OVERLAPPING JURISDICTIONS AND THE STRUCTURE OF INTERDEPENDENCE BETWEEN INTERNATIONAL COURTS AND TRIBUNALS

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Abstract

This study recommends a strict or formalistic application of regulatory rules to resolve conflicts between overlapping and conflicting jurisdictions of international courts and tribunals. The study argues that a formalistic approach gives rise to a structure of interdependence. The structure, a hybrid of theoretical and practical steps, works together to maintain jurisdictional distinctions while engaging comity to coordinate relationships between overlapping jurisdictions. Currently, international legal scholars and practitioners apply the rules in a non-formalistic manner, which undermines the integrity and authority of international law. The study argues that reversing the situation requires a strict or formalistic application of the rules, which preclude conflict. At the same time, each jurisdiction keeps its judicial function distinct.

However, with the formalistic application, preclusion is also not achieved. Instead, disorder ensues as the rules fail to preclude and keep each jurisdiction distinct. With the failure, a theoretical situation arises and needs deconstructing to keep the jurisdictions distinct to maintain their judicial function so as not to undermine the integrity of international law. After deconstruction, comity is engaged to resolve this hypothetical conflict using approaches interconnecting the binary opposing or overlapping jurisdictions. Thus, a theoretical framework of interdependence evolves, offering an entirely new perspective in understanding relationships within the international judicial order.

This original contribution begins with a strict or formalistic interpretation of overlapping jurisdictions before applying the regulatory rules strictly. The study also recognises that overlapping jurisdictions are dormant binary oppositions activated when the regulatory rules are triggered formalistically. However, when the rules fail to preclude and maintain order by keeping them distinct, disorder and indeterminacy ensue. Thus, deconstruction is applied to differentiate the binary opposing jurisdictions to keep them distinct. After which, comity-based approaches that build relationships resolve the jurisdictional conflicts while each jurisdiction remains distinct. This hybrid process occurs in three stages or steps through the different chapters of the study.

This thesis comprises seven chapters. Chapter one introduces the study identifying the problems and conceptualising the key words. Chapter two explores the issue of overlapping jurisdictions and fragmentation, while chapter three explores the theoretical positions involved above. Chapter four analyses the regulatory rules for the case studies in chapter five. Meanwhile, chapter six analyses the comity based approaches and issues encountered in the case studies. The study concludes in chapter seven with a review of the entire research process conclusion. The study also makes some recommendations in light of this innovation in resolving jurisdictional conflicts maintaining the integrity and authority of each jurisdiction without compromising the integrity and authority of the international legal order.

Declaration

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

Copyright Statement

Acknowledgement

This statement is offered as a token to say a very special "thank you" for the immense debt that I owe the University of Manchester for awarding me a scholarship to realise this project, and for my supervisor - Professor Yekong Hodu and Dr. Shavana Musa for their immense support and supervision of this project. I will also like to thank Professors Jean d'Aspremont and Christopher Thornhill for their invaluable feedback and critiquing in the course of this project. Above all, I want to thank God almighty, my family and friends for all the prayers and moral support that have brought me this far.

List of Abbreviations

ACHPR	African Court of Human and Peoples' Rights
BIT	Bilateral Investment Treaty
BYBIL	British Year Book of International Law
CACJ	Central American Court of Justice
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
DSU	Dispute Settlement Understanding
ECJ	European Court of Justice
ECFI	European of First Instance
ICSID	International Centre for the Settlement of Investment Disputes
ITLOS	International Tribunal for the Law of the Sea
EC also EU	European Community also European Union
ECHR	European Court of Human Rights occasionally ECtHR
EFTA	European Free Trade Area
FATU	From Apology to Utopia
GATT	General Agreement On Tariffs and Trade
EURATOM	European Atomic Energy Community
IACHR	Inter-American Court for Human Rights
HRC	Human Rights Committee
ILC	International Law Commission
ICJ	International Court of Justice occasionally The Court
ICC	International Chamber of Commerce
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ITFR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organisation
ILS	International Legal Structuralism
ITLOS	International Tribunal for the Law of the Sea
JLRS	Journal of Law, Religion and the State
MERCOSUR	Common Market of the South or Southern Common Market
NAFTA	North Atlantic Free Trade Agreement
PCIJ	Permanent Court of International Justice
OAPEC	Organisation of Arab Petroleum Exporting Countries
OSPAR	Marine Environment of the North-East Atlantic
RTA	Regional Trade Agreement
TEAEC	Treaty establishing the European Atomic Energy Community
TFEU	Treaty of the Functioning of the European
SCSL	Special Court for Sierra Leone
WTO	World Trade Organisation
VCLT	Vienna Convention on the Law of Treaties
UNCHR	United Nations Committee on Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNRIAA	United Nations Reports of International Arbitration Awards
UNCITRAL	United Nations Commission on International Trade Law
U. Pa. J. Int' Econ. L.	University of Pennsylvania Journal of International Economic Law
USITC	United States International Trade Commission
VCLT	Vienna Convention on the Law of Treaties

Chapter 1

Introduction

This study investigates whether the current jurisdictional regulatory rules – *lis pendens, res judicata, electa una via, lex specialis* and *lex posterior* can preclude jurisdictional conflicts between overlapping and conflicting jurisdictions of international courts and tribunals (ICTs). It also investigates whether these rules can coordinate relationships between overlapping and conflicting ICTs, keeping their judicial functions distinct and maintaining their integrity and authority. Upon carefully analysing several cases, the study found that in cases where preclusion occurred, scholars and practitioners interpreted the concept of overlapping jurisdictions non-formalistically to apply the regulatory rules. The study also found that the rules were applied non-formalistically, not adhering to the triple identity standard - same parties (*persona),* same object (*petitum)* and the same cause of action (*causa petendi).* This resulted in false preclusion, which undermined the integrity and authority of the entire international legal order.

In order to reverse the situation, the study interprets overlapping jurisdictions formalistically and applies the rules formalistically with strict adherence to the triple identity standards to a hypothetical situation. However, while taking the formalistic approach, the rules fail to preclude and do not keep the conflicting jurisdictions distinct. Instead, with the failure of the rules, disorder, uncertainty, and indeterminacy ensue, adding to the initial problem of overlapping and conflicting jurisdictions. Nevertheless, the study argues that overlapping and conflicting jurisdictions are binary oppositions by nature, which remain dormant. When the regulatory rules are triggered, they become active and react disorderly, creating uncertainty and indeterminacy. Thus, deconstruction steps in to differentiate the binary opposing jurisdictions and keep their jurisdictions distinct. However, while deconstruction resolves the indeterminacy problem between the binary opposing jurisdictions and keeps them separate or distinct, the initial judicial conflict still needs to be addressed.

So, comity is engaged to resolve the initial problem of overlapping and conflicting jurisdictions between the overlapping jurisdictions, which also become known as binary opposing jurisdictions. Through comity based approaches, jurisdictional relationships between ICTs are appropriately managed and coordinated. With conflicting jurisdictions now precluded and kept distinct, upholding the integrity of their judicial functions, the integrity and authority of international legal order are also restored. This is done without compromising the interpretation of the concept of overlapping jurisdictions and a less strict or non-formalistic application of the regulatory rules.

However, several factors have contributed to this situation of compromise and the non-formalistic application of the regulatory rules. Some of these shall all be examined in the course of this study. Meanwhile, as an introductory chapter, the following section shall make a statement of purpose and original contribution to scholarship. This is followed by conceptualising the key terms that shall guide this research, followed by a statement of purpose and original contribution of this study to research. It then looks at the evolution of fragmentation, overlapping jurisdictions and parallel proceedings before making a few remarks about the work of the International Law Commission(ILC) Study Group on fragmentation. It introduces the central problem of undermining jurisdictional distinctions and the threat to the integrity and authority of international law(IL). The chapter presents the problem of finding an interface between overlapping and conflicting jurisdictions. It also examines the theoretical situation in light of the above introduction, highlighting the involvement of binary oppositions, deconstruction, and structuralism in this study. The above problems lead to the breakdown of the research questions explored in the different chapters of this research. The chapter then introduces the research methodology undertaken by the study. The chapter conclusion introduces chapter two.

1.1 Statement of Purpose and Original Contribution to Scholarship

This study aims to innovate and present to the international legal community the first theoretical framework that underpins the relationships between ICTs, practically applied to resolve jurisdictional conflicts between overlapping or binary opposing jurisdictions. It will also help ICTs find an interface they have often struggled with between two exclusive regimes, leading to a stalemate or reluctance to make a precise determination in their findings. For example, in the *Vivendi v Argentina case,* the tribunal, without the competence to determine Argentina's human rights obligations, was reluctant to diagnose a conflict between human rights and trade or investment law and decided to state that Argentina could have complied with both obligations.[1] Without an interdependence framework, there was nothing to stop the matter from being adjudicated within the human rights regime despite the *Vivendi* tribunal trying to find an interface and stating that Argentina had to respect both obligations equally.[2] This study provides a more reliable framework or interface to address these types of situations. The decade long parallel proceedings between the exclusive and specialised regimes of trade and law of the sea in the *Swordfish cases* could have taken less time. It got prolonged because of the lack of a framework or interface between the WTO

[1] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 para 262.
[2] Ibid para 262.

jurisdiction and the ITLOS.[3] Eventually, there was an agreement to resolve the dispute by a Special Chamber under the UNCLOS.[4] Nevertheless, the framework for interdependence postulated in this study would have resolved the dispute within a significantly shorter time and at a lesser litigation cost if it was available during the conflict.

The interface or framework is not only meant to resolve extra regime conflicts like between trade and human rights regimes, but it also resolves intra-regime conflicts like between two human rights regimes. For example, the potential conflict between the ECHR and ICCPR within the human rights regime that ended in a stalemate between the Committee influences the non-formalistic interpretation of overlapping jurisdictions.[5] It does not suggest that all intra-regime disputes, particularly those with the same or similar *ratione materiae* like the *CME/Lauder cases,*[6] will be suitably managed by the framework. In this case, consolidation will be most appropriate.

Another original contribution is to the lexicon of internal law the terms 'binary opposing jurisdictions' as a synonym for overlapping, competing, or parallel jurisdictions to study overlapping and conflicting jurisdictions involving a theoretical approach. Also added is the term 'preclusive jurisdictions' as a synonym for distinct or distinctive jurisdictions, which depicts the distinct or independent nature of jurisdictions when engaging a theoretical approach when the regulatory rules fail to preclude and keep jurisdictions separate, which is achieved through deconstruction. So, theoretically, most structuralist IL discourse in the language of signifier and signified is not discussed by their binary oppositions. As such, their binaries which form the relationships between them, appear less distinct.

This study uses binary oppositions and deconstruction as a method of differentiation, which are subsets of structuralism to remove threats to the international legal order's credibility, integrity, and authority. Applying relationship structures practically between binary opposing jurisdictions without emphasising the distinctions between them would affect the integrity

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[3] *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, *Chile v European Community*, Procedural Order, ITLOS Case No 7, Order 2000/3, ICGJ 340 20 December 2000; *Chile – Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/1 G/L/367 26 April 2000.

[4] 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] 6 (1) ASIL <https://www.asil.org/insights/volume/6/issue/1/eu-and-chile-suspend-swordfish-case-proceedings-wto-and-international>accessed 20 December 2019.

[5] See Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals, (OUP, Oxford 2003) 189.

[6] *CME/Lauder cases: Ronald S. Lauder v. The Czech Republic*, Final Award of 3 Sept. 2001, reprinted in 14 World Trade and Arbitration Materials (2002) 35; *CME Czech Republic BV v. The Czech Republic*, Partial Award of 13 September 2001.

and authority of IL. So, to maintain the integrity and authority of IL, binary oppositions and deconstruction are given effect when the regulatory rules fail to achieve preclusion.

Finally, the study 'christens' the different inter-jurisdictional solutions applied in the different situations of competing jurisdictions like 'professional international judges'[7] who move across competing jurisdictions as experts under the umbrella of 'comity-based approaches'. For example, due to the same presiding arbitrator in the *Enron v Argentina*[8] and *Sempra v Argentina*[9] cases, there was some degree of consistency in the outcome and language in the proceedings.[10] Meanwhile, within the same dispute but under a different presiding arbitrator, the *LG & E v Argentina* reached a different result on assessing a state of necessity in Argentina.[11] A comity based approach would have allowed the same presiding arbitrator across all the cases against Argentina. Proposals like inter-jurisdictional exchange of resources, transferring different heads of claims between competing or binary opposing jurisdictions, delegation and re-categorisation under different heads of claims fall under the comity-based approaches.

1.2 Conceptualisation of Key Terms

This section introduces and conceptualises some of the key terms applied within the context of this study. The point is to guide readers to navigate some of the inherent complexities within the analysis. So, it acts as a glossary or quick reference list, which is easily accessible to assist with the contextual usage of terms where necessary. Some of the words are very narrowly defined, mostly where meaning may be self-explanatory, though with a slight twist. Meanwhile, others are explained in depth to contextualise and rationalise their usage fully. The words are fragmentation, overlapping jurisdictions, parallel proceedings, preclusion, binary oppositions, indeterminacy, deconstruction, structuralism, comity and interdependence.

1.2.1 Preclusion and the Regulatory Rules

Preclusion is simply the process of keeping jurisdictions distinct or separate from each other through termination, stay or suspension or decline of jurisdiction by applying jurisdictional

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[7] See Cesare P R Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' [2009] 41 (755) Journal of International Law and Politics.

[8] *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award May 22, 2007.

[9] *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept.28, 2007).

[10] See August Reinisch. 'The Issues Raised by Parallel Proceedings and Possible Solutions', in Michael Waibel, Asha Kaushal, et al. (eds), The Backlash against Investment Arbitration (Kluwer Law International 2010) 113 – 126.

[11] *LG & E Energy Corp., LG & E Capital Corp. and LG & E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), 46 ILM 40 (2007), para 257.

regulatory rules.[12] These rules are also known as preclusion doctrines though the concept is often attributed to *res judicata*.[13] However, all the other rules produce preclusive effects. As such, they are all known as preclusive doctrines. So, preclusion is said to occur when the applicable regulatory rules fulfil the triple identity criteria. Traditionally, jurisdictional regulatory rules – *lis pendens*, *res judicata*, and *electa una via* share a common characteristic of providing the basis for testing the requirements for precluding conflicts between overlapping and conflicting jurisdictions.[14] As such, the rules are sometimes defined in terms of the relationships they create between conflicting jurisdictions to give a preclusive effect.[15] For example, *lis pendens* is a situation of parallel proceedings between the 'same parties and same cause of action' between different courts or tribunals.[16] However, besides defining in terms of preclusion, ordinarily, *lis pendens* is a lawsuit pending elsewhere or a dispute currently under consideration by a tribunal in another jurisdiction.[17]

Meanwhile, *res judicata* applies to the preclusion of jurisdictional conflicts that have already been litigated in another jurisdiction and finalised.[18] It is used to invoke the identity criteria or standard to prohibit the subsequent proceeding if satisfied. Similarly, *electa una via*, precludes a party from starting multiple or parallel proceedings in different courts or tribunals which have competence over the same dispute.[19] Provided the identity criteria are met, parties are made to stick to the court or tribunal first engaged and so precluded from engaging another court or tribunal.

This study adds *lex specialis* and *lex posterior* to the list of preclusion doctrines because they assist in assessing the rules and produce similar preclusive effects in situations of conflicting jurisdictions. In straightforward terms, a specialised rule takes precedence over a general rule

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[12] See James Fawcett, 'Declining Jurisdiction in Private International Law, Report to the XIVth Congress of the International Academy of Comparative Law, Athens, 1994' (Oxford University Press, Oxford, 1995).

[13] Maximillian Pika and Camilla Gambarini, '*Res Judica*ta accessed via *Res Judicata* (jusmundi.com on 01 February 2022.

[14] See Yuval Shany, Regulating Jurisdictional Relations Between National and International Courts (2007) Online OUP available<DOI: 10.1093/acprof:oso/9780199211791.001.0001> accessed 20 May 2019.

[15] See Gerard Sanders, 'Rethinking Arbitral Preclusion' Law and Policy in International Business,[1992 -1993] Vol. 24 pp 101.

[16] Filip de Ly and Audley Sheppard, 'ILA Final Report on *Lis Pendens* and Arbitration', Arbitration International [2009]25 (1) 3–34 para. 1.2.

[17] Aaron X. Fellmeth and Maurice Horwitz, Guide to Latin in International Law (Oxford University Press 2009) 179.

[18] Filip de Ly and Audley Sheppard, 'ILA Interim Report on *Res Judicata* and Arbitration' *AI* [2009] 25 (1) 35 in [2014] AI <https://doi.org/10.1093/arbitration/25.1.35> accessed 20 May 2019.

[19] Fellmeth and Horwitz (n 17) 87.

in terms of the *lex specialis* rule.[20] Meanwhile, *lex posterior* primacy is given to the later in time rule,[21] which breaks any potential conflicts between two jurisdictions empowered by their *lex specialis* and *lex posterior* character. Like the traditional regulatory rules, these added rules are subject to the same triple identity standards. A comprehensive exploration of these rules is available in chapter four.

1.2.2 The Triple Identity Standard

There are three standard requirements to determine the similarities between overlapping and parallel proceedings for applying the regulatory rules to preclude. These are the same parties (*persona),* same object (*petitum)*, and the same cause of action (*causa petendi).*[22] The case of *Martins v. Spain*[23] illustrates the virtual identity test to support the argument that 'only the same parties involved in the first set of proceedings,' in a situation of multiple claims count.[24] This could be subsequent or parallel claims, which is the first of the two sub-categories of the same issue condition. Identity of cause or *causa petendi* is also fulfilled where the same rights and legal arguments are relied upon in different proceedings.[25] Then the second sub-category is the same object or *petitum*, which determines if the same relief is being sought. So, the same type of relief must be sought in the parallel or subsequent proceedings for the identity of the object or relief requirement to be met.[26] *Petitum* is often associated with the principle *ne bis in idem,* which translates as 'not twice about the same,' and prevents double relief or compensation through different jurisdictions for the same dispute. The *Southern Pacific Properties Limited v Egypt case*[27] was clearly relitigated on the basis of the award or relief. The triple identity test shall be fully analysed in chapter four alongside the regulatory rules.

1.2.3 Binary Oppositions, Deconstruction, Structuralism and Indeterminacy

The study takes the view that overlapping and conflicting jurisdictions in parallel proceedings are in binary opposing relationships. This view is derived from the various definitions of binary oppositions articulated by different structuralist scholars like Chris Baldick who

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[20] See *Lex Specialis* and *Lex Posterior* in International Law Commission Report on Fragmentation (2006) Finalised by Martti Koskenniemi [UN Doc A/CN.4/L.682, UN Doc A/61/10, 400] (Hereafter ILC Report) para 236, 243.
[21] Ibid.
[22] ILA Final Report on *Lis Pendens* and Arbitration 2006, ILA para 4.1.
[23] ECHR, *Cereceda Martin v Spain*, Case 16358/90, 12 October 1992, DR Vol. 73, 120 *et seq.*
[24] Shany (n 5) 24.
[25] August Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* As Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes,' [2004] 3: The Law and Practice of International Courts and Tribunals, Koninklijke Brill NV, Leiden, The Netherlands 37–77;
[26] Ibid.
[27] *Southern Pacific Properties (Middle East) Limited, Southern Pacific Properties Limited v The Arab Republic of Egypt*, Decision on Jurisdiction of 27 November, 1985, ICSID Case No. *ARB/84/3, hereinafter SPP v Egypt.*

describes binary oppositions as the contrast between two mutually exclusive terms such as 'on and off' and 'up and down'.[28] So, when two overlapping and mutually exclusive jurisdictions are in a jurisdictional conflict, they can be said to be binarily opposing. The relationship is not contradictory, but structurally complementary with each element or jurisdiction maintaining its jurisdictional distinction with the binary opposition. To maintain this distinction and make sure that the jurisdictions complement each other, deconstruction is employed to ensure that the jurisdictions are kept distinct. Both binary oppositions and deconstruction are important concepts of structuralism[29] - the phenomenon of understanding meaning through interrelationship structures.[30] Structuralism, which originates from Saussurean Structuralist was theory pioneered by Ferdinand de Saussure who defined binary oppositions as a means by which the units of language are defined reciprocally with another term.[31]

However, Jacques Derrida, influenced by Saussurean structuralism deconstructed binary oppositions. The point about deconstruction is to separate indeterminate or disorderly binary opposing relationships arising from the failure of jurisdictional regulatory rules to preclude and keep them distinct. Catherine Turner notes that in Jacques Derrida's *Positions*, the first of three tasks of deconstruction is to overturn 'any hierarchical, conflictual or subordinating structures' without favouring one arm of the binary oppositions over the other, exposing and keeping both distinct.[emphasis added].[32] And then there is continuous analysis in the second and third tasks. Even though there are no overt hierarchical relationships between overlapping jurisdictions, the fact that jurisdictions conflict and end up in parallel proceedings suggest rivalry and a struggle for hierarchical positions. Thus, deconstruction can be applied to covert hierarchical structures between overlapping and binary opposing jurisdictions. However, Derrida warns against applying deconstructions as a method because it involves endless analysis to prevent existing structures of dominance trying to reassert themselves.[33] This study does not agree because only the first task of deconstruction is necessary for this study. Once indeterminacies are formed from the failure of the formalistic application of the regulatory rules, deconstruction kicks in to differentiate into distinct binary opposing jurisdictions. There is no need for the indeterminate elements of deconstruction

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[28] See Chris Baldick, 'The Concise Oxford Dictionary of Literary Terms' 2004 <http://www.highbeam.com/doc/1056-binaryopposition.html> accessed 28 December 2018.
[29] Ibid
[30] Simon Blackburn, Oxford Dictionary of Philosophy (2nd edn OUP, Oxford 2005) 353
[31] See Sorcha Fogarty, "Binary Oppositions". *The Literary Encyclopedia*. First published 15 February 2005 [https://www.litencyc.com/php/stopics.php?rec=true&UID=122, accessed 07 July 2021.
[32] See Catherine Turner, 'Jacques Derrida: Deconstruction', Critical Legal Thinking, Law and Politics<https://criticallegalthinking.com/2016/05/27/jacques-derrida-deconstruction/> accessed on 18 May 2019.
[33] Ibid.

from the second stage.[34] So, instead of continuous analysis to maintain jurisdictional distinctions, comity takes over and there is no need for continuous or endless analysis to avoid the return of previous dominance structures.

Regarding differentiation, as a tool to deconstruct, even though it is not a stand-alone concept in this study, it is still important to understand its role in the deconstruction of uncertain binary opposing jurisdictions. Differentiation is not alien to fragmentation studies. The ILC Study Group applied differentiation to separate or illustrate the different types of special law with references to trade and environment law debates under the WTO.[35] With the help of the 1998 *Beef Hormones case,*[36] the Fragmentation Report analysed the difficulty in separating trade from environment law as the boundaries are not clear. Using the example of the maritime transport of oil which is linked to both trade and environment, as well as rules governing the law of the sea. The ILC then questioned which rules should reasonably apply from the perspective of oil transport as a commercial activity or as an environmentally dangerous activity?[37] The ILC concluded that the differentiation depends on what one chooses as the frame of legal interpretation.[38] However, what is really of the essence is the disentanglement into distinct binary opposing jurisdictions to avoid prolonged disputes involving two mutually exclusive self-contained jurisdictions.[39] Differentiation assists deconstruction to play a similar role in the present study when the regulatory rules fail to preclude, leading instead to uncertainty and indeterminacy.

Meanwhile, indeterminacy is the state of uncertainty, disorder or lack of clarity when jurisdictional rules fail to preclude and keep jurisdictions distinct from each other. Indeterminacy as a legal concept is quite slippery and less airtight to define than expected.[40] However, this study tailors the definition around the need to bring back determinacy and certainty lost when the regulatory rules fail to preclude conflicting jurisdictions. This is where deconstruction comes in to differentiate the binary opposing jurisdictions and keep them distinct, ensuring their integrity and authority are not compromised. Compromising jurisdictional integrity and authority undermine the integrity

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[34] Ibid.

[35] See ILC Report on Fragmentation (2006) Finalised by Martti Koskenniemi [UN Doc A/CN.4/L.682, UN Doc A/61/10, 400] para 489. (Hereafter ILC Report) para 55.

[36] *EC- Measures Concerning Meat and Meat Products (Hormones)* 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 123-125.

[37] ILC Report (n 35).

[38] Ibid.

[39] See *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, *Chile v European Community*, Procedural Order, ITLOS Case No 7, Order 2000/3, ICGJ 340 20th December 2000; *Chile – Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/1 G/L/367 26 April 2000.

[40] See Kevin R Reitz, The Traditional Indeterminate Sentencing Model in The Oxford Handbook of Sentencing Model (OUP, 2012) 276.

and authority of IL in general. Chapter three explores the theoretical basis of indeterminacy in more significant detail alongside international legal structures.

1.2.4 Comity and Interdependence

The methodology of this study has already highlighted comity as its third step. in the previous sections as the third methodological step. After the formalistic application of the regulatory rules, the preclusion failure gives rise to the deconstruction of the binary oppositions in step two. Thus, allowing the third step to engage different comity based approaches to analyse how distinct jurisdictions can work together to resolve jurisdiction conflicts.

This has been observed in several prominent cases like the *MOX Plant Cases*, in which Judge Treves mentioned *obiter dicta* comity as a means of regulating jurisdictional relationships.[41] In the *British Caribbean Bank Case,*[42] the respondent invoked comity with respect to *lis pendens* as parallel proceedings were pending, noting that a tribunal may exercise its discretion 'as a matter of comity to stay proceedings concerning timing and conduct.[43] Similarly in the *Southern Pacific Properties Ltd Case*,[44] the tribunal noted that there was no rule in IL preventing any tribunal from exercising its jurisdiction over a matter in which it had competence.[45] Thus, comity was the only reason to favour another jurisdiction.[46]

While these cases have used comity in conjunction with the regulatory rules to achieve a stay, termination or decline of jurisdiction, there is little interdependence. Staying, terminating, or declining proceedings sets the suspending, declining or terminating jurisdiction into dormant mode. However, the comity based approaches advocated in this study are slightly different because it entails interdependence in which both binary opposition jurisdictions are active. So, the different interdependent comity-based approaches include conflicting tribunals working together. This involves, amongst others, transferring judges and arbitrators to hear cases in different courts or tribunals and sharing different heads of claims between mutually exclusive jurisdictions to find an interface between them. It also involves inter-judicial dialogue and communication to exchange material during dispute resolution proceedings.

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[41] *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*, ITLOS Case No. 10, Separate opinion of Judge Treves

[42] PCA, *British Caribbean Bank Limited v. The Government of Belize* - Award, 19 December 2014, PCA Case No 2010-18 para. 187.

[43] Thomas Schultz and Niccolo Ridi, 'Comity and International Courts and Tribunals' [2017] 50 (3) CILJ <https://scholarship.law.cornell.edu/cilj/vol50/iss3/5> accessed 20 October 2018.

[44] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (the Pyramids Case) (Award on the Merits)* (1995) 3 ICSID Rep 45

[45] Ibid

[46] Ibid.

This form of cooperation and interdependent interactions between ICT jurisdictions is what real comity entails, allowing ICTs to work together.

1.2.5 Overlapping Jurisdictions, Parallel Proceedings and Fragmentation

The concept of overlapping jurisdictions refers to jurisdictions that can be exercised simultaneously by more than one court over the same subject-matter, with the litigant possessing the right to choose the court where the action gets filed.[47] This ordinary definition is acceptable for technical analysis as observed in the *EC – Biotech Products Case* wherein the panel noted ICTs could rely on legal and non-legal dictionaries to determine the ordinary meaning of terms.[48] An ordinary definition is best suited for this particular concept to confront the complexity that may arise between overlaps and conflict, and overlap and competition, which are often used interchangeably by scholars and practitioners. It is worthy to note that overlaps result in three possible outcomes - conflict, competition and cooperation. These outcomes can all be used to describe overlaps depending on the context of the conceptual analysis. For example, the ILC refers to conflict or overlap between two sets of rules, while stressing that normative conflicts are 'endemic to international law' due to the 'spontaneous, decentralised and non-hierarchical nature of law-making by custom and treaty'.[49]

Meanwhile, Shany interchangeably uses 'jurisdictional competition (or overlap)' in reference to a dispute that can be addressed by more than one available forum or procedure.[50] He also emphasises 'true competition' to extricate procedural overlap between competing courts and tribunals from other conflicts, such as conflicting norms and disagreement between parties.[51] Other scholars like Lim and Gao have also used the prefix 'true' to make the distinction between these two easily confused concepts.[52] Taking the queue, to diffuse the complexity and set aside any confusion, this study uses real jurisdictional conflicts or overlap where the distinction between procedural and normative conflicts are less obvious to identify.

Parallel proceedings between two competing jurisdictions would therefore take place simultaneously as the term 'parallel' entails, or consecutively between ICTs also involving

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[47] Overlapping Jurisdiction, 'Law and Legal Definition' [2020] <https://definitions.uslegal.com/o/overlapping-jurisdiction/> accessed 4 April 2018.
[48] *EC – Measures Affecting the Approval and Marketing of Biotech Products,* (*United States of America, Canada* & *Argentina v. European Communities*), Panel Report adopted on 21 November 2006, WTO, WT/DS291R, WT/DS292R, WT/DS293R, para 4.163.
[49] ILC Report (n 35) para. 486.
[50] Shany (n 5) 21.
[51] Ibid.
[52] C.L Lim and Henry Gao, 'The Politics of Competing Jurisdictional Claims in WTO and RTA Disputes: The Role of Private International Law Analogies' in Tomer Broude, Marc L. Busch and Amelia Porges, The Politics of International Economic Law (CUP, Cambridge 2011) 287.

domestic courts.[53] At times, it may involve more than one proceeding also referred to as multiple proceedings as seen in the *MOX Pant Case*[54] or *Argentina Crisis Cases*.[55] However, these are still referred to as by most scholars and practitioners as parallel proceedings.[56]

In terms of conflict, while the ILC claimed to have adopted a wide notion of conflict as situation where two rules or principles suggest different ways of dealing with a problem, this definition only applies to the subject-matter and the legal subject bound by the dispute rules.[57] While this definition does not directly involve ICTs, when they clash over which court has the competence to deal with the claim based on overlapping competences, then a jurisdictional conflict ensues.[58] However, where the conflicting jurisdictions each proceeds with a claim either simultaneously or consecutively between the same parties and seeking the same relief, then parallel proceedings.[59]

Regarding fragmentation, as mentioned above, it refers to the institutional, procedural and substantive diversification of IL into different specialised subfields of self-contained regimes.[60] International legal scholarship seems settled on the question of fragmentation as not posing any danger to the unity of IL. This has been influenced to a great extent by the ILC Study on the subject.[61] However, the ILC excluded institutional fragmentation despite overlaps, competition and real jurisdictional conflicts that were already occurring and threatening the credibility, reliability, integrity and authority of IL.[62] Note that the ILC Study had included institutional fragmentation in its syllabus, which involved the risk resulting from the conflict between overlapping and conflicting jurisdictions.[63] While the ILC Study excluded institutional fragmentation, overlapping and conflicting jurisdictions, which are all

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53 Hanno Wehland, 'The Regulation of Parallel Proceedings in Investor-State Disputes' [2016] 31 (3) ICSID Review 740 - 755.

54 The *MOX Plant Case, Ireland v United Kingdom,* Order No 3: Suspension of proceedings on jurisdiction and merits, and request for further provisional measures, Case No 2002-01, ICGJ 366 (PCA 2003), (2003) 126 ILR 310, (2003) 42 ILM.

55 *LG* & *E Energy , Capital and Int. v. Argentina* (n 47); *Enron v Argentine (n 44); Sempra v Argentina(n 45).*

56 See Reinisch (n 10)113 – 126.

57 ILC Report (n 35) para 21-25.

58 See Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' [2017] Vol. 28 No. EJIL 1

59 See Wehland (n 53).

60 Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' [2017] 15 (3) International Journal of Constitutional Law 671

61 See ILC Report (n 35).

62 See Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law'[2004] 25 MICH. J. INT'L L. 849.

63 Gerhard Hafner, 'The Risk Ensuing from Fragmentation of International Law', in Report of the International Law Commission on its 52nd session, U.N. Gaor, 55th Sess., Suppl. 10, at 321-39, U.N. Doc. No. ILC(LII)/WG/LT/INFORMAL/2 (2000).

by-products of institutional fragmentation, have been problematic since the PCIJ days.[64] Thus, the need for preclusion arises from the associated problems due to the non-formalistic interpretation of overlapping jurisdictions to the credibility, integrity and authority of IL. These issues are discussed in greater detail in the next chapter.

1.3 The Evolution of Fragmentation and the Practical and Theoretical Problems

It is worth recalling that the 'new world order', attributed to the influences of global political activities, which evolved after the Cold War brought about a new international legal order with the fragmentation of IL into specialised subfields.[65] This new legal order was influenced by many factors, culminating in an increase in states interests and acceptance of international judicial settlement of disputes.[66] Thus, a shift from the anti-interventionist positions and reluctance exuded by states at the start of the United Nations(UN) system.[67]

With globalisation and the emergence of new regimes and the lack of an 'international political society' as regimes operate in 'boxes – European law, trade law, human rights law, investment law, environmental law,[68] trial of war crimes all operate in separate regimes or boxes. Without a global legislature nor a world government that could manage or regulate international activities,[69] divergence and challenges to manage legal activities remains. Hence, IL's new subjects and actors, the multiplication of treaties, and the need to settle disputes, amongst other factors in the post-war globalisation era, contributed to the proliferation of 'independent judicial bodies'.[70] As such, IL expanded into relatively new areas such as environmental protection, alongside more specialised areas like world trade, investment and human rights law.[71] Many states are now fully attracted to third-party dispute settlement

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[64] See *PCIJ The Mavrommatis Palestine Concessions (Greece v Great Britain)* 1924 PCIJ (Ser. A) No.2; *Certain German Interests in Polish Upper Silesia (Merits)*, PCIJ Series A. No 7, Judgment, 25 May 1926; *Factory at Chorzow (Germany v Poland)* (Jurisdiction) 1927 PCIJ (ser A) No 9 (Claim for Indemnity) (Jurisdiction)

[65] See Anne Peters, 'Fragmentation and Constitutionalisation' in Anne Orford and Florian Hoffmann, The Oxford Handbook of the Theory of International Law, (OUP 2016) Available online on DOI: 10.1093/law/9780198701958.003.0049. Accessed 19 August 2021.

