

REVIEW ESSAY

THE PROLIFERATION OF INTERNATIONAL COURTS AND TRIBUNALS: FINDING YOUR WAY THROUGH THE MAZE

Manual on International Courts and Tribunals, Philippe Sands, Ruth Mackenzie and Yuval Shany (eds) (London: Butterworths, 1999) pages i–xxxviii, 1–346. Price £105.00 (hardcover). ISBN 0406925313.

CONTENTS

- I Introduction
- II Setting the Scene: The Proliferation of International Courts and Tribunals
 - A The Increase in the Creation of Bodies for the Settlement of International Disputes
 - B An Increased Interest in International Dispute Settlement
 - C Publications on International Dispute Settlement
- III Potential Problems of the ‘Proliferation’ of International Courts and Tribunals
 - A Doctrinal Inconsistencies and the ‘Fragmentation’ of International Law
 - B Overlapping Jurisdictions of International Courts and Tribunals
- IV The Content of the *Manual*
 - A Which Courts and Tribunals are Included?
 - B What Information is Included about Each Court and Tribunal?
- V Conclusion

I INTRODUCTION

In 1794 Great Britain and the United States concluded the *Treaty of Amity, Commerce and Navigation*, commonly referred to as the ‘*Jay Treaty*’.¹ The *Jay Treaty* is usually regarded as representing the origins of modern international adjudication, as it provided for the establishment of mixed tribunals, consisting of members appointed by Great Britain and the US, to decide claims by nationals of each state, with an impartial umpire deciding the claim in the event of disagreement.² Although the process was a diplomatic exercise as much as it involved the application of any legal rules, the *Jay Treaty* set an important precedent. The next watershed was the conclusion of the 1871 *Washington Treaty* between Great Britain and the US,³ under which the *Alabama* claims of 1872 were decided by an arbitral tribunal.⁴ In these claims, an ‘essentially judicial process’ was followed, and the tribunal delivered ‘a reasoned decision

¹ Opened for signature 19 November 1794, TS No 105, 1 British Foreign and State Papers 784, 12 Bevens 13 (entered into force 28 October 1795); see generally John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999) 32; J L Simpson and Hazel Fox, *International Arbitration* (1959) 1–17.

² Collier and Lowe, above n 1, 32.

³ Opened for signature 8 May 1871, 61 British Foreign and State Papers 40, 12 Bevens 170 (entered into force 17 June 1871).

⁴ J Wetter, *The International Arbitral Process: Public and Private* (1979) vol 1, 27.

clearly based on law', thus marking a significant step forward.⁵ It was not until 1899 that a permanent framework for the settlement of international disputes was founded, being the Permanent Court of Arbitration ('PCA').⁶

Today, a survey of the international legal landscape reveals an almost staggering array of bodies, both permanent and ad hoc, for the settlement of international disputes. A recent publication edited by Philippe Sands, Ruth Mackenzie and Yuval Shany, the *Manual on International Courts and Tribunals* ('*Manual*'),⁷ evidences the extent of this development. The *Manual* includes basic information on litigation and proceedings before 28 different international adjudicatory bodies and procedures, and is the first book of its kind. The establishment of new fora for international litigation, however, entails dangers for the international legal order, and this review essay seeks to contextualise the publication of the *Manual* against the background of the creation of new international courts and tribunals. Part II of this review essay outlines the recent 'proliferation' of international adjudicatory bodies, and Part III highlights two problems which have arisen with the creation of these new bodies. The first problem is the possibility of divergent jurisprudence between different international courts and tribunals, and a resulting 'fragmentation' of international law. The second problem is the potential for more than one international court or tribunal to be seised of the same dispute, as has already occurred, and the resulting possibility of conflicting decisions. Part IV reviews the *Manual* and assesses its contribution towards our understanding of the burgeoning 'international judiciary', and concludes that despite some shortcomings, the *Manual* is a most useful publication, and provides a solid foundation for a better understanding of the evolving international legal order and trends in settling international disputes.

II SETTING THE SCENE: THE PROLIFERATION OF INTERNATIONAL COURTS AND TRIBUNALS

A *The Increase in the Creation of Bodies for the Settlement of International Disputes*

The establishment of new fora for third party dispute settlement is undoubtedly one of the more striking international legal developments in recent years. This 'proliferation', as it is termed, is well documented,⁸ and the

⁵ Collier and Lowe, above n 1, 32.

⁶ *Convention for the Pacific Settlement of International Disputes*, opened for signature 29 July 1899, [1901] ATS 130, 1 Bevens 230 (entered into force 4 September 1900); see also *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907, 54 LNTS 435, 1 Bevens 577 (entered into force 26 January 1910) (collectively, '*Conventions for the Pacific Settlement of International Disputes*').

⁷ Philippe Sands, Ruth Mackenzie and Yuval Shany (eds), *Manual on International Courts and Tribunals* (1999).

⁸ See, eg, Judge Thomas Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 *Leiden Journal of International Law* 267; Mireille Couston, 'La multiplication des juridictions internationales: Sens et dynamiques' (2002) 129 *Journal du Droit International* 5; Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Problem?' (1999) 31 *New York University Journal of International Law and Politics* 679; Cesare Romano, 'The Proliferation of International Judicial Bodies:

publication of the *Manual* bears witness to its significance. Benedict Kingsbury notes that 'in the past decade alone', over a dozen international judicial or quasi-judicial bodies have been established.⁹ These include the panels and the Appellate Body of the Dispute Settlement Body ('DSB') of the World Trade Organization ('WTO'),¹⁰ the *North American Free Trade Agreement* dispute settlement system ('NAFTA'),¹¹ the International Tribunal for the Law of the Sea ('ITLOS'),¹² and the ad hoc International Criminal Tribunals for the Former Yugoslavia ('ICTY')¹³ and Rwanda ('ICTR').¹⁴ Lesser known dispute settlement bodies are the United Nations Compensation Commission ('UNCC'),¹⁵ the World Bank Inspection Panel¹⁶ and its Asian and Inter-American Development Bank counterparts,¹⁷ the Mercosur dispute settlement system,¹⁸ and the

The Pieces of the Puzzle' (1999) 31 *New York University Journal of International Law and Politics* 709; Jonathan Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 *New York University Journal of International Law and Politics* 697; Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *New York University Journal of International Law and Politics* 919; Laurence Boisson de Chazournes (ed), *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution* (1995); Gerhard Hafner, 'Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?' in Lucius Caflisch (ed), *The Peaceful Settlement of Disputes between States: Universal and European Perspectives* (1998) 25; Judge Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *International and Comparative Law Quarterly* 848; Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des Cours* 101; Hans van Mierlo, 'The Future Development of Binding Dispute Settlement Mechanisms in International Law' in Wybo Heere (ed), *International Law and the Hague's 750th Anniversary* (1999) 445, 448; and Hugh Thirlway, 'The Proliferation of International Judicial Organs and the Formation of International Law' in Wybo Heere (ed), *International Law and the Hague's 750th Anniversary* (1999) 433.

⁹ Kingsbury, above n 8, 680; see also Romano, above n 8, 709.

¹⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*Marrakesh Agreement*'), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401 ('DSU').

¹¹ *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (1993) (entered into force 1 January 1994).

¹² The ITLOS is established under the *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1883 UNTS 3 (entered into force 19 November 1994) ('*UNCLOS*').

¹³ The ICTY and the *Statute of the ICTY* were established by *United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/Res/827 (1993).

¹⁴ Like the ICTY, the ICTR and the *Statute of the ICTR* were established by *United Nations Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/Res/955 (1994).

¹⁵ The UNCC was established by SC Res 692, UN SCOR, 46th sess, 2987th mtg, UN Doc S/Res/692 (1991). See generally Marc Weller (ed), *Iraq and Kuwait: The Hostilities and Their Aftermath* (1993) 13–14.

¹⁶ *Resolution Establishing the World Bank Inspection Panel*, 22 September 1993, IBRD Res No 93–10 and IDA Res No 93–6, 34 ILM 520 (1995).

