

Yuval Shany. ***Regulating Jurisdictional Relations between National and International Courts.***
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1 Content and Outline of the Book

The vertical relationship between national and international courts is the core subject of this book, in which Shany develops and integrates

the findings of his previous 2003 work,¹ by enlarging the analysis thereof to the ‘vertical’ relations between domestic and international courts. In this work he puts forward some suggestions on how to restrain the chaotic trend of fragmentation of the global legal order, making use of some procedural principles which are traditionally rooted in the field of private international law (*lis alibi pendens*, *ne bis in idem*, *estoppel*, *res judicata*, *electa una via*).²

The set of problems arising in the national–international relationship, indeed, is similar to the issues related to the competition among international courts which were explored in the previous book. The enlargement and multiplication of international jurisdictions cannot but give rise also to overlaps with the competence of domestic courts, which by definition are endowed with general jurisdiction.³

The aim of this book, quite differently from the previous one, is not so much to provide an exhaustive overview of the infinite interactions between national and international courts, but rather to abstract a number of typical situations which normally occur in the interplay between domestic and international judicial bodies, in order to give account of the theoretical foundations of such interplay and to propose a juridical framework to refer

to, a kind of toolkit for lawyers in search of a solution.

In the first part of the book Shany explores the theories which are commonly used to describe the relationship between the national and the international legal orders, and whilst reviewing these paradigms he points out the ones that can prove useful in regulating jurisdictional relations between national and international courts. The second part, instead, focuses both on the existing norms (that is, the study of provisions designed to favour vertical harmonization between jurisdictions) and on the case law (providing a description of significant cases where jurisdictional overlap was at stake), before passing on to examine and promote ‘flexible’ jurisdiction-regulating rules such as comity or the doctrine of *abus de droit*.

2 The Appraisal of Theoretical Models

The book first tackles some issues of constitutional law and jurisprudence relating to the national–international relationship.⁴ The first is the monism/dualism distinction, which Shany faces in a pragmatic way: were domestic orders to be deemed isolated from the international system, no regulation and coordination would be needed at all. Perfectly dualistic views are therefore discarded for the purpose of this study, although national judges will often have the temptation to resort to them whenever they seek to reassess the untouchable status of ‘their’ law.⁵

Nonetheless, scholars adopting a monistic view of the relationship between national and supranational courts often refer to a hierarchy of norms, but this cannot work itself as a

¹ See Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (International Courts and Tribunals Series) (2003), where the author provides an encyclopaedic description of the current status of horizontal ‘competition’ among international judicial bodies (giving rise to overlaps, multiple proceedings, inconsistencies, forum shopping).

² On this issue see Gattini, ‘Un regard procédural sur la fragmentation du droit international’, 110 *RGDIP* (2006) 303, and Reinisch, ‘The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes’, 3 *JL and Practice of Int’l Courts and Tribunals* (2004) 37. See also P. M. Dupuy’s remarks, in ‘L’Unité d’Application du Droit International à l’Echelle Globale et Responsabilité des Juges’, 1 *Eur J Legal Studies* (2008) 21.

³ See the examples at 9–13.

⁴ See at 2–15.

⁵ Moreover, provisions like Art. 35 of the ECHR, Art. 234 of the EC Treaty, and the rules of complementarity in the statute of the ICC are strong hints proving that national and supranational orders, even if seen as separate ones, are to be coordinated to a certain extent.

fully-fledged harmonization device: supremacy in itself implies mutual exclusion rather than the coordinated coexistence of different judiciary actors.⁶ Both doctrines of hierarchy and dualism are further and extensively discussed, in order for their influence to be recorded in the current status of the interrelationship between national and international judiciaries; however, they are unable to provide a reliable answer to the conceptual questions related to the subject of this study.⁷ These doctrines are not relevant in respect of the need for coordination advocated by Shany since, as said before, they are based on the canon of the superior jurisdiction's clear-cut pre-eminence and are therefore neutral towards – for instance – duplicate proceedings and inconsistency phenomena.

Scelle's *dédoublement fonctionnel*⁸ theory, although it cannot serve as a comprehensive model for the role of national courts,⁹ proves useful in overcoming the rigid vertical distinction between the levels of the multilayered legal order: national courts can be treated as 'horizontal' peers *vis-à-vis* international courts when they apply international law, hand down decisions which are binding upon subjects of international law; as well as when

they comprehend, retain, and take notice of the international tribunals' case law. Shany remarks that in unregulated fields such as the one under consideration, a good deal of spontaneous cooperation is required (since few real obligations can be invoked); hence also dualistic views can have their weight and must be carefully considered, regardless of their actual legal justification: whenever a national court does not feel bound to report to any higher authority, coordination has to flow from a gradually accepted trend of deference, rather than from a top-down set of directions which lack either legal basis or a supporting *consensus*.

