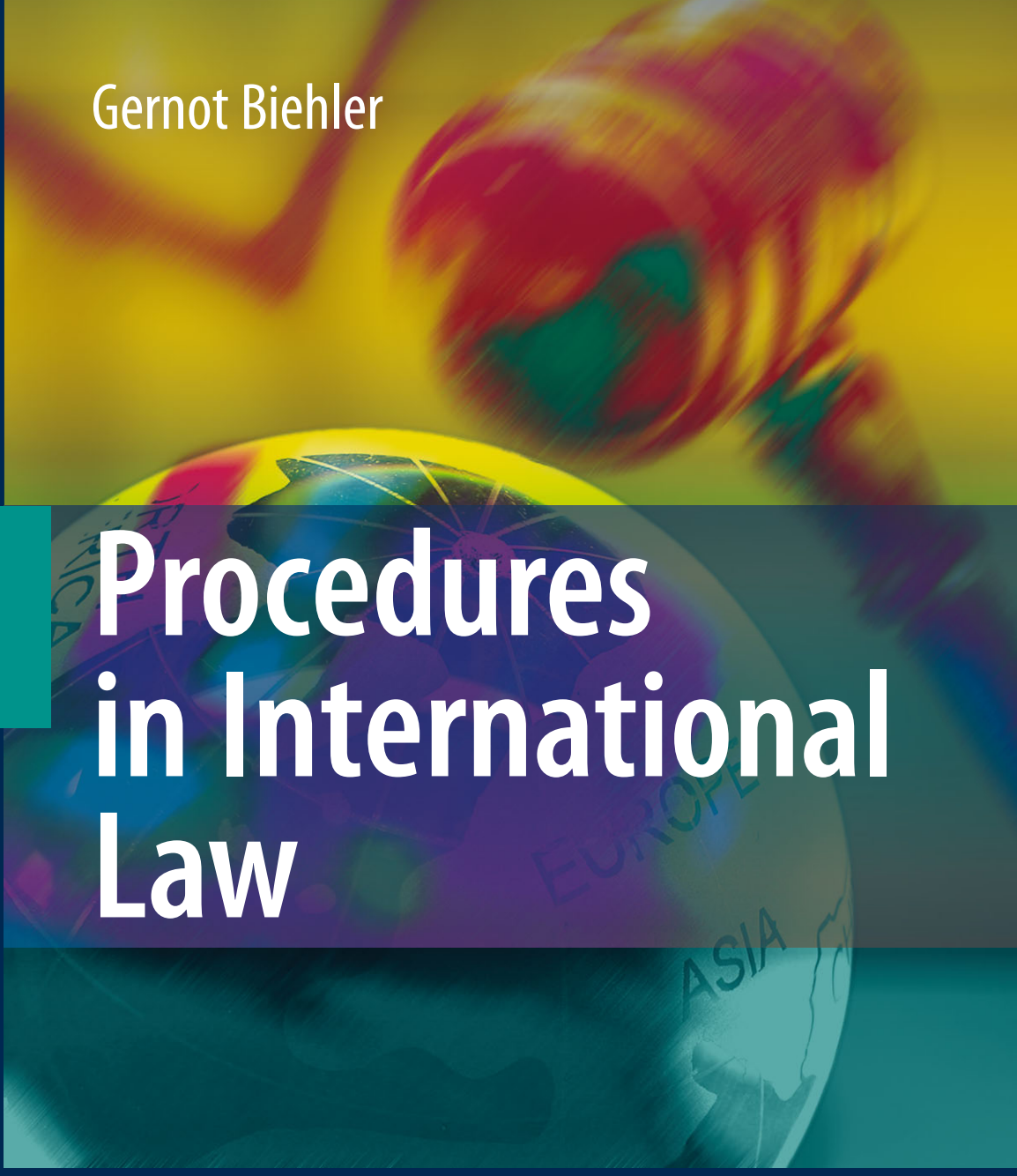
Gernot Biehler



Procedures in International Law

Springer

Chapter 9

Conflicts Between Adjudicators Applying International Law

9.1 An Emerging International Judicial System?

The proliferation of international adjudicating bodies and the increasing activities of national courts pronouncing on international law gives rise to the question of how to address potential conflicts between the jurisdiction of different courts, tribunals and panels. Certain rules exist in different contexts, for example, the ECJ's relationship to national courts of the EU member states is governed by Article 234 ECT as examined later in this chapter in the *Bosphorus*[1] case. However, how a WTO/DSU Panel decision in trade matters relates to a decision of the ECJ is less clear and the litigation around the EC "Banana Market Order" in *International Fruit*[2] gives rich evidence as to the lack of any applicable rule which goes beyond the EC or the WTO rules respectively. The question of competing jurisdictions of international courts and tribunals and the jurisdictional relations between national and international courts have recently been covered in excellent textbooks by one author and it is not intended to repeat here what is said there.[3] However, it is submitted that the usual techniques known from international procedural law and conflict of laws such as *lis pendens* or *forum non conveniens* may be the appropriate approaches. The recognition of foreign judgments by national courts outside the rules of the relevant Conventions and Regulations (which provide special regimes hardly acceptable in an unregulated global environment) provide ample guidance as to how to deal with competing jurisprudence in the international field.

This may be exemplified by the *Southern Tuna Dolphin*[4] Arbitration. In addition to this case by case evaluation recommended to bodies adjudicating in an in-

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1 *Bosphorus v Minister for Transport and Ireland* [1994] 2 ILRM 551 (Irish High Court); [1997] 2 IR 1 (Irish Supreme Court); ECJ (Case C- 84/95) [1996] ECR I – 395; (2006) 42 EHRR 1 (ECtHR).

2 *International Fruit Co. NV v Produktschap voor Groenten en Fruit* (Cases 21-24/72) [1972] ECR 1219.

3 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2003); Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007).

4 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, 15 June 2001 (WT/DS58/R W).

ternational context to be practised along the lines known from national conflict laws the idea of a central court addressing such conflicts appeals to those who want a coherent overall structure on the global level. It is very much the system of Article 234 ECT for the ECJ which by some is considered to be extended. The former President of the ICJ Guillaume J argues as follows:

> "Courts and tribunals must … be very cautious in developing their case law, which must remain consonant with the jurisprudence of the ICJ, which, after all, is the 'principal judicial organ of the United Nations' and to which 'legal disputes should as a general rule be referred', under Article 36, paragraph 2 of the Charter."[5]

Certainly, if there should be a body deciding such conflicts the ICJ would have a privileged position and the global authority to be the relevant court. Indeed it had addressed such questions of jurisdictions in an appeal relating to the jurisdiction of the ICAO Council.[6] The same can be said for the Arbitral Award of 31 July 1989 by the ICJ.[7] However, this potential role of the ICJ or another body to authoritatively pronounce on questions of conflicts of other bodies' jurisdiction is dependent on the will of the states to give such competency to the ICJ. It would create an appeal system ensuring the coherent application of international law. This could only be established on the basis of the consent of the states to create such a system. However, such consent does not yet exist. Therefore, the questions will be addressed on a case by case basis with the potential of mutual ignorance of the competing judicial systems towards another, a feature not unknown from competing national jurisdictions. As the ECtHR formulated in relation to the ICJ:

> "The ICJ is a free standing international tribunal which has no links to a standard setting treaty such as the Convention [European Convention on Human Rights]."[8]

And, summing up, the ICTY correctly stated in relation the current international adjudicative system:

> "International Law, because it lacks a centralised structure, does not provide for an integrated judicial system operating in an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralised or vested in one of them but not the others. In international law, every tribunal is a self contained system (unless otherwise provided)."[9]

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5 Guillaume, Gilbert "The Future of International Judicial Institutions" (1995) 44 ICLQ 862.

6 [1972] ICJ Rep 46; on the basis of the Chicago Convention 1947 (ICAO) and the former ICJ Rules of 1978 in Article 87.

7 [1991] ICJ Rep 62.

8 *Loizidou v Turkey* (1995) 20 EHRR 99, 133.

9 *Prosecutor v Tadic* (Jurisdiction) 35 ILM 32, 39 (1996).

However, there is hope; Slaughter has commented that "[t]he underlying conceptual shift is from two systems – international and domestic – to one; from international and national judges to judges applying international law, national law, or a mixture of both."[10] She suggests that the institutional identity of courts is forged rather by their common function of resolving disputes than by differences in the law they apply and the parties before them and describes them as a "global community of courts". However, Slaughter has also pointed out that the activities of the many different types of courts involved in this process do not conform to a template of an emerging global legal system in which national and international courts play defined and co-ordinated roles.[11] While a desirable aim may be to "help the world's legal systems work together, in harmony, rather than at cross purposes",[12] the reality is a rather confused system in which hierarchies are unclear and regulation is decidedly lacking.

A further relevant factor in this area is that the growing expansion and diversification of transactions between international parties has resulted in a blurring of the distinction between state and non-state activities and between different methods of dispute settlement.[13] Schreuer has suggested that these factors have contributed to a situation in which it is becoming increasingly difficult to distinguish between international or inter-state litigation on the one hand and domestic or private judicial proceedings on the other hand.[14]

It has been suggested that the emerging international judicial system can serve three basic functions; provide an institutional framework for co-operation, promote compliance with international law and reinforce rights-respecting democracy at a national level.[15] There is a clear rationale behind promoting the development of a structured international judicial system; as has been stated, international courts "cannot behave as if the general state of the law in the international community … is none of their concern; to act on that blinkered view is to wield power divorced from responsibility".[16] However, while there is an established system for adjudicating on private international law disputes, there is less agreement about the role which various courts should play in resolving disputes in public international law. Henken has commented that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[17] However, this element of uncertainty about the extent to which principles of public

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[10] "A Global Community of Courts" (2003) Harv Int'l LJ 191, 192.