¹⁷ Asian Development Bank, *ADB's Inspection Policy: A Guidebook* (1996) 11; Inter-American Development Bank Board of Executive Directors Decision on Independent Investigation Mechanism, 10 August 1994, Minutes DEA/94/34/sec 142; both referred to in Sands, Mackenzie and Shany (eds), above n 7, 313, 317.

Economic Court of the Commonwealth of Independent States ('ECCIS').¹⁹ The *Statute of the International Criminal Court*²⁰ and the *Statute of the African Court of Human and Peoples' Rights*²¹ were also adopted during the 1990s, as was the *Statute of the Court of Justice of the Common Market for Eastern and Southern Africa*²² and the *Statute of the Caribbean Court of Justice*.²³ In addition, several quasi-judicial procedures were adopted, including an Optional Protocol allowing for complaints by individuals to the Committee on the Elimination of Discrimination against Women.²⁴ To this list can be added the Court of Conciliation and Arbitration of the Organisation for Security and Cooperation in Europe, which began to function in 1995.²⁵ Other recently established quasi-judicial procedures include the North American Environmental Cooperation Commission's 'citizens' submissions procedure',²⁶ the 'collective complaints procedure' under the *European Social Charter*,²⁷ and the 'non-compliance procedures' ('NCPs') under the *Montreal Protocol*,²⁸ the 1994 Protocol to the *Convention on Long Range Transboundary Air Pollution*,²⁹ and the *Chemical*

¹⁸ *Treaty Establishing a Common Market between Argentina, Brazil, Paraguay and Uruguay (Treaty of Asunción)*, opened for signature 26 March 1991, 30 ILM 1041 (1991) (entered into force 29 November 1991); *Protocol of Brasilia for the Settlement of Disputes*, opened for signature 17 December 1991, 36 ILM 691 (1997) (entered into force 22 April 1993).

¹⁹ *Agreement on the Statute of the Economic Court of the Commonwealth of Independent States*, opened for signature 6 July 1992, (1992) 6 *Commonwealth Information Bulletin* 53 (entered into force 1994), cited in Gennady Danilenko, 'The Economic Court of the Commonwealth of Independent States' (1999) 31 *New York University Journal of International Law and Politics* 893, 895.

²⁰ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 37 ILM 999 (1998) (entered into force 1 July 2002).

²¹ *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights*, opened for signature 8 June 1998 (not yet in force) <http://www.achpr.org/Protocol_on_the_African_Court.doc> at 23 September 2002.

²² *Treaty Establishing the Common Market for Eastern and Southern Africa*, opened for signature 5 November 1993, 33 ILM 1067 (1994) (entered into force 8 December 1994).

²³ *Agreement Establishing the Caribbean Court of Justice*, opened for signature 14 February 2001 (not yet in force) at <<http://www.caricom.org/ccjagmnt.htm>> at 23 September 2002.

²⁴ *Optional Protocol to the Convention for the Elimination of Discrimination against Women*, opened for signature 15 October 1999, 39 ILM 281 (2000) (entered into force 22 December 2000).

²⁵ *Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe/Organisation for Security and Cooperation in Europe*, opened for signature 15 December 1992, 32 ILM 551 (1993) (entered into force 5 December 1994).

²⁶ *North American Agreement on Environmental Cooperation*, opened for signature 14 September 1993, 32 ILM 1480 (1993) (entered into force 1 January 1994).

²⁷ *European Social Charter (Revised Version)*, opened for signature 3 May 1996, ETS 163 (entered into force 1 July 1999).

²⁸ *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989); Non-Compliance Procedure, Decision II/5, Report of the Second Meeting of the Parties to the Montreal Protocol, UN Doc UNEP/Oz L Pro 2/3, 25 November 1992, 31 ILM 874 (1993), annex IV.

²⁹ *Convention on Long Range Transboundary Air Pollution*, opened for signature 13 November 1979, 1302 UNTS 217 (entered into force 16 March 1983); *Protocol to the 1979 Convention on Long Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions*, opened for signature 14 June 1994, UN Doc EB.AIR/R.84 (entered into force 5 August 1998).

Weapons Convention.³⁰ Further NCPs which may shortly appear on the horizon aim to supervise the compliance of States Parties with their obligations under the *Kyoto Protocol*,³¹ and the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*.³²

These developments can be contrasted with the fact that prior to 1990, there were only six permanent international courts in total. These were the International Court of Justice ('ICJ'), the Court of Justice of the European Communities ('ECJ'),³³ the Court of Justice of the Andean Community,³⁴ the Court of Justice of Benelux Economic Union,³⁵ the European Court of Human Rights ('ECHR'),³⁶ and the Inter-American Court of Human Rights ('IACHR').³⁷

When one adds to this already long list of international judicial bodies the functioning semi-permanent arbitral tribunals, such as the Iran-US Claims Tribunal, which has been operating since 1980,³⁸ the International Centre for the Settlement of Investment Disputes ('ICSID'), which was established in 1966,³⁹ and the PCA, which was created in 1899 under the first *Hague Convention*,⁴⁰

³⁰ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997) ('*Chemical Weapons Convention*').

³¹ *Kyoto Protocol to the Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (1998) (not yet in force); Subsidiary Body for Implementation, Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, 17 September 1999, UN Doc FCCC/SBI/1997/7 (1999).

³² *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993); *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, opened for signature 29 January 2000, 39 ILM 1027 (2000) (not yet in force).

³³ The ECJ was created pursuant to the *Treaty Establishing the European Coal and Steel Community*, opened for signature 18 April 1951, 26 UNTS 140 (entered into force 25 July 1952), the *Treaty Establishing the European Community*, opened for signature 25 March 1957, 298 UNTS 3 (entered into force 1 January 1958) ('*EC Treaty*'); and the *Treaty Establishing the European Atomic Energy Community*, opened for signature 25 March 1957, 298 UNTS 167 (entered into force 1 January 1958) ('*Euratom Treaty*'). The competence of the ECJ is limited to those matters enumerated in these treaties: *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 224, 6 (entered into force 1 November 1993). The ECJ's Court of First Instance was created in 1989: *EC Treaty* (as amended by the *Treaty on the European Union*) art 225; Sands, Mackenzie and Shany, 'Court of Justice of the European Communities' in Sands, Mackenzie and Shany (eds), above n 7, 125.

³⁴ *Treaty Creating the Court of Justice of the Cartagena Agreement*, opened for signature 28 May 1979, 18 ILM 1203 (1979) (entered into force 10 March 1996).

³⁵ *Treaty Instituting the Benelux Economic Union*, opened for signature 3 February 1958, 381 UNTS 165 (entered into force 29 January 1971).

³⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Human Rights Convention*').

³⁷ *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

³⁸ The Iran-US Claims Tribunal was established under the *Algiers Accords* of 19 January 1981, 20 ILM 223 (1981).

³⁹ *Convention for the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

⁴⁰ *Conventions for the Pacific Settlement of International Disputes*, above n 6.

one can see that the number of bodies available for international adjudication is overwhelming.

B *An Increased Interest in International Dispute Settlement*

This recent ‘proliferation’ of international courts and tribunals can be explained by an increased interest of the international community in the judicial settlement of disputes. The reasons cited for this are manifold. Shany argues that ‘the traditional reluctance of states to submit themselves to judicial or quasi-judicial dispute-settlement mechanisms has gradually eroded’ for five main reasons.⁴¹ First, there is an ‘increased density of international norms’, which require correspondingly sophisticated dispute settlement institutions.⁴² Second, there is a greater commitment to the rule of law in international relations.⁴³ Third, the end of the Cold War has seen an ‘easing of international tensions’, which had hampered the growth of international adjudicative procedures.⁴⁴ Fourth, the ‘positive experience with some international courts and tribunals’ has inspired the creation of more such bodies.⁴⁵ Finally, the realisation that the ICJ was unsuitable for the resolution of all types of disputes, be they regional, trade or investment-related, or focussed on the protection of human rights, has encouraged the establishment of more adjudicative bodies.⁴⁶ In his introduction to the *Manual*, Sands refers to the recent proliferation as the ‘fourth phase’ in international adjudication,⁴⁷ which ‘is characterised by compulsory jurisdiction and binding decision-making powers, as is now also reflected in the provisions of the WTO’s Dispute Settlement Understanding’.⁴⁸ Sands contends that the trend reflects a movement away from the ad hoc arrangements which had dominated until the early years of this century, and ‘a trend towards “judicialisation” and recourse to third party adjudication.’⁴⁹ He concludes that ‘[i]n short, there has been a sharp increase in the number of international adjudicatory bodies, and a greater willingness to resort to them.’⁵⁰

⁴¹ Yuval Shany, *Competing Jurisdictions of International Courts and Tribunals: Which Rules Govern?* (PhD Thesis, University of London, 2001) 15–16.