Other theories, such as that defined by Shany as the 'American School of Informal Socialization'¹⁰ or the pluralist approach advocated by scholars like Teubner and Fischer-Lescano, or Maduro (in the EC constitutional order), are more likely to reflect the actual status of the interplay among courts in the multilevel system.¹¹ These models are efficient in interpreting the legal reality, but they fall short of providing instructions or forging steady principles, as Shany observes. The coherence of the judicial system is more likely to be derived from the unity of the normative

⁶ See at 80–81: 'dualism denies the existence of normative contact points between . . . jurisdictions. . . . [A]ccording to dualist thinking, . . . conflicting decisions by national and international courts do not present doctrinal problems'.

⁷ See at 93.

⁸ See Scelle, 'La phénomène juridique du dédoublement fonctionnel', in W. Schätzel and H.-J. Schlochauer (eds), *Rechtsfragen der Internationalen Organisation: Festschrift für Hans Wehberg* (1956), at 324; and A. Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law', 1 *EJIL* (1990) 210.

⁹ Since it cannot cover the activity of hybrid courts such as the Special Court for Sierra Leone or the Bosnia War Crimes Tribunal, and does not take into account the physiologic sympathy for national interest felt by domestic courts, even when they act as international law adjudicators.

¹⁰ In particular, see Slaughter's seminal work 'A Global Community of Courts', 44 *Harvard Int'l LJ* (2003) 191; see also Martinez, 'Towards an International Judicial System', 56 *Stanford L. Rev* (2003) 429.

¹¹ See, for instance, Fischer-Lescano and Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan J Int'l L* (2004) 999, and Schiff Berman, 'Global Legal Pluralism', 80 *S California L Rev* (2007) 1155. For a recent essay see Teubner and Korth, 'Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation', Maastricht University Working Paper (2008), available at: www.rechten.unimaas.nl/iuscommune/activities/2008/2008-11-27/Paper_Teubner.pdf. For Maduro's concept of pluralism see Poirares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (2003), at 501 ff.

building than from the design of the institutional structure:¹²

While national and international courts do not function as a unitary judicial system, they sometimes apply a common body of law – specifically, international law. The[se] norms do possess, arguably, coherence and organization-generating features.... [J]urisdiction-regulating rules represent part of the context for the application of international law, ie, background principles, which condition resort to international law norms. Their role in this respect is not dissimilar to other international background rules, such as the rules of treaty interpretation or State responsibility.¹³

In other words, while for the time being a set of rules addressing the relationship between international and domestic courts is lacking, the coherence of the global legal order allows scholars and lawyers (and judges) to study and pursue a harmonized model, at least to provide support to what former ICJ judge and WTO Appellate Body president Georges Abi Saab calls a self-fulfilling prophecy of unity of the international law system.¹⁴

¹² See, for instance, the very initial lines of the ILC report's first conclusion: see *supra* n 1: '(1) [i]nternational law as a legal system. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.'

¹³ See at 104.

¹⁴ See Abi Saab, 'Fragmentation or Unification: Some Concluding Remarks', 31 *NYU J Int'l L & Politics* (1999) 919: '[t]he consciousness of the need for a common framework, and the requirements of such a framework, together with the adoption of judicial policies supportive of them, would serve as a self-fulfilling prophecy. Thus, from the exploded constellation of proliferating judicial organs, each endeavoring to fulfill all the components of the judicial function as best as it can and *faute de mieux*, a tendency would form towards the coalescence of judicial activity in a manner conducive to the emergence and hardening of an international judicial system'.

3 The Existing Jurisdiction-harmonizing Devices

In the second part of his book, Shany provides an illustration of the provisions which already exist in international treaties currently into force. He singles out some procedural scenarios which have been variously regulated (*lex lata*), and which could serve as a model for prospective regulatory schemes (*lex ferenda*). It is remarkable how Shany, far from 'stating the obvious', as he modestly puts it,¹⁵ lucidly explores some general principles of inter-level harmonization and specifies the scope of their application. In fact, the exploration of this 'charted' territory is doubly useful: on the one hand it familiarizes the reader with some well rooted principles (the exhaustion of local remedies, the ECJ preliminary rulings, the complementarity principle emerging from the Statute of the ICC, the *electa una via* principle, the recognition of international arbitral awards), whereas on the other hand it makes clear how vast the 'uncharted territory' is, that is how significant the lack of regulation of the interplay is, beyond the occasional occurrence of those principles.¹⁶

The presentation of the principles regulating the relationship between international and domestic jurisdictions is followed by a description of the most significant cases of overlap between national and international proceedings: the *Consular Notification* saga (the ICJ and the US Supreme Court), the *Israel wall* cases (the ICJ and the Israeli Supreme Court), the 'Zeroing' cases (as dealt with by WTO panels/Appellate Body and the US Court of International Trade), the *Softwood Lumber* proceedings (before the WTO panels, NAFTA panels, and the US Court of International Trade); ITLOS

¹⁵ See at 27.