[66] See Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdictions-Problems and Possible Solutions' [2001] 5 Max Planck UNYB 68; Herman Mosler, 'Chapter XIV 'The International Court of Justice,' in B. Simma (ed.) Charter of the United Nations, A Commentary [1994] 973.

[67] Ibid.

[68] Though the environment protection regime at present is without a specialised court or tribunal, there is an appetite for it as the proliferation of ICTs continues alongside public interest.

[69] Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' 1 (2007) Eur. J. Legal Stud., available online at:
< http://www.ejls.eu/1/3UK.htm > (last accessed 10 June 2018)

[70] Liliana Popa, Patterns of Treaty Interpretation as Anti-Fragmentation Tools (Springer, Cham 2018) 129. 15.

[71] See Christopher Greenwood, 'Unity and Diversity in International Law' in Mads Andenas and Eirik Bjorge (eds), A Farewell to Fragmentation: Reassertion and Convergence in International Law (CUP 2015).

procedures involving state to state disputes and states against private parties. The International Centre for the Settlement of Investment Disputes(ICSID) and the investor-state dispute settlement (ISDS) mechanisms.[72] Thus, increasing the number of investment disputes and ad hoc arbitrations under different bilateral investment treaties (BITs).

Meanwhile, in the trade regime, regional trading arrangements have also developed dispute settlement mechanisms with looser jurisdictional structures like NAFTA Article 2005,[73] in relation to GATT/WTO. On its part, the WTO has developed a much tighter or exclusive jurisdiction under Article 23 of the DSU[74] in relation to other trading arrangements or jurisdictions and potential intra-jurisdictional and intra-regime conflicts. In the human rights, humanitarian or international crimes regime, many ICTs developed under the UN system, including ad hod tribunals as specialised bodies that contributed to the proliferation of ICTs. The law of the sea and environment regime has also developed different specialised mechanisms with much looser structures, prioritising other jurisdictions.[75] Thus, there is potential for jurisdictional interactions and relationships between jurisdictions and regimes despite most jurisdictions' self-contained and specialised or exclusive nature.

Over time, more specialised and exclusive dispute settlement mechanisms have evolved as the fragmentation and proliferation of ICTs continue.[76] This leads to the competences of different jurisdictional bodies overlapping over a single dispute. Either the subject matter is justiciable in two or more forums because the parties are the same, or the relief sort is identical. Thus, leading to situations of parallel, multiple or subsequent proceedings.[77] This study refers to these situations as parallel proceedings.[78] However, before delving into these problems, a few remarks about the contribution of the ILC will suffice.

1.3.1 Contribution of the International Law Commission (ILC) Fragmentation Study

The ILC Study Group on Fragmentation excluded the risk of undermining the reliability, credibility, integrity and authority of IL from its syllabus.[79] Meanwhile, earlier studies had

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

[73] North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994. Hereafter referred to as NAFTA.

[74] Article 23 [Exclusive Jurisdiction clause] of the Dispute Settlement (DSU), officially referred to as Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1869 UNTS 401 art 3.2 (entered into force 1 January 1995).

[75] See Article 287 of UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at <https://www.refworld.org/docid/3dd8fd1b4.html> accessed 22 January 2018.

[76] See Peters (n 60).

[77] Wehland (n 53) 740 - 755.

[78] Ibid.

[79] See ILC Report (n 35).

taken into account these risks before the Commission decided to exclude institutional fragmentation, focusing instead on substantive fragmentation and concluding that fragmentation posed no 'serious danger' to the international legal order.[80]

However, this study argues that having excluded institutional fragmentation, which gives rise to jurisdictional competition and parallel proceedings, the ILC's conclusion was, therefore, premature.[81] Even though the Study Group syllabus excluded institutional fragmentation, the ILC Report suggests it addressed the entire fragmentation question. Against this backdrop, the ILC suggested the Vienna Convention on the Law of Treaties (VCLT) as a toolbox that 'provides the normative basis [...]for dealing with fragmentation'. This does not suggest limited use of the VCLT to substantive fragmentation because, even though paragraph 492 expressly mentions substantive fragmentation,[82] paragraph 493 refers to fragmentation in general.[83] Therefore, the VCLT toolbox is limited because it does not contain regulatory rules which resolve jurisdictional conflicts.[84] As a result, there is reliance on general principles adopted under the gateway of Article 38 (1)(c) of the Statute of the Court to resolve jurisdictional disputes.[85] These rules are often applied in a non-formalistic manner to manage jurisdictional relationships, which undermines the integrity and authority of IL. Before delving into the problems, a few remarks about the evolution of the fragmentation of IL into specialised subfields of self-contained, exclusive jurisdictions or regimes will suffice. Thus, a brief introduction to the evolution of fragmentation and the proliferation of ICTs leading to overlapping jurisdictions and parallel proceedings will open the discussions in this chapter.

1.3.2 The Central Problem - Undermining Jurisdictional Distinctions, Threat to the Integrity and Authority of IL

With the different problems accompanying the fragmentation of IL into self-contained and exclusive jurisdictions of ICTs, managing their relationships has been challenging. Alongside the lack of a centralised mechanism to coordinate jurisdictional conflicts, compromises are made when defining overlapping jurisdictions and when applying jurisdictional regulatory rules. Compromises that lead to the non-formalistic application of the rules has led to false preclusion, maintaining a fragile distinction between two binary opposing and competing jurisdictions. The non-formalistic application undermines the integrity and authority of not only the judicial functions of the individual judicial bodies, it also involves the entire

[80] Ibid para 222.
[81] Ibid.
[82] Ibid para 492.
[83] Ibid para 493.
[84] Ibid paras 492 - 493.
[85] Statute of the International Court of Justice (1945) (concluded 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355, 38.

international legal order. Jurisdictional distinctions, particularly within overlapping and conflicting jurisdictions, are crucial to maintaining IL's integrity and authority. The significance of maintaining the integrity and authority of IL and maintaining jurisdictional distinctions has been highlighted in several circumstances, involving international legal actors. including overlaps between judicial and non-judicial functions and political organs of the UN. For example, in the *Chagos Archipelago Advisory opinion*, Judge Donoghue, in his dissenting opinion, highlighted the importance of maintaining the distinction between the Statute of the Court and the UN Charter.[86]

Thus, separating or precluding the Court's judicial function to preserve IL's integrity and authority. Considering the seriousness of the risk between the judicial organ of the UN and the political organs undermining the integrity of IL, the problem could be worse between two overlapping jurisdictions if not appropriately managed. This requires maintaining the distinction between the political organs and the judicial organ that could damage the integrity and authority of IL. So, it means the problem would be worse between two judicial organs that are self-contained and exclusive jurisdictions that need to be kept distinct. This being the central problem, the manifestations of all other issues culminate around this main problem and shall be explored in light of this main problem as the central node of this ramification.

1.3.3 Finding an Interface between Overlapping and Conflicting Jurisdictions

The ILC remark that there were enough tools in the toolbox of international legal practitioners to deal with fragmentation did not exclude institutional fragmentation.[87] However, the issue of institutional fragmentation remains unsettled. First and foremost, the ILC Study did not cover institutional fragmentation. With the continuous fragmentation and proliferation, most ILC did not have the normative authority to deal with conflicts originating from different international legal regimes.[88] As such, overlapping and conflicting jurisdictions could not find answers in the recommendations of the ILC, particularly the Vienna Convention on the Law of Treaties(VCLT) the ILC stated provided the normative toolbox for fragmentation.[89] Therefore, the tools recommended by the ILC did not include jurisdictional regulatory rules with the exclusion of institutional fragmentation. Therefore, it

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[86] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 25 February 2019 via <https://www.icj-cij.org/en/case/169/advisory-opinions> accessed 20 June 2020.

[87] ILC Report (n 35) para 222.

[88] See Jeffrey Dunoff, 'A New Approach to Regime Interaction,' in Regime Interaction in International Law: Facing Fragmentation', ed. Margaret Young [2012] Cambridge University Press, 136–74.

[89] ILC Report (n 35) para 222.

was premature to conclude that practitioners have enough tools in their toolbox to deal with complexities when the ILC Study was not comprehensive.[90]

Therefore, resolving overlapping and conflicting jurisdictions remain unsettled. There is a need to find an interface between two overlapping and conflicting jurisdictions involved in parallel proceedings. As such, reliance is on jurisdictional regulatory rules borrowed from the world's different legal systems through the gateway of Article 38(1)(c) of the Statute of the Court. The nature and legal status of each rule get examined in chapter four. Meanwhile, how the rules are applied to resolve jurisdictional conflicts and find an interface between two parallel jurisdictions remains unsettled because the rules and identity test criteria are difficult to fulfil. As such, the regulatory rules applied in a non-formalistic manner tend to undermine the integrity and authority of internal law. Thus, an interface between the overlapping and conflicting jurisdiction gets missing.

The exclusive and self-contained nature of ICTs dealing with dual regime disputes like trade and human rights often struggle to find an interface because no ICTs wants to sacrifice their interest for a common cause.[91] For example, in the *Swordfish cases*, the WTO-DSB, on the one hand, could not find the interface between trade for which it had the competence and the law of the sea and environment for which the ITLOS and other UNCLOS tribunals were responsible.[92] On the other hand, the ITLOS could not find an interface between the law of the sea and trade issues for which the WTO-DSB was responsible.[93] The failure to find an interface ended in parallel proceedings. However, the regulatory rules could not preclude nor provide an interface for both jurisdictions to work together. That notwithstanding, applying the regulatory rules are valuable sources for a theoretical and practical solution to the problem of overlapping jurisdictions, even without a framework or interface to manage their relationships.

However, this study argues that the regulatory rules can produce the interface or framework between two competing parallel jurisdictions if the rules are triggered formalistically to stop proceedings. Note that overlapping and conflicting jurisdictions are dormant binary opposing jurisdictions until activated with the regulatory rules. When the rules fail, the jurisdictions interact disorderly, producing an uncertain and indeterminate theoretical situation. However, there is no formally recognised theory to underpin this situation besides the understanding

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[90] ILC Report (n 35) para 222.
[91] Ibid.
[92] *Chile – Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/1 G/L/367 26 April 2000.
[93] *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, *Chile v European Community*, Procedural Order, ITLOS Case No 7, Order 2000/3, ICGJ 340 20 December 2000.

that parallel proceedings are dormant binary oppositions. Scholars like Ronald Dworkin consider this the default position when rules or positivist principles fail while applying the law in its stricter versions.[94] Note that this study is not advertising a positivist approach to resolving jurisdictional conflicts.

Nevertheless, Dworkin acknowledges there is no correct answer to controversial legal questions. Such questions or solutions do not subscribe to legal positivism or theories that make positive legal arguments indeterminate.[95] Notwithstanding, this study is mainly concerned with the relationships that evolve and assist in explaining the relations between overlapping and competing jurisdictions, related in theory and practice.

1.3.4 The Theoretical Problem

The theoretical problem arises from the formalistic application of the regulatory rules to preclude parallel proceedings. When the rules are applied formalistically, preclusion fails as the triple identity requirements are not satisfied. Instead, the dormant binary opposing jurisdictions are activated to react disorderly, creating indeterminacy. The current practice is the non-formalistic application of the rules in a compromised manner for fear that the rules may become redundant, which tends to undermine the integrity and authority of IL. Since there are no other tools to deal with the overlapping and parallel proceedings, there is desperation to apply the rules. The choice is to either apply the rules formalistically and fail to preclude the jurisdictions, which create the need for theory, or apply the rules non-formalistically and achieve a false preclusion. The study identifies with the latter, which inserts an additional theoretical step into the research methodology. So, when the rules are triggered formalistically, preclusion fails, and the dormant binary oppositions start interacting in a disorderly manner. Thus, creating uncertainty and indeterminacy. As such, deconstruction then steps in to separate or differentiate the binary opposing jurisdictions and keep them distinct from each other. In this way, they tend to relate and cooperate better. While deconstruction differentiates the jurisdictions, comity-based approaches are finally applied to resolve the jurisdictional conflict.

Regarding binary oppositions and deconstruction, part of the problem is that international legal scholars rarely use structuralism to tackle jurisdictional conflicts. Structuralism has featured in international legal scholarship though not often expressly stated as observed in works like Martti Koskenniemi's, *From Apology to Utopia…*[96]and David Kennedy's *International*

[94] Ronald Dworkin, 'Indeterminacy and Law' in Positivism Today, (Dartmouth Publishing 1996) 7.
[95] Ibid.
[96] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers Publishing Company Helsinki 1989).

Legal Structures[97]. However, none of these has been applied directly to understand the nature of the relationships between two exclusive self-contained jurisdictions when their competences clash over a particular dispute or subject-matter. Some commentators had even questioned whether Koskenniemi betrayed his scholarship when he Chaired the Study Group on Fragmentation, which excluded from its syllabus institutional fragmentation[98] Understandably, the ILC does not codify theoretical structures. However, some traces of Koskenniemi's ideological positions feature in the ILC Fragmentation Report, like his methodology of 'moving between opposite ends of a spectrum',[99] which projects the idea of binary oppositions. Meanwhile, others run contrary, such as IL being a single legal system and not a random collection of ideas.[100] In contrast, Koskenniemi argues that a formal unity of IL is impossible.[101] Nevertheless, there is still room to analyse and understand how international legal scholars and practitioners deal with relationship structures emanating from binary opposing jurisdictions. The following research questions shall guide the discussion to explore these issues, all associated with overlapping jurisdictions.

1.4 Breakdown and Analysis of the Main Research Questions

The questions are targeted at overlapping jurisdictions and parallel proceedings because they create and manifest inter-jurisdictional conflicts requiring regulatory rules to resolve, leading to the main problem of undermining the integrity and authority of IL. So, how does managing overlapping jurisdiction undermine the integrity and authority of IL? This question runs against the backdrop of the non-formalistic interpretation of overlapping jurisdictions and non-formalistic application of the jurisdictional regulatory rules, which leads to false preclusion and undermines the integrity and authority of IL. To answer these questions, chapter two begins by clarifying the definitional difficulty, asking - what is overlapping jurisdictions? And how is it interpreted to affect the application of jurisdictional regulatory rules when managing parallel proceedings?

It is also important to understand how parallel proceedings manifest for the application of the regulatory rules. Hence, the question - what situations constitute parallel proceedings? How are jurisdictional distinctions maintained when regulatory rules fail to preclude conflicts, creating disordered and uncertain relationships instead? What happens to the binarily opposing parallel jurisdictions when the rules fail to achieve preclusion? Where the

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[97] See David Kennedy, International Legal Structures (Nomos Verlagsgesellschaft, Baden-Baden 1987).
[98] See Sean D. Murphy, 'Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project' [2013] Temple International & Comparative Law Journal.
[99] Ibid.
[100] ILC Report (n 35) para 33.
[101] Murphy (n 98).

rules fail, how are the jurisdictional conflicts resolved finally? These questions constitute the foundational questions, which give rise to further questions explored in chapters three, four and six.

So, chapter three explores structuralism as the basis of binary oppositions and deconstruction, representing the events when the regulatory rules fail to preclude after the formalistic application of the regulatory rules. Having argued that overlapping jurisdictions are, by default, binary opposing, the nature of binary oppositions is explored in this chapter by answering the question – what are binary opposing jurisdictions, and how do they manifest? When the rules are triggered, giving rise to indeterminate or disordered interactions, the need to understand the nature of indeterminacy also arises. Hence, what is indeterminacy, and how does it influence the nature of inter-jurisdictional relationships? Deconstructing the disordered and indeterminate relationships differentiates the binary opposing jurisdictions and keep them distinct. Hence, what is deconstruction, and how does it separate binary opposing jurisdictions to bring back order resulting from the formalistic application of the regulatory rules? Understanding how binary oppositions, deconstruction, and indeterminacy work begins with understanding structuralism. Hence, the chapter begins by asking what structuralism is and how does it influence inter-jurisdictional relationships? Even structuralism has been in international legal scholarship for over three decades, international legal scholars and practitioners are still show very little interest, which raises the question - why are international legal scholars and practitioners so disinterested in applying structuralism and its subfields of binary oppositions and deconstruction to explore jurisdictional relationships?

Meanwhile, chapter four which forms the foundation of the case study analysis in chapter five, explores the regulatory rules that are formalistically tested against a strict triple identity test criteria. It explores the nature and character of the regulatory rules and comity before entering into the case study analysis in chapter five. Hence, what is *lis pendens* and its legal status, and how does it preclude overlapping and parallel proceedings? The same pattern is repeated for *res judicata, electa una via, lex special* and *lex posterior*. When these rules fail to preclude and prevent jurisdictional conflicts, after completing the theoretical step to keep the jurisdictions distinct, comity-based approaches are finally engaged to resolve the jurisdictional conflict. Therefore, the questions – What is comity, and how does it completely resolve jurisdictional conflicts and create interdependence? What is the nature and legal status of comity? Is comity or political tool in the hands of judges? What are the margins of discretion that judges and arbitrators apply when engaging comity based approaches? What are the comity based approaches applied to build interdependent relationships, and how do

they apply? These questions get explored in chapter six before wrapping up the entire study in chapter seven. These comity-based approaches and questions get examined in chapter six after the case study analysis.

1.5 The Research Methodology

Having introduced the background to the research and main research problems, the next phase involves exploring the problem to find a theoretical framework for interdependence or an interface between distinct binary opposing or conflicting jurisdictions. This runs in three methodological steps. The first is the formalistic interpretation of overlapping jurisdictions and a strict application of the regulatory rules, which fail to preclude jurisdictional conflicts, leading instead to disorderly, uncertain or indeterminate jurisdictional interactions. This failure affect the integrity and authority of IL. The second is the differentiation through deconstruction of the indeterminate, disordered or uncertain binary opposing jurisdictions that result from the failure to preclude and keep jurisdictions distinct from each other. At this stage, the integrity and authority of IL starts yielding back, pending the complete engagement of comity in step three. So, at the third methodological step, comity is engaged through different approaches to resolve the jurisdictional conflict that the jurisdictional rules fail to preclude following the formalistic application of the rules.

With this approach, cases of real jurisdictional overlaps are identified and analysed in the case studies using the regulatory rules - *lis pendens, res judicata, electa una via, lex specialis and lex posterior*. There is also the elimination of cases that are likely to be misconstrued as overlapping jurisdictions when rationalising case choices for the case studies. During the case study analysis, the rules are put through a strict process of applying the triple identity standard, which leaves the rules unable to prevent or preclude jurisdictional conflicts. Once the rules are triggered formalistically against the cases, dormant binary opposing jurisdictions interact and connect disorderly as preclusion fails. The disorder results from the fact that the rules that were meant to prevent conflict and maintain order have failed cannot do so, even though having set the binary opposing jurisdictions into action. As such, disorder, uncertainty or indeterminacy ensues, giving rise to the need for deconstruction, which brings back order by differentiating and maintaining each case within its distinct jurisdiction.

Note that the formalistic approach does not advocate a positivist or rule-based approach to resolving jurisdictional conflicts. Instead, it makes a case for strictly applying the rules where the only available remedy is managing jurisdictional conflicts. The formalistic approach allows a better understanding of the rules and concepts in question, and it avoids distorted interpretations or compromises that undermine the integrity and authority of IL. It involves

the strict adherence to the original meaning of overlapping jurisdictions and a strict application of the regulatory rules without compromise to suit a given situation.

The concept of formalistic interpretation is adopted and developed from Robert Kolb's analysis of how to interpret the expression' same interest' in separately initiated cases in light of Article 31 (5) of the Statute of the Court,[102] and consolidation under Rule 47 of the Rules of the Court.[103] Kolb argues that the formalistic interpretation separates two closely related cases where it is impossible to determine if they have the same interest and where the Court has not consolidated. According to Kolb, there is 'same interest' where there is consolidation. The Statute and Rules of the Court are strictly for consolidation and not separation. A strict interpretation of 'same interest' ends with separation where there are difficulties in determining whether two cases have the same interest. Thus, the formalistic approach produces binary oppositions between consolidation and separation.

The alternative to formalistic interpretation, according to Kolb, is in light of material implication,[104] which would entail the non-formalistic understanding and tantamount to compromises and discretion. Compromise is a source of risk to the integrity and authority of IL, which is why this study engages a formalistic approach to undermine any threats. Recently, the formalistic application approach has been applied to the strict identity test by Lucas Vanhonnaeker in the book *Shareholders' Claims for Reflective Loss in International Investment Law*.[105] So, by strictly applying the jurisdictional regulatory rules against the identity test, the opposite of preclusion will lead to inter-jurisdictional relationships managed through the three methodological steps analysed above.

1.6 The Layout of the Study

While this chapter introduces the overall research, chapter two explores the problem in greater detail to illustrate the difficulties in applying regulatory rules in resolving overlapping and conflicting jurisdictions. It examines the formalistic application of the regulatory rules against the backdrop of the non-formalistic application that undermines the integrity and authority of IL. The chapter also examines the system problem and threats to the unity of international legal order before engaging current theoretical and practical approaches to resolving jurisdictional conflicts. Some of these approaches constitute the comity-based approaches developed later in chapter six.

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[102] Robert Kolb, The International Court of Justice, (Hart Publishing, Oxford 2013) 128.
[103] International Court of Justice, Rules of the Court (1978) Adopted on 14 April 1978 and entered into Force on 1 July 1978.
[104] Kolb (n 102).
[105] Lukas Vanhonnaeker, 'International Res Judicata as a Solution to Parallel Proceedings Arising from Shareholders' Claims for Reflective Loss in International Investment Law' in Shareholders' Claims for Reflective Loss in International Investment Law (Cambridge University Press 2020) 265.

Chapter three examines the theoretical basis of binary oppositions, deconstructions and structuralism, which fill the gap once the regulatory rules fail to preclude, giving rise instead to a situation of indeterminacy. The chapter also explores why international legal scholars do not engage fully in inter-jurisdictional relationship studies through the lens of present studies on international legal structures.

Meanwhile, chapter four examines the different regulatory rules, their nature, and legal status to justify their suitability as the tools to analyse the case studies. That triggers indeterminacy when applied strictly to resolve jurisdictional conflicts. The chapter conceptualises comity as an alternative to the regulatory rules to manage jurisdictional relationships when the rules fail to preclude. The chapter also examines whether comity is a principle of IL that can be fully applied without posing any threats to its integrity and authority and without political influence. Whether comity is merely a political principle providing courts with considerable discretion in settling jurisdictional relationships? Answering these questions make comity more reassuring and reliable as the right tool to deal with overlapping jurisdictions without undermining the integrity and authority of IL.

Chapter five conducts the case study analysis of selected cases with which the regulatory rules are tested. Meanwhile, chapter six conducts a review of the performance of the regulatory rules and the problems emanated from the case study analysis and showcasing the structure of interdependence. The chapter then applies different comity based approaches to illustrate the structure of interdependence that connects different jurisdictions which otherwise are binary opposing and subject to preclusion.

Chapter seven concludes the entire study, highlighting that there is no need to compromise the integrity and authority of international by engaging a non-formalistic approach. The study recommends the formalistic and other theoretical approaches to address jurisdictional relationship issues and comity to resolve jurisdictional conflicts. Recommendations are also made for the ILC to reconsider its abandoned work on institutions fragmentation which it excluded from its fragmentation studies. Alternatively, the ILC should reconsider the role of comity, excluded from its recent study in 2016 on the identification of customary IL. This will empower the role of comity role to resolve complex jurisdictional conflicts.

1.7 Chapter Conclusion

This chapter has presented an overview of the entire research and the research problems that need further exploration in the next chapters. With this, it is much clearer why the ILC concluded that fragmentation posed no serious danger to the international legal system because it did not engage institutional fragmentation. Institutional fragmentation bears an

indirect threat from overlapping and conflicting jurisdictions through the non-formalistic application of the regulatory rules, which tends to undermine the integrity and authority of IL. The next chapter explores overlapping jurisdictions focusing on parallel proceedings as the most common form of competition and the related problems to which the regulatory rules are applied. This highlights theoretical opportunities from which binary opposing jurisdictions are deconstructed, leading to forming the theoretical framework for interdependence. The theoretical analysis is conducted in chapter three, while comity is engaged in chapter six. Engaging comity will help find the interface between binary opposing and conflicting jurisdictions.

Chapter 2

Overlapping Jurisdictions and Related Issues

2.1 Introduction

This chapter conducts a situation analysis of overlapping jurisdictions, parallel proceedings and related jurisdictional conflicts. The chapter pays particular attention to parallel proceedings as the basis for the non-formalistic application of the regulatory rules. The first associated problem is the lack of specifically designed regulatory rules to manage jurisdictional conflicts between ICTs. Hence the adoption to avoid a *non-liquet* situation as per Article 38(1)(c) of the Statute of the Court. The second problem is the desperate attempt to utilise the rules, resulting in a less strict or non-formalistic application and interpretation of the concept of overlapping jurisdiction. The study argues that maintaining the integrity and authority of IL requires a strict application of the regulatory rules to real cases of overlapping jurisdictions. When this happens, the regulatory rules will fail to preclude, creating a situation of uncertainty and indeterminacy. With uncertainty and indeterminacy, the jurisdictional boundaries become unclear and need to be made distinct. Thus, requiring deconstruction to maintain clear the jurisdictions clear so that they can interact independently.

However, to resolve the jurisdictional conflict pending preclusion due to the failure of the regulatory rules, comity based approaches are engaged. These approaches, amongst others, are inter-judicial communication, moving judges around different ICTs as experts and transferring subject-matters or different heads of claims across jurisdictions. This constitutes the theoretical framework, ensuring that the binary opposing jurisdictions are kept distinct. So, what is the concept of overlapping jurisdictions, and how has its interpretation affected the application of jurisdictional regulatory rules to manage parallel proceedings? Furthermore, what situations constitute overlapping jurisdictions, and how are related problems resolved? How are jurisdictional distinctions maintained when regulatory rules fail to preclude conflicts creating disorderly reactions instead? What happens to the binarily opposing parallel jurisdictions when the rules fail to achieve preclusion? Where the rules fail, how are the jurisdictional conflicts resolved finally? Exploring these questions will accomplish the objectives of this chapter.

2.2 Overlapping Jurisdictions, Definitional Difficulty and Related Issues

As conceptualised in the previous chapter, where a particular dispute falls within the competence of two separate judicial bodies – a court or tribunal, overlapping jurisdictions is

said to occur.[106] This formalistic interpretation is directed towards the institutions – courts or tribunals that can both hear a dispute simultaneously. For overlapping jurisdictions, the dispute must be capable of generating competition that can lead to the testing of the identity criteria. It must fall within the general IL rules that govern overlapping or competing jurisdictions.[107] It must generate competition, and rather than the norm, the dispute must fall within the competence of at least two jurisdictional mechanisms.

However, some scholars tend to focus more on the substantive interpretation of concepts or norms discussed by multiple jurisdictions, disregarding the possibility of parallel proceedings. Shany argues that such interpretation would not address concurrent jurisdictions' realities where many international obligations are multi-sourced.[108] With the prohibition of the use of force, which falls under custom and treaty law,[109] if the interpretation of norms or concepts were treated as overlapping jurisdictions, the system would be awash with parallel proceedings.

While it is not always easy to stick with the formalistic meaning, when situations beg for flexibility, then compromises can be made. However, some scholars interpret the concept very broadly to the extent that its meaning is completely distorted. Some overly expansive or flexible interpretation mischaracterises the concept, making it challenging to tackle overlapping jurisdictions as a problem. The following sections examine one typical mischaracterisation of overlapping jurisdictions and situations of parallel proceedings capable of diminishing jurisdictional distinctions.

2.2.1 Mischaracterisation of Overlapping Jurisdictions

Some scholars mischaracterise the concept of overlapping jurisdiction based on an expansive interpretation of the concept. This includes interpreting normative conflicts where no parties struggle over forum selection, with a substantial time-lapse between two unrelated cases. Even cases where the general IL rules to manage competition are unsatisfied. For example, Nikolaos Lavranos description of overlapping jurisdictions includes the *Tadic*[110] and *Nicaragua*[111] conflicting interpretations of the state responsibility under Article 8 of the Article

[106] Overlapping Jurisdictions (n 47).
[107] Shany (n 5).
[108] Ibid.
[109] Ibid.
[110] ICTY Appeals Chamber, Tadic judgment, 15 July 1999, <http://www.un.org/icty/ tadic/appeal/judgment/tad-aj990715e.pdf> accessed 5 November 2018.
[111] See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America), Judgment - Merits, ICJ Report, 27 June 1986, pp 64-65 paras 115.

on State Responsibility of persons.[112] Such a mischaracterisation are not in line with the general rules of IL governing multiple proceedings.[113] It was noted in the *MOX Plant case* that identical language in an instrument does not constitute normative overlap 'having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice…'[114] Similarly, the identical issue between two jurisdictions, considered at different times did not meet the criteria for overlap or competition. With the time-lapse, like the thirteen years between the *Nicaragua* and *Tadic* Judgments, there is no chance for the cases to meet the general IL rules governing parallel proceedings.

In this light, Lavranos' identification of the *Tadic case* by the International Criminal Tribunal for the Former Yugoslavia(ICTY)*[115]* and the ICJ *Nicaragua case[116]* as overlapping jurisdictions was a mischaracterisation. At best, these are overlapping conflicts of conceptual interpretation as the two cases, and jurisdictions were unrelated by any identity criteria – the identity of the party, cause of action and relief,[117]which form the basis for preclusion. Mere overlapping interpretations of concepts, rules, doctrines or principles do not fit the criteria for overlapping or competing jurisdictions to be determined by the standard triple identity criteria.[118]

So, there was no basis for considering preclusion between the ICJ and the ICTY. Even if there were to be a reconsideration of the *Nicaragua case* based on some new material facts, such facts would never have come from the Tadic case. Any reconsideration was already out of time three years before the *Tadic case*. The *Nicaragua case* was thirteen years before the *Tadic judgment. There was* no chance of a waiver of Article 61(5) of the Statute of the Court based on some new material evidence.[119] The ICJ was never going to reopen the *Nicaragua case* based on the *Tadic* Judgment that had nothing to do with the merits of the *Nicaragua case*. Regarding the possibility of forum selection, there was no basis for forum shopping or forum selection issues between the ICJ and ICTY. Interpreting state responsibility for controlling a foreign militia was similar to the disparity in interpreting sovereign immunity and *jus cogens* in

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[112] See Nikolaos Lavranos description of overlapping jurisdictions in Nikolaos Lavranos, 'Regulating Competing Jurisdictions among International Courts and Tribunals' [2008] 68 MPIPIL 575-621.
[113] Shany (n 5).
[114] *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*, ITLOS Case No. 10, Order - Provisional measures, 3 December 2001, para. 51
[115] *Tadic* Judgment (n 110).
[116] See Nicaragua (n 111).
[117] Reinisch (n 25).
[118] Ibid.
[119] *The Nicaragua case* was concluded in 1986, while *Tadic* was concluded in 1999. So, Under 61(5) of the Statute of the Court, the ten years' time-lapse to re-examine the case upon new material evidence had already been exceeded.

the *Al Adsani case. However, the Al Adsani case* never attracted forum shopping or forum selection concerns.

In the 2001 *Al Adsani case* before the ECtHR, a peremptory norm of IL on the prohibition of torture and rules of state immunity that potentially create inter-jurisdictional conflict does not fit the overlapping or competing jurisdiction criteria.[120] The ECtHR based its findings on several international instruments like the Statutes of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) alongside the ICC, which defined the crime of torture. Thus, demonstrating that torture prohibition had crystallised as a *jus cogens* rule.[121] However, most judges in the case agreed that the rules of sovereign immunity overrode the *jus cogens* rule on the prohibition of torture.[122] According to Lavranos' interpretation of overlapping jurisdictions with the *Tadic* and *Nicaragua* example, the *Al Adsani case* was an overlap between the ECtHR on the one hand and the ICTR, the ICTY and the ICC on the other. That is based on their conflicting interpretations of torture and sovereign immunity. In this light, the *Nicaragua* ICJ and *Tadic ICTY* cases as overlapping jurisdiction are not sustainable. The ICJ preferred effective control by a state to be liable for the acts of persons under Article 8 of the Articles on State Responsibility.[123] Meanwhile, the ICTY preferred the overall control test concerning the acts of Bosnian Serb militia in the conflict in the former Yugoslavia.[124]

With no basis of forum selection, even though Court had the competence to hear the *Tadic case*, it was not possible as the ICTY was created as a specialised criminal jurisdiction within the UN system.[125] The worse that could occur between the two jurisdictions was a conflict of interpretation or jurisprudential overlap, which is the divergence of the jurisprudence of the two courts.[126] So, despite Lavranos' mischaracterisation, chances of real jurisdictional overlap and conflict between the ICJ and ICTY were rare.[127] However, in the much later *Genocide Convention cases*,[128] the Court dismissed the overall control test, reiterating the 'effective control test' in the *Nicaragua judgment*.[129] These were cases of conflicting

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120 *Case of Al Adsani v. the United Kingdom*, Application no. 35763/97, ECHR, Judgment of 21 November 2001.
121 Liliana Popa, Patterns of Treaty Interpretation as Anti-Fragmentation Tools (Springer, Cham 2018) 129.
122 Ibid.
123 *Nicaragua case* (n 111).
124 *Tadic* (n 110).
125 Statute of the International Criminal Tribunal for the former Yugoslavia, Security Council Resolution 827(1993), 25 May 1993.
126 See Tullio Treves, 'Conflict between the International Tribunal for the Law of the Sea and the International Court of Justice' (1998 -1999) 31 N.Y.U. J. Int'l L. & Pol. 809.
127 The ad hoc ICTY eventually rounded up in 2017.
128 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Serbia and Montenegro)* ICJ judgment of 26 February 2007.
129 *Nicaragua case* (n 111).

interpretation even though Lavranos considers them as cases of competing or overlapping jurisdiction.[130]

Even though the cases of mischaracterisation of overlapping jurisdictions are few and their impact may be less significant, the factors that influence non-formal interpretation are common and include, amongst others, the lack of self-contained jurisdictional regulatory rules. In the absence of regulatory rules, the international legal order tends to rely on traditional jurisdictional regulatory rules adopted from different legal systems of the world as per Article 38(1)(c) of the Statute of the ICJ.[131] However, this has not been effectively applied as compromises have been made where the triple identity requirements are not satisfied.[132] Before stepping into understanding how the regulatory rules function, it is worth examining certain situations of parallel proceedings as some of the manifestations of overlapping jurisdictions.