⁴² *Ibid.* 15.

⁴³ *Ibid.* 16.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ For Sands, the first phase was ‘prior to the establishment of the PCA’, when international disputes were adjudicated almost exclusively between states alone and before ad hoc bodies often established to deal with a particular dispute. The second was marked by the establishment of the PCA in 1899, ‘with the recognition of the need to establish a standing body’, this being the creation of the Permanent Court of International Justice (‘PCIJ’) under the auspices of the League of Nations in 1919; and the third phase began in the 1940s and 1950s ‘with the establishment of the ICJ, the ECJ and the European Commission and the European Court of Human Rights’: Philippe Sands ‘Introduction and Acknowledgments’ in Sands, Mackenzie and Shany (eds), above n 7, xxv, xxvi.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

C *Publications on International Dispute Settlement*

Commensurate with the proliferation of international courts and tribunals, and the increased preparedness of states to utilise these institutions and procedures, has been the interest shown by scholars in disseminating information on these developments. Recent publications on the subject include a book by John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, which was published in 1999, and a third edition of John Merrills' work, *International Dispute Settlement*, which appeared in 1998. Yet there was still a notable absence of easily accessible basic information about many of these international courts and tribunals, what type of disputes they seek to resolve, and what powers they have. For instance, how does one seek an advisory opinion from the Central American Court of Justice? Are provisional measures available from the ECHR? Who can make use of the inspection mechanism of the Asian Development Bank? And what is the procedure for filing a complaint to the International Labour Organization's Committee on Freedom of Association?

Enter Philippe Sands and his assistant editors, Ruth Mackenzie and Yuval Shany, and their publication of the *Manual* in 1999. The *Manual* is a product of the Project on International Courts and Tribunals ('PICT'), a joint endeavour between the Foundation for International Environmental Law and Development in London, and the Center on International Cooperation at New York University. PICT was established in 1997 to undertake a range of research and capacity-building activities in the field of international dispute settlement, to promote the dissemination of information on the 'international judiciary' and to enhance understanding of how the 'international legal system', if it can be described as such, functions.⁵¹ In his introduction to the *Manual*, Sands justifies the publication of the *Manual* by noting the 'remarkable' transformation over the past two decades, for '[a]longside international organisations legislating standards there now exists an international "judiciary" the powers of which seem to be ever more extensive and, consequentially, intrusive upon national sovereignty.'⁵² Before the relative strengths and weaknesses of the *Manual* are put forward, the context in which this publication appears will be considered in more detail.

III POTENTIAL PROBLEMS OF THE 'PROLIFERATION' OF INTERNATIONAL COURTS AND TRIBUNALS

The proliferation of international courts and tribunals, which, at least superficially, should be regarded as a positive development as it evidences a trend towards judicial settlement of international disputes, does not come without complications. The main concern with this almost frenetic creation of new international courts and tribunals is that it has occurred in the absence of an overarching framework within which the international judicial bodies operate. This absence of a formalised system can create potential problems. First,

⁵¹ Sands, Mackenzie and Shany (eds), above n 7, v. See, eg, PICT website <<http://www.pict-pecti.org>> at 23 September 2002.

⁵² Sands, 'Introduction and Acknowledgments' in Sands, Mackenzie and Shany (eds), above n 7, xxv.

different courts and tribunals might develop different answers to the same question of international law, thus causing international law to become 'fragmented'. The absence of a court of final appeal in international law, as is found in most domestic legal systems, makes this a distinct possibility. Second, having more than one forum available to hear a dispute can lead to 'forum shopping' in international law, and also to the prospect of parallel proceedings, whereby more than one forum is seized of the same dispute. Each of these problems will now be considered.

A *Doctrinal Inconsistencies and the 'Fragmentation' of International Law*

As noted, there are fears among international legal scholars and practitioners that this 'proliferation' of international courts and tribunals will lead to a 'fragmentation' in the development of substantive international law.⁵³ With the 'fragmentation' of international law comes the consequent risk of conflicting decisions, and the danger that the position of the ICJ as the 'principal judicial organ' of the UN could be undermined.⁵⁴ The current President of the ICJ, Judge Gilbert Guillaume, has expressed fears that '[t]he proliferation of international courts may jeopardise the unity of international law and, as a consequence, its role in inter-State relations'.⁵⁵ He observes that the proliferation of international courts and tribunals 'raises a number of administrative and financial problems', not least of which is 'how the unity of international law can be maintained in spite of this proliferation'.⁵⁶ Judge Guillaume concludes that 'the dangers for international law, resulting from the increasing number of judicial institutions in the modern world, should be stressed. These dangers may have been underestimated by lawyers'.⁵⁷ The US Judge on the PCIJ, Manley Hudson, appreciated these dangers as early as 1944, when he opposed a suggestion that an 'Inter-American Court of International Justice' be constituted, for he wanted to avoid 'the danger of a particularistic development of international law'.⁵⁸ Hudson argued that 'in the field of adjudication ... it is important to safeguard the primacy of the general international law, to protect the universality of its application, and to assure uniformity in its administration'.⁵⁹

⁵³ See, eg, Judge Shigeru Oda, 'The International Court of Justice Viewed from the Bench' (1976-93)' (1993) 244 *Recueil des Cours* 12, 153-4; Judge Gilbert Guillaume, 'The Future of International Judicial Institutions', above n 8, 854-5; Judge Gilbert Guillaume, 'Address by HE Judge Gilbert Guillaume, President of the International Court of Justice, to the UN General Assembly' (26 October 2000) <<http://www.icj-cij.org>> at 23 September 2002; Judge Abdul Koroma, 'The Interpretation of International Law' in *Contemporary International Law Issues: Proceedings of the Third ASIL/NVIR Joint Conference* (1996) 154-7; see also above n 8.

⁵⁴ Elihu Lauterpacht, *Aspects of the Administration of International Justice* (1991) 19-22; Charney, 'Is International Law Threatened?', above n 8, 116; Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 *New York University Journal of International Law and Politics* 791, 792.

⁵⁵ Judge Gilbert Guillaume, 'Address to the General Assembly of the United Nations' (30 August 2001) <<http://www.icj-cij.org>> at 23 September 2002.

⁵⁶ Guillaume, 'The Future of International Judicial Institutions', above n 8, 849.

⁵⁷ *Ibid.* 861.

⁵⁸ Manley Hudson, *International Tribunals: Past and Future* (1944) 179.

⁵⁹ *Ibid.*

Indeed, as Judge Guillaume notes, some conflicting decisions have already occurred. First, the ICTY decided in *Tadic* to disagree with ICJ jurisprudence on an aspect of the law of state responsibility.⁶⁰ Judge Guillaume reports that:

in ruling on the merits in the *Tadic* case, the International Criminal Tribunal for the former Yugoslavia recently disregarded case-law formulated by the International Court of Justice in the dispute between Nicaragua and the US of America. The Court had 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. After criticizing the view taken by the Court, the Tribunal 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', thereby broadening the range of circumstances in which a State's responsibility may be engaged on account of its actions on foreign territory.⁶¹

In addition to the divergent jurisprudence in the *Tadic* decision, Shany has noted several other instances where different international courts and tribunals have rendered differing decisions.⁶² First, divergent jurisprudence is found in the permissibility of reservations made in declarations of acceptance of the compulsory jurisdiction of international judicial bodies. In *Loizidou v Turkey*⁶³ the ECHR disregarded ICJ authority on the effect of reservations to declarations of acceptance of jurisdiction. The ECHR was faced with the question of whether a State Party to the *European Human Rights Convention* depositing a declaration accepting the compulsory jurisdiction of the European Commission on Human Rights may attach a condition restricting the territorial scope of that acceptance. In *Phosphates in Morocco*, the PCIJ had permitted such reservations.⁶⁴ The ICJ had not directly confronted the issue, but had held by majority in the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* that a reserving state could still be considered a party to the *Genocide Convention*, so long as the reservation was compatible with the object and purpose of the Convention.⁶⁵ However, the ECHR decided that in the context of the *European Human Rights Convention*, a reservation restricting the scope of the state's acceptance was impermissible. It held:

In the first place, the context within which the International Court of Justice operates is quite distinct from that of the Convention institutions. The International Court is called on *inter alia* to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject-matter of a dispute may relate to any area of

⁶⁰ *Prosecutor v Tadic (Appeals Chamber Judgment)*, Case No IT-94-A-1, [115]–[137]. Cf *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 62–3.