[11] "Judicial Globalisation" (1999-2000) 40 Va J Int'l L 1103, 1104.

[12] *Howe v Goldcorp Investments Ltd* 946 F 2d 944, 950 *per* Justice Breyer.

[13] Schreuer, "Concurrent Jurisdiction of National and International Tribunals" (1975-76) 13 Hus L Rev 508.

[14] *Ibid.*

[15] "Towards an International Judicial System"(2003-04) 56 Stan L Rev 429, 463.

[16] *Proseuctor v Semanza* ICTR-97-20-A, 31 May 2000 at 25.

[17] *How Nations Behave* (2nd ed., 1979) p. 47.

international law will be observed and enforced has also led to inconsistency in relation to the interaction between decisions made in this context by both domestic and international courts. It is proposed in this chapter to examine various examples of how this interaction between different judicial fora in the national and international context has been dealt with and then to assess whether increased regulation and consistency in this area is either possible or indeed desirable.

9.2 The Relationship Between National and International Law – an Introduction

National and international courts are often regarded as operating in different spheres and applying different laws. Traditionally two schools of thought have been applied to the relationship between them – monism and dualism. The latter approach presupposes that the two systems are separate, that they constitute two distinct legal orders that govern the courts in these spheres independently of each other. It is accurate to say that international courts have tended to adopt a dualist view of domestic courts and have viewed the application of national law in these courts as not relevant to their functions. However, dualism does not provide an exclusive conceptual framework for determining the relationship between national and international courts and it has been acknowledged that the two systems are often engaged in the common enterprise of settling disputes, particularly those which relate to international law issues. So while the role of national courts is primarily in the domestic arena they are increasingly being called upon to decide issues relating to international law and to this extent can be viewed as part of the international system. For this reason co-ordination between what have traditionally been regarded as two distinct legal orders is also increasingly important.

One of the key questions which must be addressed in this context is whether a hierarchical system determining the roles of various international and domestic courts is workable or beneficial. Shany has suggested a hierarchical approach may serve as a justification for the lack of co-ordination between proceedings.[18] He states as follows:

> "[L]ike dualism, vertical hierarchy downplays the relevance of the other set of proceedings and offers courts a clear and simple method to resolve potential jurisdictional conflicts. This approach, however, neither provides a method for the pragmatic resolution of incompatible claims of judicial supremacy nor offers the parties to a conflict a way out of such institutional 'locking of horns'. It is therefore not surprising that some commentators emphasize some of the horizontal features that characterize relations between national and in-

[18] *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 7.

> ternational proceedings, and advocate inter-institutional deference and improved coordination between the involved courts."[19]

Undoubtedly a significant number of issues are now the subject of international regulation in a range of areas such as human rights law, environmental law and criminal law. As Francioni has commented "[t]oday international law pervades areas traditionally reserved to the domestic jurisdiction of states such as the human rights of nationals, criminal law, trade and use of natural resources, the management and conservation of the environment, and even the conservation of cultural heritage".[20] Particularly in the field of human rights, there is a growing tendency for supra-national courts, such as the European Court of Human Rights in a European context, to apply international norms in parallel with the activities of national courts applying domestic law. There has also been an increase in the number of international courts and an extension in their judicial powers and jurisdictional reach.[21] As Shany has commented "the continued penetration of international legal standards into the domestic realm and the growing influence of international norms and institutions on domestic decision makers and broader constituencies have rendered the separation of international law from domestic law less and less tenable."[22] An example of this increasing reliance on international law principles before domestic courts is the decision of the English Court of Appeal in *R. (Al-Jedda) v Secretary of State for the Home Department*,[23] in which the court relied on a UN Security Council Resolution and the Hague Regulations 1907 in upholding a decision to detain the claimant, who had dual British and Iraqi nationality, in Iraq.

However, the most problematic feature of the developments referred to above is that it is now increasingly common to bring proceedings before international courts which tend to overlap with those taken before national courts. This inevitably gives rise to issues of priority and superiority and the lack of a consistent approach towards these questions poses a growing problem. It is now proposed to examine some examples of these clashes in jurisdictions and then to consider some potential solutions in this area.

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[19] *Ibid*.

[20] "International Law as a Common Language for National Courts" (2001) 36 Tex Int'l LJ 587, 588.

[21] See generally Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2003) pp. 3 -7.

[22] *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 12.

[23] [2006] EWCA Civ 327. However, as Martinez notes (2003-04) 56 Stan L Rev 429, 494, the record of the US is particularly mixed as regards the use of international decisions as precedents.

9.3 Examples of Jurisdictional Conflicts

9.3.1 The Attitude of Domestic Courts in the US

The failure of the US authorities to inform detained foreign nationals of their entitlement to consular assistance as required by Article 36(1)(b) of the Vienna Convention on Consular Relations 1963 has given rise to a considerable amount of litigation in recent years. In *Breard v Greene*[24] a Paraguayan national brought proceedings before domestic courts in the US challenging the imposition of the death penalty on the basis that the US authorities had failed to inform him following his arrest of his entitlement to consular assistance pursuant to the Vienna Convention. The state of Paraguay also brought unsuccessful proceedings before the US courts[25] and then before the ICJ, where it alleged that the US had violated the Vienna Convention at the time of Breard's arrest and was successful in its provisional measures motion requesting the US not to execute him pending a final decision in the proceedings before the ICJ.[26] However, the US Supreme Court rejected Breard's argument in the following terms:

> "First, while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State … This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Article 36(2), [1970] 21 U.S. T., at 101. It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas … By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review.[27]

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[24] 523 US 371 (1998).

[25] *Paraguay v Allen* 134 F 3d 622 (1998).

[26] *Paraguay v US* [1998] ICJ Rep 248.

[27] 523 US 371, 375-376 (1998).

The majority of the court stated that although treaties are recognised by the Constitution as the supreme law of the land, that status also attaches to the Constitution itself, to which rules of procedural default apply. Even if Breard's Vienna Convention claim had been properly raised and proved, it was extremely doubtful that the violation could result in the overturning of a final judgment of conviction without some evidence that the violation had had an effect on the trial. In relation to the suits brought by Paraguay, the majority took the view that neither the text nor the history of the Vienna Convention clearly provided a foreign national with a private right of action in US courts to set aside a criminal conviction and sentence for violation of consular notification provisions. In addition, the Eleventh Amendment to the US Constitution provided a further reason why the state's suit might not succeed and that Amendment's "fundamental principle" that "the States, in the absence of consent, are immune from suits brought against them … by a foreign State" had been clearly laid down.[28] The court added that it was unfortunate that the matter came before it while proceedings were pending before the ICJ that might have been brought to that court earlier. However, it stated that the Supreme Court must decide questions presented to it on the basis of law. Earlier in the judgment reference was made to the fact that proceedings had been instituted nearly five years after Breard's convictions became final. Yet there was no sign of any willingness on the part of the US courts to attach significance to the clear request made by the ICJ and the decision of the majority undoubtedly displays a somewhat dismissive attitude to the ruling by that court.

A similar attitude was adopted by the majority of the US Supreme Court in *Federal Republic of Germany v Unites States*[29] which concerned almost identical circumstances. In his dissenting judgment Justice Breyer made reference to the Solicitor General's submission that the Vienna Convention did not furnish a basis for the Supreme Court grating a stay of execution and that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief".[30] Reference was subsequently made to this view by the ICJ in the *Le Grand* case in which the court made it clear that in its view the decision of the majority of the Supreme Court had failed to give effect to the order the ICJ which was of a legally binding nature.[31]

Other relevant litigation in this context is that in the *Avena* case, in which the Mexican authorities brought proceedings against the US seeking to prevent the execution of a number of Mexican nationals. In *Torres v Mullin*[32] the majority of the Supreme Court again refused to quash the death penalty despite provisional

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[28] *Principality of Monaco v Mississippi* 292 US 313, 329-330 (1934).

[29] 526 US 111 (1999).

[30] *Ibid.* at 113.

[31] [2001] ICJ Rep 466.

[32] 540 US 1035 (2003).

measures granted by the ICJ requesting that the execution should not take place.[33] Once again Justice Breyer questioned this in a dissenting judgment. He referred to a brief filed by the State in opposition in two related cases then pending before the court[34] in which it argued, *inter alia*, that "the ICJ does not exercise any judicial power of the United States, which is vested exclusively by the Constitution in the United States federal courts." He said that while this was undeniably correct as a general matter, it failed to address the question of whether the ICJ had been granted the authority, by means of treaties to which the United States was a party, to interpret the rights conferred by the Vienna Convention.

