; and possessing some degree of unity or cohesion. Moving ahead, the author examines the main theories dealing with this issue and concludes that international law can be viewed as a system of relevant norms. Thus, it can be stated that there is an important potential for jurisdictional overlap. This overlap may be total, if the claims contain essentially the same issues, or partial, if they only touch upon common issues under general international law. Furthermore, the phenomenon may involve different branches of the law or fall under the same branch, when it suits the jurisdiction of different institutional arrangements. The following step is to examine whether international courts and tribunals meet the definition of a system. In connection with this subject, the originator states that, at present, international courts and tribunals do not appear as a coherent system, particularly if we compare it with national court systems. Several arguments are given in support of this statement, notably the sporadic rules regulating competition and the limited acceptance of *lis alibi pendens* or *res judicata* rules in the constitutive instruments of international judicial bodies. However, the most important are both the inexistence of a hierarchic environment in the international judicial field and the lack of a supreme court capable of resolving all questions of law. Thus, international courts and tribunals are characterized as «islands of jurisdiction», due to the limited attention given to jurisdictional interaction among them.

Therefore, a question arises as to the advisability of regulating jurisdictional competition. According to the author, the answer is affirmative, as long as coherence of international law is strengthened and not undermined. At the same time, greater coherence contributes to increasing the reputation and legitimacy of international law, and encourages a better level of compliance with its norms. In the long run, such an improvement could transform the current judicial bodies into a coherent judicial system. At the current stage of development of international law, the adoption of a regime of jurisdictional regulation among different international courts and tribunals is thus highly desirable. This regime should be similar to the one which rules relations between courts and tribunals acting inside the same legal system. Aiming at the future, the international system must search for new methods for unifying the international judiciary in order to alleviate procedural problems stemming from overlapping. This would allow better levels of coordination and harmonization.

The book further focuses on rules for regulating some jurisdictional conflicts in particular. The first part deals with the regulation of jurisdictional problems associated with forum selection. In the first place, the originator deals with the concept of «forum shopping», defined as the process by means of which one of the parties to a dispute attempts to bring a claim before the forum most to his or her advantage. Jurists have traditionally approached the subject in a rather hostile manner. However, the present study concludes that there is no special ban of forum shopping, either at the national or international levels since according to the freedom of parties it is a legitimate right of the plaintiff. Nevertheless, in order to avoid an abusive use of this right some exceptions must be considered.

Secondly, the book examines the question of parallel proceedings. In accordance with the theory and practice of domestic legal systems, this is a negative phenomenon, particularly in the international judicial system, because of the lack of enforcement of its decisions. Therefore, in order to avoid this problem the author encourages the adoption of two widely recognized legal principles: the *lis alibi pendens* rule and the *res judicata* rule.

Part III of the book is entitled «The Law Governing Competition between the Jurisdictions of International Courts and Tribu-

nals: *lex lata* and *lex ferenda*». It begins by examining several forum selection provisions found in the constitutive instruments of various international courts and tribunals. The main categories in this regard are the exclusive and non-exclusive jurisdictions provisions. Other arrangements can be identified as halfway clauses, containing limited choice of forum.

The exclusive jurisdictions provisions can be flexible or inflexible. An example of the first type is the European Human Rights Convention, which allows parties to agree to bringing the dispute before another forum; an example of the second type is article 292 of the European Community Treaty, The non-exclusive jurisdictions provisions encompass non-residual and residual jurisdictional clauses. The ICJ is the best example of the first one, which allows parallel jurisdictions, which the United Nations Convention on the Law of the Sea (UNCLOS) provides an important example of the second pattern.

Furthermore, a halfway model can be identified in some treaties. This is the case of the North American Free Trade Agreement (NAFTA), whose article 2005 allows members to settle disputes before either GATT or NAFTA if it should fall under both jurisdictions. However, when one has been selected, exclusive jurisdiction prevails.

This variety of regimes leads the author to state that it is impossible to derive a principle governing the choice of procedure.

To complete his analysis, the authors tries to find some practical applications of the jurisdiction-regulating rules: the *lis alibi pendens* rule; the *res judicata* rule and the *electa una via* rule, and concludes that there is little material to highlight this point. However, in the field of human rights one can identify a principle for mitigating multiple adjudications. This principle cannot be extended to other legal areas owing to the scarcity of written rules about this matter in treaty law, a fact that moves the author to look for jurisdiction-regulating norms derived from non-treaty sources, as applied by international courts and tribunals.