⁶¹ Guillaume, 'Address to the United Nations General Assembly 2000', above n 53, 5–6.

⁶² Shany, above n 41, 123–4.

⁶³ (1995) 310 Eur Court HR (ser A).

⁶⁴ *Phosphates in Morocco (Italy v France)* [1938] PCIJ (ser C) No 84, 10, 23–4.

⁶⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15; Catherine Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1993) 64 *British Yearbook of International Law* 245, 251; Collier and Lowe, above n 1, 142; Stanimir Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* (1995) 26.

international law. In the second place, unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention.

Such a fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance ... provides a compelling basis for distinguishing Convention practice from that of the International Court.⁶⁶

A second area of conflicting decisions noted by Shany concerns the use of advisory proceedings in order to bring an interstate dispute before an international tribunal. In its advisory opinion in *Eastern Carelia*, where the PCIJ was asked to rule on the application of a peace treaty between Finland and Russia, the Court had declined to give an opinion, for '[a]nswering the question would be substantially equivalent to deciding the dispute between the parties', and Russia had not consented to the proceedings.⁶⁷ In contrast, the IACHR and ECCIS have both held that they may render an advisory opinion in what were essentially interstate disputes.⁶⁸

Third, the margin of discretion accorded to authorities of a confiscating state in determining the appropriate level of compensation has been differently interpreted by the ECHR and the Iran-US Claims Tribunal. The ECHR has granted the expropriating state a wide margin of appreciation in determining the level of compensation,⁶⁹ while the Iran-US Claims Tribunal has held that full value of the property taken should be paid.⁷⁰

Fourth, the application of the rule of 'proportionality' in continental shelf delimitation cases has been applied differently by the ICJ and an ad hoc arbitral tribunal.⁷¹ Finally, regarding the precautionary principle in environmental law, the WTO Appellate Body held in the *Beef Hormones Case* that it was not clear that the principle has been incorporated into customary international law.⁷² On the other hand, in the *Southern Bluefin Tuna Case* the ITLOS prescribed provisional measures in accordance with a precautionary approach, although it

⁶⁶ *Loizidou v Turkey* (1995) 310 Eur Court HR (ser A), [84]–[85].

⁶⁷ *Request for Advisory Opinion Concerning the Status of Eastern Carelia* [1923] PCIJ (ser B) No 5, 28–9.

⁶⁸ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion*, Case No OC-16/99 (1 October 1999) cited in Shany, above n 41, 123–4; Opinion No 14/95/C-1/7–96, 'Interpretation of the Agreement on Recognition and Regulation of Property Rights' (1996) 3(23) *Sodruzhestvo Informatsionni Vestnik* 82; and Opinion No 11/95/C-1/4–96, 'Interpretation of Agreement on Free Trade' (1996) 3(23) *Sodruzhestvo Informatsionni Vestnik* 88, cited in Danilenko, above n 19, 904–5.

⁶⁹ *Lithgow v UK* (1986) 102 Eur Court HR (ser A).

⁷⁰ *SEDCO Inc v NIOC* (1987) 10 Iran-USCI Trib Rep 180, 187, cited in Shany, above n 41.

⁷¹ *Continental Shelf (Tunisia v Libya)* [1982] ICJ Rep 18, 61–76, 91; cf *Delineation of the Continental Shelf (UK v France)* (1979) 54 ILR 5, 67–8, referred to in Charney, 'Is International Law Threatened?', above n 8, 331–2.

⁷² *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-2000-11 (2001) [123] (Report of the Appellate Body).

admittedly did not declare that the precautionary principle had become part of custom.⁷³

In light of these cases, it can be seen that the fragmentation of international law is more than a theoretical possibility. This situation has possibly arisen due to courts and tribunals being examined in isolation from each other, leading to the adoption of the view that international courts and tribunals are ‘self-contained regimes’. This, in turn, invariably leads to the jurisprudence of other courts and tribunals being ignored when an international court is faced with a legal problem. Indeed, an enhanced respect for comity and increased judicial interaction has been suggested as a means of combating the problem of fragmentation.⁷⁴ In this sense, it can be argued that the structure of the *Manual* might be guilty of facilitating the entrenchment of the fragmentation of international law, for the *Manual* considers each court and tribunal separately and does not point out any overlaps in areas of competence or procedural similarities. This could lead to instances of ‘tunnel vision’ by those using the *Manual*, where only one court or tribunal might be considered for the resolution of a dispute, and corresponding norms in other fora might be ignored. For instance, it is possible that an expropriation might violate an investment agreement, and also the investing party’s human rights. Such a dispute could conceivably be resolved before the ICSID and also before the Human Rights Committee. The dispute could possibly even go to the ICJ if diplomatic protection were espoused by the state of which the investor was a national.⁷⁵ In addition, the dispute could go to arbitration before an ad hoc tribunal if the parties so agreed. In this sense, the structure of the *Manual* — of which more will come later — could lead to such overlaps being overlooked.

It should be remembered, however, that just because different international courts and tribunals reach different decisions does not mean that international law is being ‘fragmented’. Fragmentation only occurs if the same rule is applied differently, and not if a rule which may be *lex specialis* differs from another rule. Here the approach of the ECHR in *Loizidou v Turkey* is instructive.⁷⁶ In the case of the interpretation of treaty reservations, the reservation might be invalid if it is incompatible with the object and purpose of the treaty. But it is up to the respective court to determine the reservation’s compatibility, or lack thereof, with the treaty. The United Nations Human Rights Committee (‘HRC’) made a ‘noteworthy step’ towards clarifying the role of adjudicatory bodies of special regimes in its General Comment No 24(52) of 2 November 1994⁷⁷ relating to reservations made to the *International Covenant on Civil and Political Rights*.⁷⁸ In its Comment, the HRC concluded that the application of the traditional rules

⁷³ *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* (Request for Provisional Measures) (27 August 1999) 38 ILM 1624 (1999), [77], [90(1)(c)].

⁷⁴ Buergenthal, above n 8, 274–5; Charney, ‘Is International Law Threatened?’, above n 8, 371–3; Shany, above n 41, 293–5.

⁷⁵ Shany, above n 41, 21.

⁷⁶ (1995) 310 Eur Court HR (ser A).

⁷⁷ General Comment 24(52) of the Human Rights Committee, UN Doc CCPR/C/21/Rev.1/Add.6.

⁷⁸ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

on reservations to human rights treaties were inappropriate due to the specific character of human rights treaties.⁷⁹ Accordingly, the fact that different courts and tribunals may reach different results is only a problem in so far as those different results relate to the application of the same general rule. There is arguably no ‘fragmentation’ or incoherence if the international courts and tribunals are merely following their own special rules.