2.2.2 Situations of Parallel Proceedings that Diminish Jurisdictional Distinctions

The problems associated with parallel proceedings result from the different situations that give rise to parallel proceedings. Like overlapping jurisdictions, the main problems associated with this is the threat to the unity (harmony and cohesion) within the international legal order,[133] and the lack of a centralised coordinating structure or a hierarchical order to coordinate inter-jurisdictional relationships.[134] The problematic situations are the divergent interpretation of the legal issues divergent interpretation of similar or identical facts, which give rise to contradictory or controversial outcomes from the same dispute.[135] The other situation arises where the same dispute is litigated simultaneously by the main party and its subsidiary. It should be noted that the overall consequence of the different situations and related problems is that jurisdictional distinctions get diminished. The following sections shall analyse some of these situations.

2.2.2.1 Situations of Divergence in Legal Issues

Different tribunals producing divergent interpretations on the same or similar legal issue may lead to different conclusions even without competition between two courts or tribunals. For example, in the *SGS cases*, two ICSID tribunals arrived at different conclusions over the meaning of 'umbrella clauses' that has given rise to two sets of precedents over the notion of

130 Nikolaos Lavranos, 'Regulating Competing Jurisdictions among International Courts and Tribunals' [2008] 68 MPIPIL 575-621.
131 Statute of the Court (n 85).
132 ILA Final Report (n 16).
133 Anne Peters (n 60).
134 ILC Report (n 35) para 487.
135 See Reinisch (n 10).

umbrella clauses. On the one hand, the *SGS v Pakistan* tribunal held that through the umbrella clause, a breach of contract was not automatically elevated to the level of a breach of IL.[136] Meanwhile, the *SGS v Philippines* tribunal held that the umbrella clause made the host state's failure to observe a binding agreement breach the BIT.[137] This has also led to contradictory awards on the same dispute, inconsistent decisions and the widespread fear that the entire international judiciary order could fragment.[138] Problems of this nature affect the system's predictability and sustainability, one of the cornerstones of self-contained and permanent regimes like the WTO.[139] As a result, questions of continuity, sustainability and the broader question of whether this constitutes a system arise. This is because of the highly decentralised nature of the dispute settlement activities, including numerous ad hoc proceedings as observed in the ICSID investment arbitration process.

Different subject-matters may feature in a single dispute and can be litigated simultaneously. Particularly when it involves two specialised or self-contained regimes, parallel proceedings will be inevitable. For example, the *Swordfish dispute* between Chile and the EU following conservation measures taken by Chile under the UNCLOS affected the harvesting of swordfish stock and consequently trade under WTO[140] As such, both the ITLOS and WTO-DSB had jurisdiction over the dispute and received separate filings by both parties, which resulted in parallel proceedings. Without any centralised coordinating or hierarchical structure within the international judiciary that oversees disputes between ICTs,[141] both jurisdictions were stuck trying to resolve the matter for over a decade. Eventually, both parties discontinued the dispute by agreement.[142] While the jurisdictions appear to be very distinct in their function and the subject matters, there was difficulty separating the legal issues to maintain these jurisdictional distinctions. Some scholars and commentators have described this situation as sufficiently distinct and not so sufficiently distinct.[143] However, despite the divergences, one assuring factor is that the number of disputes is low. That is with divergent, contradictory, unpredictable outcomes leading to instability and lack of

136 *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13
137 *Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6).
138 See Gerhard Hafner (n 2).
139 See Article 3.2 of the WTO Dispute Settlement Understanding.
140 *Swordfish* (n 39).
141 *Swordfish (n 39).*
142 Boisson de Chazournes (n 58)
143 Ibid

continuity or inconsistent outcomes is relatively low.[144] These situations appear to be the inevitable consequence of the fragmentation and the proliferation of ICT.[145]

Parallel proceedings based on divergent legal issues, which are difficult to separate, indirectly affect jurisdictional distinctions if the proceedings cannot be precluded. Disputes and proceedings emerging from similar or identical facts would cause more direct problems to jurisdictional distinctions. For example, disputes arising from states' measures that affect investment protections with potentially many claimants in arbitration proceedings against a state fit this category. In the *CME/Lauder v Czech Republic cases,*[146] if the Czech Republic did not oppose consolidation, the parallel UNCITRAL tribunals would not have retained jurisdiction. However, in the *CME* and *Lauder* dispute, the two-party distinctions were artificially created by the same party and subsidiary by lifting the corporate veil.[147] Otherwise, the same claimant would have faced the defendant in parallel disputes with similar or identical facts and legal issues.[148] Most scholars agree that the requirements are difficult to apply strictly, with the fear of rendering the regulatory rules 'obsolete'.[149] However, the extent to which the *CME/Lauder* departed from the identity criteria attracted much interest amongst scholars and practitioners, which suggests that the rules should be applied more strictly to avoid situations that damage the system's credibility, integrity, and authority. Even though the BITs and potential tribunals were different, the facts and circumstances, legal issues and defendants were the same under the US-Czech Republic BIT. The same was with the Netherlands-Czech Republic BIT.[150] Besides lifting the corporate veil, other tactics have included applying an economic reality approach to determine the party identity that tribunals have willingly accepted.[151] For example, the International Chamber of Commerce and ICSID follow an 'economic reality approach' to disregard corporate distinctions between different principles and subsidiaries as observed in the *Dow Chemical Case v France.*[152]

Amidst all this, the system gets exposed to questions about its credibility, predictability, integrity and authority, and above all, whether the international legal system is indeed a

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144 Reinisch (n 10).
145 August Reinisch, International Courts and Tribunals, Multiple Jurisdiction, in Max Planck Encyclopedia of Public International Law (Reiger Wolfrum ed., 2006), assessed via www.mpepil.com/ on 10 June 2020.
146 UNCITRAL, *CME Czech Republic BV v The Czech Republic*, Final Award, 14 March 2003, para 412.
147 Boisson de Chazournes (n 58).
148 *CME/Lauder* (n 6).
149 See Shany (n 5) 189
150 Reinisch (n 10).
151 Reinisch (n 25).
152 Ibid; *Dow Chemical France et al. v. Isover Saint Gobain,* ICC Case No. 4131 (1982), 9 Yearbook of Commercial Arbitration (1984) 131, at 136

system.[153] The question of whether the system is indeed one is explored further ahead in the discussion. The effect of undermining party identity is tantamount to undermining jurisdictional distinctions needed for the effective functioning of a highly specialised or self-contained system. Nevertheless, the number of cases with these issues is relatively minimal because the formalistic approach is only very rarely applied, which might sound reassuring.[154]

However, applying the formalistic approach while determining the legal basis for applying *lis pendens* or *res judicata* to preclude or consolidate the claims, both the CME and Lauder tribunals agreed that the claimants were different entities.[155] Thus, raising the fundamental question of either engaging the formalistic approach, ending up with contradictory awards at the expense of its integrity and authority or the non-formalistic process with compromises. The formalistic approach retains the system's integrity and authority and does not resolve the conflict at first sight. Instead, requiring an additional methodological step, which is an opportunity for the theoretical framework to emerge and help differentiate and keep the competing jurisdictions distinct. Through this, different comity driven approaches are applied to resolve the jurisdictional conflict. The formalistic approach is explored further ahead in greater detail.

2.2.2.3 A General Situation Analysis of Overlapping Jurisdictions - Parallel Proceedings

The lack of a centralised or hierarchical structure that could better manage the relationships between competing or parallel jurisdictions is one of the main weaknesses of fragmentation and the proliferation of ICTs, leading to competition and parallel proceedings.[156] Meanwhile, a variety of approaches involving inter-jurisdictional communication discussed in this chapter also facilitate the management of the situation. These situations are avoidable if jurisdictions are aware of potential competing and parallel proceedings likely to arise when engaging specialised jurisdictions.

Recently, proactive steps have been taken in treaties like the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU. While CETA is an exception to the WTO general rules, parallel proceedings between arbitration under the agreement and a WTO-DSB is possible.[157] However, Article 29.3.2, which deals with forum selection and *electa una via* situation, has dealt with the situation proactively. Thus, saving time and preventing

[153] Boisson de (n 58).
[154] Reinisch (n 10).
[155] Ibid.
[156] See Anne Peters, 'Fragmentation and Constitutionalisation' in Anne Orford and Florian Hoffmann, The Oxford Handbook of the Theory of International Law, (OUP 2016) Available online on DOI: 10.1093/law/9780198701958.003.0049. Accessed 19 August 2021
[157] EU-Canada Comprehensive Economic and Trade Agreement (CETA), 30 October 2016.

any potential parallel proceedings between the WTO and any possible CETA ad hoc tribunal.[158] A similar situation is observed with the EU-Vietnam FTA,[159] a good illustration of how modern FTAs are designed to tackle competition and parallel proceedings before they arise.[160] Another proactive effort is observed in the EU-South Korea FTA, which places emphasis on *electa una via* to prevent conflicting jurisprudence and parallel proceedings as stated in Article 14.19(1).[161] Boisson de Charzournes describes this as a new type of fork-in-the-road provision intended to constraint parties to limit the type of proceedings.[162] Thus, preventing situations where parties could modify the claim and parties as in the *CME/Lauder* situation.[163]

Meanwhile, the drafting of NAFTA did anticipate a situation of this nature with its Article 2005.6 even though it has not been exercised as noted by the Appellate Body in the *Mexico – Soft Drinks case.*[164] However, despite not being exercised the 'later in time,' WTO-DSU under Article 23 exclusivity meant that it was not compatible with NAFTA Article 2005.6, eventually leading up to the *Mexico-Soft Drinks* forum selection problems between NAFTA and the WTO.*[165]* So one of the leading causes of this situation is the exclusive nature of the self-contained regimes and its jurisprudential impact.

The exclusive nature of specialised jurisdictions was disregarded in earlier PCJ/ICJ cases.[166] However, there has been a dynamic shift towards recognising specialised jurisdictions, deferring and giving them specific heads or aspects of a claim to handle. As seen in the *Ambatielos case,*[167] the ICJ recognised an arbitration agreement between the parties. Under the agreement, the parties were obliged to resolve any questions of fact or law falling within 'the merits' and 'final validity' of the claim.[168] This case went beyond the general reluctance showed by the PCIJ towards other dispute settlement mechanisms observed in its earlier cases.[169]

Even though there has been a dynamic shift, as much as it has reduced the resistance of certain ICTs, it has also influenced exclusive jurisdiction to resist communicating or

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158 Ibid.
159 Art. 24(1)–(2) of the EU–Vietnam Free Trade Agreement (EU–Vietnam FTA), 2 December 2015.
160 Boisson de Chazournes (n 58).
161 European Union-South Korea Free Trade Agreement (EU-South Korea FTA), 1 July 2011.
162 Boisson de Charzournes (n 58).
163 *CME/Lauder* (n 6).
164 *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Appellate Body, 6 March 2006, WT/DS308/AB/R, para. 54.
165 *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel, WT/DS308/R (7 October 2005).
166 *See Mavrommatis; The Chorzow Factory case and Certain German Case (n 64).*
167 *Ambatielos (Greece v UK)*, Judgment, 15 June 1939 ICJ Reports (1953) 10
168 Ibid.
169 *See Mavrommatis; The Chorzow Factory case and Certain German Case (n 64).*

interacting with other jurisdictions. However, with cases involving sharply divergent subject-matters like the *Swordfish Cases,* parallel proceedings will ensue unless parties agree on an alternative mechanism, resulting in time waste and financial cost.[170] bout time waste, the *Swordfish case* lasted a decade before an ITLOS Special Chamber was agreed to resolve the matter, before the eventual discontinuance.[171]

Still, on the situation of lack of a centralised coordinating mechanism, some judicial bodies may not be aware of the similarity in facts and issues or the identity of the litigants and how to assess them, which is one of the causes of forum shopping.[172] Competing jurisdictions should apply the same identity criteria regulatory rules apply for preclusion. But if they are unaware of the parallel proceeding, it is impossible to apply the requirements, let alone apply them strictly. So, there is no guarantee that ICTs may assess parallel proceedings without some form of direct communication or a structure in place to facilitate such communication.

This problem is exacerbated by the non-formalistic application of rules borrowed from legal systems of the world as per Article 38(1)(c) of the ICJ Statute.[173] Thus, not only the unity and cohesion of the international system suffers, the integrity and authority of the international system also suffers. As a response, international legal scholars and practitioners have attempted different practical and theoretical approaches to address these problems..

It is worthy to note that despite the specialised or self-contained nature of ICTs, they do not determine the exact heads of claims or disputes that fall within their jurisdictions.[174] Thus, two or more jurisdictions with competence over the same dispute or subject-matter have become a standard feature associated with the fragmentation and proliferation of IL. This phenomenon is directly illustrated in cases like *Mexico – Soft Drinks* between a NAFTA Panel and WTO-DSB.[175] The same dispute might involve different heads for which the parties disagree on a single forum, resulting in parallel proceedings. This was the situation in the *Swordfish case* involving the WTO-DSB versus the UNCLOS-ITLOS.[176] The WTO was faced with the law of the sea and environmental heads of claim, which were not within its competence.[177] Meanwhile, the ITLOS was faced with trade issues that were not within its

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170 *Swordfish* (n 39).
171 Ibid ITLOS Case on Conservation Special Agreement para 14.
172 August Reinisch (n 25).
173 Article 38 (1)(c) Statute of the ICJ (n 85).
174 See *The MOX Plant Case* (n 54).
175 *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel, WT/DS308/R (7 October 2005), 4.185 – 4.187
175 Lim and Gao (n 52) 295.
176 *Swordfish* Dispute (n 39).
177 *Chile – Measures Affecting* (n 92).

competence.[178] Thus, creating situations where compromises are made at the expense of the system's credibility, reliability, integrity, and authority. Meanwhile, as already observed in the *CME/Lauder cases*, parties may use different identities to initiate the same claims in various fora.[179] So, it can be quite challenging to prevent a single dispute from having other heads or subsidiaries as they operate within socially interactive spaces where activities are not jurisdictionally confined. Specialised self-contained exclusive mechanisms like the human rights and trade regimes often overlap because jurisdictions operate in a social space and not in isolation, communicating within a social and legal context.[180] The ILC illustrated this during its study on fragmentation, using different regimes such as the trade and environment regimes, which are governed by other principles.[181] So, regardless of specialised jurisdictions or self-contained regimes, there is a high tendency to always overlap due to the different heads of claim because ICTs do not exist or operate in an institutional vacuum.[182]

For the many cases that have illustrated the phenomenon of overlapping jurisdictions and parallel proceedings, from the very early PCIJ/ICJ cases to the most recent ones, applying the regulatory rules have always faced difficulties. The proliferation of specialised regimes makes it more challenging to preclude jurisdictional conflicts. Thus, maintaining jurisdictional distinctions through differentiating to safeguard the integrity and authority of the system remains problematic even though the ILC does not believe these are serious problems.[183] However, these rules are not self-contained within the international legal system. Jurisdictional regulatory rules are adopted from different legal systems of the world through Article 38(1)(c)of the Statute of the Court.[184] Before delving into how the rules are applied, the following section examines the circumstances arising from the lack.

2.3 Situation Analysis - Lack of International Jurisdictional Regulatory Mechanisms

In domestic legal systems, a constitution and a hierarchical structure are responsible for maintaining order and stability within the system.[185] That is not the case in the international system due to the fragmented self-contained, and specialised nature of ICTs. Each of these can deliver valid judgments in its capacity as a dispute settlement body capable of

[178] *Case Concerning the Conservation of Swordfish Stocks* (n 66).
[179] *CME/Lauder cases* (n 6).
[180] Niklas Luhmann, Law as a Social System (OUP 2004); Boisson de Chazournes (n 58).
[181] See ILC Report (n 35).
[182] Bernard Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals' The Oxford Handbook of the Law of the Sea, (OUP 2015) available on <https://www-oxfordhandbookscom.manchester.idm.oclc.org/view/10.1093/law/9780198715481.001.0001/law-97> accessed on 20 July 2021.
[183] ILC Report (n 35).
[184] Article 38(1)(c) Statute of the ICJ (n 85).
[185] See Joel P Trachtman, *The Future of International Law: Global Government* (CUP Cambridge 2013) 251-2

triggering *res judicata* or any of the relevant regulatory rules.[186] However, the international legal order does not have these rules to manage jurisdictional relationships or coordinate overlaps and conflicts between ICT jurisdictions.[187] So, regulatory rules are adopted from different legal systems of the world under Article 38(1)(c) of the Statute of the Court.[188] Even though rules of interpretation under the VCLT help maintain harmony throughout the system through systemic integration, most of it is limited to jurisprudential overlaps. It does not wholly resolve jurisdictional conflicts.[189]

So, managing jurisdictional conflict, except for some proactive steps being taken recently, as seen in some BITs,[190] has always been with regulatory rules. Hence, the proverbial 'traditional regulatory rules'. However, applying the rules has been a significant problem because the criteria of application are not always fully implemented to resolve conflicts due to the fragmented nature of conflict heads.[191] Often compromises are made to ensure that the rules are utilised as practitioners try as much as possible to avoid tensions between ICTs and to avoid forum shopping, which is one of the major causes of parallel proceedings.[192] In addition to the different proactive steps, such as those seen during the signing of BITs, different methods applied in recent years to manage and keep the number of conflicts down have been successful.[193] To scholars like Anne Peters, success in managing conflicts means the problem of overlapping jurisdiction is overstated.[194] An issue does not cease to be an issue when it solvable. It remains an issue because there is no universal remedy to an issue. Successfully solving a problem does not mean the problem never existed. However, as this study has revealed, the real problem is not the common threat of fragmenting the system but its integrity and authority from the compromised application of the rules. Post ILC Study Group scholarly pieces have been greatly influenced by the Report, which suggests that there

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186 See Katia Yannaca-Small, 'Parallel Proceedings' by Peter Muchlinski, Federico Ortino and Christopher Schreuer (eds) [2012], The Oxford Handbook of International Investment Law via <http://oxfordhandbooks.com> accessed 3 June 2020.
187 Tullio Treves, 'Conflict between the International Tribunal for the Law of the Sea and the International Court of Justice' (1998 -1999) 31 N.Y.U. J. Int'l L. & Pol. 809.
188 Article 38 (1)(c) Statute of the ICJ.
189 See Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' [2005] 54 (2) Int'l and Comp. Law Quarterly 279 – 319.
190 See CETA (n 157); EU-South Korea BIT (n 161); EU-Vietnam (n 159).
191 See *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*, ITLOS Case No. 10, Order - Provisional Measures, 3 December 2001
192 Peters (n 60).
193 Richard Kreindler, 'Parallel Proceedings: A Practitioner's Perspective' in Michael Waibel (ed.), The Backlash against Investment Arbitration: Perceptions and Reality (2010) 127
194 Ibid.

are enough tools in the practitioner's toolbox and only depends on the lawyer's imagination and implementation.[195]

However, the effect of the non-formalistic application of the regulatory rules, beginning with the lack of IL ready-made rules, adoption and implementation with compromises, have not caught the full attention of many scholars and practitioners. Meanwhile, others have explored different approaches to resolving the problem alongside the regulatory rules. These include inter-judicial dialogue,[196] or inter-jurisdictional communication and other integrative methods like systemic integration[197] derived from Article 31(3)(c) of the VCLT.[198] Different forms of delegation of cases between ICTs, judges and arbitrators. These are comity based approaches, which are studied further ahead in chapter six. However, the few remarks in this chapter are an *avant-goût* of the more comprehensive analysis in the main section.

Without a unified judiciary and an express agreement on dispute settlement, it is not clear what mechanisms can be triggered before external forums when conflicts occur over protecting the same obligations, where they overlap between two international instruments.[199] Particularly when none of the instruments or jurisdictions qualifies as a special agreement, with none able to take precedence over the other, in terms of the later in time rule conflicts of this nature can be quite challenging to resolve. However, examining the *lex specialis* and *lex posterior* rules also tested party identity and subject-matter criteria.[200] The same standards are tested when applying *lis pendens*, *res judicata* and *electa una via*, commonly known as traditional regulatory rules.[201] These rules are 'hard-edge' preclusion doctrines, as some commentators have described *res judicata* because it is designed to separate or preclude conflicting jurisdictions.[202] However, as stated earlier, neither of these rules are IL rules developed to resolve overlapping and conflicting jurisdictions. They are adopted from international legal systems of the world as per Article 38(1)(c) of the Statute of the Court.[203]

So, even though there is no established hierarchical relationship within sources, the absence of an agreement or convention and custom rules under Articles 38(1)(a) and 38(1)(b) has to be first established, respectively. As such, general principles under Article 38(1)(c) are applied

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[195] ILC Report (35) para 222
[196] Anne-Marie Slaughter, 'A Global Community of Courts' [2003] 44 (1) Harvard Int'l LJ 191.
[197] McLachlan, (n 189).
[198] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, here after VCLT.
[199] See Shany (n 5) 188.
[200] ILC Report (n 35) para 229.
[201] See Shany (n 5) 22.
[202] See Stavros Brekoulakis, 'The Effect of an Arbitral Award and Third Parties in International Arbitration: *Res Judicata* Revisited' [2005] 16 Am. Rev. Int. Arb. 177, 193.
[203] Statute of the ICJ (n 85).

to avoid a *non-liquet* situation.[204] With the absence of both agreements and customary IL rules, reliance is on general principles of law common to legal systems of the world under Article 38(1)(c) of the Court's Statute.[205] As such, where treaty provisions or norms of general IL and the constitutive instruments of ICTs tend to fall short, a *non-liquet* situation arises.[206] Thus, general principles fill such gaps as intended by the drafters of the PCIJ/ICJ Statute under Article 38(1)(c).[207]

2.3.1 Jurisdictional Regulatory Rules Under Article 38(1)(c) and Application Criteria

According to the drafting history of the PCIJ/ICJ, the Statute provides for the use of 'general principles of law recognised by civilised nations'.[208] However, 'modern international lawyers' and publicists tend to exclude the element of 'civilised nations,' which is now outdated (used in 1920), preferring its shortened form - 'general principles instead'.[209] The point about this is to understand the extent of the definitional shift that influences non-formalistic interpretations of norms, principles or rules and their application. So, assessing earlier judgments of the Court, like the *Chorzow factory case*, Judge Anzilotti's dissenting opinion referred to *res judicata* as a 'general principle of law recognised by civilised nations'.[210] This can be confusing with 'general principles of international law,' which the ICJ often uses when mentioning general principles.[211]

For example, a careful examination of the *Nicaragua judgment*, a mention of 'principle' in relation to the prohibition against the use of force does not refer to 'general principles of law' under Article 38(1)(c) of the Statute of the Court.[212] It is about its customary and general IL character of the prohibition against force. This begs for clarification to determine whether the regulatory rules are general principles of IL as custom, under Article 38(1(b), or as general principles of law as envisaged by the drafters of the Statute of the Court as per 38(1)(c). In the article, *The Use and Limits of Res Judicata and Lis Pendens by August Reinisch* he

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[204] See H C Gutteridge, 'The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice' in Transactions of the Grotius Society for the Year 1952 [1952] 38 CUP on behalf of the BIICL <https://www.jstor.org/stable/743162> accessed 10 October 2020.
[205] Statute of the ICJ (n 85).
[206] Shany (n 5) 229.
[207] Statute of the Court (n 85).
[208] Ibid.
[209] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment - Merits, 27 June 1986, para 187.
[210] Interpretation of Judgments Nos. 7 and 8 *(Factory at Chorzów)*, PCIJ Series A. No 13, Dissenting Opinion by M. Anzilotti, page. 23
[211] See *Nicaragua* Judgment (n 111).
[212] Ibid.

identifies renowned scholars who argue that *res judicata* is customary international law.[213] Therefore, traditional regulatory rules as general principles also have a customary character. So, it is also important to understand each regulatory rule's international customary law nature when assessing its legal status. It helps to show how narrow or wide the scope of interpretation a rule is when faced with overlapping and parallel proceedings. Therefore, determining the customary status of each regulatory rule is important, though not necessarily in all circumstances. Empirical evidence suggests a widely consistent practice of applying the rules as preclusion doctrines and general principles to avoid gaps adopted from domestic jurisdictions.[214] Since its earlier cases, there has been a consistent international practice of debating and reluctance of applying the regulatory rules, as seen in the *Chorzow factory case.*[215] However, the ICJ is gradually showing deference towards other jurisdictions.

In terms of the domestic law character of the traditional regulatory rules, the International Law Association (ILA) 2006 *Conference on Lis Pendens and Arbitration* relied on James Fawcett's description of *lis pendens,* which was based on domestic analysis.[216] Fawcett's analysis was based on different domestic systems in a 1994 Report to the *International Academy of Comparative Law[…]*[217] He describes *lis pendens* as 'a situation in which parallel proceedings, involving the same parties and the same cause of action are continuing in two different states at the same time'.[218] According to Fawcett, there are four ways a court could deal with a *lis pendens* situation. That is, to 'decline jurisdiction, or suspend (stay) its own proceedings; seek to restrain the foreign proceedings; allow both sets of proceedings to continue, and rules of *res judicata* used to prevent two judgments being given'.[219] And finally, in addition to preventing two judgments, the court could either adopt a mechanism to encourage the parties to opt for trial in just one jurisdiction.[220] Fawcett's analysis shows that regulatory rules linked and described based on their domestic character covered under Article 38(1)(c), which provide their legal status as general principles. However, the ILA also noted that the rationale

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213 August Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* As Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes,' [2004] 3: The Law and Practice of International Courts and Tribunals, Koninklijke Brill NV, Leiden, The Netherlands 37–77; See B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953), 336; Sir H. Lauterpacht, The Development of International Law by International Courts (1958), 19, 325–326; H. Mosler, "General Principles of Law", in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. II (1997), 511, 522.

214 See H C Gutteridge (n 204).

215 See *Factory at Chorzow (Germany v Poland)* (Jurisdiction) 1927 PCIJ (ser A) No 9.

216 James Fawcett (ed.), "Declining Jurisdiction in Private International Law", Report to the XIVth Congress of the International Academy of Comparative Law, Athens, 1994 (Oxford University Press, Oxford, 1995) 27.

217 Filip de Ly and Audley Sheppard, 'ILA Final Report on *Lis Pendens* and Arbitration', Arbitration International [2009]25 (1) 3–34).

218 Ibid para 1.2.

219 Ibid para 1.3.

220 Ibid.

for taking the above steps was to avoid conflicting judgments, prevent costly parallel litigation, and protect the parties from oppressive litigation.[221] These reasons are not different from those underpinning *res judicata'* and, by extension, *electa una via* and *lis pendens.*

The ILA report also highlighted the triple identity criteria based on a comparative study of domestic systems and other international instruments.[222] These are the same parties (*persona*), the same cause of action(*causa petendi*), which is further split into the grounds and relief object (*petitum*) of the claim.[223] These are all interpreted differently to achieve a specific interpretive objective to facilitate the application of the rules. The rules and identity criteria are examined in greater detail in chapter four to understand how each rule is applied to achieve preclusion. In the meantime, how does compromising the rules and interpretation of overlapping jurisdiction looks?

2.3.2 Compromising Regulatory Rules and Interpretation of Overlapping Jurisdictions

Adopting regulatory rules from different legal systems to fill the void is understandably a good enough reason why scholars and practitioners would do anything to protect the rules and ensure utilising them. They take a broad, non-formalistic approach towards interpreting the concept of overlapping jurisdictions. As earlier stated, this is to safeguard the rules due to the fear of rendering them irrelevant or obsolete if left underutilised.[224] In light of this, Shany analysed the Council of Europe's Expert Report to the Council of Europe Ministers Committee of experts in the late sixties. The Committee examined problems arising from the European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR). The experts paid particular attention to the overlap between rights and obligations protected under two international instruments before different forums. Concerning the ICCPR and the ECHR, there was a stalemate as experts could not agree on whether two proceedings involving similar rights derived from different legal instruments competed against each other.

However, Shany observed that some experts believed that 'an overly narrow and technical definition of jurisdictional competition, would have rendered most conventional and customary jurisdiction-regulating rules obsolete'.[225] This appears to shed light on the practice of compromise. Albeit the example is within the same human rights regime, there is a clear jurisdictional distinction between the ICCPR and ECHR in light of overlapping and

[221] Ibid para 1.4.
[222] See ILA Report (n 118).
[223] Ibid para 1.3.
[224] See Shany (n 5) 188.
[225] Ibid.

competing jurisdictions on the one hand and the regulatory rules on the other. On the contrary, relying on a less narrow and non-technical definition undermines the credibility, integrity, and authority of the ICTs and IL in general. As such, international legal scholars and practitioners face a binary and challenging choice for which only one is applicable.

The two possibilities are to either apply the regulatory rules non-formalistically and preclude conflict, or formalistically and fail to preclude with the rules and create a disorder situation between binary opposing jurisdictions. This study advocates the strict, narrow or formalistic interpretation of the concept of overlapping jurisdictions and a strict application of the regulatory rules. This approach leads to the failure of the rules to preclude jurisdictional conflict. However, without preclusion, disorder ensues due to the regulatory rules failure to resolve the jurisdictional conflict. As observed earlier, overlapping jurisdictions in competition are dormant binary opposing jurisdictions that become reactive when the rules are triggered. When the rules fail to preclude the outcome of their formalistic or strict application, then disorder ensues between the binary opposing jurisdictions requiring separation to keep them distinct.

So, how does the formalistic approach maintain the integrity and authority of IL without the rules achieving preclusion and keeping the binary opposing and conflicting jurisdictions distinct? Answering this question involves three stages—first, the formalistic application of the regulatory rules, which leads to the failure to preclude. Then, the second stage is to apply deconstruction to differentiate the binary opposing jurisdictions into distinct jurisdictions. And the third stage involves comity based approaches to resolving the jurisdictional conflicts completely. The below section examines the formalistic application of the rules and their consequences.

2.4 The Formalistic Application of Jurisdictional Regulatory Rules and Distinctions

With the ILC side-stepping institutional fragmentation and the risk resulting from real jurisdictional conflicts, the international judiciary's credibility, integrity, and authority remained threatened by fragmentation and its related problems. However, unlike the threat to the unity of the system, which is directly related to fragmentation, the threat to credibility, integrity and authority is an indirect threat from formalistically applying the regulatory rules. The failure of the formalistic application and the resulting uncertainties is the basis of the theoretical framework. This is the first stage towards developing the theoretical framework, while the second stage deals with the uncertainties.

The formalistic approach presupposes that parallel proceedings from overlapping and conflicting jurisdictions are dormant binary oppositions that can react to the regulatory rules.

Borrowing from Newton's third law of motion, when forces are binary opposing, there is no motion between them until a third force is applied, triggering action. The triggered action carries an equal and opposite force that moves in the opposite direction.[226] In critical legal thinking, the same theoretical basis applies to jurisdictional regulatory rules to dormant binary opposing jurisdictions. When the rules are triggered, the competing jurisdictions tend to interact.

With a strict or formalistic application of the regulatory rules, strict adherence to all the requirements of the triple identity standard (the identity of the party, identity of cause and identity of object), the dormant binary opposing jurisdictions start interacting. Satisfying these conditions to achieve preclusion which does not only preclude conflict but also stops inter-jurisdictional interaction. With the strict or formalistic application, preclusion is not achieved. However, the interactions triggered upon applying the rules continue and lead to disorder when the rules fail. This disorder creates uncertainty that blurs jurisdictional borders and must be differentiated into distinct, independent jurisdictions. Without jurisdictional distinctions, the binary opposing jurisdictions would continue to interact disorderly while the uncertainty prevails. At this stage, applying the rules is either reverting to the non-formalistic approach and damaging IL's credibility, integrity, and authority or sticking with the formalistic approach to safeguard integrity and authority.

Having excluded institutional fragmentation and downplayed any associated risks, the practice of compromise and the non-formalistic approach seems unavoidable. There is also the fear that if compromises are not made when applying the rules, they may become obsolete.[227] With the fear of obsoleteness, practitioners tend to apply regulatory rules non-formalistic for the sake of achieving preclusion at the expense of the credibility, reliability, integrity and authority of the international legal order. Thus, portraying IL as a system that does not adhere to its rules undermines not only the relevance of the international judiciary but also IL in general. Once again, raising questions about IL as a system. Examining some of the harmonising or unifying approaches to address the different threats posed by fragmentation and overlapping jurisdictions shall include responding to the system question.