Following the *Avena* decision, the President, George W. Bush, determined through a Memorandum to the Attorney General that the United States would "discharge its international obligations" under *Avena* "by having State courts give effect to the decision."[35] However, this memorandum did not seem to have any real effect on the attitude adopted by the majority of the Supreme Court towards this issue. Yet it should be noted that a number of dissenting justices questioned the lack of deference shown to the decision of the ICJ in the subsequent US Supreme Court case of *Medellín v Dretke*.[36] Justice O'Connor referred to the fact that the Vienna Convention is a self-executing treaty and that its guarantees are susceptible to judicial enforcement in the same way as the provisions of a statute would be.

Subsequently, in *Sanchez-Llamas v Oregon*[37] this issue was revisited with Chief Justice Roberts speaking for the majority stating that although the ICJ's interpretation required "respectful consideration"[38] he concluded that this did not compel the court to reconsider its understanding of the Vienna Convention as expressed by it in *Breard*. He continued as follows:

> "Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts. The ICJ's decisions have "*no binding force* except between the parties and in respect of that particular case," Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 993 (1945) (emphasis added). Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself;* there is accordingly little reason to think that such interpretations were intended to be controlling on our

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33 42 ILM 309 (2003).

34 *Ortiz v United States*, No. 02-11188 and *Sinisterra v United States*, No. 03-5286.

35 Memorandum to the Attorney General of 28 February 2005 (App. to Pet. for Cert. 187a).

36 544 US 660 (2005).

37 548 US 331 (2006).

38 Referring to *Breard v Greene* 523 US 371, 375 (1998).

> courts. The ICJ's principal purpose is to arbitrate particular disputes between national governments. *Id.,* at 1055 (ICJ is "the principal judicial organ of the United Nations"); see also Art. 34, *id.,* at 1059 ("Only states [*i.e.,* countries] may be parties in cases before the Court"). While each member of the United Nations has agreed to comply with decisions of the ICJ "in any case to which it is a party," United Nations Charter, Art.94(1), 59 Stat. 1051, T.S. No. 933 (1945), the Charter's procedure for noncompliance-referral to the Security Council by the aggrieved state-contemplates quintessentially *international* remedies, Art. 94(2), *ibid*."

Shany refers to the fact that the majority in *Sanchez-Llamas* alluded to the interstate nature of ICJ proceedings and enforcement procedures.[39] He commented that "[t]hese elements of the decision, together with the majority's reference to the limited history of US court reliance on ICJ judgments and the tradition of attributing great weight to executive branch interpretations of the treaties it negotiates cast serious doubt on whether the Supreme Court would have been willing to apply an ICJ judgment … in the event that such a judgment was issued in the very same case pending before the Supreme Court."[40]

The most recent case in this area which confirms the US Supreme Court's view on the issue is *Medellín v Texas*.[41] The petitioner filed a second Texas state-court habeas application challenging his state capital murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention rights. The Texas Court of Criminal Appeals dismissed his application as an abuse of the writ, concluding that neither the decision of the US Supreme Court in *Avena* nor the President's Memorandum was binding federal law that could displace the State's limitations on filing successive habeas applications. On appeal to the Supreme Court the majority held that the decision of the International Court of Justice in *Avena* that United States had violated the Vienna Convention by failing to inform 51 named Mexican nationals including the petitioner of their Vienna Convention rights was not directly enforceable domestic federal law that preempted state limitations on filing of successive habeas petitions. The Supreme Court further held that the President's Memorandum to the Attorney General that the United States would discharge its international obligations under *Avena* by having state courts give effect to the decision, did not independently require states to provide reconsideration and review of named Mexican nationals' claims without regard to state procedural default rules.

The questions raised for consideration by the court were first, was the ICJ's judgment in *Avena* directly enforceable as domestic law in a state court in the US?

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[39] *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 52.

[40] *Ibid*.

[41] 128 S Ct 1346, 25 March 2008.

In addition, it had to consider whether the President's Memorandum independently required the States to provide review and reconsideration of the claims of the Mexican nationals named in the *Avena* case without regard to state procedural default rules. Chief Justice Roberts, speaking for the majority, stated that no one disputed that the *Avena* decision, which flowed from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes, constituted an international law obligation on the part of the US. However, in his view not all international law obligations automatically constituted binding federal law enforceable in US courts. The question which the court had to confront was whether the *Avena* judgment had automatic domestic legal effect so that the judgment of its own force applied in state and federal courts.

Chief Justice Roberts expressed the opinion that the Statute of the ICJ, incorporated into the UN Charter, provided supporting evidence that the ICJ's judgment in *Avena* did not automatically constitute federal law judicially enforceable in US courts. He added that the pertinent international agreements did not provide for implementation of ICJ judgments through direct enforcement in domestic courts, and that "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own."[42] He said that the conclusion of the majority was further supported by general principles of interpretation. Given that ICJ judgments might interfere with state procedural rules, in his view he would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended. Here there was no statement in the Optional Protocol,[43] the UN Charter, or the ICJ Statute that supported the notion that ICJ judgments displace state procedural rules.

However, the approach taken by the majority can be criticised as unduly restrictive and rather dismissive of the effect of the principles of international law and in many respects the reasoning of the minority is to be preferred. Justice Breyer again disagreed with the position taken by Chief Justice Roberts and his views merit attention. He stated that the US had signed and ratified a series of treaties obliging it to comply with ICJ judgments in cases in which it has given its consent to the exercise of the ICJ's adjudicatory authority. Specifically, he said that the US had agreed to submit, in a case of this kind, to the ICJ's "compulsory jurisdiction"

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[42] Referring to the decision of the US Supreme Court in *Sanchez-Llamas v Oregon* 548 US 331, 347 (2006).

[43] The Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol or Protocol), 24 April 1963. The Optional Protocol provided a venue for the resolution of disputes arising out of the interpretation or application of the Vienna Convetion (Article I, 21 UST at 326) According to the Protocol, such disputes "shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] … by any party to the dispute being a Party to the present Protocol."

for purposes of "compulsory settlement." [44] Further it had been agreed that the ICJ's judgments would have "binding force … between the parties and in respect of [a] particular case."[45]

Justice Breyer also expressed the opinion that President Bush had determined that domestic courts should enforce this particular ICJ judgment.[46] He added that the President had correctly determined that Congress need not enact additional legislation. In his view the majority had placed too much weight on treaty language that said little about the matter. As he stated:

> "The words "undertak[e] to comply," for example, do not tell us whether an ICJ judgment rendered pursuant to the parties' consent to compulsory ICJ jurisdiction does, or does not, automatically become part of our domestic law. To answer that question we must look instead to our own domestic law, in particular, to the many treaty-related cases interpreting the Supremacy Clause. Those cases, including some written by Justices well aware of the Founders' original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation."[47]

Justice Breyer concluded that he found the relevant treaty provisions self-executing as applied to the ICJ judgment before the court for a number of reasons. First, the language of the relevant treaties strongly supported direct judicial enforceability, at least of judgments of the kind at issue in this case. Secondly, the Optional Protocol applied to a dispute about the meaning of a Vienna Convention provision that was itself self-executing and judicially enforceable. Thirdly, logic suggested that a treaty provision providing for "final" and "binding" judgments that "settl[e]" treaty-based disputes was self-executing in so far as the judgment in question concerned the meaning of an underlying treaty provision that was itself self-executing. Fourthly, the majority's very different approach had seriously negative practical implications as the US had entered into numerous treaties that contained provisions for ICJ dispute settlement similar to those in the Protocol. Fifthly, other factors related to the judgment at issue made it well suited to direct judicial enforcement. Sixthly, to find the treaty obligations of the US self-executing as applied to the ICJ judgment, and consequently to find that judgment enforceable, did not threaten constitutional conflict with other branches of the state. Finally, neither the President nor Congress had expressed concern about direct judicial enforcement of the ICJ decision; to the contrary, it appeared that the President favoured enforcement of the judgment. Justice Breyer concluded as follows:

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[44] See Article 1 of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention 1963.

[45] United Nations Charter, Article 59, 59 Stat 1062, TS No. 993 (1945).

[46] Referring to the Memorandum to the Attorney General of 28 February 2005 (App. to Pet. for Cert. 187a).

[47] 128 S Ct 1346, 1377 (2008).

> "For these seven reasons, I would find that the United States' treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action beyond Senate ratification of the relevant treaties. The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language). Hunting for what the text cannot contain, it takes a wrong turn. It threatens to deprive individuals, including businesses, property owners, testamentary beneficiaries, consular officials, and others, of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide. In a world where commerce, trade, and travel have become ever more international, that is a step in the wrong direction."[48]

It is submitted that the approach adopted by Justice Breyer in his dissenting judgment in *Medellín v Texas* contains more convincing reasoning than that of the majority and it is certainly the more favourable one from the perspective of international law. However, the type of approach adopted by the majority is all too familiar in domestic jurisprudence[49] and does not augur well for the effective enforcement of the principles of international law in a national forum.

9.3.2 Conflicts Between Treaty Provision and Contracts

Another area in which a conflict has arisen between the jurisdiction of international and national courts is in relation to arbitration cases decided by the ICSID (the International Centre for Settlement of Investment Disputes). These cases raise issues of priority as between claims based on international investment protection treaties which provide for the settlement of disputes in an international judicial context and claims based in private law which fall to be resolved before domestic courts, tribunals or arbitration panels. As Shany has commented these cases "are more than indicative of the growing interaction between national and international courts; they also demonstrate the level of doctrinal and practical confusion surrounding attempts to regulate the complicated relations woven between parallel procedures involving formerly different, yet substantially similar applicable laws."[50]

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[48] *Ibid*. at 1389.