The search is divided into three issues and examines a wide range of cases, beginning with those awarded by the Permanent Court of International Justice (PCIJ).

The first issue is the Choice of Forum. In this regard, no consistent practice revealing a principle of law restricting choice of

forum was found. However, in certain situations a specific exercise of choice of forum was deemed illegal. For instance, it is the case of proceedings initiated in breach of an effective jurisdictional arrangement. The outcome is that the improperly seized court or tribunal should decline jurisdiction over the dispute.

The second issue is Parallel Proceedings. Currently, the regulation of this issue by international law is rather scarce, and there is no sufficient judicial practice leading to definitive conclusions. Nevertheless, as long as the *lis alibi pendens* rule is recognized by most domestic legal systems, it may qualify as a general principle of law. In this scenario, the application of this principle to avoid the risk of conflicting judgments is highly advisable.

The last issue examined by the author is Successive Proceedings, where we can find the most regulated interaction between proceedings before different courts and tribunals. The case-law hints that international law recognizes *res judicata* as a binding rule which precludes the relitigation of settled disputes. This conclusion is also enhanced by the acceptance of the theory of abuse of rights. This theory implies that right-holders must exercise their rights while taking into account the rights and interests of those affected by their conduct. As to jurisdictional competition, this doctrine means the applicability of the estoppels rule to disputes brought to an international forum in violation of a binding instrument mandating that the case must be adjudicated before a different forum.

When the strict conditions for the application of the *res judicata* rule are not met, there is some evidence of implicit recognition of comity considerations, especially in the practice of human rights judicial bodies. Comity operates when parallel proceedings are pending before different courts and tribunals, in order to paralyze proceedings or even decline jurisdiction in deference to the first-seized or more appropriate jurisdiction.

The final chapter of this part proposes some reforms to improve the international legal system as a consequence of the phenomena detected throughout the book. Some are easy to implement while others aim at the foundations of international law.

The first proposal is a reorganization of judicial bodies in order to improve their coherence, complemented by the enumeration of «conflict of jurisdictions» rules.

A more ambitious plan promotes the establishment of a uni-

versal appellate court, similar to a national supreme court, invested with mandatory jurisdiction. This could entrance uniformity of international law. The ICJ could be a good candidate to assume this role.

A more modest proposal consists in investing the ICJ with mandatory universal jurisdiction to arbitrate over jurisdictional disputes between competing jurisdictions.

However, these reforms are very difficult to implement since they involve radical changes to the ICJ statute, which states are rather reluctant to undertake, as no major jurisdictional clashes have taken place.

Therefore, less dramatic changes can be explored. Here, the author points out to the increasing coordinative and harmonizing role of the ICJ because of its unique position under international law.

At the same time, it would be advisable to examine to what extent the community is inclined to establish new judicial bodies. In order to avoid overlapping, the drafters of the instruments creating these bodies are encouraged to introduce jurisdiction-regulating provisions.

Another measure that could be implemented in the short term, is to enhance cooperation among the different courts and tribunals. The exercise of comity follows this line. Comity implies that, unless overriding considerations mandate otherwise, courts and tribunals would defer to pre-existing judicial pronouncements of other judicial bodies on current disputes.

A regular exchange of information among courts and tribunals and other measures to increase their interaction are also advisable. This interaction can be formalized in inter-institutional agreements.

Finally, states are also encouraged to cooperate in this effort. This implies increasing coordination between their various procedural obligations to submit to methods of settlement of disputes. This goal can be achieved through reservations avoiding their exposure to multiple proceedings. At the same time, it would be necessary to consistently rely on the case-law of international judicial bodies when litigating before other fora.

The book ends with a section of conclusions, where Mr. Shany reviews the main issues covered in his work and restates his points

of view regarding the solution of problems related to jurisdictional competition in the international environment.

In sum, this is an outstanding work that contributes a deep analysis and includes interesting proposals regarding competing jurisdictions, an issue of increasing concern for the international legal system.

Ricardo Letelier
Programa de Magíster en Derecho Internacional, Inversiones y Comercio (L.L.M.)
Universidad de Chile | Universidad de Heidelberg.