2.5 Responding to the Threats of Overlapping Jurisdiction and Parallel Proceedings

The above situation analysis has revealed two main threats resulting from fragmentation, overlapping jurisdiction and parallel proceedings. The first is the direct threat to the unity of the international legal order from fragmentation and proliferation of specialised ICTs.

[226] Fred Bortz, Laws of Motion and Isaac Newton (The Rosen Publishing Group, New York 2013) 46.
[227] Shany (n 5)189.

Scholars and practitioners have discussed many different practical and theoretical positions to reverse the threat to the unity of the system. Amongst others are categorisation into groups or mappings. This depends on how their competencies overlap over specific subject matters and the systematisation of the different ICTs, norms and concepts.

2.5.1 Categorisations to Reduce Fragmentation and the Effect of the Proliferation

This section shall examine approaches that scholars and practitioners like to reduce the ILC through the Study Group though focusing mainly on normative conflicts, categorised the relationships into four types.[228]

The first type of relationship is between special and general law,[229] in other words, *lex specialis* and *lex generalis,* which also function in practical situations.[230] The second type of relationship is between prior and subsequent law, also referred to as *lex specialis* and *lex posterior*.[231] The third type of relationship is between different hierarchical levels, which is irrelevant in this study since there is no hierarchical or vertical relationship structure between ICTs.[232] In other words, the exceptions under Article 103 of the UN Charter, *jus cogens* and obligations *erga omnes* norms or rules which also help to regulate hierarchical relationships as conflict rules or norms.[233] The fourth type – represents relationships of law to its normative environment. In this light, the principle of systemic integration was applied, establishing a link between the other three types and Article 31(3)(c) of the VCLT.[234] These normative integrative approaches go against the premise of this study, which is to ensure that binary opposing or parallel proceedings are kept distinct so that they can react independently under comity. It is also worth noting that this does not suggest that systemic integration cannot be applied to resolve jurisdictional conflicts. At this stage of the methodology approach, it diminishes jurisdiction borders, which is not helpful. Systemic integration shall be examined further ahead in greater detail..

Meanwhile, before the ILC commissioned its study, scholars and practitioners like Vaughan Lowe, Cesare Romano and Yuval Shany also categorised jurisdictional relationships in response to the diversification and threat to the unity of the system following the proliferation of ICTs. The Project on International Courts and Tribunals (PICT) has developed a Synoptic Chart to address issues relating to the proliferation categorising ICTs

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[228] ILC Report (n 35) para 18.
[229] Ibid para 18(a).
[230] Ibid para 46.
[231] Ibid para 223.
[232] Ibid para 324; the sources doctrine – Article 38(1) of the Statute of Court (n 106).
[233] Ibid.
[234] Ibid paras 410 - 414

into subject-matter clusters.[235] Doing this, Cesare Romano identified diversities between a hundred and forty-two international bodies, arranged into subject-matters, and contrasted their diversities with their commonalities.[236] These common characteristics help as criteria to determine ICTs alongside arbitral tribunals and international claims and compensations bodies.[237] According to Romano, these are:

> bodies that have been established by permanent institutions; composed of independent judges, adjudicate disputes between two or more entities, at least one of which is either a state or an international organisation; work on the basis of predetermined rules of procedure and render decisions that are binding.[238]

However, Romano also notes that to fully understand and apply the criteria, the reasons for the proliferation, the 'transformation' of the 'competences' and the success of certain subject-matter jurisdictions over others have to be recognised.[239] Nevertheless, the other reasons for the proliferation were taken up by the Study Group, ignoring institutional fragmentation to which the categorisation was responding.

Meanwhile, Vaughan Lowe mapped jurisdictional overlaps into three main categories or types depending on how their competences may overlap over a specific subject-matter. In type one, he placed a general jurisdiction and a specific jurisdiction, type two comprises two general jurisdictions, and type three, two specific jurisdictions.[240]

By way of examples, Lowe argued that type one involves the jurisdictions of the ICJ and a specialised tribunal like the ITLOS overlapping over a dispute like the maritime dispute between Costa Rica and Nicaragua.[241] Even though this was a law of the sea jurisdiction, it was heard by the ICJ. The UNCLOS allows the Court under Article 287(1)(b) of UNCLOS to hear the matter. This overlap between the ICJ and the ITLOS is more of cooperation than conflict or competition. Even if one of the parties were to seise the ICJ, under Article 287 of UNCLOS, the ITLOS would defer to the ICJ. However, Lowe recommends that the special procedure takes precedence over the general procedure in this situation, which means without UNCLOS Article 287(1)(b), ceding jurisdiction to the ICJ, the ITLOS as *lex specialis* would have taken precedence in this category or type of overlap.

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235 Cesare P.R. Romano, 'The Project on International Courts and Tribunals, International Judiciary in Context' via <http://www.pict-pcti.org> 01 November 2018.
236 Ibid.
237 Popa (n 121) 19.
238 Romano (n 235).
239 Ibid.
240 Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' [1999] 20 Australian Year Book of International Law 191.
241 Dispute regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*) ICJ, Judgment of 13 July 2009.

Under type two categorisation between two general jurisdictions, the possibilities are rare. There are no known disputes between the ICJ or its predecessor, the PCIJ overlapping and conflicting or competing with the other courts or tribunals of general jurisdiction. Endowed with the power to hear cases of different kinds, which give them the description of courts of general jurisdiction, by default, their competences already overlap. But, it is rare for parties to create a jurisdictional conflict or competition by seising the Court and the Permanent Court of Arbitration(PCA) or the Court and the Organisation for Security and Cooperation in Europe (OSCE) Conciliation Tribunal, or the PCA and OSCE. These are the three known courts and tribunals of general jurisdiction.[242] Since Lowe described a situation of overlap and conflict between two general jurisdictions, there has been no known conflict or competition involving two overlapping general jurisdictions. This category is purely hypothetical.

Meanwhile, type three between two specific jurisdictions, this category under which most jurisdictional conflicts tend to occur from overlaps because ICTs under this category often try to assert their authority to fulfil their mandate. Conflicts in this category include the *Swordfish case* between the European Union and Chile, which involved the ITLOS and the WTO.[243] Both jurisdictions seemed to overlap over the dispute from a *prima facie* position. However, the two jurisdictions had exclusive competence and were actually in conflict on close examination. Most ad hoc investment tribunals fall within this category. However, in most situations, forum shopping or forum selection is in the hands of parties that influence the conflict as opposed to the former types, which occur due to the setup of the court or tribunal. In any case, parties have a massive role in influencing the conflict.

Other more complicated categories have been identified by Shany and placed into four main categories and eight potential sub-categories.[244] Most of these fall within the categories mapped by Lowe, while the rest are hypothetical, which paints a much-complicated picture of what entails overlapping jurisdictions. Thus, breeding confusion, controversy, or uncertainty. These sub-categories have been the source of conceptual confusion of what constitutes jurisdictional overlaps. Some scholars apply a broad definition to include these theoretical models with similar subject-matter, normative or substantive conflicts. This more comprehensive scope increases case law, accompanied by inconsistencies, controversy, lack

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242 See Cesare Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' [1999] 31 JILP, 709 – 751.

243 *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, Chile v European Community*, Procedural Order, ITLOS Case No 7, Order 2000/3, ICGJ 340 20th December 2000.

244 Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals, (OUP, Oxford 2003) 29 -74.

of stability, and predictability within the international system. Shany's eight theoretical categorisations give rise to uncertainty, making coordination difficult. Comparatively, Lowe's categorisations, though with an unlikely scenario or hypothetical conflicts between two general jurisdictions, is more representative of conflicts between two overlapping jurisdictions.

So, with the exception of the hierarchical relationships in which *jus cogen*, Article 103 of UN Charter or *erga omnes*, which invalidated competing for norms or rules between parallel or competing jurisdictions,[245] the ILC relationship types created no jurisdictional distinctions. Instead, the jurisdictional lines between parallel or competing jurisdictions became much narrow and could not keep jurisdictions separate from each other to allow independent interactions. However, with hierarchical relationships between ICTs not tenable, the ILC categorisation did not help keep parallel or binary opposing jurisdictions distinct. Scholars and practitioners would consciously not invalidate any jurisdictional influencing norms. They will always compromise.

2.5.2 A Theoretical Response to the Threat to Unity and System Question

On the other hand, scholars and practitioners have also taken certain theoretical and ideological positions like constitutionalisation, postulated as the binary opposition to fragmentation.[246] However, even though scholars and practitioners agree that IL lacks a centralised and hierarchical structure, similar to a constitutionalised domestic system, as a major cause of the threat to its unity, they all agree that constitutionalisation or constitutionalism is not about creating a constitutionalised system.[247] While this study is not advocating for a constitutionalised international system either, it is therefore not of any significance to the present study.

Instead, the study shall examine the different theoretical responses to the system question, mainly whether there is a system of ICTs directly linked to whether IL constitutes a system. Meanwhile, the threats from the non-formalistic interpretation of the overlapping jurisdictions and application of regulatory rules are examined through some practical approaches. These approaches, christened 'comity based approaches', are implemented when the study emerges from the theoretical phase with the structure of interdependence to restore the reliability, credibility, integrity and authority of international law.

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[245] Ibid para 19.
[246] Peters (n 65).
[247] See ibid.

It is worth acknowledging that the issue of whether IL and its judicial bodies constitute a legal system has been concluded and recognised as one by the ILC Study Group.[248] Even before the ILC study concluded its findings with techniques to reduce the vagueness and diversity of interpretation of treaties under Article 31 of the VCLT, these developments have not ended the system question. This study does not pretend to do so either. With the continuous fragmentation and proliferation of ICTs, jurisdictions will continue to overlap, raising questions to which new practical and theoretical responses will continue to emerge. Some of the practical approaches that constitute the comity based approaches are examined later. In the meantime, it suffices to analyse some of the theoretical responses to the system question with excerpts from Raz, Hart and Kelsen's deductions of a system of IL.

2.5.2.1 The System Question – Deductions from Raz, Hart and Kelsen

Structure and identity have featured analyses by scholars like Neil Blokker[249] and Yuval Shany,[250] while reviewing Joseph Raz, H.L.A Hart, and Hans Kelsen's response to the broader question of a legal system. As such, Blokker identifies and highlights Raz's theory that every law necessarily belongs to a legal system with a complete theory of the legal system consisting of the solutions to four problems.[251] That is the criteria of existence, criteria of identity, structure, and content.[252] To Raz, every legal system theory must provide a solution to the existence and identity problems.[253] However, of particular interest to this study is the structure of the legal system, which Raz concludes with ideas from Kelsen and Hart that any legal system consists of two kinds of laws.[254] Thus, a binary structure of laws as norms and laws and non-law norms.[255]

While Raz did not attempt to analyse non-law norms, he noted that the laws affect the existence or application of legal norms.[256] This binary is relevant as it highlights the question of structure and binary oppositions from a deconstructionist perspective examined in the next chapter. For laws that are norms, Raz divides them into a binary strand comprising of

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[248] Under paragraph 1 of the Draft Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Adopted by the International Law Commission at its Fifty-eight session in 2006 and submitted to the General Assembly as part of the Commission's report covering the work of that session (A/61/10, para. 251). The Year Book of the International law commission, 2006, vol. II, Part Two.

[249] Niels Blokker, International Regulation of World Trade in Textiles: Lessons for Practice (Martin Nijhoff Publishers 1989) 22.

[250] Shany (n 5) 87 - 90.

[251] Blokker (n 249).

[252] Ibid.

[253] Ibid.

[254] Ibid 23.

[255] Ibid.

[256] Ibid 25.

laws embodying regulative powers and laws composed of legislative powers.[257] According to Raz, every law belongs to a legal system—a view rejected by Hart, arguing against such a necessity favouring primary and secondary rules as basic features of a legal system.[258] Primary and secondary rules work together in binary format, at times opposing each other and creating uncertainties, increasing the need for regulation. These analyses contribute to the question of IL as a legal system to which Raz, Hart, and Kelsen provide an instrumental analytical framework that responds to the question of structure. Further analysis of structural and binary oppositions takes place in the next chapter.

In addition to Raz's and Hart's contributions, certain definitions of a legal system, particularly involving notions of a superior sovereign institution making laws for subjects to obey, are a basis for uncertainty.[259] While IL does have a hierarchy of norms, the lack of a hierarchical structure within the entire system leaves room for disorder, indeterminacy and uncertainty. Many scholars have considered this while defining a system. For example, Shany captures Jean Combacau's definition of a legal system[260] as a 'purposeful arrangement or constellation of interrelated elements or components, which cannot accurately be described and understood in isolation from one another.'[261] He reiterates with Santi Romano's description of this as a 'working definition'[262] that should incorporate three central ideas, captured by the term 'system.'[263] These are, '(1) a set of elements, (2) arranged in an order characterized by their interactions, and (3) possessing a certain degree of unity or cohesion which facilitates the description of elements as parts of a bigger whole.'[264]

However, Shany combines two normative and institutional theories from Hart's system, consisting of primary and secondary norms, to address this question. Hart's 'Concept of Law' observes that a legal system consists of the union of primary and secondary norms.[265] Such binary primary and secondary norms work together, similar to Kelsen's 'Pure Theory of Law'.[266] To Kelsen, 'plurality forms a single legal system if the validity of the norms can be traced back through norms higher in their constitutional ranking, to standard or basic

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[257] Ibid.
[258] Ibid.
[259] John Austin, The Province of Determined (1832) Wilfred E. Rumble (ed) CUP 1995) 171.
[260] Jean Combacau, *Le Droit International: Bric-a-Brac ou systeme?' 31 Archives de Philosophie du Droit* (1996) 85, 86.
[261] Shany (n 5) 87.
[262] Santi Romano, L'Ordre Jurisddique (2nd edn) translated by L. Francois and P. Gotho 1975 (Paris Dalloz 2002).
[263] Shany (n 5) 87.
[264] Ibid.
[265] Ibid.
[266] Hans Kelsen, Introduction to the Problems of Legal Theory (1934)55; Joseph Raz, A Concept of a Legal System (2nd ed., 1980) (1990 reprint) 102-5

norms.'[267] This chimes with John Austin's description of a system as a set of laws legislated by the same' sovereign,' superior to the subjects of the laws and habitually obeys the sovereign and, therefore, the law. To this end, IL lacking a 'sovereign' cannot be regarded as a legal system or as law.[268]

To support this, Shany highlights Romano's[269] comparison of legal norms and legal institutions to conclude that norms cannot be functional without institutions.[270] So, legal institutions and their processes rather than norms provide the 'framework and inner structures' as the distinctive features of a legal system. Thus, a justification as of the delineation of this research to exclude substantive and normative conflicts. However, norms are still relevant in the connections or relationships formed between judiciary institutions, as Raz concludes that a legal system consists of a web of interconnected norms.[271]

While these debates highlight uncertainties and facilitate the need for a theory to underpin jurisdictional relationships, it is worth noting that no particular definition of a system is void of criticism or different critical analysis. Kelsen reiterates this point by prescribing the notion of a 'general correspondence' between the prescriptions of the legal system and reality to validate the system, which also includes different legal orders.[272] But how does contemporary IL view this question? A look at the work of the ILC on fragmentation alongside some commentators will help validate this point.

2.5.2.2 The System Question from the Perspective of Contemporary Scholarship

To answer whether IL is a legal system, the ILC also asked the technical question of how to deal with conflicts and interrelations between its rules. Prost presents the idea of logical unity as a remedy that constrains judges to interpret rules concerning other rules.[273] To Prost, this is achieved by removing uncertainties and ambiguities even though he acknowledges that determinacy and acceptance of Hart's theory of a legal system are essential.[274] However, this study does not dig into a realist or formalist debates on how judges or arbitrators decide to underpin this point. The focus in this study is not normative, but jurisdictional conflicts which comity, rather than a realist or formalist argument should handle.

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[267] Ibid.
[268] Austin (n 259).
[269] Romano (n 262).
[270] Shany (n 5) 92.
[271] Ibid 90.
[272] Ibid 89.
[273] Prost (n 312) 164.
[274] Ibid.

Nevertheless, the ILC acknowledges a system of IL and presents techniques to address fragmentation through plurality.[275] As in any system, when rules tend to conflict like the frequent clashes of regulatory rules, the 'unity of the law suffers,' resulting in a threat of fragmentation.[276] Meanwhile, the ILC Report did identify four areas of relationships that may be used as tools in making 'reasoned decisions.'[277] These relationships are in categories between special and general law, between prior and subsequent law, often expressed as *lex posterior derogate lege priori,* also known as the later-in-time rule.[278] Another strand is the relationship between rules that operate on different hierarchical levels – such as UN Charter Article 103, *jus cogens* norms, and obligation *erga omnes*.[279] However, competition was absent from the ILC Study on Fragmentation like most conflict studies. The Draft Conclusion admits exclusion of jurisdictional conflicts, allowing an inference that it is a matter for the courts and tribunals to handle.[280]

Even though scholars like Shany had started writing about inter-jurisdictional competition three years before the ILC commissioned the study on fragmentation, competition was ignored entirely.[281] The study focused more on conflict, as evidenced in its final report submitted to the United Nations General Assembly (UNGA) in April 2006.[282] It is worth noting that excluding competition from the work of the ILC has significantly limited exposure to the problem of real jurisdictional competition between ICTs, which emanates from overlapping jurisdictions. While the ILC does not expressly use the term competition or overlapping jurisdictions in the final report, evidence suggests deliberation indirectly touched on competition and possible overlaps. Analysis of the *MOX Plant* dispute noted that three different jurisdictional procedures were involved, which posed institutional and substantive problems. That is, an Annex VII Arbitral Tribunal with competence over matters emanating from the UNCLOS, the European Court of Justice (ECJ) with competence over cases arising under the European Community and Euratom Treaties within the ECJ

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[275] Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law' [2012] 22 Duke J. Comp. & Int'I L 349, 376.
[276] Ibid.
[277] Ibid.
[278] Ibid.
[279] Ibid.
[280] ILC Conclusions (n 139) para 245. The Draft Conclusions was submitted to the General Assembly as part of the Commission's Report covering the work of that session (A/61/10, para. 251). The Report appears in the Yearbook of the International Law Commission, 2006, vol. II, Part Two.
[281] Shany's *'Competing Jurisdictions of International Courts and Tribunals,'* was published in February 2003. Meanwhile, the Study Group on Fragmentation by 2004 was still adding new topics to its schedule outline such as 'Function and Scope of the *Lex Specialis* rule and the question of 'self-contained regimes.'
[282] ILC Report (n 35).

alongside the compulsory dispute settlement procedure under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).[283]

There was an overlap of the rules from all three procedures, which addressed the same subject-matter. Thus, creating difficulty in determining if the principal character of the dispute was of a law of the sea character - pollution of the North Sea, or about 'inter-EC relationships'.[284] The Study Group contemplated how such complex rules could link the jurisdictions in its deliberations. It also considered the principles applied to decide any conflicts between the ECJ, the OSPAR Arbitral Tribunal, and the Annex VII UNCLOS Arbitral Tribunal involved in the dispute. So, the ILC was not unaware of the potential impact of overlapping jurisdiction due to the proliferation of institutional and substantive problems, which were treated very differently during the study.[285] However, the Study Group overlooked competing or overlapping jurisdictions, favouring substantive, normative or conflicting interpretations, which creates the gap this study seeks to fill. Scholars and practitioners have examined these institutional relationships resulting from overlapping and conflicting jurisdictions and the need to regulate as a remedy.[286] However, it is worth analysing the principle of systemic integration, which is at the heart of the ILC toolbox.[287]

2.5.2.3 Systemic Integration and the Impact on Jurisdictional Distinctions

It is worth recalling that the ILC concluded that fragmentation was not a 'serious danger' to the unity of the international system.[288] This conclusion was obvious because instead of institutional fragmentation, which gives rise to overlapping and conflicting jurisdictions, the Commission focused on substantive and normative conflicts, which address jurisprudential overlap.

This section analyses the principle of system integration against the backdrop of overlapping and conflicting jurisdictions. The section reiterates that the ILC suggested toolkit under the VCLT did not exclude overlapping jurisdiction, which may be debatable and need clarity. Some scholars have argued that Article 31(3)(c) of the VCLT is supposed to reduce the wide use of discretion, the vagueness, and disparity in the interpretation.[289] Therefore, how does the principle of systemic integration as part of the ILC suggested toolkit contribute to forming jurisdictional distinctions?

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283 Ibid para 10.
284 Ibid.
285 ILC Conclusions (n 280) para 245.
286 See Nikolaos Lavranos (n 112).
287 ILC Report (n 35).
288 Ibid.
289 Andrea Bianchi, Daniel Peat, Matthew Windsor, Interpretation of International law (1st edn, OUP, Oxford 2015).

The ILC exclusion of institutional fragmentation and suggesting a comprehensive solution under the VCLT does not remove the gap resulting from the exclusion. Interpretation of Article 31(3)(c) of the VCLT does not remove the gap resulting from the lack of general rules for dealing with overlapping and conflicting jurisdictions despite the ILC recommendation. To fill this gap, concepts like 'dynamic treaty interpretation' have emerged, giving a broad scope to changing circumstances to which a treaty or a treaty term could apply.[290] This innovative doctrine of the ICJ and the European Court of Human Rights has been questioned and concluded as giving the wrong impression.[291] This results from the fact that the treaty's terms remain static with fixed meanings instead of the actual treaty or a treaty term interpreted differently—meanwhile, the circumstances around the treaty environment change.[292] However, there is a disparity in what entails 'dynamic or evolutionary treaty interpretation. Dynamic interpretation implies that a term or expression takes a different meaning from the original agreed one between the parties.[293] Nevertheless, systemic integration addresses jurisprudential overlap, which creates convergence does not readily assist in keeping binary opposing jurisdictions distinct. That is, following this study's methodological approach.

So, despite the relevance of systemic integration as one of the tools within the VCLT toolbox, its place within the tools for overlapping and conflicting jurisdictions is somewhat untenable. It serves better through the sources doctrine, over which the jurisprudence of ICTs overlap. For example, the WTO analytical index analyses Article 3 of the DSU jurisprudence in light of the sources doctrine through a series of cases.[294] *In the EC-Approval and Marketing of Biotech Products Case,*[295] the Panel analysed Article 31(3) (c) of the VCLT relating to the sources of IL with regards to the interpretation of treaties.[296] This portrays WTO law as part of 'the general corpus of international law'. It also supports the notion that Article 31(3)(c) is a principle capable of sustaining the unity of the international judiciary. It, therefore, undermines the threat of system fragmenting.

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[290] M. Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties: Part I' [2008] Hague Y.B. Intl. L 21; M. Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties: Part II' [2009] Hague Y.B. Intl. L 22x.

[291]Georg Nolte, Treaties and Subsequent Practice, (OUP, Oxford 2013)...ii.

[292] Ibid.

[293] Ibid cvii.

[294] WTO Analytical Index DSU Article 3 Jurisprudence
< https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art3_jur.pdf > accessed 15 June 2018.

[295] Panel Report, *EC – Approval and Marketing of Biotech Products,* para. 7.67 (citing Appellate Body Report*, US – Shrimp, para. 158*.) in WTO Analytical Index (n 216).

[296] Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999: III, p. 1221.

In the analysis, the panel asserted that 'there could be no doubt that treaties and customary rules of international law are rules of international law within the meaning of Article 31(3)(c)'.[297] As such, the panel accepted that a treaty like the Biosafety Protocol,[298] like any other treaty, would qualify as a rule of international law.[299] Regarding general principles under Article 38(1)(c), in the *US-Shrimps Case,*[300] the appellate body agreed with the panel that the European Community's precautionary principle was a rule within the meaning of Article 31(3) (c).[301] In light of judicial decisions, the panel referred to customary rules of IL concerning attribution in the *US-Gambling Case.*[302] It noted that actions of the United States government agency with specific responsibilities and powers like the International Trade Commission (USITC) are attributable to the United States.[303] The WTO Analytical Index reports that this view was supported in the *Brazil–Aircraft Case.*[304] The Arbitrators referred to the ILC Articles on State Responsibility in the context of interpreting the term 'countermeasure'.[305]

The arbitrators noted that the ILC work is based on relevant state practice, judicial decisions, and doctrinal writings that constitute recognised sources of IL.[306] Besides Article 31(3)(c), analysis of supplementary means of interpretation in Article 32 of the VCLT when Article 31(3)(c) does not assist in the interpretation of a treaty when conflict arises.[307] In the *Japan - Alcoholic Beverages II Case,*[308] the Appellate body confirmed that Article 32 of the Vienna Convention has also attained the status of a rule of customary international law.[309] Noting that all international jurisdictions rely on sources doctrine as shown above but with different rules of interpretation within each ICT, jurisprudential overlap due to different interpretation. As such, the ILC toolbox under Article 31(3)(c) is more relevant to address overlapping and conflicting jurisprudence, not overlapping jurisdictions. Even though

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297 Ibid.
298 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M 1027.
299 WTO Analytical Index (n 294).
300 *United States - Import Prohibition of Certain Shrimp and Shrimp Products* - AB-1998-4 - Report of the Appellate Body WTO WT/DS58/AB/R 12 October 1998 (98- 3899).
301 WTO Analytical Index (n 294).
302 *Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services ("US – Gambling"), WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report, WT/DS285/AB/R.*
303 WTO Analytical Index (n 294).
304 Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999: III, p. 1221.
305 WTO Analytical Index (n 294).
306 Ibid.
307 Ibid.
308Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996: I, p. 97
309 WTO Analytical Index (n 294).

divergent interpretations keep jurisdictions apart, which is a form of preclusion, it does not fit within the methodological steps in this process. Therefore, it cannot be deconstructed to achieve jurisdictional distinctions.

2.6 Other Approaches to Jurisdictional Overlaps and Parallel Proceedings

Different approaches put forward have also addressed the question of ICTs and IL as a system, with some outrightly acknowledging its disuniting, fragmented, specialised and self-contained nature as ICTs do not work in isolation.[310] Peters captures different expressions of the unity and diversity of the international system, such as Mireille Delmas-Marty's description of the system as 'ordered pluralism'.[311] From Mario Prost,[312] she captures the concept of 'unitas multiplex' and 'flexible diversity' from Rainer Hofmann[313] to emphasise that IL is a system despite its fragmented nature. Meanwhile, Judge Greenwood in the *Ahmadou Sadio Diallo(Guinea v Congo*) *case* that IL is not a series of fragmented specialised self-contained bodies of law functioning in isolation.[314] However, what this means for this study is that jurisdictional boundaries will remain less distinct, while the effort to coordinate and harmonise continues with the risk. That is the risk of applying regulatory rules less formalistically, resulting in compromises. Thus, affecting the integrity and authority of international law.

However, once the missing theoretical step is inserted, the above approaches can readily return to their jurisdictional relationship character. Alongside other communication approaches shall constitute comity based approaches to complete the process of resolving the jurisdictional conflicts. Before wrapping up this chapter, it is worth examining two common comity-based approaches.

2.6.1 Inter-judicial dialogue and Inter-jurisdictional Communication

Besides jurisprudential interaction through precedents, there is inter-jurisdictional dialogue, particularly between regional human rights courts like the ECHR, the IACHR, and the ACHPR through which judicial experiences are shared. For example, in 2016, the ECHR and the ACHPR held a workshop to share their judicial experiences in Arusha, Tanzania.[315]

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310 See Peters (n 60).
311 Ibid; See Mireille Delmas-Marty, *Le pluralisme ordonné* (Seuil Paris 2006).
312 Mario Prost, The Concept of Unity in Public International Law (Hart Publishing, Oxford 2012).
313 Peters (n 60); see Rainer Hofmann, 'Concluding Remarks' in A Zimmermann and R Hofmann (eds), *Unity and Diversity in International Law* (Duncker and Humblot Berlin 2006) 491–4, at 491.
314 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation Owed by the Democratic Republic of the Congo to the Republic of Guinea) (ICJ, 19 June 2012) at [8] (Declaration of Judge Greenwood).
315 ACPHR, 'European Court of Human Rights and African Court Start Week-Long Joint Workshop to Exchange Judicial Experiences in Arusha June 20016' < https://en.african-

In November 2018, a seminar on 'Optimisation of Large-Scale Human Rights Violations' was jointly organised by the ECHR and IACHR, held in Strasbourg.[316] Meanwhile, the ACHPR, ECtHR, and IACHR have been meeting within the cooperation framework under the 2018 San Jose Declaration[317] and the Kampala Declaration.[318] The aim was to share their methodological approach to adjudication following their 2016 Strasbourg seminar. Through this cooperation, the IACHR and the ACPHR can be accessed through a link on the website of the ECHR as useful links.[319]

In a more general sense, beyond regional human rights courts, there is communication and inter-jurisdictional interaction and communication. At a jurisprudential level, relationships develop within the international judiciary through several different approaches. ICTs do not only interact through normative conflicts but also through cooperation in a straightforward manner such as the European Court of Justice (ECJ), accessing the European Convention on Human Rights (ECHR), the ECJ citing the Inter-American Court of Human Rights (IACHR) and vice versa. Unlike comity that is more effective in dealing with the created jurisdictional disorder, trans-judicial communication and precedents are straightforward ways of building jurisdiction relationships. Most interactions between ICTs are cordial through cooperation. However, some 'simultaneous competitive, conflictual and cooperative conflictual positions within the European Courts' have encountered unintended jurisprudential entanglement.[320] Scheeck has observed how judges and advocate generals in

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court.org/index.php/news/press-releases/item/83-european-court-of-human-rights-and-african-court-start-week-long-joint-workshop-to-exchange-judicial-experiences-in-arusha> accessed 17 May 2019.

316 ECHR, 'Joint Public Seminar of the European Court Of Human Rights and Inter-American Court of Human Rights: Optimization Of A Methodology In Adjudicating Large-Scale Human Rights Violations Friday 9 November 2018' <https://echr.coe.int/Documents/Seminar_Inter_American_Court_20181109_ENG.pdf> accessed 17 May 2019.

317 Declaration of San José, Joint Declaration of the Presidents of the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, on the occasion of the 40th Anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights, Signed in San José, Costa Rica on the 18th of July 2018 <https://echr.coe.int/Documents/San_Jose_Declaration_2018_ENG.pdf> accessed 17 May 2019.

318 Kampala Declaration, The African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, at the First International Human Rights Forum 28 to 29 October 2019 < https://www.corteidh.or.cr/docs/declaraciones/Kampala_declaration_29_October_2019_En.pdf > accessed 17 December 2019.

319 ECHR Useful Links https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/regionalcourts&c= accessed 17 December 2019.

320 Laurent Scheeck, 'Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks' IEP de Paris CERI and Institut d'Etudes Européennes – Université Libre de Bruxelles <https://www.ucd.ie/t4cms/06_wish_paper_laurent_scheeck.pdf> accessed 2 December 2019.

the European courts respond.[321] He also notes that judges and advocate generals have started transforming these 'conflicts' into strategic interdependence while establishing diplomatic relationships.[322]

Meanwhile, Shany acknowledges the intensification of interdependence.[323] These relationships occur in different ways, including reciprocal empowerment, inter-institutional and cross-organisational interaction, trans-judicial communication, cross-citation, recognition of foreign judgments, judicial borrowing, reciprocal determination, and acceptance.[324]

Carla Buckley, Alice Donald and Philip Leach assert that this is a commendable initiative, showing open-mindedness towards sister institutions in the American continent within the universality of human rights.[325] Carla Buckley, Alice Donald and Philip Leach assert that this is a commendable initiative, showing open-mindedness towards sister institutions in the American continent within the universality of human rights.[326] The report identified a total of 25 cases with cross-references with the ECtHR referring not only to judgments of the IACHR but also to its advisory opinions.[327] For example, the Grand Chamber of the ECHR in the *Ocalan v Turke*y judgment[328] invoked the right to information on consular assistance in the framework for the guarantees of due process as per the standard of the IACHR.[329] Meanwhile, the IACHR has relied on the case of *Salgueiro da Silva Mouta v Portugal* as an illustration of the ECHR inexhaustive list of categories under Article 4 of the European Convention.[330] IACHR has also relied on the ECHR findings in *Clift v United Kingdom*[331] to include sexual orientation as a condition under the term 'another condition.'[332] With evidence that ICTs share precedents amongst themselves, what then is the role of precedents in building inter-jurisdictional relationships?

2.6.2 The Use of Precedents between Self-Contained Regimes

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321 Ibid.
322 Ibid.
323 Shany (n 5) 3.
324 See Anne-Marie Slaughter, 'A Typology of Trans-Judicial Communication' [1994] 29(1) URLR 99; Anne-Marie Slaughter, 'A Global Community of Courts' [2003] 44 (1) Harvard Int'l LJ 191; Anne-Marie Slaughter, 'A New World Order' [2004] PUP.
325 ECHR, 'Research Report: References to the Inter-American Court of Human Rights in the Case-Law of the European Court of Human Rights, 2012 at 1 – 20.
326 Carla Buckley, Alice Donald, and Philip Leach, Towards Convergence in International Human Rights Law: Approaches of Regional and International system (Brill Nijhoff, Leiden 2017) xiv.
327 Ibid.
328 Application No 30078/06, Merits and Just Satisfaction, 12 May 2003.
329 See Buckley, Donald and Leach (n 326) 75.
330 See Case of *Atala Riffo and Daughters v Chile*, para 87.
331 Application No 7205/07, Merits and Just Satisfaction, 13 July 2010
332 Buckley, Donald and Leach (n 329) 178.