[49] See also the approach adopted by the Irish High Court in *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97. This decision is considered in detail in Biehler, *International Law in Practice* (Thomson Round Hall, 2005).

[50] Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 63.

In *Vivendi I*[51] the respondent sought to argue that an ICSID arbitral tribunal should not hear a case because submission to its jurisdiction violated a clause in the contract between the parties which referred contractual disputes to domestic administrative tribunals. The ICSID arbitral tribunal upheld this objection to jurisdiction and dismissed the claim. The tribunal found that the nature of the facts supporting most of the claims put forward in the case made it impossible for it to distinguish or separate violations of the bilateral investment treaty from breaches of the concession contract without first interpreting and applying the detailed provisions of the agreement. It stated that it was apparent that the actions of the Argentinian province, with which the claimant had contracted and on which it had relied were closely linked to the performance or non-performance of the parties under the concession contract. The tribunal therefore concluded that all of the issues relevant to the legal basis for these claims against the respondent arose from disputes between the claimants and the province concerning performance and non-performance under the contract. It addressed the relationship between the terms of the contract, in particular the forum selection provision, and the alleged international legal responsibility of Argentina under the bilateral investment treaty with respect to the previously outlined actions of officials and agencies of the province. The tribunal continued:

> "In this regard the tribunal holds that, because of the crucial connection in this case between the terms of the concession contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the concession contract requires, asserted their rights in proceedings before the contentious administrative courts of [the province] and have been denied their rights, either procedurally or substantively."[52]

The tribunal concluded that it was not possible for it to determine which actions of the province had been taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the concession contract, particularly considering that much of the evidence in the case had involved detailed issues of performance under the contract. It stated that the claimants should first have challenged the actions of the provincial authorities in its administrative courts. In addition, any claim against Argentina could arise only if the claimants were denied access to the courts of the province to pursue their remedy or if the claimants were treated unfairly in those courts or if their judgments were substantially unfair or otherwise denied rights guaranteed under the bilateral investment treaty by Argentina. However, since the claimants had failed to seek relief from the province's administrative courts and since there was no evidence before the tribunal that these courts would deny the claimants procedural or substantive justice, there was no basis on which to hold Argentina liable under the bilateral investment treaty.

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[51] *Vivendi I; Compania de Aguas del Aconquija SA v Argentine Republic* 40 ILM 426 (2001).

[52] *Ibid*. at 443.

As Shany comments "the arbitral tribunal construed the jurisdictional relations established by the contract and the BIT as a horizontal regime in which national and international jurisdictions serve as legal alternatives to one another".[53] However, in subsequent proceedings, known as *Vivendi II*[54] an ICSID annulment committee set aside the tribunal's award on the basis that it had exceeded its powers. The committee stated that the relevant articles of the bilateral investment treaty did not relate directly to breach of a contract but rather set an independent standard. The committee said that a state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of the provisions of the bilateral investment treaty. The committee continued as follows:

> "In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of [the province]."[55]

The committee concluded that it was not open to an ICSID tribunal with jurisdiction under a bilateral investment treaty in relation to a claim based on a substantive provision of that treaty to dismiss the claim on the grounds that it could or should have been dealt with by a national court. In the view of the committee the inquiry which the tribunal was required to undertake was one governed by the ICSID Convention, by the bilateral investment treaty and by applicable international law. Such an inquiry was not in principle determined or precluded by any issue of domestic law, including any agreement between the parties. Although the committee conceded that where "the essential basis of a claim brought before an international tribunal is a breach of contract", the tribunal will give effect to any valid choice of forum clause in the contract, it found that this requirement was not met in the case before it. On the other hand, it stated that where the fundamental basis of the claim was a treaty laying down an independent standard by which the conduct of the parties was to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and respondent state could not operate as a bar to the application of the treaty standard.

Similar issues arose in *SGS v Pakistan*,[56] which concerned a dispute relating to a contract between a Swiss corporation and Pakistan which contained an exclusive

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[53] *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 66.

[54] 41 ILM 1135 (2002).

[55] *Ibid.* at 1154.

[56] 42 ILM 1290 (2003).

jurisdiction clause requiring such disputes to be referred to arbitration in Pakistan. The corporation instituted proceedings against Pakistan on the basis of a bilateral investment treaty between that country and Switzerland, which provided that all disputes should be referred to an ICSID arbitral tribunal. Pakistan also brought arbitration proceedings pursuant to the exclusive jurisdiction clause. The ICSID arbitral tribunal concluded that it had jurisdiction to determine the claims of violation of provisions of the bilateral investment treaty raised by the claimant. However, it also concluded that it had no jurisdiction in relation to claims based on alleged breaches of the agreement between the parties which did not also amount to breaches of the substantive standards of the bilateral investment treaty. The approach taken has been characterised as "simple and elegant"[57] and it has been suggested that it offers "greater doctrinal clarity and ease of application than the more nuanced tests offered in the two stages of the *Vivendi* litigation … since the two jurisdiction-regulating clauses apply to parallel legal universes the tribunal is released from the need to coordinate between them".[58] However, it has also been acknowledged that this reasoning encourages parallel proceedings over the same factual issues before different judicial fora which may involve the application of comparable legal standards.[59]

Very similar jurisdictional issues were raised subsequently in *SGS v The Philippines*,[60] although a different approach was taken by the ICSID arbitral tribunal in resolving them. As in the *Pakistan* case, a contractual forum selection clause provided that disputes under the agreement would be subject to the exclusive jurisdiction of the domestic courts in the Philippines. As in the earlier cases, the respondent state objected to the ICSID tribunal exercising jurisdiction in the matter and claimed that any dispute was governed by the forum selection clause in the contract. However, the claimant relied on a bilateral investment treaty concluded between Switzerland and the Philippines and made the argument that in cases where jurisdiction overlapped the jurisdiction of the international arbitral tribunal should take priority over that of domestic courts. The tribunal concluded that Article VIII of the bilateral investment treaty which provided for the settlement of disputes in relation to investments between a contracting party and an investor of the other contracting party gave it jurisdiction to adjudicate on the matter. It noted that a different view on this issue had been taken by the ICSID Tribunal in *SGS v Pakistan*. However, the majority of the tribunal concluded as follows:

> "The present tribunal agrees with the concern that the general provisions of BITs should not, unless clearly expressed to do so, override

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[57] Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 70.

[58] *Ibid.*

[59] *Ibid.*

[60] ICSID Case No. ARB/02/6, 29 January 2004.

> specific and exclusive dispute settlement arrangements made in the investment contract itself. On the view put forward by SGS it will have become impossible for investors validly to agree to an exclusive jurisdiction clause in their contracts; they will always have the hidden capacity to bring contractual claims to BIT arbitration, even in breach of the contract, and it is hard to believe that this result was contemplated by States in concluding generic investment protection agreements. But there are two different questions here: the interpretation of the general phrase 'disputes with respect to investments' in BITs, and the impact on the jurisdiction of BIT tribunals over contract claims (or, more precisely, the admissibility of those claims) when there is an exclusive jurisdiction clause in the contract. It is not plausible to suggest that general language in BITs dealing with all investment disputes should be limited because in some investment contracts the parties stipulate exclusively for different dispute settlement arrangements. As will be seen, it is possible for BIT tribunals to give effect to the parties' contracts while respecting the general language of BIT dispute settlement provisions."[61]

Shany points out that the arbitral tribunal's findings on jurisdiction and applicable law created a direct jurisdictional conflict between the ICSID proceedings and the domestic proceedings in the Philippines, as contract claims fell within the concurrent jurisdiction of both *fora*. He suggests that this facilitated the possibility of applying the jurisdiction-regulating rule, in other words the exclusive jurisdiction arrangement found in the contractual forum-selection clause to the parallel jurisdiction of the domestic court and the ICSID over contract claims. Shany expresses the view that the decision of the arbitral tribunal in the *Philippines* case is instructive as it illustrates the potential for jurisdictional interaction between national and international courts when both sets of procedures address the same subject matter and apply the same law. He suggests that the decision can be viewed as dismissive of the notion that there is an inherent hierarchy between national and international courts. Instead it applied horizontal rules to ascertain the respective jurisdiction between itself and domestic courts in relation to the parallel claims in contract.

The decision of the ICSID arbitral tribunal in *SGS v The Philippines* appears to represent a middle ground approach somewhere in the centre of the spectrum between that taken by the tribunals in *Vivendi I* and *SGS v Pakistan*. These decisions illustrate just how inconsistent the approach towards the interaction of international and national proceedings may be, even in cases heard by the same international body.

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[61] *Ibid*. at para. 134.

9.4 A Disintegrationist Approach

9.4.1 The MOX Litigation

Courts involved in resolving disputes which are within the remit of more than one international regime have traditionally been faced with two approaches. One is that of disintegrationism which involves breaking the dispute up into different claims governed by separate legal regimes and only dealing with those aspects of it that are governed by the relevant regime. The other approach is termed integrationism and involves integrating the related claims into one dispute by co-ordinating all applicable procedures and substantive legal principles in a manner which reflects a unified international legal system. While disintegrationism discourages courts in one regime from considering the effect of legal principles which may operate in another regime, integrationism encourages co-ordination of parallel jurisdictions.