¹⁶ A clear consequence of the difficulty in drawing a clear line of demarcation between the unregulated and the regulated areas is represented by the debate on the application of the exhaustion of local remedies in the framework of the WTO Dispute Settlement Mechanism. See, e.g., Kennedy, 'Parallel Proceedings at the WTO and Under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform?', 39 *George Washington Int'l L Rev* (2007) 47.

cases dealing with the release of detained vessels (involving the ITLOS and various national courts) and, most notably, the ICSID litigation in the *Vivendi* and *SGS* cases. The ICSID cases represent a prominent example of the difficulties which unregulated jurisdictional allocation results in (in general, arbitral clauses provided for domestic court jurisdiction; however, in these cases they were disregarded by the foreign investors who initiated the establishment of an ICSID tribunal, even though litigation had already been triggered on the same facts by the host country, before a national court).

The approaches of the international courts involved in these cases follow two different trends, according to Shany. On the one hand there are 'disintegration'-friendly courts which tend to divide hybrid cases into multiple matters and pick up only the aspects which fall within their jurisdiction, in order to preserve the purity of the proceedings (by doing so, they do not question the limit of their competence, and are comfortable in referring to a single applicable law); this could result in the fragmentation of a single case into several cases, each dealing with a single legal (sub)system.¹⁷ On the other hand, courts sometimes prefer to adopt an 'integrationist' attitude, and absorb under their own jurisdiction all the elements of a case, preferring pragmatism and judicial economy to overly accurate jurisdictional demarcation.¹⁸

Observing these unpredictable and largely unregulated trends in behaviour, often amounting to little more than a mere enumeration of the occasional discretionary or opportunistic choices made by the individual tribunals, the only element which could entail a prescriptive nature (i.e., which could help us foresee the outcome of similar situations in the future) is a certain path-dependency (choices are more likely to be repeated than repudiated).

¹⁷ See the careful illustration of the *Mox Plant* and *Iron Rhine* cases, on which see also Lavranos, 'The MOX Plant and Ijzeren Rijn Disputes: Which Court is the Supreme Arbitrator?', 19 *Leiden J Int'l L* (2006) 223.

¹⁸ This approach could actually result in a stay of the case, in order to preserve the integrity of proceedings pending elsewhere.

4 The Peculiarity of the Multi-level Order

A description follows of the conditions subject to which regulating principles (*res judicata, electa una via, ne bis in idem, lis alibi pendens*) could apply. Such principles are drawn from national (infra-system) experiences or from horizontal interplay situations, with the purpose of applying them to vertical national-international relations (inter-system). Traditionally, two or more cases fall within the purview of such regulating devices when they are – roughly speaking – similar, and usually they are supposed to pass the 'same (legal and factual) issues' and the 'same parties' tests. Quite correctly, Shany introduces a sub-test, which would apply at the inter-system level, concerning the identity of applicable law in the proceedings at issue: the application of different norms to the same facts could possibly lead to a different evaluation and adjudication of the litigated values; in this case, they do not necessarily need the same degree of coordination as if the judicial bodies were applying the same norms.

Accordingly, another conceptual distinction should possibly be further investigated, one which was fundamental in the debate surrounding the possibility of 'linking' the WTO DSM with non-WTO issues such as environmental protection and human rights law.¹⁹ We refer to the distinction between the law applicable to and the jurisdiction of a certain tribunal: this distinction could – in my view – deserve autonomous treatment. Whilst a court ought to refrain from accepting disputes

¹⁹ See Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', 35 *J World Trade* (2001) 501; Pauwelyn, 'The Application of Non-WTO Rules of International Law in WTO Dispute Settlement', in P. Macrory, A. Appleton, and M. Plummer (eds), *The WTO: Legal, Economic And Political Analysis* (2005), i, 1405; Pauwelyn, 'How to Win a WTO Dispute based on Non-WTO Law: Questions of Jurisdiction and Merits', 37 *J World Trade* (2003) 997. A forthcoming volume by Bartels could provide a comprehensive overview of the issue: see L. Bartels, *Applicable Law Before International Courts and Tribunals* (forthcoming, 2010).

arising outside its competence (jurisdiction), it could also be necessary, when a court adjudicates upon a case which is properly rooted in norms of the same legal system to which such court belongs, to apply some 'external' norms, drawn from another legal (sub)system. This double step complicates the study of the integration–disintegration trends, as they can affect both the initial choice regarding the court's jurisdiction (is the court ready to accept a hybrid case without chopping it into sub-cases?) and the subsequent choice of the applicable law (is the court ready – if that is the case – to apply a set of provisions originating in another legal order?).