General IL has not codified the binding use of precedents similar to the common law principle of *stare decisis*. However, codification similar to *stare decisis* is limited within each jurisdiction as other jurisdictions cannot be bound. Meanwhile, Article 21 (2) of the Rome Statute of the ICC allows the use of its previous decisions as a source of law.[333] However, there are no precedents in related ad hoc criminal tribunals as observed in the ICTY *Tadic Case*[334] in which the trial chamber noted that past doctrines do not bind international tribunals.[335] However, extra-jurisdictional precedents are indirectly provided under Article 21(1)(b), allowing for applicable treaties, principles, and rules of international law. As such, persuasive precedents that would connect other jurisdictions could be drawn from any other jurisdiction. However, these are mainly used as examples or evidence to support a particular argument.[336] It is not a mere academic exercise to acknowledge this practice of courts while analysing, exemplifying, differentiating, distinguishing, or comparing decisions of ICTs.[337] Judges do, too, as observed between the IACHR and the ECHR above.

The use of persuasive precedents runs alongside the application of trans-jurisdictional communication, inter-jurisdictional dialogue, cross-citation, and cross-referencing. These are more direct means to jurisdictional relationships. However, jurisdictional protection doctrines like *lis pendens* and *res judicata* do not prevent the use of precedents, which create a more direct path to inter-jurisdictional interactions.[338] Nevertheless, much ambiguity in interpreting and applying precedents generally within the international judiciary has been observed with the ICC, particularly concerning Article 21.[339] Uncertainties and the protective functions of the principle of legality of external judicial decisions are non-binding. It cannot be treated as a primary source of IL within the criminal regime.[340] The point being that some stability like finality is achieved through res judicata. The point is that some stability like finality is achieved through res judicata. This is necessary for precedents to function as a jurisdictional relationship builder and conflict preventer.

However, finality, in other words, *res judicata*, which is a protection doctrine, prevents re-litigation but not cross-jurisdictional communication with cases drawn across different

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333 Statute of the International Criminal Court Article 21.
334ICTY Appeals Chamber, Tadic judgment, 15 July 1999, <http://www.un.org/icty/tadic/appeal/judgment/tad-aj990715e.pdf> accessed 5 November 2018.
335 Borda (n 253).
336 Collins English Dictionary & Thesaurus (4th edn Harper Collins Publishers, Glasgow 2006) 935.
337 Aldo Zammit Borda, 'Precedent in International Criminal Courts and Tribunals' [2013] 2 CJICL 287-313.
338 Ibid
339 Joe Verhoeven, 'Article 21 of the Rome Statute and The Ambiguities of Applicable Law'. [2002] 33 Netherlands Yearbook of International Law 2-22.
340 Kaing Guek Eav (alias `Duch'), Appeal Judgment, Case File/Dossier No. 001/18-07-2007-ECCC/SC, 2012, 97 in Borda (n 337).

jurisdictions. However, more attention is paid to regulatory rules for their preclusive or protective function because previously, few cases were available for cross-jurisdictional communication and referencing. Recently, there has been more interaction and cross-referencing as the rulings of ICTs have become 'sizeable' due to the proliferation of ICTs.[341] Nevertheless, the role of *res judicata* and other preclusive and protection doctrines and how they create interactions are covered in chapter four. However, while acknowledging the role of precedent across international courts, Cesare P R Romano also notes that it is still an unmapped territory. Most of the literature contains very few studies about the treatment of precedents across jurisdictions.[342]

Meanwhile, Borda notes that in *the Kupreskic and Others Case,*[343] the tribunal established precedent relating to other international jurisdictions of claims brought before national courts adjudicating international crimes as not binding.[344] Meanwhile, in the *Case of Sesay and Others,*[345] the SCSL Trial Chamber underscored that decisions of the ICTY Appeals Chamber did not bind it.[346] However, other commentators have noted that this exclusionary practice is further compounded in the *Lubanga Case.*[347] The ICC Trial Chamber avoided applying decisions of different ICTs from the scope of its applicable law under Article 21 of its Statute.[348]

The above notwithstanding, there is sufficient evidence of the practice of courts and tribunals, citing extra-jurisdictional decisions as seen with the IACHR citing ECHR judgments. A study by Erik Voeten revealed that the IACHR has referred to ECHR judgments in 60% of its 126 judgments.[349] That was from 2000 up to 2010 when the study concluded. Meanwhile, in European case law, the IACHR has also cited many human rights disputes, including recent ones, which indicates that the IACHR judges follow ECHR

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341 Daniel Terris, Cesare P R Romano, and Leigh Swigart, The International Judge: An Introduction to the Men and Women Who Decide the World's Cases (OUP, Oxford 2007) 120.
342 Romano (n 7); Borda (n 337).
343 *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, (aka `Vlado')*, Judgment, Case No IT-95-16-T, 2000, 540.
344 Borda (n 337).
345 *Prosecutor v Issa Hassan Sesay*, Morris Kallon, Augustine Gbao, Judgment, Case No SCSL-04-15-T, 2009, 295.
346 Borda (n 337).
347 *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, Case No ICC-01/04-01/06, 2012, 603 in Borda (n 253).
348 Gilbert Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC' [2008] The Emerging Practice of the International Criminal Court [2008] 48 Brill Nijhoff 281 - 304
< https://doi.org/10.1163/ej.9789004166554.i-774.91> accessed 11 April 2020
349 Erik Voeten, 'Borrowing and Nonborrowing among International Courts' [2010] 39 (2) The Journal of Legal Studies 547 in Buckley, Donald and Leach (n 14).

jurisprudence.[350] A study on harmonisation using judgments on freedom of expression within the human rights regime revealed that the IACHR has extensively relied on external precedents, particularly its earlier judgments.[351]

Similarly, on the part of the ECHR, according to a 2016 ECHR research on References to IACHR instruments in the case-law of the ECHR,[352] the ECHR has referred to over 160 IACHR cases with the most recent being the *Duque v. Colombia* Case[353] cited in the *Aldeguer Tomas v Spain Case*.[354] This practice is not very common within other specialized regimes. Instead, in the trade regime, exclusivity clauses like Article 23 of the WTO-DSU[355] make it compete rather than cooperate with regional trade dispute settlement mechanisms. Meanwhile, in the human rights regime, the ECHR and IACH, where there are no such harsh restrictions, there is continuous cross-referencing and reliance on each other's jurisprudence.

The IACHR has also referred to the African Commission on several occasions as in the *Maya indigenous communities of the Toledo District v Belize and Ecuador v Colombia Cases*.[356] So, there is a practice allowed by the methodology of the IACHR to engage in dialogue and borrowing from the global human rights system and other regional human rights tribunals.[357] However, the communication flow has not been unidirectional as Neuman notes, the African and European Regional Tribunals do 'openly engage with inter-American precedents on procedure and substance from both the Court and the Commission.'[358]

Nevertheless, this is less extensive than the IACHR methodology allows it to draw from ECHR comparatively.[359] That notwithstanding, there is still communication across jurisdictions with the exchange of precedents. However, there are no clearly defined principles to coordinate these interactions. Regardless of the direction of flow, the inter-jurisdictional interactions between them are essential. From a study involving a range of

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350 Ibid.
351 Chloe Cheeseman, 'Harmonising the of Regional and International Human Rights Bodies: A Literature Review in the collection' in Buckley, Donald and Leach (n 14).
352 Research Report on References to the Inter-American Court of Human Rights and Inter-American instruments in the case-law of the European Court of Human Rights 1 November 2016 <https://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf> accessed 13 December 2019.
353 *Duque v. Colombia* ((Preliminary Exceptions, Merits, Reparations and Costs), judgment of 26 February 2016, Series C No. 310).
354 *Aldeguer Tomás v. Spain*, no. 35214/09, 14/06/16, Third Section.
355 Article 23 WTO-DSU.
356 *Toledo District v Belize*, *Case* 12,053, Report No 40/04(2004) at para 149; *The Ecuador-Colombia Border: Historical Links, Current Events, and Future Possibilities*, May 2008.
357 Gerald L. Neuman, 'The External Reception of Inter-American Human Rights Law' [2011] (Special Edition) Quebec Journal of Int'l Law 100 – 127.
358 Ibid.
359 Ibid.

international courts and references of each other's jurisprudence, Cheeseman noted only eight instances of external referencing by the ECHR, including three references to the ICJ and one reference to the IACHR.[360] Quasi-judicial bodies like the African Commission cited in the *Stoll v Switzerland Case*[361] by the ECHR.

Besides the criminal, human rights, and trade regimes already discussed, Article 287 of the UNCLOS allows the ITLOS to connect with other jurisdictions. Therefore, it is clear that the ITLOS is not overly protective of its jurisdiction. Comparatively, Article 60 of the Statute of the Court implies finality, which is a protection in line with *res judicata* and *lis pendens*. However, regime protection does not stop cross-communication, cross-referencing, and cross-citation.

2.7 Conclusion

This present chapter has conducted a detailed critical analysis of overlapping jurisdictions and related issues through its non-formalistic interpretation and the non-formalistic application of rules to achieve preclusion and how to keep binary opposing jurisdictions distinct. However, this is false preclusion because the interpretive compromises and the compromises on the identity requirements in applying the rules undermine IL's integrity and authority. Addressing this situation and regaining the integrity and authority of international law, the regulatory rules are applied formalistically. However, the formalistic approach fails to resolve the conflict between the overlapping jurisdiction and preclude the conflicting binary opposing jurisdictions. While comity based approaches are engaged to resolve the conflict, deconstruction ensures the jurisdictions are kept distinct. The next chapter examines the theoretical basis of the binary opposing jurisdictions and their deconstruction to keep them precluded and distinct.

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[360] Cheeseman (n 351).

[361] *Stoll v Switzerland,* Reference Application No 69698/01. European Court of Human Rights. Judge Grand Chamber. Date of Judgment 10 Dec 2007.

Chapter 3

The Theoretical Framework—Deconstructing Binary Opposing Jurisdictions

3.1 Introduction

Binary oppositions, deconstruction and structuralism have already been conceptualised in chapter one, forming the background to the theoretical positions undertaken in this chapter. Binary oppositions and deconstruction are subsets of structuralism. For a recap, it is worth recalling that the study has already established that overlapping and conflicting jurisdictions are binary opposing in nature though dormant until the rules are triggered. When the rules are triggered, non-formalistically false preclusion is attained, which undermines the integrity and authority of IL. However, the regulatory rules and triple identity requirements are strictly applied to reverse the situation, which fails to achieve preclusion, resulting in disorder, uncertainty, and indeterminacy. This affects jurisdictional boundaries, making the system less reliable and credible. Therefore, to regain the system's credibility, reliability, integrity, and authority. By way of deconstruction, binary opposing and conflicting jurisdictions are differentiated to maintain jurisdictional distinctions, which will form interdependent relationships with the help of comity.

Despite existing inter-jurisdictional relationship theories like international legal structuralism (ILS), interest in international jurisdictional relationships through binary oppositions and deconstruction is still minimal. Meanwhile, structuralism has been at the heart of scholarships like David Kennedy's *International Legal Structures* and Martti Koskenniemi in *FATU* and his other works. Still, no jurisdictional relationship theory exists underpinning the relationships between overlapping and conflicting jurisdictions of ICTs. Having established the methodological step involving the binary opposing jurisdictions, the formalistic application of the regulatory rules resulting in indeterminacy, deconstruction to regain order, the following sections shall examine these concepts, their nature, role and influences in current international legal discourse. It begins with Ferdinand De Saussure's structuralism.

3.2 Structuralism From Saussurean Perspective

The modern theory of structuralism is based on the structure of language, for which Ferdinand de Saussure takes credit. It is the starting point of current structural analysis.[362] Saussure's semiology provides a binary structure of signifier and signified for the ease of studying the relationship between the signs that make up language.[363] Structuralism is where

[362] Philip Pettit, The Concept of Structuralism: A Critical Analysis (University of California Press 1977)1.
[363] Ibid

binary oppositions and deconstruction take their origin. Therefore binary oppositions and deconstruction are sub-categories of structuralism. They are applied as a critical part of the methodology to analyse jurisdictional relationships. Binary oppositions are inherent in structuralism, even though most scholars do not always state it as their methodological tool. So, it seems unnoticeable from the broader discussions involving structuralism.

Nevertheless, what does semiology in structuralism entail? However, before getting into the complexities of Saussure's linguistic theory, it is worth noting that the essential elements of structuralism, the structure, the mode of thought, a way of conceptualising phenomena, is used as a building process.[364] This has evolved into constructing meaning like 'the product of building' a wooden structure' and the manner of construction. Thus, giving the sense of constructing 'the mutual relations of the constituent parts of the whole, which define its nature like 'the internal structure'.[365]

Saussure's linguistic theory of three binary distinctions influenced this linguistic structure: signifier/signified, langue/parole and synchronic/diachronic. These distinctions influenced the semiotic approach, the composition of two sign elements (signifier/signified). Neither of these gets tied to an objective description of a world independent of linguistics. Instead, when both signifier and signified unite in communication, a sign is formed, attributing meaning to their arbitrary relationships.[366]

To Saussure and the structuralist school, the meaning of communication only becomes available by creating a difference between the signs and distinguishing them from one another.[367] Justin Desautels-Stein uses the example of how the meaning of apple is constructed in the English language by creating difference and distinguishing it from what it is not, like 'ape' or 'people' or 'orange', rather than 'from some inherent or natural connection between apple and the concept of apple.'[368] This pattern fits many other language systems similar to the English language. However, this pattern would not apply to language systems with masculine and feminine forms like the French language. Rosalind Coward and John Ellis have observed that in French, there are different signifiers of each sign.[369] Even

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364 Raymond Williams, 'Structure' in Key Words [1976] London Fontana pp. 253-59 in Robert Seiler 'Semiology and semiotics, accessed via <https://people.ucalgary.ca/~rseiler/semiolog.htm>1 May 2020.

365 Ibid.

366 Pettit (n 362).

367 Ferdinand de Saussure, Course in General Linguistics, (Columbia University Press New York. 2011) 103.

368 Justin Desautels-Stein, 'International Legal Structuralism: A Primer' [2016] 8 (2) CUP Online 201-235 <https://doi.org/10.1017/S175297191500024X> accessed 20 April 2019.

369 Rosalind Coward and John Ellis, Language and Materialism: Developments in Semiology and the Theory of the Subject. (London RKP 1977) 12.

though international legal discourse is not a language in a strictly linguistic sense, it fits this pattern and makes understanding much easier for the bilingual speaker.

Using the masculine and feminine forms of the word 'cat' translated as 'Chat' and 'chatte' respectively, they conclude that the link between the signifier and signified is arbitrary.[370] They argue that no rule states that a particular signifier should articulate a certain signified, and there is no so-called natural link between a particular signifier and its concept. Even with onomatopoeic words in which the signifier and signified are symmetrical, no such link exists and differ from language to language. Therefore, the signs in each language are constituted in the process of social fixing with the equivalence between the signifier and signified with no intrinsic link in isolation unless forming 'part of a system of signification characterised by differential oppositions'. They conclude that it is, therefore, artificial to speak of a 'sign' because signs are only understood within a system of signification and not on their own. Thus, the structure of language endows signifiers and signifieds in the process of differentiation from each other.[371]

This phenomenon is not unique to linguistics. Generally speaking, communication is made by distinguishing one sign from another or creating a difference between signs. One only encounters the meaning of an utterance because "the sound of the word has some intrinsic connection with the concept the word [...]to designate […], in a relational way."[372] In language, most of the meaning of a word is made by distinguishing it from other words and less from some inherent or natural connection between the word and its concept. But how does this translate from structural linguistics to ILS? Desautels-Stein concluded the binary between *langue* and *parole* while questioning the methodology to be applied if *langue* can only be discoverable through a study of *parole*, argues that this gets done historical, looking at the development of language or 'fashion', or 'whatever' over a period of time. This development leaves room for ILS and the historical method, which is the method that international legal structuralists have applied for the most part.

The relation between signifier and signified in word forms possess arbitrary connections with concepts, and "the forms helped shape and generate the concepts in arbitrary ways."[373] Thus the Harvard School structuralist argument about Saussurean semiotics is that the form of the language shifts over time as the very concepts conveyed by language change. As such, the notion of signified becomes just as arbitrary as the form of the signifier.[374] These arbitrary

370 Ibid.
371 Ibid.
372 Ibid.
373 Ibid.
374 Ibid.

connections within the context of this study entail uncertainty that binary oppositions and deconstruction should be able to fix.

The second distinction of *langue* and *parole*, which make up the fundamental rules of syntax and speech, act in light of each other, which shape the contours and boundaries of linguistic structure.[375] To Saussure, '*langue* represents the whole set of linguistic habits that allows an individual to understand and be understood.[376] To Saussure, langue is determinate. Its contents are fixed and closed within a universal system of constraints on the language speaker.[377] In essence, this could be termed the objective element of language within a universal scope that the speaker does not control. In essence, this could be termed the objective element of language within a universal scope that the speaker does not control. On the other hand, *parole* is the structure of the *langue*, which is the form through which language is identified.[378] Therefore, it is subjective and intentionally controlled by the speaker and helps discover *langue* through analysing 'the common qualities discoverable through *parole*'.[379]

So, in this binary relationship where *langue* depends on *parole*, for legal analysis, Saussure's third distinction (synchronic and diachronic analysis) comes in to help fix the limits of the language. This third binary distinction illustrates how languages develop from a historical or evolutionary perspective, functions and change over time. Understanding a language's origins and what happens afterwards.[380] This forms the basis of the diachronic and synchronic analysis, which demonstrates awareness of semiotics' historical dimensions. Or the signs of the language as the distinction between the diachronic and synchronic modes. On the one hand, the diachronic analysis presents the historical origin of a language system or concepts as the start of the structural analysis and how it evolves and shifts over time.[381] On the other hand, synchronic analysis deals with a specific period in time, including the present.

The development of ILS has both diachronic and synchronic elements. Saussure emphasised the importance of synchronic analysis to understand the inner functions of language, complemented by diachronic analysis. Most international legal structuralists works do not make a clear distinction between these two modes. Without this distinction, the discourse comes across as diachronic, which shifts the discourse towards historical developments. As such, the development of ILS over a period of time is often regarded as a form of

375 Ibid.
376 Saussure (n 367) 77.
377 Ibid 73; Desautels-Stein (n 368).
378 Ibid.
379 Coward and Ellis (n 369)12.
380 Desautels-Stein (n 368).
381 Ibid.

structuralist historiography.[382] The language in ILS is the different concepts that make up IL developed over time. Without binary oppositions and deconstruction, the connection between Saussure's semiology and legal language would be abstract. Saussure's third distinction seems to stand out in some international legal structuralist works. Most reviews of David Kennedy and Koskenniemi have tilted towards the diachronic mode. They have analysed different international legal concepts like sovereignty and liberal politics through structural analysis and the changes encountered over time. So, how does this all fit into the international legal argument?

3.3 Binary Oppositions and Deconstruction

Borrowing from WTO jurisprudence, the use of ordinary definitions,[383] will be a good starting point to help understand and ease some of the inherent complexities that the meanings will unravel. No single definition captures all the different elements that scholars are interested in when defining terms, so engaging as many different definitions as possible is helpful. According to Greg Smith, the concept of binary oppositions is 'a pair of related terms or concepts that are 'opposite in meaning' as words, norms and concepts are only meaningful as structures of contradictions within a system.' As this study will reveal, contradictions are relevant in determining which of the binary oppositions to prioritise or oppose. Meanwhile, Chris Baldick in the *Concise Oxford Dictionary* defines binary oppositions as the system by which language and thought—two ideological opposites are strictly defined and set off against one another.[384]

The concept of binary oppositions evolves from structuralism. The *Collins English Dictionary* defines structuralism as 'an approach to social sciences and literature in terms of oppositions, contrasts, and hierarchical structures, especially as they might reflect universal[…] organising principles.'[385] These definitions are not mere duplications for emphasis. Since no single definition captures every element that scholars are interested in, multiple definitions show the meaning of binary oppositions from different perspectives. Each bears the different elements applied by various scholars in their analysis of international legal processes using structuralism and binary oppositions.

A 'sister concept' concept that is closely related to binary oppositions, also born out of structuralism, is deconstruction. Deconstruction is a theory developed by Jacques Derrida for

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382 Ibid.

383 See *EC - Biotech Products Measures Affecting the Approval and Marketing of Biotech Products, (United States of American, Canada and Argentina v European Communities),* Panel Report adopted on 21 November 2006, WTO, WT/DS291R, WT/DS292R, WT/DS293R, paras. 4.163 et seq.

384 Chris Baldick, 'The Concise Oxford Dictionary of Literary Terms' 2004 <http://www.highbeam.com/doc/1056-binaryopposition.html> accessed 28 December 2018.

385 Collins English Dictionary & Thesaurus (n 252) 1197.

textual analysis and used to question fundamental distinctions or oppositions following close examination of language. It is sometimes problematic and at times difficult to ascertain whether it is a conceptual developer or acting against.[386] It is considered distortive on the one hand by scholars like Jeremy Telman[387] and, on the other hand, provides a unifying principle according to Rodolphe Gasche.[388] Gasche notes several instrumental themes, which have been used in rationalising deconstruction's place in this study. It begins with Derrida's insistence on rejecting the concept of 'the fragment' and the notion of anti-systematic thought.[389] Without getting too philosophical, as part of developing the theoretical framework for interdependence, deconstruction helps to keep jurisdictions together but distinct once the binaries are created by the regulatory rules and identified through binary oppositions. Deconstruction plays a central role in Koskenniemi's structural analysis in *FATU,* displayed through its relation to different analytical techniques such as turning the text against itself and disrupting its meaning, conceptual oppositions or contradictory conceptual positions.[390]

IL is a patchwork of many diverse, controversial and conflicting concepts, principles and agendas that need differentiating into distinct fragments. Otherwise, the unity, integrity and authority of IL will suffer. While analysing, some of these concepts work together while others are in continuous opposition, creating a conceptually messy situation with no common ground.[391] With the many techniques of applying deconstruction, this study cuts to the chase and assign deconstruction the role of keeping jurisdictions distinct when the regulatory rules fail to prevent jurisdictional conflicts, resulting in disorderly inter-jurisdictional interactions. With the jurisdictions kept distinct, comity comes in to complete the formation of the theoretical framework or structure of interdependence.

This disorderly situation is best termed structural indeterminacy described by d'Aspremont and Singh. They argue that it gives IL its strength in 'its systemic coherence, stability and relevance'.[392] Kennedy has also observed how structural analyses provide relationships between things rather than the things themselves because 'things do not have true essence

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386 See Andrew Halpin, Reasoning with Law, (Hart Publishing, Oxford 2001) 169.
387 Jeremy Telman, 'International Legal Positivism and Legal Realism' (University Legal Studies Research Paper 2013) No 13-9 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2292694 accessed 4 May 2019.
388 Rodolphe Gasche, Introduction to Deconstruction and Philosophy: The Texts of Jacques Derrida (The University of Chicago Press, Chicago 1987) 4.
389 Ibid 6.
390 Iain Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism'[1991] 61 (1) BYIL 339 – 362.
391 Basak Cali, 'On the Interpretivism and International Law' [2009] 20 (3) EJIL 805 – 822.
392 Jean d'Aspremont and Sahid Singh, Concepts for International aw: Contributions to Disciplinary Thought (Edward Elgar, Cheltenham 2019)12.

that can be studied' as 'their relationship to other things defines their existence'.[393] Therefore, overlapping jurisdictions in conflicting parallel proceedings are best understood by exploring meaning from the opposing jurisdictions and related concepts that contradict and interact with the 'other'. Kennedy further emphasises that one should study relationships because meaning is relational rather than essential and structured from contradictions and binary oppositions.[394]

Applying regulatory rules to stop overlapping and conflicting jurisdictions theoretically creates binary oppositions. Binary oppositions are not a new phenomenon in contemporary international legal scholarship, and it is evident in scholarly works like Koskenniemi's and others at the Harvard School apply structuralism. However, they do not always expressly state binary oppositions as their methodological approach. It is deciphered textually from words like 'structures' that portray the notion of binary oppositions straight from captions.[395] This is partly because no theoretical framework is in place based on binary oppositions to underpin this structural analysis. Meanwhile, silent binary oppositions within structuralist thinking can be traced as far back as the writings of eminent international legal scholars like Carl Schmitt in his scholarly piece - *The Changing Structure of International Law*.[396] Schmitt argued that the structure of IL rests on certain notions of space and measure concerning the earth.[397] In this regard, he presented a binary opposition between isolation and intervention as choices faced by world powers in the wake of the Second World War before they could side with intervention.[398]

Other mild thematic binary oppositions analysed by Schmitt include the notion of the 'Western Hemisphere as an unspoiled world' binarily opposed to 'the old, corrupt European world,' upon which the Monroe Doctrine had its basis.[399] Schmitt acknowledges that within structures existed contradictions, constantly arising in the Western Hemisphere based on the

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[393] David Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship' [1985] 21 New Eng. L. Rev. 209.
[394] Ibid.
[395] See David Kennedy, International Legal Structures (Nomos Verlagsgesellschaft, Baden-Baden 1987); Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Finnish Lawyers Publishing Company Helsinki 1989).
[396] Carl Schmitt, 'The Changing Structure of International law' [2016] 20 (3) Journal for Cultural Research 310-328. Note that this is a translation of the original Spanish text that was delivered by Carl Schmitt in Madrid at the *Instituto de Estudios Politicos*, on 1 June 1943. The translation is by Antonio Cerella and Andrea Salvatore for the Journal of Cultural Research in 2016.
[397] Ibid.
[398] Ibid.
[399] Ibid; The Monroe Doctrine was a United States policy which opposed European Colonisation in the Americas which began in 1823 with a letter sent to Congress by President James Monroe warning European Powers against further European Colonisation.

inner structure of a divided global line due to the lack of an internal principle that could help decide between isolation and intervention.[400]

Writing in 1943, Schmitt intimated that American philosophers claimed moral superiority, making the distinction between good and evil in America, justice and injustice, a decent person and criminal in America, opposed to transgressors of the law in corrupt old Europe.[401] These binary oppositions in international relations theory and politics convey rivalry between binary ideological positions.[402] Looking at binary oppositions from these ideological positions might not be worth emulating if not well understood in a very divergent and fragmented field like international law.[403] In 1965, Myres McDougal and Michael Reisman reviewed *The Changing Structure of International Law* by Wolfgang Friedman, and called for a 'more comprehensive theory of inquiry about international law.[404] Meanwhile, Richard Falk[405] and Harold Laswell's had earlier made similar calls.[406] In these writings, one can identify connections between structure and theory to facilitate studying interrelationships within the international legal order even though not expressed in clear binary opposition terms.

However, Friedmann uses binary oppositions described by McDougal and Reisman as an unreal dichotomy on the distinction between 'national' and 'international' interest and the distinction between 'authority and control.' In all this lies uncertainty and indeterminacy. McDougal and Reisman also pointed out that national interest could be the international interest, eliminating distinctions or binary oppositions. Thus, requiring a different approach to the relationships, similar to those comity is called to deal with due to mild indeterminacy. Other writings of that era depicting binary oppositions and structures or, as McDougal and Reisman put it, 'the two-tiered co-existence description of international law.'[407] Similarly,

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400 Schmitt (n 396).
401 Ibid.
402 See Scott Burchill and Andrew Linklater, 'Introduction' in Theories of International Relations. Ed. By Scott Burchill et al., (New York: Pelgrave Macmillan 2005) 1.
403 See Anne Peters (n 60).
404 Myres S McDougal and Michael W Reisman, 'The Changing Structure of International Law: Unchanging Structure for Inquiry' [1965] Faculty Scholarship Series. 677. <https://digitalcommons.law.yale.edu/fss_papers/677> accessed 23 March 2019
405 Richard Falk, 'The Adequacy of Contemporary Theories of International Law-Gaps in Legal Thinking' [1964] 50 VA. L. Rev. 231 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/valr50&div=25> accessed 23 March 2019.
406 Harold D Lasswell, 'The Interrelations of World Organization and Society' [1946] 55 YALE L.J. 889.
407 McDougal and Reisman (n 404).

Schwarzenberger's 'international law of reciprocity and international law of coordination' also present the notion of binaries.[408]

3.4 International Legal Structuralism from Structuralism

There is little doubt about the presence of structural analysis in international legal discourse, as already discussed and evidenced with the works of David Kennedy and Martti Koskenniemi. However, this theory has not advanced towards developing a theoretical framework for the interdependent relationships between ICTs. As evidenced by Justin Desautels-Stein's *International Legal Structuralism*, legal structuralism has not been well received after its inception in the eighties.[409] As the name implies, legal structuralism emerges out of structuralism, a theory supposing that phenomena experienced in human life can only be made understandable through how their experiences relate to each other, which constitute a structure.[410] Even though international legal structures may not have any formal definition, the theory has gradually gained prominence in international legal scholarship. It begins with the pioneer works of David Kennedy of the Harvard School and his scholarly piece, *International Legal Structures* and across Europe by Martti Koskenniemi. ILS identifies and presents a legal context in a linguistic structure. This structure is primarily binary and forms the basis of binary oppositions, which gets applied as a methodological device in this study. However, the binary oppositions are not clearly visible from international legal structuralist analysis, which focuses more on the historical approach as a methodology device. ILS does not clearly differentiate the jurisdictions of IL with distinctions that uphold the authority and integrity of international law. This begs for binary oppositions as a methodological device. This section also aims to illustrate that ILS from a broad Saussurean perspective does not fully assist ICTs in keeping their jurisdictions distinct. Therefore, the sub-category, binary oppositions, is better placed as a more suitable methodological device, supported by deconstruction for the structural analysis. This will differentiate and maintain jurisdictional distinctions as ICTs interact and form relationships.

Justin Desautel-Stein's has recently attempted to re-introduce ILS as a methodological innovation to conceptualise and shift the international legal system from politics and render it a new jurisprudential style.[411] Regardless of arguments about the indeterminate character of IL and its close relationship to politics,[412] or as others consider it shambolic,[413] fixing its

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408 Georg Schwarzenberger, The Frontiers of International Law (Stevens London 1962).
409 Desautels-Stein(n 368).
410 Simon Blackburn, Oxford Dictionary of Philosophy (2nd edn OUP, Oxford 2005) 353
411 Desautels-Stein (n 368).
412Scobbie (n 390).
413 Purvis, Nigel. 1991. "Critical Legal Studies in Public International Law'." Harvard Journal of International Law 32:81.

shambolic nature through broad structural analysis would not make the jurisdictional relationships distinct. Engaging ILS in structural analysis that will pull out the distinctive character of the international legal language requires binary oppositions and deconstruction whose elements contrast each other rather than complement. Even though binary oppositions also help jurisdictions complement each other, generally speaking, jurisdictional positions after the rules fail is crucial to keep jurisdictions distinct, which deconstruction does.

Meaning in Saussurean structural analysis occurs in a binary format. It happens when the binary units make meaning by relating to one another. As observed earlier, in binary opposition, the definition of each unit is a reciprocal determination with another term.[414] However, Saussure did not expressly distinguish between conceptual relationships, concepts that oppose each other and those that work in parallel or work along to support each other. Without this clear distinction, ILS has not made a regular contribution to IL because applying it from within the broad framework of structuralism obscures its unique analytical style. These distinctions are much clearer from a binary oppositions point of view. As such, the section examines the dichotomous character of structuralism, focusing mainly on binary oppositions with the support of deconstruction to provide a structure of interdependence between ICTs. ILS gives a more practical role in addressing IL. Particular in the area of competing jurisdictions.

ILS also uses language and its binary properties of *langue* and *parole*. *Langue* does not oppose *parole* to give both properties some utility in addressing practical problems like conflicting jurisdictions. According to Desautels-Stein, language is just one way of making a semblance or representation of ILS. As such, ILS presents IL as a language system. It is studied and understood through signs and symbols used in their interpretation. The language occurs through international legal concepts, norms, principles and rules. Through this, IL's character and integrity get tested.

Those who spearheaded this argument were international legal structuralists of the Harvard School who believed in understanding law as 'a language-system, where a deep syntax governs the forms of lexical arguments'.'[415] This was evidenced in Duncan Kennedy's 1976 *Form and Substance in Private Law Adjudication*[416] and 1979 *The Structure of Blackstone's*

[414] Sorcha Fogarty, "Binary Oppositions". *The Literary Encyclopedia*. First published 15 February 2005 [https://www.litencyc.com/php/stopics.php?rec=true&UID=122, accessed 07 July 2021.],
[415] Desautels-Stein (n 368).
[416] Kennedy, Duncan. 1976. 'Form and Substance in Private Law Adjudication.' Harvard Law Review 89:1685

Commentaries.[417] Within the discourse of legal structuralism, structuralists would 'scoured the office of the jurist,' searching for legal materials. Also, writings of legal professionals to answer questions about the unifying patterns and forms within a legal context, as present in a linguistic structure.[418]

In a network of concepts, structure and relationships are closely related and different patterns enhance or weaken these relationships. These patterns can emerge from legal structuralism and their activities. Like human activities, it is unintelligible except in a network of interrelationships. They gain their identity in opposition, difference, or dissimilarity, constituting a structure.[419] Like deconstruction, binary oppositions and linguistic structuralism, conceptual oppositions and difference give structuralism its identity. It is a process through which meaning is made in relationship with other concepts.[420] From this general depiction of structuralism, a definition of ILS is derived by applying international legal concepts within this framework, which give rise to ILS. To back this up, Desautels-Stein has observed that international legal structuralism is a relentless deconstruction that offers international legal theorists like Koskenniemi and Kennedy an enriching and edifying method for rethinking the relation between law and politics on the one hand, and law and history on the other.[421] As a structuralist deconstruction, the relationship between politics and law is what Koskenniemi implicitly sees as the binary opposing relationships. At the same time, Kennedy observes international sovereignty to be in binary oppositions[emphasis added], pulling international legal arguments in opposite directions.[422] However, when jurisdictions overlap, giving rise to courts and tribunals or regime interaction, interdependent relationships are created while each institution maintains its independence.