While a disintegrationist approach involves splitting up different legal claims into those which will be dealt with by different regimes, it does not necessarily involve the application of distinct principles. An example of this approach is that taken by the International Tribunal for the Law of the Sea in the *Mox Plant* case,[62] where it was made clear that the dispute settlement process under the OSPAR Convention[63] and the EC and Euratom Treaties deal with disputes in relation to the interpretation and application of those agreements and not with disputes arising under the UNCLOS Convention.[64] The tribunal stated that even if the OSPAR Convention and the EC and Euratom Treaties contain rights and obligations which are similar to or identical with the rights or obligation set out in the UNCLOS Convention, the rights and obligations under the former agreements have a separate existence from those under the latter convention.[65]

This approach was also adopted by an OSPAR arbitration tribunal in parallel proceedings in which Ireland challenged the UK's refusal to provide information requested in relation to reports prepared as part of the approval process for the commissioning of the MOX nuclear processing plant at Sellafield in England.[66] Despite Ireland's submissions to the contrary, the majority of the tribunal took a narrow view that "the competence of a tribunal established under the OSPAR Convention was not intended to extend to obligations the Parties might have under other instruments (unless, of course, parts of the OSPAR Convention included a direct renvoi to such other instruments)."[67] It expressed the view that to interpret

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[62] *Ireland v United Kingdom* 41 ILM 405 (2002).

[63] The Convention for the Protection of the Marine Environment of the North-East Atlantic 1992. See 32 ILM 1069 (2002).

[64] United Nations Convention on the Law of the Sea 1982. See 21 ILM 1261 (1982).

[65] 41 ILM 405 (2002) para. 50. See also the *Southern Bluefin Tuna case* (*Australia and New Zealand v Japan*) 38 ILM 1624 , 1632 (1999).

[66] *Mox Plant Case* 42 ILM 1118 (2003).

[67] *Ibid*. at 1136.

the relevant provisions of the OSPAR Convention otherwise would transform it into an unqualified and comprehensive jurisdictional regime in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under the OSPAR Convention. The majority of the tribunal concluded that there was no indication that the parties to the OSPAR Convention had submitted themselves to such a comprehensive jurisdictional regime in relation to any other international tribunal and that it was not reasonable to assume that they would have accepted such a jurisdictional regime through the vehicle of the OSPAR Convention. The majority also quoted from the rejoinder submitted on behalf of the UK that "[t]he application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux preparatoires*".[68] The tribunal also made it clear that the OSPAR Convention and the relevant EU Directive[69] were independent legal sources that established a distinct legal regime and provided for different legal remedies. It stated that the similar language of the two instruments did not limit a contracting party's choice of legal forum to only one of the two available, namely the ECJ or an OSPAR tribunal. In its view the primary purpose of employing similar language was to create uniform and consistent legal standards in the field of the protection of the marine environment and not to create precedence of one set of legal remedies over the other.

However, it should be noted that the dissenting member of the tribunal, Gavan Griffith QC, took a much less disintegrationist approach than the majority. He stated that he disagreed with the reasons for the restrictive interpretation of applicable law adopted by the majority and its rejection of the normative value of various international instruments invoked by Ireland to support its position. In his view other international legal sources had direct relevance to the subject matter of the arbitration and the tribunal could not be confined to international conventional law or the language of the OSPAR Convention exclusively. He concluded that he would depart from the majority's rejection of the normative value and applicability of the various international instruments invoked by Ireland and in particular its rejection of the relevance of the Aarhus Convention and EC legislative proposals to inform the meaning of the relevant article of the OSPAR Convention.

The advantage of a disintegrationist approach is that there will be no need to regulate the parallel jurisdiction of different courts which address discrete aspects of a dispute. However, the reality is that jurisdictional overlap is difficult to avoid in practice and a disintegrationist approach while it may be theoretically appealing is also fraught with potential practical difficulties. It may, as the next stage in the Sellafield litigation discussed below shows, also be difficult for certain supranational courts such as the ECJ to resist adopting an approach which suggests that it alone has the competence to resolve a dispute.

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[68] Para. 51 of the Rejoinder.

[69] Directive 90/313.

In *Commission v Ireland*[70] the European Court of Justice prohibited Ireland from suing the United Kingdom before the International Tribunal of the Law of the Sea in Hamburg in further proceedings claiming that it was polluting the Irish Sea with nuclear waste. Ireland was therefore effectively barred from seeking redress before the court which the State thought was the most appropriate to put an end to the nuclear pollution originating from the British Nuclear Fuel Plant in Sellafield considered by many to pose a threat. The Luxembourg judges held that Ireland should not bring any issue before an international court or tribunal which the ECJ itself could deal with.

In a statement on the matter the Minister for the Environment, Dick Roche, noted that the judgment placed the ECJ in a powerful position as it expected to apply not only EC law but also international law which protects Ireland from dangerous pollution in the Irish Sea. He added that enforcement of a wide range of international agreements, particularly in the environmental field, were now within the competence of the ECJ. In essence the Minister said that if the Luxembourg judges would not allow Ireland to sue the United Kingdom before the competent Hamburg court applying the relevant international law, then the ECJ must do the job itself and hold the British government responsible for its actions.

Therefore the question to be asked was this: was Ireland to be left in the lurch? Could it just disregard the Luxembourg decision and go ahead with fighting dangerous British nuclear waste with whatever means it considered appropriate or would the ECJ itself do the job? As time has shown, it may have been too much to expect that the ECJ would start applying international law which is not part of European law, because the court is not competent to do so. Ireland may only ask it to declare that the United Kingdom has not complied with its obligations under European law. However, it is relying primarily on the rules of international law according to the United Nations Convention on the Law of the Sea.

Ireland asked the Law of the Sea Tribunal to declare that the United Kingdom had breached its obligations under various articles of the United Nations Convention on the Law of the Sea in relation to the authorisation of the MOX plant, including by failing to take the necessary measures to prevent, reduce and control pollution of the marine environment of the Irish Sea from intended discharges of radioactive materials and international movements associated with the MOX plant or resulting from terrorist acts. Although European law provides some environmental protection, it does not provide it to the same degree as the United Nations Convention on the Law of the Sea. The European Union would not be competent to provide Ireland with the protection of this latter international legal standard which applies to the Sellafield pollution.

However, the European Court of Justice concluded that the provisions of the Convention relied on by Ireland in the dispute relating to the MOX plant and submitted to the arbitral tribunal were rules which formed part of the Community

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[70] (Case C-459/03) [2006] ECR – I 4635.

legal order and that the jurisdiction of the ECJ in the matter was exclusive. It continued as follows:

> "The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive jurisdiction of the Court is confirmed by Article 292 EC, by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraph 35, and Opinion 1/00 [2002] ECR I-3493, paragraphs 11 and 12) … It follows from all of the foregoing that Articles 220 EC and 292 EC precluded Ireland from initiating proceedings before the Arbitral Tribunal with a view to resolving the dispute concerning the MOX plant."[71]

Following this decision the other option for Ireland, which was simply to disregard the ECJ ruling and proceed to seek judicial redress with the competent United Nations judicial body, is not as bizarre as it sounds. To disregard a court ruling in a national legal order is not an option. However, as we have seen in the field of international law it is much more common to encounter several courts with competing jurisdictions This is exactly what the decision of the ECJ is about. It does not pronounce on the merits of whether the United Kingdom has indeed illegally polluted and dumped nuclear waste in contravention of international and European law, but simply states that it does not wish Ireland to apply to the Law of the Sea Tribunal which is competent in this case.

Although a certain superiority of EC jurisdiction is generally accepted inside the European Union, difficulties will arise if this results in barring the proper applicable law on the merits. Recently, the European Court of Justice has been in focus for not allowing the proper application of human rights standards by applying its superior jurisdiction. This contradicts the legal premise that where there is a wrong there is a remedy. If the ECJ cannot deliver what it implicitly promises by concentrating all competences to itself, Ireland would be free to seek the legal remedy where it finds it. The rules on ECJ competency may not be misused to deprive Ireland of the benefits of the applicable international law protecting it from the perils of illegal nuclear waste.

The judgment of the ECJ is also weak on other grounds. The European Community is itself a member of the United Nations Convention on the Law of the Sea and has agreed that member states would apply to the tribunal as provided for in this convention. Therefore, to seek to rely exclusively on EC law to prevent Ireland doing this disregards the rules of international law governing conflicting assertion of jurisdictions. The Vienna Convention on the Law of Treaties provides

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[71] *Ibid.* at paras 123 and 133.

that the more specific and later treaty pre-empts the more general and earlier treaty. In relation to nuclear waste in the marine environment, the UN Convention is a more specific and later treaty than the EC Treaty and must be applied.

This decision reminded Ireland that it is not easy to stand up for its rights against powerful neighbours. However, the judicial setback in the Sellafield struggle was effected by a procedural trick, which resulted in the European Commission fighting for its exclusive competencies. The case is not yet lost on the merits. The Irish Government would be well advised to now act to obtain a judicial decision on nuclear pollution of the Irish Sea, as opposed to one on conflicting judicial competencies.

