The Proliferation of International Courts and Tribunals: Problems and Prospects

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Outline

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- Proliferation of international courts and tribunals
  - Inconsistent decisions, and the “fragmentation” of international law
  - Creation of overlapping jurisdictions among international courts and tribunals
  - Emergence of a “common law of international adjudication”?
- Survey of practice of international courts and tribunals
- Reasons for the emergence of common standards
- Limitations for the further development of common standards
- Implications of these developments
  - Practical
  - Theoretical
- Conclusion

Proliferation of international courts and tribunals

- Prior to 1990, only six standing international courts
  - ICJ, ECHR, ECJ, IACHR, Benelux Court of Justice, Andean Court of Justice
  - Also some semi-permanent courts, such as Iran-USCT, and also ad hoc tribunals
- Explosion since about 1990
  - ICTY, ICTR, ITLOS, NAFTA, WTO, SCSL, ICC, ACHPR, CCJ
  - UNCC, EFTA, Mercosur, COMESA, OSCE
  - Also IIAs

Proliferation (cont)

- *Prosecutor v Tadic*, 35 ILM 32, 39, para 11 (ICTY Appeals Chamber, Decision of 2 October 1995):
  - 'International law, because it lacks a centralised structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals … In international law, every tribunal is a self-contained system (unless otherwise provided).'

Proliferation (cont)

- Increase in the use of international courts and tribunals, e.g.:
  - ICJ (15 cases pending; only a handful in 1970s)
  - ICSID Tribunals (35 cases registered from 1965-1995; over 270 cases registered since 1995)
  - ECHR (500 applications in 1985; now 30,000 applications per year)

Fragmentation

- Will proliferation lead to a “fragmentation” in the development of substantive international law?
- Different international courts arriving at inconsistent decisions
- Guillaume: “[t]he proliferation of international courts may jeopardise the unity of international law and, as a consequence, its role in inter-State relations.”

Fragmentation (cont)

- *Nicaragua* (1986): the ICJ found that the US could not be held responsible for acts committed by the contras in Nicaragua unless it had had "effective control" over them
- *Tadic* (1995): the ICTY adopted a less strict standard for Yugoslavia's actions in Bosnia and Herzegovina and replaced the notion of "effective control" with that of "overall control"

Fragmentation (cont)

- Other inconsistent decisions have involved:
  - Permissibility of reservations to acceptance of an international court's jurisdiction (compare *Reservations to the Genocide Convention* (ICJ, 1950); and *Loizidou v Turkey* (ECHR, 1995))
  - Awarding of monetary compensation (compare ECHR v ICSID tribunals)
- Inconsistent decisions even exist within the same "sub-system"
  - Breaches of investment treaty obligations by host State of investment (*CME v Czech Republic* and *Lauder v Czech Republic*)
  - Application of treaty and customary international law defences to State responsibility (*CMS v Argentina*, *LG&E v Argentina*, and *Continental Casualty v Argentina*)

Overlapping jurisdictions

- Lack of structural hierarchy and uncoordinated nature of creation of international courts can lead to overlapping jurisdictions, and give rise to forum shopping
  - *Southern Bluefin Tuna* (Aust/NZ v Japan) – either ICJ, ITLOS, or CCSBT dispute settlement;
  - *MOX Plant* (Ireland v UK) – ITLOS, UNCLOS Annex VII, OSPAR Convention, ECJ.
  - *Swordfish* dispute (Chile v Spain/EC) – ITLOS, WTO

Overlapping jurisdictions (cont)

- Application of rules of private international law to international disputes?
  - Forum non conveniens?
  - Lis alibi pendens?
  - Res judicata?
  - Electa una via?
- Are these general principles of law that can be applied easily on the international plane?

Emerging common standards in procedure and remedies

- Main sources of rules on procedure and remedies are the statutes and rules of procedure
- These are not identical and contain gaps
- Increasing coherence on a range of issues:
  - Burden of proof
  - Provisional measures
  - Power to revise judgments and awards in light of new evidence
  - Power to accept *amicus curiae* briefs
  - Power to issue orders requiring specific performance
- Emergence of a 'common law of international adjudication'

Reasons for the common law of international adjudication

- Similar drafting of constitutive instruments
- Relevance of precedent
- Methods of treaty interpretation permitting cross-fertilisation
  - Principle of effectiveness
  - Evolutive approach
  - VCLT, Article 31(3)(c)

Reasons for the common law of international adjudication (cont)

- Rules developed in customary practice and general principles of law
- Inherent powers
  - powers that are not conferred by the constitutive instruments and rules of procedure of international courts and tribunals, but can be exercised by such bodies in order to carry out their functions

Reasons for the common law of international adjudication (cont)

- Limited size of the international bar
- Competition among international judicial institutions
- Coherence across different regimes may be regarded as positive
- Norm-intrinsic reasons

Limitations to the common law of international adjudication

- Particular drafting of each statute and set of rules
  - E.g., DSU of the World Trade Organisation
- International courts have their own specific agendas and functions
- Normative desirability?

Implications

- Practical implications – including for live cases
- Theoretical implications – reconsider ICTY Appeals Chamber's dictum in *Tadic*
- Nonetheless, a system of international courts and tribunals?