3.5 Deconstructing Binary Oppositions – Koskenniemi's Analytical Style

Most structuralist arguments follow a binary format, traced back to Saussure's approach to semiology.[423] When analysing inter-related concepts, these arguments appear in different ways, such as binary oppositions, dichotomy, contradictions, bipolar, or simply as conceptual oppositions. This section shall look into Koskenniemi's structural analytical style to better understand how binary oppositions manifest in international legal discourse. Different scholars have raised questions regarding finding binary oppositions or which terms to

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417 The Structure of Blackstone's Commentaries." Buffalo Law Review 28:205.
418 Desautels-Stein (n 368).
419 Simon Blackburn, Oxford Dictionary of Philosophy (2nd edn OUP, Oxford 2005) 353.
420 Ibid.
421 Desautels-Stein (n 368).
422 David Kennedy, International Legal Structures (Nomos Verlagsgesellschaft Baden-Baden 1987) 109 -110; Basak Cali, 'On Interpretivism and International Law' [2009] 20 (3) EJIL 805–822,
423 Saussure (n 367).

oppose in conceptual oppositions, as noted in Scobbie's review of Koskiennemi's FATU.[424] The review acknowledges the methodology is difficult, which may lead to indeterminacy or uncertainty as conceptual pairs are not always fundamentally opposite but sometimes mutually dependent.

However, Scobbie acknowledges Koskiennemi's method of deconstruction of binary oppositions, which requires reading a text in terms of what the text is not and trying to prioritise one concept over another.[425] Relating this to overlapping and conflicting jurisdictions, this difficulty seems eliminated because of a binary choice between two conflicting jurisdictions, with one prioritised over the other. So, in terms of overlapping and conflicting jurisdictions, the answer lies in the regulatory rules which trigger binary opposing jurisdictions to connect and start interacting when the rules that were meant to preclude conflict fail. The rules are not only meant to preclude conflict but also to maintain order. Due to their failure to preclude indeterminacy, disorder and uncertainty ensue, requiring deconstruction to keep opposing jurisdictions distinct.[426]

The process of deconstruction, which is part and parcel of binary oppositions, is infested with conceptual analysis though hidden until the rules are triggered to reveal the contradictions or oppositions that get differentiated. Concepts or binaries to oppose or prioritise may be easy to trace in overlapping jurisdictions even if they are not fundamentally opposing. However, this process is not about finding which concepts to oppose but more about being aware of the more overt concepts and what creates conflicts.[427] It is about finding distinctions from the contradictions and differentiations created by looking towards the opposite direction to unveil the hidden meaning from concepts. Koskenniemi's argues:

> this form of analysis that separates phenomena of social life that are immediately visible from others that are usually 'hidden' but in some way contribute to producing the former so that once the operation of that 'hidden' background is revealed, we feel we 'understand' the more familiar phenomena better and are better able to deal with problems they are associated with.[428]

This analogy is a good illustration of the mix between the jurisprudential and jurisdictional overlaps and conflicts. The binaries that create inter-jurisdictional relationships and their distinctions often get obscured until separated through the formalistic approach. While the regulatory rules separate the fundamentally opposed parallel conflicting jurisdictions, the less

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424 Scobbie (n 390)
425 Ibid.
426 This is illustrated in the illustration from the hypothetical situation created to illustrate the three step methodological steps to achieve the structure of interdependence.
427 Scobbie (390)
428 Martti Koskenniemi, 'What is Critical Research in International Law: Celebrating Structuralism' [2016] 29 LJIL 727 – 735.

separated radically, which embody jurisprudential overlaps, face the question of how and what to separate. Deconstruction of the binaries to maintain jurisdictional distinctions and removal of the obscurity occurs at this stage.

Finding what to prioritise or oppose could be tested in Koskenniemi's analysis of the *South West Africa case,*[429] which involved conceptual oppositions of consensual, subjective strand against the non-consensual, objective strand. It did not require fundamental oppositions to decide what to oppose or prioritise. The objective considerations, in which the Court emphasised the humanitarian and the contractual character of the mandate for South Africa over South-West Africa,[430] entailed contradictory barriers that needed differentiating.[431] However, could standing constitute a fundamental criterion or part of the methodology of finding what to oppose, eliminate, or prioritise one conceptual opposition over another? This was not a case of two conflicting jurisdictions. However, the question before the Court involved a binary choice, and the Court needed to prioritise one over the other. The Court's judgment relates to Koskenniemi's argument that IL cannot be distinguished or separated from international politics.[432] In its judgment in 1966, the question on the standing of Ethiopia and Liberia was considered and held that humanitarian considerations were insufficient to grant them rights given the systemic nature of the mandate.[433] This humanitarian approach was an objective, non-consensual principle that overruled anything Ethiopia and Liberia might have subjectively intended as League members in their own right.[434] This approach was relevant in finding a preference between two binary strands when choices are affected by uncertain requirements. Regardless of the specific outcome of this case, the Court's consideration shows that there are criteria to help identify what to prioritise or oppose in binary oppositions or deconstruction on which the Court may rely.

There is no one correct answer or understanding of the rules, concepts, or decision-making approaches. Koskenniemi intimates that during the initial case, the Court did not just order South Africa to comply with the humanitarian character of the Mandate. It was a risky challengeable decision due to its realist character with political considerations igniting controversy.[435] Koskenniemi emphasised the need for consensual arrangements to justify the Mandate and notes that after looking into South Africa's behaviour, the Court concluded

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[429] *ICJ South West Africa Case,* Reports 1962 335 – 337 et seq, Namibia Case, Reports 1971 28 – 30 (45 - 51).
[430] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument, Reissue with New Epilogue* (CUP, Cambridge 1989) 322.
[431] Ibid.
[432] See Scobbie (n 390).
[433] Koskenniemi (n 430).
[434] Ibid 321 – 322.
[435] Ibid.

that South Africa's conduct and statements were interpreted as recognition by South Africa of the supervisory powers of the General Assembly.[436] This subjective recognition was consistently held in the Court's later judgments and opinions on the South West African question.[437] While this analysis illustrates the application of binary strands in resolving a particular dispute with no competing or parallel proceedings, it does help to identify what to eliminate or prioritise. Politics and other non-legal factors could guide what can be opposed or prioritised. So, too is the distinction between international politics and international law. However, the two complement each other, showing that one could be opposed or prioritised over the other when circumstances permit. Quite clearly, humanitarian and political questions are not easy to separate. On this basis, the binary opposite of the non-political but more legal arguments may get prioritised. In contrast, the politically influenced arguments get opposed.

However, discretion is also helpful in prioritising or deciding what concepts to oppose. In 'The Concept of Law', Hart talks of decision-makers exercising discretion when rules are uncertain.[438] In support of the legal theoretical or jurisprudential approach, where judges have to resolve a case between two opposing interpretations, for the 'true and correct' legal meaning, Hart's exercise of discretion when there is uncertainty provides a way forward.[439]

The *Reservations to the Genocide Convention Case*[440] in which the Court discussed the conditions of validity of reservations to the Convention on the Prohibition of Genocide.[441] Koskenniemi notes that the Court started by considering whether a State which makes a reservation to which others object could be a party to the treaty and outlined a rule which it held well-established. '... a State cannot be bound without its consent, and consequently, no reservation can be effective against any State without its agreement.'[442] In this situation, the Court faced two binary opposing objectives, a non-consensual strand and a subjective consensual strand.

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436 *Status of South West Africa Case*, Reports 1950 p.135 in Koskenniemi (n 430) 286.
437 *South West Africa Case*, Reports 1962 p. 335, 339 – 340. Namibia Case, Reports 1971 p.39 -41 in Koskenniemi (n 30).
438 H.L.A Hart, The Concept of Law (2nd edn, Claredon Press, Oxford 1994) 145.
439 Ross Charnock, 'Hart as Contextualist? Theories of Interpretation in Language and the Law' in Michael Freeman and Fiona Smith in Law and Language: Current Legal Issues (Vol 15, OUP, Oxford Scholarship Online 2013)129 <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199673667.001.0001/acprof-9780199673667-chapter-9> accessed 20 February 2020.
440 *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (ICJ), 28 May 1951 p. 21.
441 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, 277.
442 Koskenniemi (n 430) 323.

Under the objective strand, the Court expressed the principle of the integrity of conventions which explains that the rights of 'old' or existing parties cannot be objected to by the rights of a 'new' party if the latter's reciprocal duties do not counterbalance these.[443] In the second strand, the Court switched the preference to the objective non-consensual strand, concluding that a reserving State does not become a party. According to the Court, against specific objective considerations, which is the 'universal nature of the Genocide Convention, the wide degree of participation envisaged for it as well as the need for flexibility.'[444] To elucidate the point, Koskenniemi applied binary opposition to counteract a subjective viewpoint envisaged during the *travaux preparatoires*.[445] By implication, he also notes the Court's conclusion that merely not consenting to a reservation does not preclude a reserving state from becoming a party to a convention.[446]

According to Koskenniemi, the Court held that such reservations are acceptable and in conformity with the 'object and purpose' of the Convention, which was an objective standard.[447] He also notes the Court argued in a non-consensual way by stressing the universal character of the Convention, with its object being unrelated to particular state interests which were not wholly objective.[448] So, the Court applied the object and purpose test to determine what meaning both the General Assembly and the contracting parties had in mind when drafting. To this end, Koskenniemi observed that the Court inferred the 'object and purpose' from the 'intention of the General Assembly and states, which adopted the convention, stressing that disregarding it would 'frustrate the purpose, which the General Assembly and the Contracting Parties had in mind.'[449] He notes that the Court first approached the objective non-consensual 'object and purpose' and did not point out the reserving state's subjective intentions before switching to the subjective element.[450] Koskenniemi notes that subjectively, the Court acknowledged, state parties to the Convention can appreciate the validity of the reservation, exercise their right individually and from their own 'standpoint' as no state gets bound by a reservation to which it has not consented.[451]

However, citing the Soviet position, Koskenniemi notes that contrary to state sovereignty, a non-consensual test about whether or not reservations are allowed, the Court pointed out

[443] Ibid.
[444] Ibid 324.
[445] Ibid.
[446] Ibid.
[447] Ibid.
[448] Ibid.
[449] Ibid.
[450] Ibid.
[451] Ibid.

that 'the idea of State sovereignty could lead to a complete disregard of the object and purpose...'[452] He disregards the objective non-consensual strand preferring the subjective consensual strand, seen in his later writings. Koskenniemi insists on the idea of embedded preferences as a way out because it produces 'structural biases' that act as 'a professional consensus' or a mainstream answer to any specific problem.[453] This will include systemic problems like fragmentation and the controversies and contradictions involving attempts to address them. To Koskenniemi, in situations like this, all positions are open to the reproduction of contrasting arguments. The system 'prefers certain outcomes or distributive choices to other outcomes or choices'.[454] Getting to these preferences or preferring one outcome over another contains an element of bias that limits the range of possible choices within different methodological choices.[455]

This binary approach applies in analysing the structure of the doctrine of sources using several cases in which Koskenniemi illustrates the binary nature of the identity of custom. It integrates a descending, objective non-consensual strand on the one hand, and on the other, an ascending, subjective consensual strand.[456] Using the *South West Africa case*, he notes that the practice of decision making is justified by undermining the binary oppositions between consent and justice.[457] The Court was faced with deciding between an objective and a subjective element.[458] The objective element is the textualist interpretation of the relevant instruments that created the Mandate, and the subjective element is South Africa's original intention to consent.[459]

Similarly, in the *Admissions Case,*[460] there was equally a conflict between the objective approach based on the unambiguous wording of Article 4 of the Charter and a subjective approach based on the practice of states and their relationship with the United Nations and its organs.[461] With the expectation that binary opposing views of objective and subjective approaches would disagree on the interpretation of Article 4, this was not the case while making exhaustive and non-exhaustive arguments.[462] Both exhaustive and non-exhaustive

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[452] Ibid 325.
[453] Koskenniemi (n 430) 607.
[454] Ibid.
[455] Ibid 610.
[456] Koskenniemi (n 430)
[457] *Status of South West Africa Case (*n 436)
[458] Koskenniemi (n 430) 321.
[459] Ibid
[460] *Admission Case*, ICJ Reports 1948 p. 58; other cases include the *Reservations to the Genocide Convention Case (1951),* in which the Court was faced with a situation of binary opposing answers and noted that a reservation could be valid if other states consent to it or if tied to other non-consensual criteria; in the T*emple Case, Reports* 1962 p 16 – 20.
[461] Koskenniemi (n 430) 327
[462] Ibid 329

arguments had common ground on the unambiguous wording of Article 4 as a form of objective support.[463] Similarly, as a form of subjective support, there is agreement on the drafters' intent, which suggests indeterminate interpretations by the opposite positions to find common ground.[464] Koskenniemi concludes that both objective and subjective approaches are fully determined, and interpretation of Article 4 cannot flow through both approaches.[465]

A much-pronounced illustration of indeterminacy occurs in the A*rbitral Awards Case.*[466] In analysing the case, Koskenniemi notes that it was not clear whether the validity of the award was a matter of consent or justice, based on the actions of Nicaragua in relation to Honduras in the course of the proceedings.[467] So, despite binary oppositions, Koskenniemi notes that decision-making must consider party intent and justice, which removes the oppositions between consent and justice, allowing reliance on each other.[468] hat notwithstanding, this study's focus is more on the disorder and uncertainties that are easily dealt with through deconstruction.

3.5 Difficulties Advancing International Legal Structuralism

Several factors have contributed to the engagement of structural analysis in international legal discourse. Critical scholars tend to embrace emerging theories from face value before actually digesting to understand what the approach entails at a very general level within the broad field of structuralism. An example is Derrida's introduction of deconstruction, first embraced as the missing piece or starting point of textual analysis.[469] Later, it became criticised as an attack on structuralism, and its binary oppositions and hierarchical distinctions considered the dismantling of the text structure.[470] Meanwhile, Derrida himself did not have a fixed definition for the term. Throughout his career, the concept changed meaning, ending with various meanings.[471] This makes the idea of deconstruction complex and challenging to follow. However, one of its elements—binary oppositions—is applied as part of the methodology in this study. In ILS, the term deconstruction gets applied quite differently. In his review of FATU, Scobbie identifies with Koskenniemi's structural analysis, which takes a

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463 Ibid
464 Ibid
465 Ibid
466 *Arbitral Award of 1906 Case,* ICJ Reports 1960 p 197 – 199, 205, 210)
467 Koskenniemi (n 430) 335 – 336.
468 Ibid 320.
469 Gerald L Bruns, 'Review: Structuralism, Deconstruction and Hermeneutics, Reviewed Work: On Deconstruction: Theory and Criticism after Structuralism by Jonathan Culler, [1984] Vol. 14, No. 1
470 J Hillis Miller, 'Deconstruction and Criticism *Stevens' Rock and Criticism as Cure'* [1976] II, 30 Georgia Review 5.
471 Leonard Lawlor (2019), 'Jacques Derrida', in Zalta, Edward N. (ed.), Metaphysics Research Lab, Stanford University, retrieved 11 04 2020.

deconstructionist approach with extensive usage of binary oppositions. He also refers to this as the bipolar approach, involving objective and subjective divisions in different ascending and descending argumentation, but never really as binary oppositions[emphasis added].[472] The point about this overview is that the struggles of international legal scholars with structuralism stem from a much broader context and are not simply mere fix with ILS.

However, some of these factors have already been highlighted above. Amongst which is the overlooking of sub-categories like binary oppositions and deconstruction. Other difficulties include the varied interpretations and understanding of these concepts. Most scholars have admitted that these difficulties are inherent. Despite the central role of binary oppositions in structural analysis, it is not always apparent from the writer's language. Sometimes scant mentions of the word "binary oppositions" do appear. Others get identified from the context through words like distinctiveness or relationships. Other difficulties stem from the misunderstanding of critical scholarship when it first emerges. Derrida's introduction of deconstruction mentioned above is a case in point. Even though Derrida had refused the post-structuralist label, some scholars still class his work as post-structuralist.[473] On his part, Derrida considered himself a structuralist. This may not be easy to apply as a methodological choice for those who care about labels.

Even though deconstruction is criticised for not following well-determined independent signs,[474] it reveals binary oppositions. However, both often get obscured in broader structuralist writings, even though well utilised in structural analysis. There are many variations in how structuralist writings get interpreted and reviewed. The point of this is to emphasise the methodological choice and acknowledge some of the difficulties that led scholars like Desautels-Stein to argue that ILS has not been well received and, therefore, its re-introduction.[475] Both binary oppositions and deconstruction, inherent in structural analysis, need more outright presence in the re-introduction of ILS. They are very relevant in addressing conflicting jurisdictions. On this count, this study applies binary oppositions and deconstruction directly. The direct application exposes the inherent binary oppositions to support the methodological choice of this study. Binary oppositions and deconstruction are subsets of structuralism, often appearing indirectly within structural analysis. This study believes that readers would be better served with these more precise doctrines used independently instead of the umbrella theory—structuralism. Doing this will reveal the specifics often hidden within broader structuralist discourse.

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472 Scobbie (n 390).
473 James William, Understanding Post Structuralism (Taylor and Francis 2014) 33.
474 Ibid.
475 Desautels-Stein(368).

3.5.1 Problems with Reviewing International Legal structuralist Writings

Desautels-Steins asserts that international legal scholars often make several mistakes when appreciating structuralist works.[476] Using *FATU,* he illustrates that even though the book is a 'fantastic representation of structuralist jurisprudence,' it fails when readers consider it a piece of cultural, social, intellectual or legal history.[477] The reason is that structuralism is often mistaken for nihilism, involving structuralist history as history without context.[478] The context to these readers is the political, economic, social and cultural contexts which the legal history should be set around, without which the structuralist history is deprived of context.[479]

A second common mistake Desautels-Steins identified is the indeterminacy between law and politics together with law and history. International legal structuralists tend to go very far back in time without any apparent context.[480] Meanwhile, ILS rejects accounts of law that could clearly be likened to the natural sciences. Of course, one tends to wonder why apodictic accounts of natural sciences should not be rejected or considered a mistake within a complex discipline that is not fully delineated. Desautels-Stein argues that because structuralist history is contextualist history, international legal structuralists are mistaken to not hold a view of law beyond any other context but politics, dismissing non-political arguments.[481] However, some scholars would argue that the law being traditional indeterminate, going beyond politics increases the complexities. When faced with an indeterminate sentencing system, judges go for the highest penalties out of discretion which may not be the correct judgment.[482] Regardless of the basis of rejecting specific structural contexts, what is clear is uncertainty in applying ILC as a methodology for structural analysis built around the three semiological and binary distinctions. These are *langue* and *parole*, signifier and signifieds, and finally, the diachronic and synchronic distinctions discussed below.

Many different interpretations have resulted from works on international legal structuralism, which are at times an inaccurate depiction of the scholars' view. Most discourses portray the linguistic structure pioneered by Saussure, which is in binary form—*langue* and *parole* or the signifier and signified, or the diachronic and synchronic distinctions. However, binary oppositions never get engaged as a methodological tool. Most often, commentators focus on the historical evolution of international legal concepts ignoring the binary oppositions

476 Ibid.
477 Ibid.
478 Ibid.
479 Ibid.
480 Ibid.
481 Ibid.
482 Reitz (n 40).

portrayed in line with *langue* and *parole*, signifier and signified or the diachronic and synchronic distinctions.

For example, Nicholas Onuf, in his Review of Kennedy's *International Legal Structure*, infers from Kennedy's essay—*Primitive Legal Scholar*, to break down Kennedy's discourse into three eras. Kennedy discussed the launch of a new era in developing international legal doctrine.[483] Onuf, on his part, used this to break down Kennedy's discourse into three eras—the primitive, traditional and modern eras.[484] Even though Onuf is quite emphatic in his review, he acknowledges that Kennedy does not directly sketch these eras of international legal doctrine. Nothing is wrong in referring to an author's previous scholarly work to understand the present. However, Onuf's review and breakdown into three eras disfavour the relationship discourse in Kennedy's work. Onuf's review shifts attention away from the relationships inherent in Kennedy's work, as he traces the references that one doctrine makes to another through their 'recurring rhetorical structures'.[485] He notes that legal arguments are effectively made by relating one rhetorical argument to another and considers his views under three doctrinal areas: sources, process and substance.[486] Reading this in conjunction with Onuf's review and characterisation of the discourse into the primitive, traditional and modern eras diverts attention to historical development at the expense of the relationship structures within the three doctrinal areas.

Under the sources doctrine, Kennedy examines the origin and authority of IL by referring to authority constituted elsewhere. His analysis of the process doctrine shows that the greater part of modern IL considers participants and jurisdictional framework for IL separate from generating IL and 'the substance of its normative order'.[487]Meanwhile, in the substance doctrine, he addresses sovereign cooperation and conflict issues by referring to the boundaries and authorities established in other doctrinal fields.[488] He believes that dividing and categorising doctrines into these distinctive parts might lead to uncovering different rhetorical patterns.[489] Thus, discovering patterns entails dealing with those that are not visible but still influential and highlighting the existence of a binary strand subject to discovery in the analysis. While this structural analysis relates to other concepts or doctrinal fields, legal commentators often miss the binary element of these analyses and focus more on the non-binary aspects. As such, binary oppositions and the distinctions that abound become

[483] Nicholas Onuf, 'International Theory, Essays and Engagements, 1966 – 2006'(London Routledge-Cavendish London) 266.
[484] Ibid.
[485] Kennedy (n 422) 7.
[486] Ibid.
[487] Ibid.
[488] Ibid.
[489] Ibid.

obsolete in international legal structuralist arguments. Onuf recognises that his review of Kennedy's work might not reflect Kennedy's intentions and describes it as 'difficult and complicated.' Wondering what Kennedy's reaction might be to his review, he concludes by self-assertion that he believes his review is valuable and appreciated.[490]

This phenomenon is not only true with the work of Kennedy. The same treatment has been observed in the work of Koskenniemi's *FATU*, leading to a colloquium, following which he wrote an essay titled *What is Critical Research in International Law? Celebrating Structuralism* and examining the exercise of power through analysis of legal language.[491] In the essay, he took the occasion to spell out as 'clearly' as he could the power of the type of analysis regarded as structuralist. He argues that structuralists analysis 'separates phenomenon of social life that is immediately visible from others that are usually "hidden" but in some way contribute to producing the former'.'[492] He continues to argue that this is so that once the operations of that hidden background are revealed, the more familiar phenomena can be understood better and can deal with the associated problems. He then uses the metaphor of 'surface' contrasted by 'deep structure', which he says are commonly used in twentieth-century social thought to emphasise the point. At the same time, this is still necessary for today's international legal structuralist arguments.[493]

It may not be evident to scholars that Koskenniemi is applying binaries leading them to different interpretations, some of which he has tried to refute. Like Onuf acknowledging the difficulty in Kennedy's work upon review, which he never received, Koskenniemi took time to address some of the thoughts and reactions triggered by FATU. He recognises Jean d'Aspremont's analogy that structural analysis helps lawyers reflect on what they already feel, like the complexity of their practice and the fragility of the outcomes it helps produce.[494] That which 'it helps to produce comes from the 'deep structure' and is not readily available but eventually emerge through structural analysis. Similarly, he acknowledged Akbar Rasulov, who argues that FATU was written to 'eradicat[e] the gap between academic theory and practical knowledge by giving a literary form to practitioners and vice versa.[495] Meanwhile, he didn't quite agree with John Haskell's analogy that FATU over-emphasises linguistic analysis

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490 Onuf (n 483) 265.
491 Martti Koskenniemi, 'What is Critical Research in International Law: Celebrating Structuralism' (2016) 29 LJIL 727
492 Ibid.
493 Ibid.
494 Ibid; Jean d'Aspremont,'Martti Koskenniemi, the Mainstream, and Self-Reflectivity', (2016) 29 LJIL 625-39.
495 Ibid; Akbar Radulov, 'From Apology to Utopia and The Inner Life of International Law', (2016) 29 LJIL 641-66.

in his Article *From Apology to Utopia's Condition of Possibility.*[496] He argues that while analysis of the law's operating structure can only be predominantly linguistic, that was not his main argument. Instead, his emphasis was on the wrong or injustices that trigger or motivate best practices.[497]

However, like Haskell capturing the linguistic analysis or historical sociology rather than the binary oppositions that project each other such as the 'wrong' that motivates the 'best' of practices, there is a need to emphasise binary oppositions for scholars to understand semiology. This does not suggest that international legal structuralists do not engage in historical analysis. They do. Koskenniemi argues *that FATU* enables critical examination in the course of research and offers ways in which intuitions might be turned into practical 'choices' in legal work. By scrutinising past ways of dealing with a problem, propose a new rule or policy to resolve it.[498] The problem lies where instead of emphasising the binary choices that emerge in the structural analysis, attention is on the historical or linguistic developments. These choices can hardly bring out the binary distinctions present in the structural analysis necessary to highlight the integrity and authority of international law.

Other challenges involve the application of different criteria like regulatory rules to separate binary oppositions. Through the formalistic approach, regulatory rules may separate and prioritise binary oppositions. Nevertheless, discretion is still relevant in determining binary oppositions with other criteria, whether political or other social factors.

3.5.2 Difficulties Exercising Discretion in Choosing Oppositions

The exercise of discretion comes down to ICTs deciding which oppositions to prioritise and how to separate binary oppositions, granted that regulatory rules could easily separate jurisdictional conflicts. In the absence of regulatory rules and conflicting jurisdictions, non-legal factors depend on discretion, which is not always easy to differentiate. How to balance discretion in structural analysis remains uncertain, and legal scholars struggle to balance these positions. When Koskenniemi highlights the difficulty in separating international law from international politics, it is evident that for ICTs to decide conflicts, a certain level of discretion is needed. However, he argues that law by implication entails that courts must be independent of the political views of the State. Unless such views have received 'objective affirmation,' courts should not give them effect.[499] It does seem Koskenniemi eliminates discretion based on political views unless affirmed by a legislative body. Scobbie recognises

[496] John Haskell, 'From Apology to Utopia's Conditions of Possibility', (2016) 29 LJIL 667-76.
[497] Koskenniemi (491).
[498] Ibid.
[499] Koskenniemi (n 430) 16.

Koskenniemi's rule-based approach to international law, which agrees with relative indeterminacy. There is always an uncertain and conflicting margin of political discretion that is uncertain and conflicting.[500] Thus, binary opposing by implication.

Ironically, Koskenniemi rules out the possibility of discretion and argues that legal systems must be fully determinant. If IL must separate conflicting norms by some objective standards and if not possible, it will be down to the lack of standards.[501] This idea of objective standards creates a gap as to what then constitutes legal indeterminacy. Scobbie identifies the indeterminacy of language to fill the gap from deconstruction, while Koskenniemi argues that legal systems are absolutely determinant, leaving no room for discretion.[502] These very complex positions leave international legal scholars more uncertain regarding applying rules or standards and politico-social considerations in structural analysis.

It seems Koskenniemi emphasises the adverbs and adjectives that accompany most of the determinants like 'objective' criteria as opposed to 'subjective', 'absolutely determinate', 'fully determinate,' or 'relative indeterminacy.' *Prima facie*, the notion of relative indeterminacy as used by Hart to depict cases with a wide margin of discretion, is a contradiction, as Koskenniemi admits.[503] To use relative indeterminacy to rule out the possibility of discretion, hoping that the international lawyer would figure out the significance of the objective or subjective nuance to determine binary opposites creates more complexities. Many international legal scholars are not prepared to explore or interpret complexities within the system, which also leaves the system in a deficit of structural analysts.

Koskenniemi eliminates legal indeterminacy and discretion from these complexities. Applying these to find binary opposites beyond rules and contradictions to differentiate conceptual oppositions leaves the system susceptible to criticism. No legal system can be utterly devoid of discretion and non-legal considerations. Koskenniemi himself concedes that 'if […] conflict-solution cannot coherently[…] be undertaken[…] beyond the available legal concepts and categories, then the legal project is faulty or incomplete'.[504] Trying to balance this has only led to endless contradictions that make the structuralist school less appealing for international legal analysis. Scobbie admits that some of Koskenniemi's claims are self-contradictory.[505] The contradictions also stem from misconceptions about IL indeterminacy

[500] Scobbie (n 390).
[501] Ibid.
[502] Ibid; Koskenniemi (430) 16.
[503] Koskenniemi (n 430) 24.
[504] Ibid 422-423
[505] Scobbie (n 390)

only revolving around politics and structuralist history, which Desautels-Steins mistaken.[506] However, international legal structuralists' being more expressive on their binary opposing and deconstructionist dispositions could reduce these misconceptions and unnecessary complexities..

This study is not advocating for a less complex or a less critical approach to structural analysis. Faced with the criticism that the scope of ILS as being too broad with the lack of presentism, binary oppositions and deconstruction can contribute a great deal to refocus the scope of ILS. More binary oppositions and deconstructionist attempts are needed to clarify the indeterminacy of handling conflicting jurisdictions and the attempts to regulate. The following section examines the problem of indeterminacy and its relationship with binary oppositions. This is to understand the extent of indeterminacy the formalistic application of the rules for deconstruction to differentiate jurisdictional distinctions.

3.6 The Relationship Between Indeterminacy and Binary Oppositions

Indeterminacy is part and parcel of the methodology of this study. It arises from different conceptual bases following a wide range of uncertain conceptual situations. Lack or inadequacy of legal tools also contributes to indeterminacy. International legal scholars describe the concept differently depending on the conceptual situation the term addresses. One of which is Shlomo C. Pill's definition, which holds that 'the totality of available legal materials and methods is inadequate for determining uniquely correct results[...] in some important cases...'[507] Whatever constitutes uniquely correct results, or important cases, there is not one certainty. Indeed, the outcome of any legal matter is never wholly determinate. Thus, inadequacy arises from methodological choices and materials which can never be complete, allowing judges and decision-makers a window of discretion. Pill notes further that 'when resolving cases where the law is indeterminate, judges and other officials inevitably rule based on discretionary choices about their subjective understanding of what the law is and requires.'[508]

Applying Pill's logic, using binary oppositions as a methodological device also entails indeterminacy. There is no doubt that discretion is highly involved when deciding this methodological choice. However, the task of binary oppositions and deconstruction is not as difficult as it may seem from the outset because the need emerges from the effect of the regulatory rules. From applying the rules formalistically, two possible outcomes emerge.

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[506] Desautels-Steins (n 368).
[507] Shlomo C. Pill, 'Leveraging Legal Indeterminacy, A Judeo-Islamic View of the Indeterminacy Problem and Rule of Law' [2018] 6 Journal of Law, Religion and State 147 – 194.
[508] Ibid.

Agreeing that real overlapping and conflicting jurisdictions are binary opposing, struggling to preclude each other clears some of the uncertainties early. When the formalistic approach is engaged, it is left for deconstruction to complete the process by differentiating. Differentiation limits indeterminacy, uncertainty or disorder to achieve order, preclusion and distinctions.

The concept of indeterminacy is not a mere 'abstract notion' or concept giving rise to the need to find the opposite of an uncertain or contradictory outcome linked to interpretations using legal theories.[509] Without a single or unified method of interpretation of IL, the degree of uncertainty is wide. Indeterminacies are inevitable and often linked to conflicting, controversial, or fragmented interpretations, with interpreters paying no attention to the VCLT.[510] Of course, the VCLT does not provide a magic solution either, despite Koskenniemi's and the ILC Fragmentation study claiming the VCLT offers a toolbox with all solutions.[511] Roucounas notes Koskenniemi's extension of the debate on indeterminacy to embrace the entire international legal system. He also emphasises that the indeterminacy of norms and legal arguments require a political solution and not law alone.[512]

Cameron A. Miles observes four types of indeterminacies, which make indeterminacy the object of contestation.[513] The four types all create uncertainties in their methodologies. However, note that even though structuralism is part of Saussure's linguistic theory, it is different from linguistic indeterminacy initially set out by H.L.A. Hart.[514] Linguistic indeterminacy, also known as semantic indeterminacy, applies in decision-making.[515] Studying all four forms of indeterminacies does not add much to the discourse of indeterminacy and deconstruction of binary oppositions. What matters is the quality of uncertainty that triggers the deconstruction of binary oppositions. The degree of uncertainty is measured through relative and radical indeterminacy, examined next.

Regardless of how each form of indeterminacy addresses questions of uncertainty in jurisdictional relationships, structural indeterminacy has the potential of working with binary oppositions and deconstruction into jurisdictional distinctions. However, this does not mean eradicating uncertainties entirely. Controversies or contradictions because more uncertainties

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509 See Emmanuel Roucounas, 'A Landscape of Contemporary Theories of International Law', [2019] Brill, Leiden 612.
510 Ibid 611.
511 ILC Report (n 35).
512 Roucounas (n 509) 612.
513 Cameron Miles, 'Indeterminacy' in Jean d'Aspremont and Sahid Singh, Concepts for International law: Contributions to Disciplinary Thought (Edward Elgar Publishing 2019) 450
514 H.L.A Hart, The Concept of Law (2nd edn, Claredon Press, Oxford 1994) 145.
145; Miles (n 509) 450.
515 Ibid 450.

get created when resolving existing ones. Some desirable opposites may even be more controversial, like Koskenniemi's political choice solution, because the indeterminacy of norms cannot be resolved by law alone.[516] Nevertheless, Roucounas also highlights from Ronald Dworkin that there is no correct answer for the critical school.[517] Indeterminacy is inevitable and can only reduce or increase at different times, as Miles argues with semantic indeterminacy.[518] So, is the critical school only about controversies, contradictions, conflicting interpretations and uncertainties? Do these indeterminacies create the need for their binary opposites or differentiation into distinctions? Whatever answer there is to this question, what is essential is the dynamism or movement between binary situations in the structural analysis that continuously interact and form relationships when kept distinct.