9.4.2 The Bosphorous Litigation

Consecutive decisions of the High Court and the Supreme Court in the same matter are a normal judicial feature; there is no issue in relation to which pre-empts the other; it is clear which decision must ultimately be applied. Where an additional decision of the Luxembourg European Court of Justice comes into play the matter becomes rather more complicated but is nevertheless still relatively clear. However, when after judgments by those courts, the Strasbourg European Court of Human Rights rules on a matter which has been dealt with in a quasi judicial manner by the United Nations Security Council Sanctions Committee purporting to act with legally binding force, it certainly becomes more difficult to decide which of the potentially conflicting decisions will take priority. International lawyers are accustomed to one organ of the United Nations adopting sanctions, for example, against Iraq, and another organ pronouncing that those very sanctions in themselves gravely violate human rights.[72] Such conflicting holdings would not be of such great concern if it were not for the fact that they may be pronounced by judicial bodies which are seen as the final arbiters in their field with the power to authoritatively decide an issue before them. In the international realm increasing legal guarantees in the field of human rights and European and international integration have resulted in more and more international litigation. Even the relationship between different international *fora* and national courts dealing with the same subject matter is far from clear.[73] Matters become yet more complicated when different international *fora* are called upon to potentially deal with the same issue.[74]

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[72] It is not so much the recently disputed "Oil for Food" Programme itself as the sanctions it was supposed to soften which led the Economic and Social Council of the UN to condemn them on human rights grounds (Special Rapporteur Marc Bossuyt).

[73] *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97.

[74] The International Court of Justice has only once indirectly pronounced on this issue in the *Lockerbie* case [1992] ICJ Rep 3. It was held that the potential national adjudication according to the UN Terrorist Convention of Montreal against the hijacking of aircraft had to give way to the ICJ ruling itself; however, the feature of confirming the domestic court's superiority against other courts is typical for the non-integrated international

There have not yet been too many opportunities to develop a "conflict of courts" law and no one would expect Ireland to be so heavily involved in international litigation as to lead in this field. So it came as something of a surprise that all conceivable layers of litigation, both national and international, were employed in the *Bosphorus* cases which exemplify the relevant courts and the governments' practices. The cases indeed provide some valuable insights into how different levels of law and judicial review may interact. They are particularly interesting because the question of formal validity of different international decisions on the same issue is combined with the much debated issue of how far individual fundamental and human rights may be limited by public international programmes to fight the evil posed by terrorism, rogue states etc. The question is how much civilian pain must be suffered for what political gain?

The international legal obligation of states to adhere to UN sanctions[75] even when these affect the rights of individuals and the legal redress of those prejudiced has only recently come before the courts and has now been considered in its first full judicial cycle. Obviously, the hierarchy of rules originating from national, European and international sources is at issue as is whether to allow the benefit of the doubt to the innocent individual concerned or to give it to those states and organisations which act in the name of the public good.

Bosphorus was a company, incorporated under Turkish law, in which all shares were held by Turkish nationals. By a lease agreement made in April 1992, Yugoslav Airlines (JAT) leased two of its aircraft to Bosphorus which were then registered in the Turkish Register of Civil Aviation, thus rendering them Turkish without affecting JAT's ownership. One of the planes arrived in Dublin in April 1993 for the carrying out of maintenance work. The Irish government issued instructions in May 1993 that "the aircraft was to be stopped" according to EC Regulation 990/93 of the same year which incorporated the United Nations Security Council Resolution 820/1993 prohibiting trade with what was then Yugoslavia according to Article 41 of the United Nations Charter. The New York UN Sanctions Committee notified Ireland that the aircraft fell within the terms of these provisions. The High Court held that while the United Nations resolutions did not form part of Irish domestic law, the Security Council Resolution provided the genesis for Article 8 of European Council Regulation. However, in the absence of any judicial or academic commentary on its terms "the unexplained conclusion of the United Nations Sanctions Committee was of no value to the court." Although Article 8 of the EC Regulation failed to distinguish between the nature, as opposed to the degree or percentage, of the interest held by the Yugoslav person or undertaking in the asset, the relevant "interest" was the possession or the right to enjoy, control or regulate the use of the asset, rather than the right to any income derived

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structure (see the equivalent provision in Article 27 of the Vienna Convention on the Law of Treaties). The United Nations assertion of supremacy is contained in Article 103 of the UN Charter.

[75] According to Article 25 of the United Nations Charter.

from it. The majority and controlling interest in the aircraft was held by the applicant alone and so Murphy J held that the Minister was not empowered to impound the aircraft in the circumstances.

However, in view of its desire to formally comply with the sanctions requirements from an international perspective[76] the government appealed against the release of the plane to the Supreme Court[77] which in turn according to Article 234 EC referred the question to the ECJ of whether Article 8 of the EC Regulation was to be construed as applying to an aircraft which is owned by an undertaking, the majority or controlling interest in which is held by Yugoslavia where such aircraft has been leased to an undertaking, the majority or controlling interest in which is not held by a person or undertaking in or operating from Yugoslavia. The ECJ answered this question in the affirmative, considering itself bound in this decision by the Security Council Sanction Committee's decision to the same effect.

After October 1994 the UN sanctions were relaxed so that all Yugoslavian aircraft could fly freely;[78] however, the Bosphorus run plane – which was actually the only impounded aircraft under the sanctions regime – remained so impounded. Bosphorus questioned what possible justification on the merits the impoundment could still have given the heavy private losses it was suffering and the fact that the sanctions had by this time been lifted and covered no more than this single non-Yugoslav run plane.

This gave rise to the second phase operation whereby the High Court and Supreme Court quashed the decision of the Minister to detain the aircraft further. It had by then been detained for more than three years at Dublin Airport partly due to the delayed reasoning on another potentially violated EC Regulation put forward by the Minister. It is noteworthy that the Supreme Court commented that the Minister's notice of appeal was framed in the most general of terms, merely stating that the learned High Court Judge was wrong in law in making his finding but there was no attempt to particularise how he could possibly have been wrong,[79] which may have contributed to the outcome. At this stage the aircraft was free to leave; however, a few days later the ECJ decided the question posed by the Supreme Court seventeen months earlier, with the effect that the original EC Regulation which led to the impounding was to be applied to the aircraft. The Minister then immediately re-instated the impounding order.

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[76] The written submissions in the Strasbourg case lead us to assume that the owner of Bosphorus, Mr Ozbay had considerably alienated part of the government so that it would not agree that he was a *bona fide* applicant in the matter although the court subsequently confirmed him to be such.

[77] The facts are represented here in a slightly simplified manner as there had been not one but two High Court and two Supreme Court decisions and to distinguish them would not contribute to the issue dealt with here.

[78] UNSC Resolution 943/1994.

[79] *Per* O'Flaherty J in *Bosphorus v Minister of Transport* [1997] 2 IR 1, 19.

A final application to the Strasbourg Court wound up this saga of litigation in which Bosphorus's allegation that its property rights had been violated by the impoundment were refuted by the argument that the ECJ had provided equivalent human rights (property rights) protection which left Ireland free to comply in an uninhibited manner with international sanctions and obviated the need to treat the allegations on the merits. Neither the ECJ nor the ECtHR actually weighed the concrete alleged human rights violations and exorbitant losses against the public international legal obligations of Ireland to formally adhere to sanctions. It should be pointed out that these sanctions had at the material time been lifted and the court limited itself to short statements made in the abstract which balanced the public good against individual claims and prioritised the former.

Conflicting sets of rules in international law may be assumed to be valid and to be applied. Human rights law as such does not allow other fields of law to call its applicability into question nor does the law governing international sanctions allow for such qualification. As a result the relevant courts, the ICJ, ECJ and ECtHR, generally assume that their decisions are final and binding. It is only in some rather remote fields such as international economic law in the context of the World Trade Organisation's General Agreement on Traffic and Trade that some allowances are made to balance conflicting international legal aims such as free trade and environmental protection in a structured way.[80] In the more central area of conflicting human rights and international sanctions no rules exist to balance these absolute claims properly nor is there any agreed way in which decisions of the Luxembourg, Strasbourg and national courts should be brought into line if this proves necessary.

It is possible to identify two approaches; either a forum treats itself and its set of rules in an absolute manner and does not accommodate conflicting principles or a decision is made on the basis of balancing different sets of rules irrespective of what forum is deciding the matter. A corresponding attitude to the former approach is to yield jurisdiction to another forum. Accepting for example, ECJ decisions or Security Council Sanctions Committee Resolutions as binding and denying any further judicial discretion on the merits is typical of the former approach. The latter, however, is less concerned with status and abstract structure but rather is an actual balancing process on the merits which potentially disregards claims of abstract legal superiority. It is interesting to see how both attitudes may be observed in the proceedings under consideration.

Murphy J in the first Irish High Court decision in 1994 approached the issues with refreshing clarity when stating that "the UN resolutions do not form part of Irish domestic law and, accordingly, would not of themselves justify the minister in impounding the aircraft".[81] In relation to the advice received from the Security

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[80] The GATT 1947/1994 expressly provides for this institutionalised balancing, see however, the rather frustrating "close the market for protection" attitude in *Portugal v Council* (Case 149/1996) [1999] ECR I-8395.

[81] [1994] 2 ILRM 551, 557.