After a description of the legal instruments (contractual or treaty clauses, general principles) aimed at regulating the choice of the forum for a dispute (and after recording that – in principle – forum shopping is an admissible practice), Shany passes on to the analysis of the rules regulating the coordination (or limitation) of multiple parallel proceedings (*res judicata, lis pendens, electa una via*). It becomes clear that none of these principles is plainly defined in the national–international relationship, and that as of today 'conceptual confusion'²⁰ seems to govern their possible application.

5 The Importance of Comity

In light of the foregoing, other principles can substitute for the lack of regulations, although they are not binding. A great deal of the analysis is dedicated to the principle of comity,²¹ on the basis of which courts may be willing *spontaneously* to grant wider acknowledgment and higher credit to the case law of other courts,

or to their pending or prospective activity.²² Despite its discretionary and politic character, the principle of comity²³ is still the only device which judges can envisage and use to enhance cooperation with other courts, whenever they deem it appropriate to do so, and irrespective of the absence of any obligations in that sense. Comity has something to do with institutional loyalty and good faith, also on its face,²⁴ and there is nothing wrong in entrusting the courts with the ability to promote a more efficient administration of justice by way of some courteous practices towards other courts, at least as long as such behaviour does not interfere with the principle of legal certainty.²⁵ Likewise, Shany juxtaposes

Jurisdiction-Regulating Rules Apply?', Hebrew University International Law Research Paper No. 02-06 (2006), at 54; and Martinico and Fontanelli, 'The Hidden Dialogue: When Judicial Competitors Collaborate', 8 *Global Jurist (Advances)* (2008), available at: www.bepress.com/gj/vol8/iss3/art7.

²² Comity can amount to stay of the proceedings, the declining of jurisdiction, or the use of materials and authorities drawn from other proceedings.

²³ See Brown, 'Comity in the Federal Courts', 28 *Harvard L Rev* (1915) 589: 'it is perhaps true that no more definite principle than caprice can be said, on the whole, to govern the attitude of the courts of one nation towards those of another'.

²⁴ The concept of *abus de droit* is also strictly linked with the principle of good faith.

²⁵ The Italian Constitutional Court, for instance, chose to deal with a case of parallel proceedings (the others were pending before the ECJ in preliminary ruling proceedings under Art. 234 of the EC Treaty) staying the proceedings pending before it, thus waiting for the ECJ's judgment before restoring the constitutional trial. See order of the Italian Constitutional Court no. 165 of 2004, available at: www.cortecostituzionale.it, and the judgment of the ECJ in Case 387/02 *Berlusconi and others* [2005] ECR I–3565. This 'double preliminary', in other words, represents a case where a court autonomously chose a deferential approach towards another court (the stay of the proceedings

²⁰ See at 164.

²¹ See the landmark definition contained in the US Supreme Court decision in *Hilton v. Guyot*, 159 US 113, 40 L Ed 95, 16 S Ct 139 (1895). For an overview of the concept see Paul, 'Comity in International Law', 32 *Harvard Int'l LJ* (1991) 1; see also Y. Shany, 'Jurisdictional Competition between National and International Courts: Could International

the doctrine of the *abus de droit* with comity: the greater the similarity between two parallel proceedings the greater will be the willingness of the second (or less appropriate) court seised not to harm the other court's activity (*comity*), in light of the presumption of unreasonableness of the behaviour of a party who chooses to duplicate the same litigation (*abus de droit*).

This book paves the way for a new branch of studies of law devoted to the relationship between courts in multilevel systems, many subjects of which are still relatively understudied and deserve a new and more systematic analysis. We just note, for instance, that even within the 'charted' territory of the relationship between the ECJ or the ECtHR and national courts, new issues are continuously arising. In a sense, the lack of a regulating framework is a preliminary problem, but many others emerge as to the application and interpretation of the few existing rules. Thus the main subject of this book is destined to be an ever-debated one, as it goes hand in hand with the developments of the case law of the dozens of courts and tribunals which deal with inter-jurisdiction cases on a daily basis.

The plethora of issues tackled in this book cannot but give rise to further debate: we are likely to face and to study similar matters repeatedly, and this work surely provides us with the right theoretical framework and a suitable set of practical information and precedents which will definitely be of use to us in finding our way through the 'uncharted' lands.

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to await the ECJ's ruling), still without being bound to do so. This possibility is described at 179–181, where other cases are mentioned as comity examples.