Essentially, indeterminacy is needed for the process of interpretation to find a balance to overcome any inconsistencies. Such a balance, Roucounas calls the 'reflective equilibrium', which he borrows from Rawls while noting that the reasoning of judges and indeterminacy provides room for the construction of counter-rules.[519] So, indeterminacy must be present when practical steps take effect on the search for consistency. The same applies in seeking non-controversial, uncontradictory or more determinate outcomes. This includes those created when attempting to address overlapping, competing or parallel jurisdictions problems with regulatory rules, tested against the triple identity factors.

Scholars like Hart argue differently in response to the indeterminacy question from a systemic perspective. Thus, the notion of a system is also indeterminate. However, to Hart, the question of indeterminacy can be reversed if decision-makers or the judiciary gets trained to apply rules 'determinate enough' at the centre 'of correct judicial decisions.'[520] While regulatory and interpretive rules exist, albeit borrowed from other systems, pragmatically, these rules are not determinate. However, according to Miles, Hart's discourse responds to semantic indeterminacy underscored by American realists, claiming arbitrariness in judicial decision-making. Hart proposed this as 'a fall-back to linguistic communication to bring certainty to the decision-making process.'[521] Regardless of whose view is prevailing, the application of rules to bring about certainty or reduce arbitrariness between ICTs is yet to

[516] Roucounas (n 509).
[517] Ibid.
[518] Miles (n 513) 451.
[519] Ibid.
[520] H.L.A Hart, The Concept of Law (2nd edn, Claredon Press, Oxford 1994) 145.
[521] Cameron A. Miles, 'Indeterminacy' in Jean d'Aspremont and Sahid Singh, Concepts for International law: Contributions to Disciplinary Thought (Edward Elgar Publishing 2019) 450.

find a level of determinacy as most legal scholars agree that the proliferation of ICTs has brought about structural indeterminacy.[522]

However, it is important to briefly discuss structural indeterminacy to the extent of its relevance in this discussion, continuing with Koskenniemi. He argues that IL is a tool for international lawyers acting as social actors.[523] He applies structural indeterminacy for particular outcomes based on 'structural biases in the relevant legal institutions that make them serve typical, deeply embedded preference'.[524] To this end, the broader question of legal institutions in critical legal studies, first addressed by Harvard academics Roberto Unger and Duncan Kennedy, advocated for more objective considerations to legal institutions' values and positions.[525] Thus, taking into consideration' substantive visions of human personality while avoiding the class domination of legal institutions.[526]

From David Kennedy's *International Legal Structures* are identified binaries such as between 'process'(institutional) and 'substances.'[527] To Kennedy, 'the structure of the law is indeterminate when political concerns intrude in the legal reasoning of each international legal text used to generate authority to the detriment of legal analysis.'[528] This depicts a sense of binary oppositions, an approach that was later picked up and harnessed by Koskenniemi, even though not expressly stating binary oppositions as a methodological approach.[529] Accordingly, Koskenniemi's *FATU* presents the indeterminate character of international law.[530] To Koskenniemi, the irreconcilable nature of IL is based on the view that states behaviour alone determines the content of international law. Thus, a reference to' apology,' binarily opposed to 'utopia,' the desire for IL to have normative force.[531] These indeterminate and irreconcilable positions portray the nature of international law, its processes and procedures that create relationships challenging to reconcile.

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[522] According to Miles, Posner's view of Koskenniemi's observations on structural indeterminacy in the human rights context is that the proliferation of human rights treaties is a form of structural indeterminacy and not an indication of the general good health of the human rights project, which ascertains the fact that proliferation breeds indeterminacy; Ibid 456.
[523] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument, Reissue with New Epilogue.* (CUP, Cambridge 2005 [1989]) 606-7.
[524] Ibid.
[525] Miles (n 521); Jonathan Turley, 'Introduction: Hitchhiker's Guide to CLS, Unger, and Deep Thought' [1987] 81 Northwestern University Law Review 594 -95.
[526] Ibid.
[527] David Kennedy, International Legal Structures (Nomos Verlagsgesellschaft Baden-Baden 1987) 109 -110; It is worth noting that the binary oppositions between process and substance create indeterminacies between real institutional overlap examined in Chapters Five and Six, as opposed to substantive, normative or conflicting interpretations not very much in focus in this study.
[528] Ibid; David Kennedy, 'Tom Franck and the Manhattan School' [2004] 35 NYU Journal of International Law & Policy 397, 398 -99
[529] Miles (n 521) 453.
[530] Koskenniemi (n 430).
[531] Ibid.

Meanwhile, commentators like Ann-Charlotte Martineau have followed through with titles like *Faith and Fear in International Law* with implied binary positions such as the European formalist to the American realist positions on fragmentation — unity versus diversity as a pattern of critiquing and proposing reform.[532] Others include Wen-Chen Shih, from whom binaries are implied from 'good faith' and '*abuse de droit,'* translated as 'abuse of rights' in binary opposition to the regulatory rules applied to deal with conflicting jurisdiction.[533]

3.7 To What Extent Does Indeterminacy Cause a Jurisdictional Shift

To attempt a response to this question, it is worth looking at Koskenniemi's concepts of relative and radical indeterminacy, often vaguely described by scholars due to the lack of specific conditions of application. However, such vagueness also has a role to play. Vagueness breeds creativity.[534] So, against this backdrop of vagueness are discretionary non-legal measures, excised when faced with challenges that lead to indeterminate outcomes. To Koskenniemi, radical indeterminacy points to 'legal standards' that cannot be fully protected against social, economic and political processes - often experiencing the flexibility of 'international legal rules'.[535] This flexibility allows the defence of any course of action by legal arguments. From a binary perspective, the same flexibility of rules helps IL maintain credibility, integrity, and authority and either justify or criticise international behaviour.

Within the context of jurisdictional conflicts and regulatory rules, radical indeterminacy follows a non-formalistic pattern. Thus, with flexibility, regulatory rules treat jurisprudential overlaps and substantive conflicts like overlapping jurisdictions conflicts to maintain the regulatory rules' relevance and help keep the integrity and authority of the system as they are the only existing rules. Rendering them obsolete could threaten the unity of the international order. As such, radical indeterminacy allows more social, economic, and cultural factors to influence the interpretation of conflicting situations. Meanwhile, the reverse would refer to non-jurisdictional conflicts treated as jurisdictional conflicts, which would affect the integrity and authority of the system. On the flip side, Koskenniemi's relative indeterminacy is a product of some complex cases where there might not be one correct interpretation or understanding requiring the exercise of discretion.[536] In contrast, radical indeterminacy takes the non-formalistic approach that leads to false preclusion and eliminates the opportunity for

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532 Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' [2009] 22 (1) Leiden Journal of Int'l Law 1 - 18.
533 Wen-Chen Shih, 'Conflicting Jurisdictions Over Disputes Arising from the Application of Trade-Related Environmental Measures' [2009] Rich. J. Global L. & Bus. 351.
534 Timothy Endicott, 'The Generality of Law' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti, Reading HLA Hart's Concept of Law (Hart Publishing, Oxford 2013) 50.
535 Koskenniemi (n 430) 387.
536 Ibid.

binary opposing jurisdictions to be deconstructed into distinct structures to uphold the integrity and authority of international law. Hence the risk of undermining the integrity and authority of IL.

So, there is no particular point where indeterminacy needs reversing. The interpretation and application of the regulatory rules determine the extent of indeterminacy. On the one hand, relative indeterminacy would lead to no movement or a marginal shift within the internal system when interpretation is within strict formal lines. However, a significant shift towards the external system, connecting other jurisdictions, would occur. On the other hand, radical indeterminacy occurs when the scope of interpretation widens to include substantive and normative conflicts. As such, the regulatory rules will perform a preclusive function, considering social, economic and political factors within that jurisdiction, rendering no chance for extra-jurisdictional considerations. Deconstructing this dichotomy is reflected in the concepts of justice and law. Even though they exist independently, the two cannot be easily separated, as justice can only be constructed regarding the law. While the meaning between the two is only deconstructed through the interplay of the distinctions between them.[537] Considering the regulatory rules and conflicting binary opposing jurisdictions, this clarifies why the same regulatory rules meant to preclude interactions interconnect the same jurisdictions intended for preclusion. However, what is essential is to find the binary oppositions, which may be difficult since they are not expressly stated in scholarly writings.

In non-essentialist writings, Koskenniemi implies several binary oppositions—such as those between facts and norms, concreteness and normativity, and apology and utopia, which he regards as irreconcilable.[538] For Koskenniemi, the anti-essentialists take this conceptual messiness a step further. Asserting that it runs so deep like IL that it makes it impossible to assert in an essentialist sense what the law is.[539] She intimates that instead of a single international legal system, subjective preferences of international legal actors using international legal language differently exist.[540] Basak Cali clarifies that IL does not have procedures internal to its functioning, determining what makes propositions of law true or false because of contradictions within.[541] From the different theoretical perspectives, pulling it together, indeterminacy remains a central feature in managing competing overlapping and

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[537] Derrida Jacques and Bass Alan, Freud and the Scene of Writing, Writing and Difference (New edn. Routledge, London 2001) 276; Derrida Jacque, 'Positions' Translated and Annotated by Alan Bass (University of Chicago Press 1982)

[538] Basak Cali, 'On Interpretivism and International Law' [2009] 20 (3), 805-822 EJIL <https://ssrn.com/abstract=1950522> accessed 20 April 2019.

[539] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2nd edn, CUP, Cambridge 2006) 320-322.

[540] Ibid.

[541] Cali (n 538).

conflicting jurisdictions, keeping jurisdictions distinct and maintaining the integrity and authority of the international system. From these theoretical perspectives, the structure of interdependence emerges with the help of indeterminacies, through which deconstruction separates binary opposing jurisdictions. Koskenniemi argues without them, 'there will be no international law in the first place.'[542] The structure underpins the theoretical framework for interdependence between ICTs.

3.8 Conclusion

This chapter has analysed the theoretical framework that underpins relationships between international judiciary bodies and has also enhanced the methodology approach applied in this study. A better understanding of binary oppositions and deconstruction as jurisdictional tools is secured from the different structural analyses of ILS. It has therefore brought theory and practice together. Without overstretching Koskenniemi's influence in this foundational process, it is worth concluding with this quote that links theory to method, which states:

> something akin to what used to be called theory is nowadays sometimes termed "method." […] one consequence being the feeling that theory is over and that what is needed is to have scientific means to verify law's content without bothering too much about the metaphysical questions regarding its nature.[…] A method might be over-inclusive in that it will classify as international law standards which clash with other, equally valid standards[543]

In any event, theory as a tool for legal analysis is not over, or 'a thing of the past,' as he insinuates to encourage today's rising scholars who shy away from theory.[544] On the contrary, it has found harmony with the method applied in this study. In this vein, the above theoretical framework gets enhanced.

Before proceeding to the case study analyses, the proceeding chapter shall examine the regulatory rules. The rules are tested with the triple identity test to justify their application as a significant part of the methodological approach. These regulatory rules are formalistically triggered to produce indeterminate binary opposing jurisdictions deconstructed into diction jurisdictions.

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[542] Martti Koskenniemi, 'A Response' [2006] 7 (12) *German Law Journal* 1103-1108.
[543] Martti Koskenniemi, 'Theory: Implications for the Practitioner' in Philip Alott and others, Theory and International Law: An Introduction (Published by The British Institute of International and Comparative Law, London 1991) 25.
[544] Ibid.

Chapter 4

The Regulatory Rules and Comity – A Binary Opposition

4.1 Introduction

This chapter analyses the traditional regulatory rules to the extent of their relevance to the methodology applied in this study. The rules introduced in chapter one reserved its complete analysis for the present chapter. The rules to be discussed are *lis pendens*, *res judicata*, *and electa una via.* The principles of *lex specialis* and *lex generalis* are discussed jointly straight after as they are not traditional regulatory rules. The analyses in this section aim to understand the nature of each regulatory rule and how they resolve jurisdictional conflicts through declining, staying or suspending parallel proceedings. The specific elements of the triple identity standard shall be examined in the same light. That is, the identity criteria of the same parties (*persona*) and the same cause of action(*causa petendi*), which is further split into the grounds and relief object (*petitum*) of the claim.[545]

Noting that *lis pendens is* foundational to this chapter and the overall concept of overlapping and parallel jurisdictions, its analysis is much more extensive than the other rules. However, analysis of the other rules shall focus on their nature and characteristics, how they function and identifying their legal status.

4.2 *Lis Alibi Pendens or Lis Pendens (shortened form)*

To better understand the role of *lis pendens*, this section examines its character and functions in general litigation and arbitration. It also discusses its legal status. Doing this involves precedent from some ICTs, particularly the PCIJ/ICJ, used to illustrate how declining, suspending, terminating or waiving jurisdiction in respect of other jurisdictions occurs. A further discussion involving all the regulatory rules occurs after all the rules have been discussed individually. This is to understand how the rules fix within the methodology steps established to complete this study and how they will facilitate moving forward.

4.2.1 The Character and Function of *Lis Pendens*

Aaron Fellmeth and Maurice Horwitz describe *lis pendens* as a lawsuit pending elsewhere or a dispute currently under consideration by a tribunal in another jurisdiction. It sometimes applies as a 'defence to duplicative litigation in a forum other than the one originally seised of the dispute'.[546] Applying *lis pendens* as a defence to duplicate litigation often occurs in

[545] ILA Report (n 22) para 1.3.
[546] Aaron X. Fellmeth and Maurice Horwitz, Guide to Latin in International Law (Oxford University Press 2009) 179.

preliminary objection. For example, the *Chorzow Factory case*[547] involving the seizure of the properties belonging to German companies in Poland was a real case of *lis pendens*. While the PCIJ was deliberating the preliminary objection put forward by Poland, the Germano-Polish Mixed Arbitration had Tribunal already heard the dispute.[548] Albeit put forward by the private parties; the Court rejected the Polish motion, which requested the Court to decline jurisdiction. It also refused to make any pronouncement on *lis pendens*.[549] Germany, on its part, argued that *lis pendens* could not be relied on because the cases involved different parties and different issues. So the identity criteria were not satisfied.[550] According to the Court, the Mixed Tribunal operated in the sphere of domestic private law. It was not based on the same sources of law as was the case before it that involved treaty interpretation.[551] Could a more restrictive approach to the interpretation of *lis pendens* make the difference? In response to this question, let us try a restrictive interpretation by the IL Association (ILA) and see if it makes a difference.

The ILA provides a similar definition - 'lawsuit pending elsewhere' whilst introducing the work of James Fawcett, which helps to illustrate its status as a general principle.[552] The ILA captures James Fawcett's description of *lis pendens* from his Report to the Congress of *the International Academy of Comparative Law*. Fawcett *describes* '*lis pendens* as a situation in which parallel proceedings involving the same parties and the same cause of action continue in two different states simultaneously.*[553]* It is understandable why the ILA takes particular interest in this definition and describes it as 'authoritative.' It emanates from a comparative study that involved different judicial or domestic legal systems. It reflects its character as a principle common to different legal systems as a general principle of law under Article 38(1)(c) of the Statute of the Court. So, Article 38(1)(c) provides the gateway for applying *lis pendens* as a regulatory rule in resolving jurisdictional disputes. So, *lis pendens* character lies in its ability to stay(suspend), terminate, decline or waive proceedings in one jurisdiction in favour of another jurisdiction. Fawcett identified this character amongst the different domestic systems.*[554]* Thus, from Fawcett, the ILA recognises four possible ways a court or tribunal might deal with a situation of *lis pendens,* which include: declining, suspending (or staying) proceedings; seeking to restrain the parallel proceedings; allowing both sets of proceedings to

547 See *Factory at Chorzow (Germany v Poland)* (Jurisdiction) 1927 PCIJ (ser A) No 9.
548 Shany (n 5) 231.
549 Ibid.
550 Ibid 240.
551 Shany (n 5) 239.
552 Filip de Ly and Audley Sheppard, 'ILA Final Report on *Lis Pendens* and Arbitration', *Arbitration International* [2009]25 (1) 3–34.
553 Fawcett (n 216).
554 Ibid.

run and apply *res judicata* to prevent two judgments, and finally adopting mechanisms to encourage the parties to opt for trial in just one jurisdiction.[555]This was observed in the *Laker Airways Ltd v Sabena Belgian World Airlines Case.*[556] In the case, Judge Wilkey stated that 'parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one, which can be pled as *res judicata* in the other'.[557] It is not unusual for two regulatory rules to be applied on a single case. This happens when more than two jurisdictions compete on the same dispute and different heads of claims. In this situation, one jurisdiction will stay, sometimes claiming comity to wait for the outcome of another parallel proceeding and then to claim res judicata. This situation was observed in the *SPP v Egypt case* involving an ICSID tribunal, an International Chamber claim and the French Court.[558] The ICSID tribunal allowed the French Court to decide on the International Chamber of Commerce claim before continuing its proceedings. Terminating procedures in such circumstances entails res judicata because the outcome of the French Court would mean finality based on *res judicata*.

Nevertheless, as illustrated in the following sections, achieving these outcomes of suspending, declining or terminating proceedings in light of parallel jurisdictions is slightly different between general litigation and arbitration. The following section shall examine *lis pendens* under litigation and *lis pendens* in arbitration proceedings.

4.2.1.1 *Lis Pendens* in General Litigation

In litigation, as observed in the PCIJ/ICJ cases, the Court is more reluctant to decline or stay proceedings relating to an ongoing or potential parallel proceeding. This has been the situation since its earlier cases. In the *Mavrommatis case*, Greece claimed diplomatic protection on behalf of one of its nationals in Palestine whose rights had been infringed by Great Britain, under the Administering Authority of the League of Nations Mandate over Palestine.[559] In considering the different heads of claim, the Court found that indemnities were reserved for the specialised procedure under the Protocol to the Treaty of Lausanne. The special procedure constituted both *lex specialis* and *lex posterior* and overrode the Mandate from which the Courts derived its general jurisdiction.[560] While trying to find a balance between the different heads of the claim, the Court could have temporarily suspended the

[555] ILA Final Report (n 552); Fawcett (n 553) 28.
[556] *Laker Airways Ltd v Sabena Belgian World Airlines* 731 F. 2d 909 (DC Cir., 1984).
[557] Campbell McLachlan, *Lis Pendens* in International Litigation, AIL Pocket Books, (Hague Academy of International Law 2009) 60.
[558] *Southern Pacific Properties Limited v. Arab Republic of Egypt*, ICC Case No. YD/AS No. 3493, Award, 11 March 1983.
[559] *The Mavrommatis Palestine Concessions (Greece v Great Britain)* 1924 PCIJ (Ser. A) No.2 paras 31, 32.
[560] Ibid.

preliminary proceedings, allowing the special tribunal to be constituted to examine the indemnities head of claim.[561] The Court did acknowledge the special procedure's competence over the indemnities, which it lacked to deal with the indemnities head of claim as a reservation under the Protocol, but did not decline jurisdiction on the matter.

Understandably it could have equally been unfair for the Court to decline or cede jurisdiction to the special procedure, which was actually a quasi-judicial body and not a real court or tribunal, let alone of the 'same status' with the Court. Even so, the quasi-judicial procedure was yet to be constituted. Amidst all of this, the Court could have found the balance by exercising comity and temporarily suspending its proceedings, allowing the special procedure to examine the indemnities head of claim before reverting to deliberate on the diplomatic protection head of claim.[562] The Court did acknowledge the special procedure's competence over the indemnities, which it lacked as a reservation under the Protocol, but did not decline jurisdiction on the matter.[563]

Could the Court have suspended proceedings or declined jurisdiction if the special procedure was already operational and *lis pendens* triggered by either party? Could the Court have rejected or ceded jurisdiction if the special procedure was a Court or Tribunal of the same status? Or was the Court applying a formalistic approach regarding the triple identity standard? The circumstances suitable to answer these questions prevailed in the *Chorzow factory case*. However, the Court rendered a similar outcome to its *Mavrommatis* decision. The similarity in both cases was the involvement of indemnities and a specialised body to examine them. While the Court may have argued that the specialised body in the *Mavrommatis case* did not have any judicial powers, the Mixed Tribunals in *Chorzow* did. Still, the Court's position on jurisdiction did not shift either.[564]

The *Chorzow factory case* between Germany and Poland involved the seizure of the properties of German companies in Poland, for which Germany seised the Court to claim indemnities albeit in its own right.[565] Meanwhile, the Germano-Polish Mixed Arbitral Tribunal or the Upper Silesian Arbitration Tribunal specialised tribunals to deal with claims of properties between private litigants in case of any infringements already operational.[566] This gave rise to real parallel proceedings requiring the triggering *lis pendens* to stop the parallel proceedings.

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561 See *MOX Plant Case(n 54)* where the ITLOS temporarily suspended in favour of the ECJ.
562 This is the current practice as illustrated in the *MOX Pant case*; *SPP v Egypt case* - an ICSID tribunal exercised comity towards the French Court.
563 Ibid; See Shany (n 5) 232.
564 See Shany (n 5) 240.
565 *Factory at Chorzow (Germany v Poland)* (Jurisdiction) 1927 PCIJ (ser A) No 9 (Claim for Indemnity) (Jurisdiction); See Shany (n 5) .
566 Shany (n 5) 231.

Instead, Poland argued that in line with the precedent set in the *Mavrommatis case*, the Court accepted (in principle) the exclusion of its general jurisdiction, recognising the specialised procedure to apply the same to the Mixed Arbitration Tribunal.[567] Germany, on its part, argued that the creation of the special tribunals does not exclude the Court's general jurisdiction in inter-state disputes.[568] The Court concluded that 'in defining its jurisdiction in relation to another tribunal, it could not allow its own competence to give way unless confronted with a clause that was sufficiently clear to prevent a negative conflict of jurisdiction involving the denial of justice'.[569] It would seem the lack of clarity was not only based on the exception of a clause as imagined by the Court but also due to the identity criteria, which could not be met and prevented the triggering of *lis pendens*. Amidst other factors, the Court considered that Germany was claiming independent rights, separate from those of the private parties under the exclusive jurisdiction of the Mixed Arbitration Tribunal. This was not an alternative to the Court and operated under domestic law.[570] The Court maintained its jurisdiction and did not cede to the Mixed Arbitration Tribunal.

So, in both the *Mavrommatis* and the *Chorzow cases*, despite the Court acknowledging that specialised bodies could deal with specific heads of claims excluded from the Court's general jurisdiction, it did not suspend or decline proceedings in favour of the specialised bodies. The difference in the substantive issues meant that the triple identity standard could not be met as Greece claimed diplomatic protection, which the specialised procedure in the *Mavrommatis Case* could not decide. Meanwhile, in the *Chorzow Case*, Germany claimed an independent right as a state. The Mixed Arbitration Tribunal, applying domestic law on indemnity issues, lacked the competence to decide on the heads of claim that fell under the jurisdiction of the Court. So, in any case, identity requirements were not met. Neither parties in both proceedings were the same nor the *rationae materiae* before both proceedings. The only other option for the Court was to exercise its discretion and engage comity towards the specialised parallel proceedings to find a balance between the Court and the specialised bodies.

4.2.1.2 *Lis Pendens* in General Arbitration

The situation is slightly different in arbitration, unlike general litigation with the ICJ as the leading dispute resolution body demonstrating reluctance towards applying *lis pendens* in relation to other jurisdictions. However, the Court showed deference with the example of the

[567] Ibid.
[568] F*actory at Chorzow (*n 565) 69 Oral pleadings by Dr Kaufmann for Germany.
[569] ibid para 30.
[570] See Shany (n 5) 240.

ICTY in the *Bosnia v Serbia* case. The Court stated that it 'attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on criminal liability of the accused… the Court takes fullest account of the ICTY's trial and appellate judgments'.[571] Similar deference was observed in the Wall Advisory Opinion. The Court turned to the UNCHR to find qualified support while asserting that states should respect human rights protected by the Covenant on Civil and Political Rights extra-territorially.[572] However, commentators like Romano have criticised the Court for only showing such deference to UN treaty bodies.[573] The same is yet to be seen towards other ICTs. Meanwhile, other arbitration tribunals have made progress in exercising *lis pendens* in parallel proceedings, not least with other ICTs and domestic jurisdictions.

This does not suggest that some arbitration tribunals have also been reluctant to exercise *lis pendens regarding* other tribunals. The *Klockner case* against Cameroon witnessed a similar pattern to the PCIJ/ICJ *Mavrammatis* and *Chorzaw cases.*[574] An arbitration clause required the arbitral tribunal to refer certain investment disputes to the International Chamber of Commerce instead of the ICSID tribunal that dealt with all investment disputes.[575] However, unlike the *Mavrommatis case*, where the protocol creating the special procedure excluded the Court's general jurisdiction, the ICSID tribunal's jurisdiction was not excluded. Thus, allowing referring under the specific clause to be applied discretionarily.

Like the *Mavrommatis* and *Chorzow cases*, the *Klockner* ICSID tribunal had its contentions, one of which was that parties should not be 'easily' deprived of the protections afforded by ICSID and not to be compelled to engage in 'piecemeal litigation'.'[576] This was a policy consideration rather than a real procedural challenge that the Court faced earlier in the PCIJ/ICJ. In the *Klockner case*, the identity criteria were satisfied with the same parties, same issues, and tribunals of the same legal order.[577] Meanwhile, in cases like *the Southern Bluefin Turner case,*[578] tribunals have assessed jurisdictions in relation to a special dispute settlement arrangement and declined jurisdiction in favour of the special mechanism. In the *Southern Bluefin Turner Case* overfishing practices between Australia, New Zealand and Japan, Japan

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571 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 403

572 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 109

573 See Romana (n 7).

574 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the ad hoc Committee (Unofficial English translation from the French original), 3 May 1985.

575 Ibid para 5.

576 See Shany (n 5) 234-235.

577 Ibid.

578 *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan*, Decision, 4 August 2000.

argued favouring the specific procedure under the Convention for the Conservation of Southern Bluefin Tuna (CCSBT).[579] This was a regional arrangement that Japan preferred, instead of the arbitration tribunal constituted as per the general dispute settlement provisions under Article 287 of UNCLOS.[580]

Even though the CCSBT convention gave the special tribunal *lex specialis* and *lex posterior* character, it still did not give both dispute settlement bodies the status. That notwithstanding, the tribunal's decline of the jurisdiction in favour of the regional body shows a degree of comity alongside satisfying the identity criteria for forum selection. Eventually, *lis pendens* was satisfied.

Talking about comity, the tribunal did mention the parallelism, which the ILC in its 2006 Fragmentation report identifies as the need to coordinate particular instruments in a 'mutually supportive light'.[581] The only issue for the tribunal was to make sure that the alternative procedure was in place while it declined jurisdiction. However, the tribunal also noted the flexible nature of UNCLOS, 'designed to afford parties great leeway in their choice of means of peaceful settlement.'[582] This made the arbitrators' decision-making process much more manageable. Flexibility requires the exercise of discretion, which also gives rise to a situation of *lis pendens* and comity, as Judge Treves did remark in another ITLOS case - *the MOX Plant*.[583] The Annex VII tribunal was suspended relative to the ECJ proceeding and did so in the spirit of comity.[584] However, there was also a request by the UK relating to the entire UNCLOS jurisdiction to give way to the OSPAR tribunal and the potential ECJ proceeding that was rejected due to the cases not meeting the same issue identity standard.[585] With the ECJ proceedings, the *MOX Plant case* exemplifies the situation of *lis pendens* arising from parallel proceedings between an arbitral tribunal and a supra-national court or tribunal. The ILA Report recognises this as one of three ways *lis pendens* could arise.[586]

From the perspective of general litigation and arbitration, it would be fair to say that the general ICJ jurisdiction is very much reluctant to deal with situations of *lis pendens*. In contrast, arbitration and the permanent and *ad hoc* tribunals are more amenable, as seen with the help of the above cases. This is partly credited to the principle of competence-

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[579] Ibid para 41
[580] Ibid.
[581] ILC Report (n 35) para 417.
[582] *Southern Bluefin Tuna Case* (n 578) para 38.
[583] *The MOX Plant,* Separate opinion of Judge Treves (n 41) para. 5.
[584] The *MOX Plant Case, Ireland v United Kingdom,* Order No 3: Suspension of proceedings on jurisdiction and merits, and request for further provisional measures, Case No 2002-01, ICGJ 366 (PCA 2003), (2003) 126 ILR 310, (2003) 42 ILM 1187
[585] Ibid.
[586] ILA Report on *Lis Pendens* (n 552) 1.7.

competence, which the ILA has also recommended. It requires an arbitration tribunal to self-assess its competence over a jurisdictional issue.[587] So, except for the seat of arbitration, an arbitral tribunal is required to assess its jurisdiction when confronted with a situation of parallel proceedings as an inherent right derived from the arbitration agreement.[588] Sometimes, the seat of arbitration might be a domestic court or tribunal. As such, the ILA exception to competence-competence might be problematic if the seat of the international arbitration is connected to a domestic appeal process as in *the SPP v Egypt case.*[589] The problem is that some ICTs like the PCIJ(ICJ), as observed in the *Mavrammatis case,* may find it as a devaluing of their status before the domestic court.[590] In *SPP v Egypt*, the situation resulted in a domestic procedure. Paris was the seat of the International Chamber of Commerce proceedings, and the French *Cour de Cassation* was also involved, which led to the whole question of due consideration in light of domestic courts.[591]

However, more relevant is that applying competence-competence allows the tribunal to decide on any of the four ways identified by the ILA to deal with parallel proceedings. The tribunal relative to the competing tribunal to either decline, stay (suspend), terminate or allow both parallel proceedings to run and apply *res judicata* to bar a controversial decision once one decides.[592] However, commentators like Reinisch had argued that when the ICSID tribunal exercised its discretion to allow the French domestic court to decide on the International Chamber of Commerce claim, it was actually applying *res judicata.*[593] This begs the question of whether one jurisdiction can apply *res judicata* against another parallelly competing jurisdiction. In this case, it will only be an indirect application since an ICT – can only apply competence-competence to stay, decline, or terminate its proceedings and not the parallel proceedings. In sum, the nature or characteristics of *lis pendens* manifest in forum selection and parallel proceedings. However, from the cases discussed, the legal status of *lis pendens* between parallel jurisdictions needs further consideration.

4.2.3 The Legal Status of *Lis Pendens*

The legal status of *lis pendens* alongside the other regulatory rules is derived from its commonality in legal systems of the world as a general principle of law as per Article 38(1)(c) of the Statute of the Court. As stated above, this has been tested by James Fawcett's study on

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587 See Kreindler (n 193).
588 ILA Final Report (n 552) Recommendation para 5.13 (4).
589 *Southern Pacific Properties Limited v. Arab Republic of Egypt*, ICC Case No. YD/AS No. 3493, Award, 11 March 1983, para 38.
590 See Romano (n 7)
591 See Shany (5) 264.
592 Ibid.
593 Reinisch (n 10).

Comparative Law on Declining Jurisdiction.[594] Needless to emphasise that the need for these general principles results from the gap created by the lack of international conventions or treaties on dealing with parallel or conflicting jurisdictions. Also, the constitutive instruments of most ICTs have left gaps in relations with other ICTs on forum selection and parallel proceedings. Hence, the reliance on Article 38(1)(c) as the gateway of *lis pendens* into the international judicial order to resolve parallel jurisdiction conflicts.

However, the problem that has existed since the days of the PCIJ is the lack of a consistent practice of applying *lis pendens* in resolving jurisdictional conflicts, which requires decline, stay or termination of proceedings in one jurisdiction in favour of proceedings in another. This inconsistency has been observed as far back as the *Chorzow Factory case* concerning the seizure of properties belonging to German companies. Poland requested the Court to make a pronouncement on *lis pendens*. That was to decline jurisdiction in favour of the Germano-Polish Mixed Arbitration Tribunal that was set up to determine the indemnities head of claims.[595] The Court dismissed Poland's request without invoking *lis pendens*, 'alluding instead to estoppel' based on some related conduct of Poland, which Germany relied on.[596] However, the Court did find that because the Mixed Tribunal and the Court provided different remedies, the identity of object condition to invoke *lis pendens* was not met.

In a similar dispute – *Certain German Interests* case, involving the illegal seizure of properties belonging to German citizens. Poland invoked *lis pendens* to object to the jurisdiction of the Court, requesting the Court to decline jurisdiction in favour of the Mixed Arbitral Tribunal. Germany objected to the request, arguing that there was no precedent for applying *lis pendens* in IL and that the traditional conditions under domestic law for the same parties, the same cause of action and object were not satisfied. In addition, the two sets of proceedings were based on different sources of law – the violation of private law rights and the interpretation of an international treaty as per the oral pleadings of Counsel for Germany.[597] The Court agreed with the German position and did not make any ruling on the applicability of *lis pendens* in IL. However, the Court remarked that even if a pronouncement of *lis pendens* were to be made, the identity conditions were not satisfied.[598] This reluctance is only an issue with the ICJ.[599] Similar remarks were highlighted by Judge Treves in the ITLOS *MOX Plant case,* albeit in a separate opinion, that the position of *lis pendens* within

[594] See James Fawcett (n 216).
[595] Chorzow Factory 1927 PCIJ (Ser. C) No. 13-1, at 154-5 (Preliminary objections of the Polish Government); Shany (n 5) 240.
[596] See Shany (n 5) 240.
[597] Ibid 239.
[598] Ibid 240.
[599] Ibid.