B *Overlapping Jurisdictions of International Courts and Tribunals*

Doctrinal inconsistency is not the only problem presented by the increased availability of international dispute settlement fora. Due to the absence of any hierarchical structure amongst international courts and tribunals, their creation can be described as ‘sporadic and largely uncoordinated’,⁸⁰ and overlaps in their jurisdictional ambits may occur. This leads not only to the possibility of conflicting jurisprudence and irreconcilable decisions, as noted above, but also to the problem of forum shopping.⁸¹ With the increase in fora for the settlement of disputes by adjudication, it is increasingly likely that some disputes affecting different branches of international law can be resolved in more than one forum. Judge Guillaume has drawn attention to the practice of forum shopping in international law,⁸² and according to Lawrence Helfer, the practice of forum shopping in human rights cases has been going on for some time.⁸³ For Judge Guillaume, the proliferation of international courts and tribunals

leads to cases of overlapping jurisdiction, opening the way for applicant States to seek out those courts which they believe, rightly or wrongly, to be more amenable to their arguments. This forum shopping, as it is usually called, may indeed stimulate the judicial imagination, but it can also generate unwanted confusion. Above all, it can distort the operation of justice, which, in my view, should not be made subject to the law of the marketplace.⁸⁴

Two recent cases where the applicant states had multiple fora available for the adjudication of their dispute are the *Southern Bluefin Tuna Case*, between Australia/New Zealand and Japan,⁸⁵ and the *MOX Plant Case* between Ireland

⁷⁹ General Comment 24(52) of the Human Rights Committee, UN Doc CCPR/C/21/Rev.1/Add.6, [17].

⁸⁰ Shany, above n 41, 20; see also Sir Robert Jennings, ‘The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers’ in Boisson de Chazournes (ed), above n 8, 2, 5.

⁸¹ Tullio Treves, ‘Recent Trends in the Settlement of International Disputes’ (1997) 1 *Bancaja Euromediterranean Courses of International Law* 395, 418; see also Laurence Helfer, ‘Forum Shopping for Human Rights’ (1999) 148 *University of Pennsylvania Law Review* 285; Lakshman Guruswamy, ‘Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?’ (1998) 7 *Minnesota Journal of Global Trade* 287; Tullio Treves, ‘Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice’ (1999) 31 *New York University Journal of International Law and Politics* 809; Romano, above n 8.

⁸² Guillaume, ‘Speech to the General Assembly of the United Nations 2001’, above n 55, 5.

⁸³ Helfer, above n 81.

⁸⁴ Guillaume, ‘Address to the United Nations General Assembly 2000’, above n 53, 5.

⁸⁵ For a discussion of this dispute, see *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Jurisdiction and Admissibility)* 39 ILM 1359 (2000). See generally Barbara Kwiatkowska, ‘The Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) Cases’ (2000) 15 *International Journal of Marine and Coastal Law* 1; Barbara Kwiatkowska, ‘The Australian and New Zealand v Japan Southern Bluefin Tuna

and the United Kingdom.⁸⁶ The *Southern Bluefin Tuna* dispute could have been submitted to any of three fora: the ICJ, as all parties had made optional clause declarations; a dispute settlement body under *UNCLOS*, such as the ITLOS or an arbitral tribunal established under Annex VII of *UNCLOS*, as the dispute arguably fell within the compulsory dispute settlement provisions of Part XV of *UNCLOS*; or an arbitral tribunal established under the regional convention, the *Convention for the Conservation of Southern Bluefin Tuna*.⁸⁷ The *MOX Plant Case* relates to the operation of a mixed oxide fuel manufacturing plant at Sellafield in North West England. Late in 2001 Ireland sought provisional measures before the ITLOS,⁸⁸ and it has also brought arbitration proceedings under the *OSPAR Convention*.⁸⁹ In addition, Ireland could possibly bring proceedings against the United Kingdom in the ECJ for alleged breaches of its obligations arising under Directives made under the *Euratom Treaty* and the *EC Treaty*.⁹⁰

In addition to these cases where the parties have the possibility of forum shopping between different courts and tribunals, the prospect exists that more than one judicial body may be seised of the same dispute simultaneously. This possibility was realised in the swordfish dispute of 2000 between the EC and Chile. The dispute concerned a Chilean legislative prohibition on the unloading of swordfish in its ports under article 165 of its fisheries legislation.⁹¹ The purpose of the legislation was to protect a species of swordfish in the South East Pacific. The EC's particular complaints were that:

fishing vessels operating in the South East Pacific are not allowed under Chilean legislation to unload their swordfish in Chilean ports either to land them for warehousing or to transship them onto other vessels. Consequently Chile makes

(Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal' (2001) 16 *International Journal of Marine and Coastal Law* 239; Deborah Horowitz, 'The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the *Southern Bluefin Tuna Case*' (2001) 25 *Melbourne University Law Review* 810; and Jacqueline Peel, 'A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes under *UNCLOS* in the Aftermath of the Southern Bluefin Tuna Arbitration' (2002) 3 *Melbourne Journal of International Law* 53.

⁸⁶ *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)* 41 ILM 405 (2002). See generally Chester Brown, 'Provisional Measures before the International Tribunal for the Law of the Sea: The *MOX Plant Case*' (2002) 17 *International Journal of Marine and Coastal Law* 267.

⁸⁷ Opened for signature 10 May 1993, 1819 UNTS 359 (entered into force 20 May 1994). On the different fora available to Australia and New Zealand, see especially Cesare Romano, 'The Southern Bluefin Tuna Dispute: Hints of a World to Come ... Like It or Not' (2001) *Ocean Development and International Law* 313.

⁸⁸ *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)* 41 ILM 405 (2002).

⁸⁹ *Convention for the Protection of the Marine Environment of the North-East Atlantic*, opened for signature 22 September 1992, 32 ILM 1068 (1993) (entered into force 25 March 1998).

⁹⁰ See generally 'Written Response of the United Kingdom', 15 November 2001, *MOX Plant Case* <http://www.itlos.org/case_documents/2001/document_en_192.pdf> at 23 September 2002.

⁹¹ Marcos Orellana, 'The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea' (2001) 60 *ASIL Insights* <<http://www.asil.org/insights/insigh60.htm#author>> at 23 September 2002.

transit through its ports impossible for swordfish. This prohibition renders also impossible the importation of the affected catches into Chile.⁹²

The EC claimed that this provision was inconsistent with Chile's obligations under the GATT,⁹³ which, inter alia, provides for freedom of transit for goods through the territory of each contracting party on their way to or from other contracting parties. On the other hand, Chile claimed that its conduct was consistent with the GATT and sought to justify its restrictions by reference to the exceptions in article XX. Moreover, it argued that the EC was not in compliance with its obligations under *UNCLOS* relating to the conservation of highly migratory species and the conservation of the living resources of the high seas.

After the failure of a decade of negotiations,⁹⁴ the EC sought resolution of the matter before the WTO.⁹⁵ For its part, Chile sought resolution of the dispute under the dispute settlement provisions of *UNCLOS*.⁹⁶ The dispute was characterised very differently by the EC and Chile — Chile regarded the dispute as an environmental dispute, and cast the dispute as one relating to its conservation measures for the swordfish. The EC, on the other hand, sought to characterise the dispute as economic. Both the ITLOS and the WTO had compulsory jurisdiction over the dispute. Had the litigation continued, this clash of jurisdictions would have effectively required the ITLOS and the WTO to determine simultaneously the legal positions of Chile and the EC in the same dispute. Given the orientations of the bodies concerned, it is not inconceivable that the WTO and the ITLOS would have arrived at different conclusions. The DSB of the WTO was established in the framework of the global trading system, while in contrast the ITLOS arguably has an institutional commitment to the principles of *UNCLOS*, including the environmental protection and conservation measures contained in Part XII.

As the WTO and the ITLOS were seised of parallel proceedings between the same parties arising out of the same dispute, they might have considered whether there were any rules in international law relating to forum selection, such as *forum non conveniens* or litispence. Vaughan Lowe has argued that while it is arguable that the doctrine of *lis alibi pendens* exists as a general principle of law, and accordingly may be considered part of international law under article 38(1)(c) of the *Statute of the International Court of Justice*, there is little evidence of a doctrine of *forum non conveniens* in international law.⁹⁷ In his

⁹² 'Panel Sets Up in a New Case: Case DS193: — Chile: Measures Affecting the Transit and Importation of Swordfish' (12 December 2000) *WTO News*, <http://www.wto.org/english/news_e/news00_e/dsb_12dec_e.htm> at 23 September 2002.

⁹³ *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190.

⁹⁴ Orellana, above n 91.