Council on the issue of impounding the aircraft he commented that: "I am afraid I do not feel that the unexplained conclusion of the Chairman of the Security Council Committee is of any value to me in the performance of my function." Finally in view of the EC Regulation endorsing the UN Resolution he concluded that "[t]o impound … simply because another party has a theoretical right to receive a nominal rent in respect thereof must be absurd."[82]

This attitude puts the conflicting foreign policy interests of international sanctions categorically into a different status in relation to the individual's property rights. This robust national perspective on Ireland's obligation in the light of EC and UN law was not upheld by the ECJ, the latter being more concerned with the supremacy of EC law. The Court went on to outline that the balance between the rights of the individual and the purposes pursued by the EC/UN must be resolved in favour of the latter. The ECJ decision avoids a proper discussion of the facts and the merits in the case. What it does say, however, is worth restating as it addresses itself with impressive clarity to the core issue in the *Bosphorus* case, the balancing of sanctions and individual property rights:

> "Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions. Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators."[83]

There is no sign of balancing the extreme losses suffered by Bosphorus bearing in mind the fact that the sanctions had already lost any conceivable meaning at the material time nor is there any evidence to indicate that the ECJ ruled properly on the issues in the case other than in the abstract.[84] There is nothing to show that the court actually evaluated the issues and instead it confined itself to general pronouncements on balancing the issue of sanctions and conflicting human rights. The Supreme Court subsequently decided to apply this decision,[85] believing that it did not have any discretion to do otherwise because of the assumed supremacy of EC law[86] despite its earlier carefully balanced holding to the contrary on the merits. Its decision is in marked contrast to its previous judgment on the matter in which it reached the opposite conclusion on the merits in the course of which it

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[82] *Ibid*. at 559.

[83] (Case 84/95) [1996] ECR I-3953, paras 22 and 23.

[84] This being said it must be admitted that a restatement of the facts and the parties' submissions is contained in the decision.

[85] 29 November 1996 (SC).

[86] Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 352; see ECtHR in *Bosphorus* (2006) 42 EHRR 1, para. 147.

balanced conflicting issues on sanctions and the applicant's property rights. This reasoning of the ECJ also forms the basis for the decision of the ECtHR which maintained that equivalent human rights protection was provided to the individual, justifying the Court not going into the merits of balancing sanctions and human rights in the given case. The relevant passage of the ECtHR decision is equally short, unambiguous and clear; the structure of the Court's decision helps to explain its reasoning. It answers the question "whether the impoundment was justified"[87] by elaborating a "general approach".[88] The ECtHR did not intend to "absolve Contracting States completely from their Convention responsibilities;"[89] however, compliance with EC law gives a presumption of Convention compliance.[90] This presumption is truly exceptional; political and economic sanctions are necessarily by their very nature in conflict with individual rights as the ECJ rightly notes and the ECtHR is exclusively designed to safeguard individual rights. To presume that by complying with sanctions imposed by both the UN and the EC there is conformity with the European Convention on Human Rights is remarkable. It would in fact be reasonable to make the opposite assumption – namely that adherence to sanctions law would indicate interference with individual rights whether justified or not. This presumption, developed in the abstract, relieves the ECtHR from scrutinising the merits of any human rights violation by the sanctions put in place. Having made such an extraordinary presumption and virtually yielding its own jurisdiction to the ECJ, it is not really unexpected that the Court thought fit to answer its question "has the presumption been rebutted in the present case?" in one short paragraph as abstract as the ECJ treatment of the same issue. It may be quoted as follows:

> "The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ (in the light of the opinion of the AG), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanism of control of the observance of Convention rights. In the Court's view, therefore, it cannot be said that the protection of the applicant's Convention rights was manifestly deficient with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted."[91]

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87 *Ibid.* para. 149.

88 *Ibid*. paras. 149-158.

89 *Ibid.* para. 154.

90 *Ibid.* paras. 159-165.

91 *Ibid.* para. 166.

Interestingly the ECtHR[92] did not evaluate the public interest of the UN sanctions against Yugoslavia against the individual rights of Bosphorus. It was concerned with status and concepts of legal supremacy and procedure, not the balancing of the conflicting interests on the merits. Particularly after the softening of sanctions in 1994, no political reason could any longer be identified to uphold them against Bosphorus. The sanctions imposed at this stage formally applied only to this Bosphorus aircraft; all other Yugoslav airplanes could by then fly freely, and the Yugoslav government negotiated in Rambouillet with the world leaders. The ECtHR nevertheless chose to elaborate extensively on the "need to secure the proper functioning of international organisations" in the abstract, notably "a supranational organisation such as the EC", explicitly referring to the supremacy of EC law as seen by the ECJ[93] over national and other spheres of law, rather than the individual's rights under the Convention. The court concluded that compliance with EC law justifies interference with the individual's human rights as the EC "is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance in a manner which can be considered at least comparable to that for which the Convention provides".

However, this assumption of equivalent protection must lead to doubts. The EC Treaty does not contain provisions for the protection of human or fundamental rights. Although the ECJ has repeatedly stated in general terms that it is to be guided by such rights and Article 6 of the Treaty establishing the European Union made reference to the European Convention on Human Rights, it does not provide any remedy to the individual for breach of those rights. While the individual may sue an EC member state for not fulfilling its obligations under EC law there is no access to the ECJ for individuals who seek to establish that the fulfilment of EC law violates their fundamental rights. The ECtHR seems to accept that "access of individuals to the ECJ under these provisions is limited; they have no *locus standi* under (former) Articles 169 and 170; their right to initiate actions under Articles 173 and 175 is restricted as is, consequently, their rights under Article 184; and they have no right to take an action against another individual." However, the ECtHR went astray when it stated that: "The parties to the domestic proceedings have the right to put their case to the ECJ during the Article 177 process", as evidently the individual is not party to the proceedings before the ECJ according to Article 177. The court concluded that equivalent protection of human and fundamental rights is provided by the EC, so that compliance with EC law apparently outweighs any ECHR rights which the individual might possibly have. Although damages in tort may be recovered from the ECJ under Articles 235 and 288 of the EC Treaty, the prospects for the individual of recovering damages are extremely unlikely. The ECJ has made clear that it is not prepared to award damages for losses incurred on the basis of EC Regulations implementing UN sanctions: "the

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[92] All following quotes from para. 143 *et seq.*

[93] *Costa v ENEL* (Case 6/64) [1964] ECR 585 and see Biehler, *op. cit*., p. 352.

alleged damage can be attributed not to the adoption of [EC] Regulation No. 2340/90 but only to the United Nations Security Council Resolution 661 (1990) which imposed the embargo".[94] Needless to say from the perspective of the individual suffering the outcome this will be seen as a *deni de justice.* From the perspective of the legal personalities involved, the State, EC or ECtHR, it is in the words of the latter "no dysfunction of the mechanism of control"[95] to leave sanctions unscrutinised.

This latter categorical approach pleases institutional interests. It left Bosphorus with millions of euros worth of losses as a result of the impounding of an aircraft which the national courts considered on the merits to be illegal and for which no possible public interest in terms of UN sanctions could be seen for most of the material time. The decisions of the High Court and the Supreme Court of 1997 – in stark contrast to those of the ECJ and ECtHR – balance the conflicting interests on the merits, deciding the matter on the basis of facts rather than pre-empting it with legal concepts.

An unprecedented judicial saga involving every possible level of judicial review, from international to national, of UN Security Council sanctions implemented by EC regulations came to an end when the ECtHR decided to let those measures pass virtually unscrutinised. Is it possible to escape human rights standards by internationalising or Europeanising certain measures? In short, may states collectively infringe individual rights to an extent which their own laws would not allow? The answer to both questions seems to be an obvious "no"; however, for the first time, a resounding "yes" has been uttered by an international court – much to the delight of governments and the European Commission, and probably less welcome to those affected by these measures.

While international law will be applied carefully by national courts to the extent to which it is considered to be part of the body of national law – thus keeping intact the constitutional and human rights guarantees contained therein – the outlook will be different if certain measures are endorsed by European regulations. These are widely believed to be supreme over all other types of law and not subject to any judicial scrutiny before the ECJ on the application of an individual on the grounds of a breach of fundamental or human rights. When the EC adopted Regulation 990/93 giving effect to the UN Security Council's sanctions against what was then called Yugoslavia, the Irish Supreme Court felt unable to rule on the merits but referred the question to the ECJ which, unsurprisingly, confirmed that by virtue of the special character of EC law the UN/EC sanction must be given effect to and individual rights must be subordinated to it. As Irish courts felt bound by the ECJ and there was no judicial remedy against the ECJ ruling on behalf of the individual, the ECtHR decision on the issue was expected to give guid-

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[94] *Dorsch Consult Ingenieurgesellschaft mbH v Council and Commission* (Case C-237/98) [2002] 1 CMLR 41, 74, applying the ECJ decision in *Bosphorus.*

[95] ECtHR in *Bosphorus* (2006) 42 EHRR 1, para. 166.

ance. However, what resulted may be seen from the individual's perspective as a *deni de justice.*

It is noteworthy that the Supreme Court and the High Court sought to achieve a balance between the general public interest and that of the individual company concerned. It is submitted that these decisions would have done the cause of UN sanctions and the EC a better service had they not been pre-empted by the ECJ decision. Such pre-emption shows a disregard for the need to address the conflict between human rights and sanctions.

Such regrettable consequences may to a great extent be attributed to the assumed supremacy of EC law. It is this level of law which more than any other purports to categorically pre-empt all others. To give too much credence to this uncompromising perspective leads to the results seen in the *Bosphorus* case. The careful balancing of conflicting legal interests of which human rights and international sanctions form a prime example should not be jeopardised in this manner.

