
Book Reviews

Shany, Yuval. *The Competing Jurisdictions of International Courts and Tribunals*. Oxford: Oxford University Press, 2003. Pp. i-lxix, 348. £60.00 hardback. ISBN 0-19-925857-0.

Recent years have witnessed the establishment of multiple fora for the settlement of international disputes, a process which is referred to as the 'proliferation of international courts and tribunals'. Two interconnected problems result from this 'proliferation': first, different international courts and tribunals may apply individual interpretations of substantive rules of international law, thus producing inconsistent jurisprudence; and second, the proliferation can result in the creation of overlapping or competing jurisdictions between such bodies, leading to the possibility of 'forum shopping' in international law. This latter problem of competing jurisdictions has recently arisen in the context of several interstate disputes. These include, notably, the *Southern Bluefin Tuna* dispute, which could have been determined either by the International Court of Justice (ICJ), or by tribunals established under the United Nations Convention on the Law of the Sea (UNCLOS), and the *Swordfish* dispute, which was submitted simultaneously to both the International Tribunal for the Law of the Sea (ITLOS) and a dispute settlement panel of the World Trade Organization (WTO). In addition, an UNCLOS tribunal has recently suspended hearings in the ongoing *MOX Plant* case between Ireland and the UK, due to the real possibility of proceedings being instituted against Ireland before the European Court of Justice (ECJ) for an alleged breach of Article 292 of the EC Treaty. The problems of jurisdictional overlap which arise as a result of proliferation are therefore more than a merely

theoretical possibility. This raises the question: How should such difficulties be resolved?

This question is one which Yuval Shany, from the Division of Academic Studies of the College of Management (Israel), strives to answer in *The Competing Jurisdictions of International Courts and Tribunals*. This volume is an edited version of his PhD dissertation, and this volume is the first in OUP's new series on international courts and tribunals, which is being developed in cooperation with the Project on International Courts and Tribunals (PICT). This is a significant contribution as it is the first major work to consider the application in public international law of doctrines developed and applied traditionally as part of private international law, such as *forum non conveniens*, *lis alibi pendens*, *res judicata*, and *electa una via*. The goal of Dr Shany's book is to seek out possible methods of regulating the problem of competing jurisdictions in international law. He has chosen to pursue that goal by focusing on three questions. These are whether there are any rules of international law that regulate instances of (i) multiple available fora; (ii) parallel proceedings; and (iii) successive proceedings (p. 17). The issue of multiple fora is crucial because of the problems of coordination that can arise when international disputes can be referred to more than one body: Is it clear, for instance, that the *Swordfish* dispute (which has been suspended as a result of an interim settlement agreement) would have been decided in the same way by the ITLOS and the WTO? Might one body have put more emphasis on the environmental protection aspects of the case, and would the other have stressed the importance of compliance with obligations under the GATT? If two international courts and tribunals are legitimately seized of a dispute, and

yet reach different decisions, is one to be preferred over the other?

Any discussion of the presence of jurisdiction-regulating norms in international law invites consideration of whether there is an 'international legal system' and a 'system' of international courts and tribunals. One way of approaching this issue might be to ask first whether there are any jurisdiction-regulating rules in international law, and to determine whether these are adequate. Such an approach would have the advantage of showing the extent of the systematization of international courts and tribunals and the conclusions would then shed light on the nature, or indeed the existence, of the international legal (and judicial) system. It would also inform the selection of rules which could be proposed to improve the regulation of overlapping jurisdictions. However, this is not the approach adopted by Shany. He begins, rather, by examining the existence of an international legal system by reference to philosophical discussions of the nature of legal systems generally. Having concluded that international law should be regarded as a legal system (p. 94), but that there is no system of international courts and tribunals like that found in municipal legal systems (p. 114), this allows him then to evaluate the jurisdiction-regulating rules that might more appropriately be applied in international law. While it may be considered problematic to begin with what in a sense one has set out to prove, this is an approach that serves its purpose well.