⁹⁵ *Chile — Measures Affecting the Transit and Importation of Swordfish: Request for the Establishment of a Panel by the European Communities*, WTO Doc WT/DS193/2 (2000) (Arrangement between the European Communities and Chile).

⁹⁶ ITLOS, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile–European Communities)* (15 March 2001) 40 ILM 475 (2001); Vaughan Lowe, 'The International Tribunal for the Law of the Sea: Survey for 2000' (2001) 16 *International Journal of Marine and Coastal Law* 549, 568.

⁹⁷ Vaughan Lowe, 'Overlapping Jurisdictions in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191, 201.

study, Shany also came to the conclusion that there is little evidence of any generally applicable principles on choice of forum in public international law.⁹⁸ Indeed, the doctrine of *forum non conveniens* is unknown in civil law countries, and is not applied uniformly in all common law systems.⁹⁹ However, the swordfish dispute was settled by direct negotiations in January 2001, and the proceedings before the WTO and the ITLOS were discontinued.¹⁰⁰ Consequently, the WTO and the ITLOS did not engage in any consideration of the relationship between the two courts. Such consideration might have included ruling on whether international courts and tribunals form part of an 'international legal system', as Judge Buergenthal would have it,¹⁰¹ or whether they operate as 'self-contained regimes',¹⁰² which may be disinterested in the work of other international courts and tribunals, even if they are seised of the same dispute. In a different context, the ICTY in the *Tadic* case was certainly of the opinion that international courts and tribunals were not part of a 'system':

International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).¹⁰³

Related to the question of whether international courts and tribunals form part of a 'system', and similar to the problem of overlapping jurisdictions, is the larger issue of overlapping or clashing of international regimes. International courts and tribunals may find themselves confronted with the problem that parties before them have obligations under different international agreements which are not necessarily compatible. In this situation, questions arise concerning the outer limits of each tribunal's competence. In particular, panels and the Appellate Body of the WTO are likely to face such problems when international conventions, which are not 'covered agreements' within the meaning of article 2(1) of the DSU, impact on the trade policies of WTO

⁹⁸ Shany, above n 41, 285.

⁹⁹ Peter North and James Fawcett, *Cheshire and North's Private International Law* (13th ed, 1999) 335; Lowe, 'Overlapping Jurisdictions', above n 97, 200.

¹⁰⁰ *Chile — Measures Affecting the Transit and Importation of Swordfish: Request for the Establishment of a Panel by the European Communities*, WTO Doc WT/DS193/2 (2000) (Arrangement between the European Communities and Chile); *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile–European Communities), Order No 1* (15 March 2002), 40 ILM 475 (2001). See also 'EU and Chile Reach an Amicable Settlement To End WTO/ITLOS Swordfish Dispute' (25 January 2001) <http://europa.eu.int/comm/fisheries/news_corner/press/inf01_05_en.htm> at 23 September 2002.

¹⁰¹ Buergenthal, above n 8, 274–5.

¹⁰² See especially Bruno Simma, 'Self-Contained Regimes' (1985) 16 *Netherlands Yearbook of International Law* 111.

¹⁰³ *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Judgment of the Appeals Chamber)*, Case No IT-94-1-AR72 (2 October 1995) [11]. See also the judgment of the ECHR in *Loizidou v Turkey* (1995) 310 Eur Court HR (ser A), [68]: 'The International Court of Justice is a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention.'

member states. For example, in the *Shrimp/Turtle* dispute,¹⁰⁴ India, Malaysia, Thailand and Pakistan made a complaint about the prohibition in US domestic legislation on the importation of certain shrimp and shrimp products. The US had imposed this prohibition because fishing vessels under the jurisdiction of those countries did not use ‘turtle excluder devices’ to protect turtles from shrimp trawling activities.¹⁰⁵ The US relied on the exception in article XX(g) of the GATT, which permits member states to adopt measures ‘relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption’,¹⁰⁶ provided that the measures were not applied ‘in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.¹⁰⁷ This provision had also been relied on in the earlier *Tuna/Dolphin* dispute under the GATT.¹⁰⁸ In its report in *Shrimp/Turtle*, the Appellate Body found that the US import ban did in fact fall within the exception in article XX(g).¹⁰⁹ However, it then went on to find that the measure had been applied by the US in a manner which constituted ‘arbitrary or unjustifiable discrimination’.¹¹⁰ What was not addressed in the panel or Appellate Body reports, however, was the situation if the US had been acting in accordance with a trade measure in a multilateral environmental agreement (‘MEA’). There are currently over 200 MEAs, of which 20 contain trade measures.¹¹¹ These include the *Convention on International Trade in Endangered Species of Wild Flora and Fauna*,¹¹² the *Montreal Protocol*, and the *Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal*.¹¹³ To date, there has been no ruling on the WTO-compatibility of any of these trade measures,¹¹⁴ and uncertainty attends the question as to whether the panels and Appellate Body have the competence to consider the effects of other

¹⁰⁴ *United States — Import of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (1998) (Report of the Panel); *United States — Import of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (1998) (Report of the Appellate Body).

¹⁰⁵ See generally the symposium on the *Shrimp/Turtle Case* in (1998) 9 *Yearbook of International Environmental Law*.

¹⁰⁶ GATT, above n 93, art XX(g).

¹⁰⁷ GATT, above n 93, art XX.

¹⁰⁸ *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (1991) (Report of the Panel); *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report of the Appellate Body); see generally Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (1997) 101–4.

¹⁰⁹ *Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (1998) (Report of the Appellate Body) [145].

¹¹⁰ *Ibid* [186].

¹¹¹ Duncan Brack, ‘The Shrimp-Turtle Case: Implications for the Multilateral Environmental Agreement — World Trade Organisation Debate’ (1998) 9 *Yearbook of International Environmental Law* 13, 13; see also Duncan Brack, ‘Reconciling the GATT and Multilateral Environmental Agreements with Trade Provisions: The Latest Debate’ (1997) 6 *Review of European Community and International Economic Law* 112.

¹¹² Opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) (‘CITES’).

¹¹³ Opened for signature 22 March 1989, 1673 UNTS 57 (entered into force 5 May 1992).

¹¹⁴ Sabrina Shaw and Risa Schwartz, ‘Trade and Environment in the WTO — State of Play’ (2002) 36 *Journal of World Trade* 129, 132–4.

conventions. Under article 1(1) of the DSU, the rules and procedures of the DSU only apply to disputes brought under the 'covered agreements', being agreements listed in the annexes to the *Marrakesh Agreement*. Accordingly, it is unclear whether panels and the Appellate Body would have the jurisdiction to interpret provisions of *CITES*, the *Montreal Protocol*, or even *UNCLOS*, as may have been required in the swordfish dispute, had it proceeded to adjudication.¹¹⁵ In this sense, the question as to whether the WTO dispute settlement system operates as a 'closed system', or whether it forms part of a wider system of international dispute settlement, remains open.

From this discussion of the issues arising in cases before WTO dispute settlement bodies, and the ICTY's description of the state of the 'international judiciary', one can see that the creation of international judicial bodies for the resolution of disputes is not without its problems. It goes without saying that there are also those who deny that the proliferation of international courts and tribunals poses a threat to the unity of international law, most notably Jonathan Charney, who argues that even if there are some variations in how different international courts and tribunals apply international law, there is no danger to its overall coherent development.¹¹⁶ In his Hague lectures, in which he considered the case law of several different international courts and tribunals with respect to seven different areas of international law, being treaty law, sources of international law, the law of state responsibility, compensation standards, the rule regarding exhaustion of domestic remedies, nationality of persons, and international maritime boundary law, he concluded that

despite the increasing number of [international law] decisions the law remains, at its core, relatively coherent ... there are variations to be found, but all of these tribunals operate within the same dialectic and reach relatively compatible conclusions. The variations that do exist might be justified based upon the different substantive regimes within which the tribunals must operate.¹¹⁷

The *Manual* does not aim to solve these larger systemic problems of fragmentation and forum shopping, but rather the more pressing and immediate problem faced by the international lawyer, which is the need for basic information on what options are available for resolution of a particular dispute. As Judge Rosalyn Higgins notes in her Foreword to the *Manual*, 'none of us can expect to be specialists in everything. The manual will ensure that at least we are aware of the full range of possibilities'.¹¹⁸ Nonetheless a comprehension of the problems arising from the proliferation of international courts and tribunals is important if one is to understand the background to the *Manual's* publication. Despite its more modest goals, it is perhaps a shortcoming of the *Manual* that it does not identify areas of jurisdictional overlap with respect to each of the courts and tribunals, although, admittedly, such overlaps are usually case-specific. The

¹¹⁵ See, eg, Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35 *Journal of World Trade* 1081, 1083.