9.5 Methods of Regulating the Interaction Between International and National Courts

Yuval Shany in his book *Regulating Jurisdictional Relations Between National and International Courts*[96] has examined in detail the interaction between proceedings conducted in national and international *fora* and explored ways of seeking to regulate this jurisdictional interaction. What follows is an attempt to summarise these principles with a view to assessing whether greater regulation of this relationship is possible or desirable.

Shany has commented that dualism and hierarchy do not always provide satisfactory or realistic answers to the problems associated with the jurisdictional interaction between national and international courts. As he has stated:

> "While they can provide national and international courts with the easy to apply rules of exclusion or jurisdictional primacy, such solutions are often artificial and incompatible with the problem-solving role of the judiciary, the interests of all parties participating in multiple litigation and general considerations of judicial economy and normative coherence."[97]

While regulation of the exercise of different jurisdictions may be required in either a horizontal or vertical context, it is clearly necessary to establish the nature of the interaction between the different courts and the extent to which the relationship between them is hierarchical in nature. Factors relevant in determining this will include power to judicially review a decision of another court, the requirement to

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[96] (OUP, 2007).

[97] *Ibid*. p. 125.

exhaust local remedies and any reference or preliminary ruling procedure which may be provided for. The presence of the latter two factors in particular is likely to indicate the nature of any hierarchical structure between a national and international court. However, it may also be possible to identify factors which suggest that no hierarchy between courts is intended, as for example, a so-called "fork in the road" provision in a bilateral investment treaty which provides for the resolution of a dispute by either a national or international court. As Shany comments "ascertainment of the nature of the relations between national and international courts in the absence of clear hierarchy signifiers remains controversial and dependent on how the relationship between national and international law is conceptualized (e.g. monism v dualism, ascending v descending authority, centralised v decentralised international order)."[98] As he points out, the inconsistent practice of national and international courts on the matter is indicative of the prevailing state of uncertainty in this regard.

9.5.1 Same Issues and Same Parties

A further significant factor in developing principles which may help to regulate the jurisdiction of national and international courts in a given matter is the degree of overlap between the proceedings which may have been instituted in different fora. Principles such as *lis pendens* and *res judicata* operate to prevent the same dispute being litigated on more than one occasion and there are strong policy reasons for seeking to prevent overlapping proceedings been conducted in parallel before national and international courts. However, a forum selection clause or exclusive jurisdiction treaty provision can only operate to confer jurisdiction on either a national or international court provided the issues involved are the same. Often, as an examination of the case law relating to the ICSID decisions above has shown, one party will seek to have a matter determined before a domestic court while the other will argue that an international forum is preferable. In this context the traditional principles which regulate parallel proceedings in private international law will almost inevitably be insufficient to resolve the matter. Yet the basic questions of the same parties and the same issues are clearly also significant in any system of national/international jurisdiction regulation and must be examined.

The way in which the test of the same parties is applied in this context will, as Shany points out, depend on the amount of formality applied in determining the degree of "sameness" required. An overly formal test requiring the same legal status of a litigant in both sets of proceedings may be more difficult to satisfy where proceedings are conducted before national and international courts. So, while a state or international organisation may represent a party in an international fora, they may be acting on behalf of a private litigant who would take proceedings before the domestic fora. Conversely, a party may sue an individual such as a

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[98] *Ibid.* p. 129.

state official in proceedings before a domestic court when faced with the prospect that the state which it wishes to sue would claim sovereign immunity.

In his dissenting judgment in *Medellín v Texas*,[99] Justice Breyer referred to the fact that Mexico, rather than the petitioner Medellín himself, had presented his claims to the ICJ. As he put it Mexico had brought the case partly in the exercise of its right of diplomatic protection of its nationals and he pointed out that such derivative claims were a well-established feature of international law. As Justice Breyer stated they are treated in relevant respects as the claims of the represented individuals themselves and can give rise to remedies, tailored to the individual, that bind the nation against whom the claims are brought.[100]

The factors referred to above have led Shany to comment that "these *locus standi* differences mean that instances of absolute identity of parties before national and international courts are bound to be rare" and both Schreuer[101] and Shany[102] have advocated a liberal application of the "same parties" test to ensure that parallel claims involving what are effectively the same parties are recognised as such.

Similar difficulties arise in applying a "same issues" test to proceedings before national and international courts. There has been a marked lack of consistency in deciding whether to adopt a formal or flexible approach to this question as the decisions of the ICSID arbitral tribunals in *Viviendi I*[103] and *SGS v Pakistan*[104] illustrate. However, it may be necessary to recognise the reality that claims brought before different types of courts may still be viewed as essentially the same. This reasoning recognises that international law is a "common language"[105] which may be applied to proceedings whether of a domestic or international nature. However, Shany has suggested that even adopting a flexible approach to the "same claims" test, there may not be a sufficient overlap between proceedings taken before domestic and international courts which may be asked to resolve different aspects of the same case.[106] As he states "even where international law norms can be invoked before domestic courts, the domestic law prism under which they are applied is likely to have a distorting effect on their contents".[107]

Provided that the difficulties relating to satisfying the "same parties" and "same issues" test can be overcome in the context of parallel national and international

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[99] 128 S Ct 1346 (2008).

[100] *Ibid*. at 1387.

[101] *Decisions of International Institutions before Domestic Courts* (1981) p. 330.

[102] *The Competing Jurisdictions of International Courts and Tribunals* (2003) pp. 24-25.

[103] *Compania de Aguas del Aconquija SA v Argentine Republic* 40 ILM 426 (2001).

[104] 42 ILM 1290 (2003).

[105] See Francioni "International Law as a Common Language for National Courts (2001) 36 Tex Int'l LJ 587.

[106] See *e.g. SGS v Pakistan* 42 ILM 1290 (2003).

[107] *Regulating Jurisdictional Relations Between National and International Courts* (OUP, 2007) p. 143.

proceedings, Shany suggests that consideration may be given to applying such jurisdiction regulating principles such as *lis pendens* and *res judicata* to any overlapping litigation. However, he acknowledges that application of the former principle may only be justified if domestic courts are viewed as integral to the international legal system when applying international law and even then its applicability may be questioned on the grounds that it will constitute a form of interaction between different systems applying norms grounded in different legal regimes. He concludes that "[t]he inconclusive nature of the theory and practice underlying the application of the *lis alibi pendens* rule to parallel national and international proceedings invites the conclusion that no hard and fast rule in international law on the matter appears to exist."[108] As regards the applicability of the principle of *res judicata* in this context, Shany comments that while there is little question that it is applied by both national and international courts, the scope of its application may be circumscribed by the degree of flexibility with which the "same parties" and "same issues" tests are applied.

9.5.2 Choice of Forum Provisions

As a general principle exclusive choice of forum agreements will be enforced both by national courts and by those in the international arena. However, certainly in the latter sphere disputes may arise about whether such forum selection agreements should be interpreted as being exclusive in nature.[109] In addition, as a result of questions which may arise in relation to the "same parties" and "same issues" requirements set out above, it may be difficult to resolve a situation where, for example, parallel proceedings are brought pursuant to a contractual forum selection clause and an exclusive jurisdiction clause in a treaty. For this reason such measures may often be an unsatisfactory way of determining the appropriate forum for proceedings as between a domestic and international court and cannot really be relied upon in this regard.

9.5.3 A Possible Future Model for Jurisdiction-Regulating Rules

It seems clear that given the inherent difficulties in satisfying the "same parties" or "same issues" requirements in the context of parallel proceedings before national and international courts necessary to invoke traditional jurisdiction regulating rules such as *lis pendens* or *res judicata*, a broader alternative method of regulation must be sought. Shany suggests that the concepts of comity and *abus de droit* could be employed to regulate related proceedings which might not meet the "sameness" criteria required and also vertical jurisdictional interactions.[110]

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[108] *Ibid*. p. 159.

[109] See *Lanco International Inc. v Argentina* 40 ILM 457 (2001).

[110] *Regulating Jurisdictional Relations Between National and International Courts* (OUP, 2007) p. 165.

Shany argues that the flexibility which the discretionary nature of judicial comity affords to courts has an advantage over the rigidity of traditional jurisdiction-regulating rules. While he acknowledges that the "respectful consideration" suggested in decisions of the US Supreme Court towards decisions of the ICJ[111] is an indication of only token deference to the decision of the international court, this may even be an exaggeration and it can be argued that the decisions in this area are indicative of a total lack of deference or judicial comity. To this extent while Shany is correct in suggesting that comity might provide a practical solution to issues relating to the regulation of jurisdiction between national and international courts, unless and until domestic courts are more willing to give real effect to the proper meaning of the word, mutual respect and deference and a more consistent system of interaction may remain an aspiration rather than become a reality.

[111] *Breard v Greene* 523 US 371 (1998) 375; *Sanchez-Llamas v Oregon* 548 US 331 (2006). See also the references by the Israeli Supreme Court in *Mara'abe v Prime Minister of Israel* HCJ 7957/04 15 September 2005, para. 56 to giving the "full appropriate weight" to the decision of the ICJ in related proceedings (see 43 ILM 1009 (2004)). However, the Supreme Court, by rejecting the factual findings made by the ICJ, found a way to reach a different conclusion on the merits in the case.

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