Before considering whether or not international law contains competition-regulating norms, Shany conducts a thorough review of the presence of such norms in domestic legal systems, such as *forum non conveniens* and the rules which control parallel proceedings. This discussion is useful, as it shows that even in the realm of private international law, jurisdiction-regulating rules are not uniform. This then leads into the real issue: Are there any similar rules of international law which regulate jurisdictional overlap between international courts and tribunals? Shany first turns to forum selection provisions in inter-

national agreements, and observes that there are, in fact, several 'inflexible' exclusive jurisdiction provisions, such as Article 292 of the EC Treaty, which has come to the fore in the *MOX Plant* case, and Article 23 of the Dispute Settlement Understanding (DSU) (pp. 180–186). There are other 'flexible' arrangements, which permit states to agree to submit disputes to different fora, such as Article 55 of the European Convention on Human Rights, and Article 26 of the International Centre for Settlement of Investment Disputes (ICSID) Convention (pp 188–195). The focus then shifts to the problem of regulating multiple proceedings, and Shany identifies three principles which have found expression in the constitutive instruments of international courts and tribunals: these are the maxims *electa una via* (pp. 213–217), *lis alibi pendens* (pp. 218–223), and the principle of finality (pp. 223–226).

But in the absence of express provision in the relevant constitutive instruments, can it be said that these forum-regulating principles are rules of customary international law or general principles of law? After a thorough trawl through international case law, the answer is somewhat disappointing, at least for those who might hope that the rules of private international law might somehow magically be transposed to the international sphere: Shany concedes that the rule *electa una via* cannot be found to have been applied in international jurisprudence (p. 229), and he concludes, almost regretfully, that 'the case law on the allocation of jurisdiction between competing international courts and tribunals is too sporadic and inconsistent to enable one to draw definite conclusions of general applicability' of the other forum-regulating rules found in private international law (p. 239). With respect to the principle of litispendence, the situation is just as inconclusive (pp. 240–241), although the reverse is true of *res judicata*, which is well established as a rule of international law (p. 245).

What other solutions are there? Shany reviews suggestions which have previously been made, such as expanding the jurisdiction of the ICJ to hear appeals from other inter-

national courts, or endowing it with a form of preliminary reference jurisdiction (such as that exercised by the ECJ with respect to national courts). He also adds a suggestion that the ICJ could potentially act as an arbiter in cases of jurisdictional competition. However, Shany concedes that such reform is unlikely to be agreed. Another proposal is for states to review their acceptances of the jurisdiction of international courts and tribunals, in order to minimize jurisdictional competition. This is unrealistic, as states will generally want to ensure that they are free to submit disputes to the most favourable forum available, and this assessment can usually be made on a case-by-case basis only. More promising, however, is the use of the principle of comity: this has, indeed, been employed by an ICSID tribunal in the *Pyramids* case to suspend the exercise of its jurisdiction pending the conclusion of a case before the French *Cour de cassation*, and also by the UNCLOS Tribunal in the *MOX Plant* case. Shany argues that the exercise of judicial comity and information exchange between courts is the most realistic solution, and this recent experience indicates that he is right. In light of the increasing frequency of jurisdictional clashes, however, one senses that the development of other solutions, including those proposed by the author, cannot be ruled out: the acceptance of the principle of *res judicata*, for instance, suggests that rules of private international law are not altogether out of place in public international law.

This book represents an impressive contribution to the study of the relationship between different international regimes and international adjudicatory bodies. It is also an ideal companion volume to PICT's *Manual on International Courts and Tribunals*, which Shany co-edited with Professor Philippe Sands and Ruth Mackenzie. Given the rising tendency on the part of states to submit disputes to third-party adjudication, and the increased availability of international dispute settlement bodies with compulsory jurisdiction, there is more likelihood today of jurisdictional overlap between international dispute settlement bodies than has previously been the case.

Yuval Shany's book offers an excellent exposition of how these issues have been dealt with by a wide range of international courts and tribunals. In making proposals to mitigate the problem of jurisdictional competition, his work is valuable both as a practical tool for those faced with such dilemmas, and also as an aid to a better theoretical understanding of the emerging international judicial system.

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