¹¹⁶ Charney, 'Is International Law Threatened?', above n 8.

¹¹⁷ *Ibid* 352.

¹¹⁸ Judge Rosalyn Higgins, 'Foreword' in Sands, Mackenzie and Shany (eds), above n 7, vii, viii.

next section reviews the content of the *Manual* and seeks to highlight its relative strengths and weaknesses.

IV THE CONTENT OF THE *MANUAL*

A *Which Courts and Tribunals are Included?*

The *Manual* sets itself the modest task of providing a ‘reliable source of basic information on the principal bodies — both global and regional.’¹¹⁹ Sands writes that ‘[i]n deciding which courts and tribunals to include, and the degree of detail to enter into, we considered the activities of the bodies — past and present — and the amount of information a user might need to have.’¹²⁰ In choosing ‘the principal international courts and tribunals’,¹²¹ Sands avoids the thorny question of what actually constitutes an ‘international court or tribunal’, or which bodies form part of the ‘international judiciary’ — perhaps these definitions are left to be dealt with elsewhere, and not in a basic reference tool — but, as noted above, a discussion of this nature would add to the value of the *Manual*’s contribution.¹²²

The first part of the *Manual* concerns ‘General bodies’, which includes chapters on the ICJ, the PCA, the ITLOS and, interestingly, the Court of Conciliation and Arbitration within the Organisation for Security and Cooperation in Europe. Sands explains that these bodies ‘have been grouped together here as they are either potentially available to all states and/or their subject-matter jurisdiction is potentially unlimited.’¹²³ His second part includes information on ‘Trade, commercial and investment protection dispute settlement bodies and rules’, and covers the WTO dispute settlement system, the ICSID, and the International Court of Arbitration of the International Chamber of Commerce. The introduction to the section explains that ‘[s]pecial arrangements within regional bodies for the resolution of these types of disputes are dealt with in the following Part.’¹²⁴ The third part, accordingly, deals with ‘Regional economic integration bodies/free trade arrangements’, such as the ECJ, the Central American Court of Justice, and *NAFTA* dispute settlement procedures, among others. Part four addresses international and regional human rights institutions, including the HRC, the Committee on the Elimination of Racial Discrimination, the Committee Against Torture, and the African Commission and Court on Human and People’s Rights. Part five looks at ‘International criminal tribunals’, and naturally includes the ICTY, the ICTR and the

¹¹⁹ Sands, ‘Introduction and Acknowledgments’ in Sands, Mackenzie and Shany (eds), above n 7, xxxi.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² See the definitions proposed by Romano, above n 8, 713–6; Christian Tomuschat, ‘International Courts and Tribunals with Regionally Restricted and/or Specialised Jurisdiction’ in Max Planck Institute for Comparative Public Law and International Law, *Judicial Settlement of International Disputes: International Court of Justice, Other Courts and Tribunals, Arbitration and Conciliation: An International Symposium* (1974) 285, 307–11; Ian Brownlie, *Principles of Public International Law* (2nd ed, 1973) 559, cited in V S Mani, *International Adjudication: Procedural Aspects* (1980) 10.

¹²³ Sands, Mackenzie and Shany (eds), above n 7, 1.

¹²⁴ Ibid 69.

International Criminal Court. The sixth part includes information on ‘Inspection panels’, which have been developed by multilateral or regional development banks. These inspection procedures exist to provide a

forum within which affected parties may bring complaints alleging that the bank in question has not followed its own internal procedures, such as procedures relating to expropriation, environmental impact assessment, or relocation of communities.¹²⁵

Finally, the seventh part looks at NCPs. These are mechanisms which are most commonly found in international environmental treaties. They provide for the non-confrontational settlement of disputes, and seek to facilitate compliance by States Parties.¹²⁶ This part contains information on the *Montreal Protocol* NCP, which was at the time of the *Manual*’s publication the only example of a treaty-specific NCP.¹²⁷

The next obvious question is whether anything is left out, and this reviewer is aware of a few courts and tribunals which are not included, some of which are very recent (for example, the Economic Court of the Commonwealth of Independent States, and the Common Court of Justice and Arbitration for the Harmonisation of Corporate Law in Africa¹²⁸) or under-utilised such that they may be described as effectively dormant (such as the Benelux Economic Union Court of Justice). Indeed, Sands notes that ‘[t]he manual does not strive to be comprehensive. Certain bodies have not been addressed, either because they have fallen into desuetude, or they were established but in practice never became operational’,¹²⁹ and also, ‘[y]et other bodies are on the verge of being established’.¹³⁰

Two surprising omissions, however, are the Iran-US Claims Tribunal¹³¹ and the UNCC.¹³² The Iran-US Claims Tribunal, which was established in 1981 under the *Algiers Accords* mainly to resolve disputes between Iran and US investors whose property was expropriated following the Iranian Islamic revolution in 1981, has arguably been one of the success stories of international dispute settlement in the last 20 years.¹³³ The Iran-US Claims Tribunal has resolved close to 4000 disputes;¹³⁴ around US\$2 billion has changed hands,¹³⁵

¹²⁵ Ibid 301.

¹²⁶ Ibid 319.

¹²⁷ Ibid.

¹²⁸ *Treaty Establishing the Organisation for the Harmonisation of Corporate Law in Africa*, opened for signature 17 October 1993, (1997) 4 *Journal Officiel de l’OHADA*, <http://www.refer.org/camer_ct/eco/ecohada/ohada0.htm> at 23 September 2002, cited by Romano, above n 8, 717, fn 42.

¹²⁹ Sands, ‘Introduction and Acknowledgments’ in Sands, Mackenzie and Shany (eds), above n 7, xxxii.

¹³⁰ Ibid.

¹³¹ See above n 38.

¹³² See above n 15.

¹³³ See especially Charles Brower and Jason Brueschke, *The Iran-United States Claims Tribunal* (1998) 657–64; George Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996).

¹³⁴ Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (1996) 16.

¹³⁵ Brower and Brueschke, above n 133, 658.

and its work is likely to continue for several years to come. Its only mention in the *Manual* appears to be in the chapter on the PCA, which houses the Iran-US Claims Tribunal in The Hague.¹³⁶ Likewise, the UNCC, which was established by UN Security Council Resolution,¹³⁷ is charged with assessing Iraq's liability 'for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of Iraq's unlawful invasion and occupation of Kuwait.'¹³⁸ This body is not insignificant, and perhaps should be included in a future edition of the *Manual*. Without wanting to dwell on the *Manual*'s omissions, another comment is that while a chapter has been included on the International Court of Arbitration of the International Chamber of Commerce, there is no chapter on any other set of arbitration rules, such as those applicable in UNCITRAL arbitrations or arbitrations at the London Court of International Arbitration, although a version of the UNCITRAL rules are mentioned as an option for arbitration before the PCA.¹³⁹ If a section is to be included on international commercial arbitration — which is, after all, more often used to settle private international disputes — then perhaps other arbitration rules might be included, especially in light of the fact that a version of the UNCITRAL rules are used before the Iran-US Claims Tribunal, a busy international court.

Finally, Sands notes in his introduction that the modern realities of international litigation provide for many new procedures and systems that do not easily compare to the traditional bilateral interstate form of dispute, and these quasi-judicial procedures, such as NCPs, are expanding in number.¹⁴⁰ For instance, in addition to the *Montreal Protocol* NCP,¹⁴¹ which is included in the *Manual*, the *Chemical Weapons Convention*¹⁴² and protocols to the *Long Range Transboundary Air Pollution Convention* have NCPs,¹⁴³ not to mention the NCPs which may (or may not) come into existence under the *Kyoto Protocol* to the *Framework Convention on Climate Change*¹⁴⁴ and the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*. A brief description of the difficulty in applying a traditional bilateralist dispute settlement model to international environmental law could be helpful. For example, where there is harm to global commons, such as the atmosphere — which state has standing? No states, as the territory of the states has not been harmed; or all states, as a

¹³⁶ Sands, Mackenzie and Shany (eds), above n 7, 24.

¹³⁷ SC Res 687, UN SCOR, 46th sess, 2981st mtg, UN Doc S/Res/687 (1991) established Iraq's liability at international law; SC Res 692, UN SCOR, 46th sess, 2988th mtg, UN Doc S/Res/692 (1991) created the UNCC. See Weller (ed), above n 15, 13.

¹³⁸ SC Res 687, UN SCOR, 46th sess, 2981st mtg, UN Doc S/Res/687 (1991).

¹³⁹ Sands, Mackenzie and Shany (eds), above n 7, 25.

¹⁴⁰ Sands, 'Introduction and Acknowledgments' in Sands, Mackenzie and Shany (eds), above n 7, xxviii.

¹⁴¹ See above n 28.

¹⁴² *Chemical Weapons Convention*, above n 30, arts 35–6.

¹⁴³ See generally Rüdiger Wolfrum, 'Means of Ensuring Compliance with and Enforcement of International Environmental Law' (1998) 272 *Recueil des Cours* 9.

¹⁴⁴ See above n 31.

resource common to all of them has suffered damage?¹⁴⁵ The absence of clear rules of state responsibility to resolve these problems has led to the creation of such multilateral NCPs, and the development of these non-contentious multilateral consultative bodies — perhaps signalling the advent of a ‘fifth phase’ which could be referred to in Sands’ introduction — is arguably quite significant.

Yet perhaps this is being too critical — after all, if every alternative for the resolution of international disputes were included, the volume would not be a handy and approachable 346 pages in length, but closer to a rather more bulky and unwieldy 800. Moreover, to be fair, Sands notes in his introduction that the *Manual* is an ongoing project and future editions will possibly expand the coverage.¹⁴⁶

B *What Information is Included about Each Court and Tribunal?*

In the introduction, Sands sets the parameters of the *Manual*, which ‘seeks to address the most commonly asked questions’ about each of the ‘principal’ courts and tribunals.¹⁴⁷ These questions range from basic information, such as where they are located, how they can be contacted, and what their constituent instruments, rules, and regulations are; through to how proceedings are instituted, whether provisional measures are available, and how written pleadings and oral arguments are presented. Less obvious information, such as on whether financial assistance is available, is also usefully included.¹⁴⁸

An examination of the chapter on the ICJ reveals that the information is arranged in helpful headings and subheadings, such as ‘Institutional Aspects’, covering the ICJ’s governing texts, substantive law, organisation and jurisdiction; ‘Procedural Aspects’, covering, inter alia, the institution of proceedings, financial assistance, provisional measures and preliminary objections; and ‘Proceedings’, covering written proceedings, oral arguments, third party intervention, amicus curiae briefs, interpretation and revision of judgment, and other issues. It becomes obvious on surveying these headings that the *Manual* is probably not the type of book which one picks up for light or even thought-provoking reading, but rather, the *Manual* fulfils the role of a very practical tool. The paucity of jurisprudence referred to in the *Manual* is one particular weakness — Sands points out that ‘we have not in this first edition sought to reflect the jurisprudence of each body, which is so important to a proper understanding of many of the procedural rules.’¹⁴⁹ As Sands admits, sometimes the meaning of a provision can only be understood in light of its interpretation, and where this is the case, an effort is made in the *Manual* to provide the relevant case law. However, the approach of the editors whereby

¹⁴⁵ See especially Malgosia Fitzmaurice and Catherine Redgwell, ‘Environmental Non-Compliance Procedures and General International Law’ (2000) 3 *Netherlands Yearbook of International Law* 35.

¹⁴⁶ Sands, ‘Introduction and Acknowledgments’ in Sands, Mackenzie and Shany (eds), above n 7, xxxii.

¹⁴⁷ *Ibid* xxxi.

¹⁴⁸ *Ibid* xxxi–xxxii.

¹⁴⁹ *Ibid* xxxii.

rules are stated and not fully explained is not unproblematic, and it is hoped that future editions of the *Manual* will include more case law.

Some minor quibbles are the repetition in each chapter of the appellate structure — in the chapter on the ICJ, the absence of an ICJ ‘appellate structure’ is noted at paragraphs 1.12 and again at 1.38; and in the chapter on the ITLOS, its ‘appellate structure’ is dealt with at paragraph 3.6 and again under ‘appeal’ at paragraph 3.33. (One wonders whether this repetition is an unintended reminder — even if it only operates at a subconscious level — that the international legal order has no central court of appeal, and therefore lacks one quality of a legal ‘system’, resulting in the problems discussed above in Part III.) An inconsistency is to be found at the end of the chapter on ICSID, where there is a list of States Parties, including dates for signature, deposit of ratification and entry into force of the Convention.¹⁵⁰ This is quite useful, but the same type of comprehensive list does not appear to be included for other regimes. Another pedantic point is the questionable placement of information on ‘warrants of arrest’ in the chapter on the International Criminal Court under the heading of ‘provisional measures’, when the two concepts are arguably quite different.¹⁵¹

Points of interest are the description of the ‘prompt release’ provision — perhaps a variant form of provisional measure — under the *UNCLOS*,¹⁵² the acknowledgment by the WTO Appellate Body in its first case that ‘the trade rules are not to be read in clinical isolation from public international law’,¹⁵³ which appears to be contrary to the clear statement by the ICTY in *Tadic* that each international court and tribunal is a ‘self-contained regime’,¹⁵⁴ and the helpful outline of the procedure required to petition the various UN Human Rights Committees. Most importantly, the *Manual* contains information about some of the more obscure international courts and tribunals, which would otherwise be quite difficult to access.

V CONCLUSION

Today’s international legal landscape is vastly different from that which was in existence even 10 years ago — the ICJ is no longer the sole permanent international court, and many other international courts and tribunals have been established to resolve specialised and regional international disputes. This is good news for international lawyers, as the proliferation of international courts and tribunals may signal an increase in international litigation. Those who predicted that the creation of more international courts and tribunals would deprive the ICJ of its workload have been proved wrong, as the ICJ has never been as busy as it is currently, a fact repeated by the President of the ICJ over the

¹⁵⁰ Sands, Mackenzie and Shany (eds), above n 7, 102–6.

¹⁵¹ *Ibid* 262.

¹⁵² *Ibid* 50–1.

¹⁵³ *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) [18] (Report of the Appellate body); Sands, Mackenzie and Shany (eds), above n 7, 73.

¹⁵⁴ See above n 103.

past few years.¹⁵⁵ The problems attendant on the creation of more fora for international adjudication have been noted, and the systemic problems faced by the international legal order may have to be confronted by the international community at some point in the future. In the meantime, those international lawyers, scholars and students faced with a more immediate problem can be well served by resorting in the first instance to the *Manual*. As Sands notes in his introduction, the *Manual* does not hope to replace specialist texts on procedure before each international court, such as Shabtai Rosenne's seminal work on *The Law and Practice of the International Court*.¹⁵⁶ Indeed, it is surely the case that once the relevant forum for resolution of the dispute has been identified, such specialist works will take precedence over the *Manual*. Nonetheless the *Manual* is a most useful tool for international lawyers, and its editors have enable users of the *Manual* to take a valuable first step towards achieving a better understanding of the international legal order.

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¹⁵⁵ See, eg, Judge Stephen Schwebel, 'Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M Schwebel, President of the International Court of Justice' (26 October 1999) <<http://www.icj-cij.org>> at 23 September 2002.

¹⁵⁶ Shabtai Rosenne, *The Law and Practice of the International Court 1920–1996* (1997). A similarly useful tool for the European courts, being the ECJ, the ECJ's Court of First Instance and the EFTA Court is Richard Plender (ed), *European Courts: Practice and Precedents* (1997).

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