ICTs remains an open matter.[600] Since then, this has been the position of IL regarding the doctrine of *lis pendens* in relation to parallel proceedings. Even though some tribunals have declined jurisdiction in favour of a parallel proceeding, like the *MOX Plant* Annex VII Tribunal and the *Southern Bluefin* ITLOS Tribunal in favour of the CCSBT regional tribunal, this was never based on *lis pendens*. From the above, it can safely be concluded that the status of *lis pendens* remains open and inconclusive. Besides its source being Article 38(1)(c) of the Statute of the Court, there is no general and consistent practice of its usage in IL.

4.3 The Character, Function and Legal Status of *Res Judicata Pro Veritate Accipur*

This study uses the shortened and commonly known form - *res judicata* instead of the long-form *res judicata pro veritate accipur*. It is important to highlight that the difference between *res judicata* and *lis pendens* is that *lis pendens* is applied as a defence in parallel proceedings. In contrast, res judicata is a defence in subsequent proceedings. So, the discussions on res judicata in this section, like the other regulatory rules, complement the nature of *lis pendens* already discussed extensively.

It is worth noting that *res judicata* in the case study analysis in the next chapter only focuses on separate litigation in other jurisdictions for the purpose of developing a relationship structure between two distinct jurisdictions. Meanwhile, the case study in chapter five shall only involve subsequent proceedings across different jurisdictions. However, to fully understand the operations of *res judicata*, the analysis in this section examines *res judicata* in general. It focuses on the nature, function and legal status of *res judicata*. This helps reveal any disorders or indeterminacies that interfere with jurisdictional borders, keeping them less distinct. The application of *res judicata* would result in binary oppositions that keep the jurisdictions distinct with the help of comity.

*A*ccording to the ILA, '[…]*res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject-matter or relief, the same legal grounds and the same parties'.[601] This definition of *res judicata* depicts the triple identity requirement for applying the regulatory rules. However, this does not suggest the starting point of the application of *res judicata* in international adjudication. Iain Scobbie notes that Professor Lammers had pointed out that international tribunals employed general principles as the basis of awards before the start of the PCIJ. Even at the time of drafting the Statute of the Court, *res judicata* was mentioned by Lord Phillimore as an example of the general principles accepted by all nations. The Advisory

[600] *MOX Plant Case* (n 54)

[601] Filip de Ly and Audley Sheppard, 'ILA Interim Report on *Res Judicata* and Arbitration' *AI* [2009] 25 (1) 35 in [2014] AI <https://doi.org/10.1093/arbitration/25.1.35> accessed 20 May 2019.

Committee used this as a guarantee to avoid declaring a *non-liquet* situation.[602] Meanwhile, Judge Anzilotti later endorsed this in his dissenting opinion in the *Chorzow Factory case*.[603]

Regarding the character of *res judicata* seen through its definition, the ILA identifies with the definition that bears the triple identity standard in its 2004 Interim Report and later in its final report in 2009.[604] The final report also sets out the criteria for an award to have both conclusive and preclusive effects.[605] To most commentators, the conclusive effect that brings finality to certain subject-matter issues and prevents re-litigation is the positive effect of *res judicata*.[606] The objective of triggering res judicata or any other regulatory rules formalistically is to achieve orderly interactions between the binary opposing jurisdictions and keep them distinct. The positive and negative effects are not needed to attain this objective. However, as explained in the introductory and conceptualisation stages, when the regulatory rules are triggered formalistically, preclusion fails, disorder ensues, and indeterminacy takes effect. The previous chapter already outlined how indeterminacy is dealt with whilst maintaining jurisdictional distinctions and return order between the binary opposing jurisdictions.

However, the general underlying idea of the doctrine of *res judicata* is that a particular matter, once settled by a judgment, must be regarded as final.[607] As such, the matter cannot be re-litigated between the parties bound by the decision to ensure legal certainty and avoid conflicting decisions.[608] As a tool involved in the procedure and ascertainment of jurisdiction between two binary opposing jurisdictions, the failure to preclude uncertainty is part of the procedure. Hence *res judicata* is a procedural tool, which Bin Cheng describe as a general principle of procedural law.[609]

While discussing its legal basis, he states further that *res judicata* is derived from municipal law, as a 'general principle of law recognised by civilised nations' under article 38(1)(C) of the Statute of the Court.[610] Meanwhile, several other international legal instruments have enshrined *res judicata* for the purposes of binding international commercial arbitration, such as Article 28(6) of the International

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602 Ibid.
603 *Chorzow case* (n 595)
604 Filip de Ly and Audley Sheppard, 'ILA Final Report on *Res Judicata* and Arbitration' *AI [2009] 25 (1) 67 in [2014] AI* <https://doi.org/10.1093/arbitration/25.1.67> accessed 20 May 2019.
605 Ibid.
606 Reinisch (n 25).
607 Norah Gallagher, 'Parallel Proceedings, *Res Judicata* and *Lis Pendens*: Problems and Possible Solutions' in Loukas A. Mistelis and Julian D.M. Lew QC, Pervasive Problems in International Arbitration (Kluwer Law International, Alphen aan den Rijn 2006) 336 para 17.
608 Reinisch (n 606).
609 Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Stevens, London 1953) 336 - 372.
610 Ibid.

Chamber of Commerce Rules, Article 26.9 of the London Court of International Arbitration and Article 32(2) of the United Nations Commission on International Trade Law (UNCITRAL).[611]

This concern is not limited to a particular case or jurisdiction in question where exceptions under Article 61 of the same Court's Statute might undermine finality. It is also a concern that other ICTs are not bound by Article 60. While this might be an intra-jurisdictional concern, cross-jurisdictional interactions cannot be prevented. There is always room for relationships to develop with other jurisdictions.[612] This concern is not limited to a particular case or jurisdiction in question where exceptions under Article 61 of the same Court's Statute might undermine finality. It is also a concern that other ICTs are not bound by Article 60. While this might be an intra-jurisdictional concern, cross-jurisdictional interactions cannot be prevented. There is always room for relationships to develop with other jurisdictions.

However, without a structuralist or binary opposing effect that converts conflicting jurisdictions into binary opposing jurisdictions, *res judicata* cannot directly present itself as a relationship builder. Instead, it is often seen as a 'hard-edged preclusion doctrine'.[613] Being 'hard-edged ascribes to *res judicata* a strong prohibitive character, compared to the other regulatory rules. As a result, relationships emerging from the failures of applying *res judicata* would equally have a strong relationship character or connecting effect. Despite this strong relationship character, *res judicata* still has some limitations, some of which come from the disparities in municipal law and the lack of a well-defined scope or application framework.

Divergences in domestic systems pose problems of adaptability into the international system, as scholars like Scobbie warn that it should not be expected that *res judicata* can be exactly replicated as it exists within domestic systems.[614] The first problem he identifies is the fact that international tribunals only exercise consensual jurisdiction, which entails a different 'structural context which can delimit the substantive issues' within a tribunals competence. By way of example, Scobbie notes the difficulty of the United States in the *Hostage Proceedings*[615] in which it felt constrained in pleading only alleged Iranian violations arising from the interpretation of treaty application. While this is not an exhaustive list of the difficulties in applying *res judicata*, consensual problems and the problem of divergences between domestic systems seem to have a solution on the broader interpretation and flexible

611 Ly and Sheppard (n 552) 22.
612 Stephen Wittich, 'Permissible Derogation from Mandatory Rules/The Problem of Party Status in the Genocide Case' [2007] 18 (4) EJIL 591 – 618.
613 Stavros Brekoulakis, 'The Effect of an Arbitral Award and Third Parties in International Arbitration: *Res Judicata* Revisited' [2005] 16 Am. Rev. Int. Arb. 177, 193.
614 Iain Scobbie, '*Res Judicata*, Precedent and the International Court: A Preliminary Sketch' [1999] 20 AU YB Int'l Law 299 <http://www5.austlii.edu.au/au/journals/AUYrBkIntLaw/1999/16.html> accessed 20 July 2020.
615 *US Diplomatic and Consular Staff in Tehran case* [1980] ICJ Rep 3 4

application of the doctrine. Scobbie notes that the English system gives a broader understanding to *res judicata*, which provides that once a matter is litigated, it cannot be relitigated on the basis of different grounds which should have been raised during the first proceedings. The English position is similar to that of most common law traditions like the United States, as seen in the case of *Commissioner v Sunnen* in which the court noted,

> The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound, not only as to every matter which was offered and received to sustain the claim or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.[616]

Besides the broad scope of admissibility of *res judicata*, illustrated in this case, the difference between the common and civil law traditions is also worth noting. While the doctrine serves only the private interest of the parties who have to raise and plead *res judicata* in the common law tradition, in the civil law tradition like the French, *res judicata* is considered *ex-officio*, not only serving the private interest of the parties.[617] These differences between domestic jurisdictions render importation and application of the doctrine into international proceedings challenging, requiring adaptability. Scobbie notes from the *South West Africa*[618] advisory opinion that general principles as a source of law are not borrowed 'lock, stock and barrel', ready-made and fully equipped with a set of rules'.[619] He asserts further that, 'the duty of the international tribunals […] is to regard these principles as an indication of policy and principles rather than as directly importing these rules and principles'.[620] In other words, some flexibility is expected. However, the extent of flexibility needs to be within acceptable limits not to undermine the credibility of the rules, which will defeat the overriding objective of the formalistic application.

4.4 The Function, Character and Legal Status of *Electa Una Via*

Like *lis pendens* and *res judicata,* this section shall examine the nature, characteristics and legal status of *electa una via.* After the specialised rules, an extended discussion involving all the other regulatory rules to understand how they produce binaries and relate to other procedural and non-legal factors follows. Meanwhile, according to *Black's Law Dictionary, electa*

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[616] *Commissioner v Sunnen*, 333 US 591, 597 (1948).
[617] Silja Schaffstein, 'The Doctrine of *Res Judicata* Before International Arbitral Tribunals PhD Thesis' [2012] QMUL <http://qmro.qmul.ac.uk/xmlui/handle/123456789/8665> accessed 20 October 2018. According to Schafferstein, on 1 January 2005, the *décret* of 20 August 2004 came into force and modified Article 125 NCPC, which provides that French courts may now consider *res judicata* issues *ex officio*. As such, the doctrine is no longer considered as serving only the private interests of the parties.
[618] *South West Africa* Advisory Opinion [1950] ICJ Rep 128.
[619] Scobbie (n 614); Separate opinion of Lord McNair in South West Africa (n 551) 146, 148
[620] Ibid.

una via is a maxim that states that 'one route having been chosen, no recourse to another is given'.[621] Some commentators define the rule with the emphasis on the prohibition, which resolves the jurisdictional conflict. For example, Fellmeth and Horwitz assert that the rule prohibits a party wishing to bring a claim (where two or more routes are available) from choosing another forum once one forum has been chosen, even if multiple fora are available.[622]

Electa una via applies to multiple proceedings, usually when no decision has been reached and is still at the forum selection stage. However, once the proceedings have started in two separate jurisdictions, then *lis pendens* would strengthen the *electa una via* response towards declining or suspending one set of proceedings in favour of another.[623] Still in the same situation, when a decision is reached in one set of proceedings, then *res judicata* will strengthen the *electa una via* response to resolve the jurisdictional conflict.[624] This gives *electa una via* an extensive scope. As Shany notes, it is the most expansive of all three traditional rules and the least widely accepted of the three.[625] Like most regulatory rules, applying *electa una via* is not straightforward with well-defined procedures. So, it has to relate to the other rules to effect jurisdictional conflicts through requesting the decline, suspension or termination of proceedings, the language commonly used in relation to *lis pendens* and *res judicata*.[626] Practice wise, cases where a party commences proceedings simultaneously to seek double compensation from two separate judicial bodies triggering *electa una via* are rare. Of course, attempts to seek double compensation are prevented by the doctrine of *ne bis in idem*, which does not allow a claimant to seek double relief for the same cause, thereby causing the opponent to suffer double jeopardy.

However, from a general IL perspective, as a principle adopted through the gateway of Article 38(1)(c) from domestic jurisdictions, it requires two concurrent proceedings by the same party. The doctrine was applied in the *MOX Plant cases* to seek exclusion of the Annex VII Tribunal because Ireland had commenced proceedings in two jurisdictions.[627] So, with elements of *electa una via* observed in the *MOX plant case*, the UK requested the exclusion of Annex VII Tribunals.[628] Ireland had commenced the related proceedings under the OSPAR

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[621] Ibid; Henry Campbell Black, Black's Law Dictionary (7th ed., West Group Austin Texas 1999) 1633.
[622] Fellmeth and Horwitz (n 546) 87.
[623] See James Fawcett's identification of the ways in which a court deals with *lis pendens* in ILA Report on *Lis Pendens* (552) para 1.3.
[624] Ibid.
[625] See Shany (n 5) 23.
[626] See *Mavrommatis case(n ; Chorzow case(n 595); Southern Bluefin Tuna case.*
[627] See *MOX Plant case* (n 54).
[628] Ibid.

Convention. It then seised the ITLOS to seek an order to restrain the UK. The UK requested exclusion based on *electa una via*.

Other situations of *electa una via* have arisen out of constitutive instruments, including the *electa una via* clause. The question arises: should *the electa una via* rule still apply in its traditional form when there are no two concurrent proceedings on the same dispute? Or when one has concluded before a party commences proceedings in another jurisdiction. A typical case where a party started proceedings in one forum and lost and then re-litigated in another has occurred within the WTO/RTA regimes. A case in point to illustrate this is *Argentina – Poultry (the Chicken Case)*,[629] which was concerned with Argentina imposing anti-dumping duties on Brazilian poultry imports.[630] Brazil brought a dispute under the Protocol of Brasilia,[631] which preceded the Olivos Protocol that had been signed pending its entering into force and was equally lacking an *electa una via* clause.[632] However, a jurisdictional conflict arose when Brazil, having brought a dispute under the MERCOSUR dispute system and lost, attempted to get the dispute before the WTO[633]—creating conflict and potential competition between the WTO and the MERCOSUR dispute system. Like other treaty clauses, article 1 of the MERCOSUR's Protocol of Olivos[634] tries to prevent jurisdictional conflicts between the WTO and other RTA dispute settlement bodies.[635] However, constitutive instruments and exclusion clauses are hardly adequate to deal with the broadly ramified conflicts of this nature. Thereby triggering not least *electa una via*, but also *res judicata, lex posterior*, and *lex specialis*, which are necessary to provide *electa una via* support in this case.

During deliberations, Argentina argued that Brazil could not relitigate the matter before the WTO, not because of *res judicata* and, thus, finality. But according to Argentina, that was in breach of the principle of estoppel and good faith, which Brazil denied.[636] However, in response, Brazil denied having acted in bad faith, claiming it was not, in the first place, precluded from bringing a second claim. Whether the protocol expressly allowed or it could have been implied from practice, what is observed from the Brazilian response is the lack of clarity in treaty language, which is a source of indeterminacy. Lim and Gao have noted that 'Brazil's argument turned on the construction of the estoppel doctrine, namely whether there was a need to establish that Brazil expressly' or by implication 'consented not to bring a

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[629] *Argentina – Definitive Anti-dumping Duties on Poultry from Brazil*, Report of the Panel, WT/DS 241/R 22 (April 22, 2003), Panel 2.10.
[630] Lim and Gao (n 52) 290.
[631] The Protocol of Brasilia for the Solution of Controversies, 17 December 1991.
[632] Lim and Gao (n 52) 290.
[633] Ibid.
[634] The Protocol of Olivos for the Settlement of Disputes in Mercosur (Feb. 18, 2002), Article 1.
[635] Lim and Gao (n 52) 290.
[636] *Argentina – Anti-dumping Duties* (n 608) para 7.18.

second claim'.[637] Meanwhile, Argentina argued that by virtue of Brazil's subsequent signing of the Olivos Protocol had 'implicitly consented' not to bring a second claim.[638]

However, Brazil argued that the legal basis of the case before the WTO was different. The 'object' of the MERCOSUR proceedings was different from the object of the WTO proceedings. This view was supported by Chile, intervening as a third party. Furthermore, Brazil argued that the Olivos Protocol did not apply to disputes brought under the Brasilia Protocol. The Olivos Protocol does not apply to disputes already concluded under the Protocol of Brasilia.[639] The third parties shared some of the views of the main parties and, even in some cases, raised views of their own. For example, Paraguay considered that Argentina's claim was *res judicata*, even though Argentina did not adopt this argument as it would have been a jurisdictional challenge and would not have continued in the proceedings it had refused to recognise by virtue of *res judicata*.[640]

Different circumstances may result in *elceta una via* situations. Particularly when specialised procedures are in place to take care of specific substantive issues, it may lead to forum selection and jurisdictional competition. So, the *Argentina – Poultry case* involving the WTO and an RTA was not a new kind of situation. This has been occurring since the PCIJ/ICJ and has been observed in some ITLOS cases discussed above, with specialised procedures reserved to deal with specific heads of a dispute or reservations for regional bodies and special and later in time rules. To this end, the *lex specialis* and *lex posterior* rules, though not triggered above, also have connections with the *electa una via* rule and are also sources of ambiguity as observed by the ILC Study on fragmentation.[641] The next section shall examine *lex specialis* and *lex posterior* in greater detail.

Regarding its legal status, *electa una via*, like the other traditional rules, also come under general principles as defined under Article 38(1)(c) of the Statute of the Court, which is generally more akin to public IL. Meanwhile, no international legal institution has declared a clear and consistent practice of *electa una via* to give *electa una via* a customary character. NAFTA Article 2005(1) anticipated an *electa una via* situation in terms of constitutive instruments. It allowed potential disputes arising under the NAFTA and GATT/WTO Covered Agreement to 'be settled in either forum at the discretion of the complaining party'.[642] In this regard, it has been argued within many scholarly circles that the framers of NAFTA presupposed a choice

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637 Ibid.
638 *Argentina – Anti-dumping Duties* (n 608) para 7.22.
639 Ibid.
640 Ibid para 7.28
641 ILC Report (n 35) para 124.
642 Article 2005(1) NAFTA, 17 December 1992.

of forum clause, in light of the RTA rule where there was no express WTO rule.[643] However, the WTO later emerged with exclusivity under Article 23 of the DSU, which set the stage for potential conflict with NAFTA as anticipated.

Some regional RTAs have begun including *electa una via* clauses in trade agreements like NAFTA and the European FTA-Singapore FTA under Article 56 signed in June 2002.[644] This allows a dispute to be brought either to the WTO or under the RTA's dispute system and for the complaining party to stick to the choice of forum first seized, without changing jurisdiction in the course of proceedings or when things become unfavourable.[645] *Electa una via* has been drafted into the constitutive instruments of judiciary mechanisms like the Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR), which features in the jurisprudence of courts, tribunals and some quasi-judiciary bodies.[646] The ICJ and Human Rights Committee (HRC) reservations in the optional clause of the ICJ Statute and the Optional Protocol of the HRC respectively have been a source of jurisdictional arguments.[647] In this light, the European Commission of Human Rights[648] in the *Fornieles* v. *Spain case*[649] invoked *electa una via* and stated that petitions previously filed before other dispute settlement bodies were not admissible.[650] While these cases do not define the status of *electa una via*, they show a practice that brings its relevance to the fore to support its impact and role in dealing with jurisdictional conflicts.

4.5 The Function, Character and Legal Status of *Lex Specialis* and *Lex Posterior*

Like the traditional regulatory rules, the characteristics, functions and legal status of *lex specialis* and *lex posterior* will be analysed together in this section. The maxim *lex specialis* has an interpretive character and accordingly prescribes that in the case of a conflict between a special and general norm, the special prevails or takes precedence.[651] However, the contrast to *lex specialis* is *lex generalis* and not *lex posterior*. Interest in *lex posterior* arises due to its ability to resolve conflicts between two *lex specialis* rules. Since there is no hierarchy of relationship between the jurisdictions in the horizontal international legal system, it is important to involve *lex posterior* to deal with the possibility of two *lex specialis* institutions in conflict or competition. In such a conflict, *lex posterior*, which is the later in time norm or rule, overrides

643 Lim and Gao (n 52) 308.
644 Lim and Gao (n 52) 290.
645 Ibid.
646 Shany (n 5) 216.
647 Ibid 217.
648 Pursuant to Article 35(2) (ex-Article 27(1)(b) of the European Human Rights Convention
649 *Fornieles v Spain App. 17512/90, 73 Eur. Comm'n. HR Decz. & Rep. 214, 223 – 4 (1992)*
650 Shany (n 5) 64.
651 See ILC Report (n 35).

the first(*lex specialis)* rule leaving the later one.[652] It is worth clarifying that whilst *lex specialis* are rules for the interpretation of normative conflicts, jurisdictional conflicts involving specialised jurisdictions or special procedures automatically give such tribunals or special procedure *lex specialis* character.[653]And without a hierarchical order, *lex posterior* determines which of the special norms or rules is the later rule, which takes priority. After analysing the rules in this section, an extended discussion with the other rules is conducted to summarise how binaries jurisdictions and indeterminacies are deconstructed to resolve conflicts, keeping jurisdictions distinct.

Going by the standard established above, the jurisdictional conflict between NAFTA and the WTO international trading system concern NAFTA Article 2005(1) *electa una via* clause, also presented a situation of *lex specialist* and *lex posterior* as contemplated by the framers of NAFTA.[654] Furthermore, between MERCUSOR and the WTO as witnessed in the *Argentina Poultry case lex specialis* and *lex generalis* in light of a jurisdictional conflict and not necessarily as a solution to conflicting interpretations as observed by the ILC study on fragmentation.[655] However, Article 23 of the WTO-DSU seem to be stubborn to this rule because of its exclusive nature, which often creates conflict between the WTO and RTAs.

Similarly, in *Thailand – Cigarettes (Philippines) case,*[656] the Panel rejected the notion that Article 11(1) of the WTO Customs Valuation Agreement was *lex specialis* to Article X(b) of the GATT 1994.[657] Whereas the general interpretive note to the Annex 1A of the WTO Agreement states that the provisions of the other agreement shall prevail in the event of a conflict between a provision of the GATT 1994 and a provision of another agreement to the extent of the conflict.[658] What this clearly indicates is the indeterminacy inherent in the application of these rules.

Even though not much attention was paid to jurisdictional conflict by the ILC in the Study on Fragmentation, the question of the same subject-matter falling between two jurisdictions or treaties was continuously encountered. While noting the different ways in which treaties link to each other and the different implantation instruments, the Commission that the question of relationships between treaties cannot be resolved without regard to their

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652 Dorota Marianna Banaszewska, '*Lex Specialis*', [2015] MPEPIL.
653 See Lim and Gao (n 52) 287, *Lex specialis* and *Lex Posterior*, and other rules were originally intended to resolve conflicts between substantive principles (fragmented norms) of international law as opposed to fragmented authority (jurisdictional conflicts).
654 Lim and Gao (n 52) 308 – 309.
655 ILC Report (n 35).
656 Panel Report, *Thailand – Cigarettes (Philippines*) para. 7.1051.
657 WTO Agreement - Preamble (Jurisprudence) para 13.
658 Panel Report, *Thailand – Cigarettes* (n 656).

institutional relationships.[659] The acknowledgement was an attempt to fill the overall gap left by the ILC in terms of jurisdictional conflicts or competition, which could be essentially narrowed with *lex specialis* and *lex posterior* where ever applicable.

However, the ILC also noted Sir Robert Jennings' and Sir Arthur Watts'[660] suggestion that *lex specialis* should be used as a 'discretionary aide' to resolve 'apparent conflicts between two differing and potentially applicable rules' that is 'expressive of common sense.[661] In like manner, the scope of application to jurisdictional conflicts remains narrow. To this end, scholars like Lim and Gao, echoing Pauwelyn, suggests the need for public IL to apply *lex specialis* and *lex posterior* to solve jurisdictional conflicts.[662] To Lim and Gao, Pauwelyn's call to 'implicitly merge a jurisdictional and a choice-of-law problem' poses a danger of a single set of principles being used to decide rules and principles and address them jurisdictional clashes.[663] Instead, such monotony could create more indeterminate and controversial outcomes with the risk of real jurisdictional conflicts being treated as an extension of normative conflicts.[664]

Meanwhile, in the international criminal law regime, the Rome Statute, which is the constituent instrument of the International Criminal Court (ICC) has a *lex specialis* character pursuant to Article 5 of the VCLT.[665] Article 5 of the VCLT recognises 'any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation.'[666] To this end, the Rome Statute drafted and adopted by the *UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* was treaty-making within an institutionalised framework, which brings the ICC under the *lex specialis* umbrella under Article 5.[667]

However, could the Court as a court of general jurisdiction have ceded jurisdiction to the ICC in the case of real jurisdictional conflict with the ICC because it is constituted within the UN System and with the Rome Statute being its constituent instrument? Pakistan came close to making this argument in the *Jadhav (India v Pakistan) case. It* argued that granting the relief,

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659 ILC Report (n 35) para 255.
660 See Sir Robert Jennings & Sir Arthur Watts, 'Oppenheim's International Law' (9th edn. Longman, London 1992) 1270 - 1280.
661 ILC Report (n 35) para 66.
662 Joost Pauwelyn, 'The Role of Public International Law in WTO: How Far Can we GO?' [2001] 95(3) Am.J. Int'l L. 535 – 538.
663 Lim and Gao (n 52) 287.
664 Ibid 288.
665 Oliver Dorr and Kirsten Schmalenbach, Vienna Convention on the Law of treaties: A Commentary (Springer, Osnabruck 2018) 104.
666 VCLT (n 198) Article 5.
667 Dorr and Schmalenbach (n 657).

India sought 'would transform the Court into a court of appeal of national criminal proceedings.[668] Two possible scenarios could explain why Pakistan did not make this argument. It would have weakened Pakistan's domestic criminal jurisdiction with appeal rights. Secondly, only an expansive interpretation of ICC's complementarity principle would have put the ICC into competition with the ICJ. However, there was no parallel proceeding or jurisdiction. The Court reiterated its precedent from the *LeGrand (Germany v United States*) case that it was not a Court of criminal appeal.[669] Even though the Court commented on Pakistan's domestic procedure,[670] did not give the domestic system the status to compete with the Court. Above all, Pakistan's request for the Court to decline jurisdiction was not granted.

In terms of legal status, *lex specialis* and *lex posterior* are widely accepted as part of customary IL as implied from Article 30 of the VCLT and recognised as the basis of a jurisdictional choice clause by dispute resolution mechanisms.[671] For example, the WTO recognises the *lex posterior* principle, which derives its base from Articles 30(3) and 30(4) of the VCLT alongside most Regional Trade Agreements as a basis for the application of choice of forum clauses with respect to the WTO dispute settlement proceedings.[672] Article 30 is fully comprehensive about what should happen when the same subject-matter overlaps between two jurisdictions leading to a jurisdictional clash. In this light, the ILC Study also observed that 'much of the text is relatively uncontroversial and captures the state of general law, especially concerning the reference to Article 103 of the Charter in Article 30(1) and conflict clauses in Article 30(2) while Article 30(3) 'effectively codifies the *lex posterior* rule'.[673] Insofar as these are linked to jurisdictional clauses or dispute resolution mechanisms, then it will resolve jurisdictional clashes.

Even though *lex specialis* and *lex posterior* are generally accepted as interpretive techniques in public international law, the VCLT does not expressly mention or accord such functions to its interpretative role under Section 3, Article 31 to 33.[674] However, the commentary to Article 55 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts states that the articles do not apply where the international responsibility of states are

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668 *Jadhav Case (India v. Pakistan)*, Judgment, 17 July 2019, para 129.
669 *LaGrand (Germany v. the United States of America),* Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I) 15 para 25.
670 *Jadhav Case (India v. Pakistan)*, Judgment, 17 July 2019, para. 127
671 Songling Yang, 'The Solution for Jurisdictional Conflicts Between the WTO and RTAs: The Forum Choice Clause' [2014] 23(1) Mich. State Int'l Law Review 108 -152.
672 Ibid.
673 ILC Report (n 35) para 252.
674 See VCLT (n 665) Section 3.

governed by special law.[675] That notwithstanding, customary rules of treaty interpretation reflected under Article 31 and 32 of the VCLT the provisions of a convention, treaties or agreements (including those with a *lex specialis* character) 'must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and the light of the object and purpose' of the special agreements.[676][emphasis added]. So, by implication, any special judicial body derived from a special agreement can be considered lex specialis in good faith following the ordinary meaning in the specific context and light of the object and purpose of the special agreement.

Both *lex specialis* and *lex posterior* have been a central part of the modern international legal practice since the days of the PCIJ, in the *Mavrommatis Palestine Concessions case* where the PCIJ jurisdiction fell between the 1922 Mandate for Palestine and the 1923 Protocol XII of the Treaty of Lausanne.[677] However, this does not suggest the origin of *lex specialis* and *lex posterior* for legal commentators note *lex specialis* and *lex posterior* from Hugo Grotius' *'De Jure Belli ac pacis, Libri Tres, Edited by James Brown Scott'*.[678] The ILC notes that the 'idea that special enjoys priority over general has a long pedigree in international jurisprudence […] its rationale is already well expressed by Grotius'.[679] The Court concluded, in such circumstances, that the instrument that was special and more recent should prevail, which scholars agree is an endorsement of the *lex specialis* and *lex posterior* principles.[680] This standard would have also been applied in solving jurisdictional conflicts, which give rise to forum shopping and, consequently, parallel proceedings.

With the above understanding of the rules and their legal status, the following section examines the triple identity standards that are applied to the rules to determine a decline, a stay or termination of proceedings in the process of preclusion and maintaining jurisdictional distinctions.

4.6 Requirements for the Application of the Regulatory Rules

For the above regulatory rules to apply and preclude jurisdictional conflicts, the rules are tested for suitability against the identity standards. That is, the identity of the parties must be the same*(persona)*, the same cause of action or grounds of the claim (*causa pentendi*) and relief

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[675] Draft Articles on State Responsibility, Commentary on Article 55, para 2 in Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/56/10) 356.
[676] See *Jadhav Case (India v. Pakistan)*, Judgment, 17 July 2019, para 71; *Avena and Other Mexican Nationals (Mexico v. the United States of America*), Judgment, I.C.J. Reports 2004 (I), p. 48, para 83; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France*), Judgment, I.C.J Reports 2008, p. 232, para 153).
[677] *Mavrommatis Palestine Concessions case Greece v Great Britain)*, P.C.I.J. Series A, No. 2 (1924) 31.
[678] See ILC Report (n 35) para 59.
[679] Ibid.
[680] Ibid para 74.

or object *(petitum)*.[681] As such, the same party cannot relitigate the same issues through a second litigation or arbitration process. That will trigger the application of regulatory rules for preclusion to avoid contradictory judgments, resulting in disconnecting jurisdictional relationships.

The triple identity test has been discussed since the earlier PCIJ cases, even though the Court never really applied it in judgment. Earlier mentions date back to the reference of Judge Anzilotti's identification and analysis of *persona*, *petitum* and *causa petendi* in the *Chorzow case*[682] as the 'three traditional elements.'[683] Also, the *Trail Smelter*[684] decision mentioned the 'three traditional elements as parties, object and cause.'[685] However, this criteria has recently been tested in the *Apotex v USA case* in which the debates put forward by the arbitrators in the *CME Czech Republic B.V. v Czech Republic*, were examined in relation to the two-elements test..[686] The two element test has been questioned in the *British-US Claims* Arbitral Tribunal where it was stated that *res judicata* applies only where there is identity of the parties.[687] As a matter of fact, the leading case in the two-element test is the *Pious Fund case*[688] in which the PCA Tribunal emphasised that the test does not only involve 'the same parties to the suit but also the same subject-matter'.[689] Meanwhile, Bin Cheng did question the accuracy of the sub-division between *petitum* and causa *petendi*, which resulted into three elements 'especially in borderline causes.'[690] In response, Christoph Schreuer and Reinisch assert that international tribunals have always been aware that if the test is applied too restrictively, then the doctrine of *res judicata,* [and by extension, the other regulatory rules] may never apply.[691] Such compromised application renders a chance for the regulatory rules to be applied, thereby creating a preclusive effect. It inhibits interactions and relationships. Even though this study contrasts with the less restrictive approach for the effective application of the regulatory rules, it does not identify with the strict two-element test. The triple identity test provides a better opportunity for jurisdictional relationships.

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681 See August Reinisch 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' [2004] 3 (1) LPICT 37-77

682 *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, PCIJ Series A. No 13, Dissenting Opinion by M. Anzilotti, page. 23

683 Reinisch (n 681).

684 *Trail Smelter (US v Canada)*, 3 R.I.A.A. 1905, 1952 (1941).

685 Reinisch (n 681).

686 *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 7.15.

687 Ibid.

688 See *The Pious Fund of the Californias (The United States of America v. The United Mexican States)*, PCA Case No. 1902-01, Award, 14 October 1902

689 *Apotex Holdings* (n 686).

690 Ibid para 7.16.

691 *CME Czech Republic B.V. v. The Czech Republic*, Legal Opinion of Christoph Schreuer and August Reinisch Submitted to the Svea Court of Appeal - 20 June 2002.

The following analysis looks into the nature of these requirements and how they are applied against the regulatory rules in parallel proceedings, as will be tested in the case studies in the next chapter.

4.4.1 Identity of the Disputing Parties—Same Parties – *Persona*

The question of party identity as a requirement for applying the regulatory rules is uncontested in international judicial proceedings to tackle jurisdictional conflicts. Even though some jurisdictions tend to assign the literal meaning of the word 'same parties,' which some commentators describe as 'virtual identity,' with the parties seen essentially as the same, it doesn't threaten party identity as a requirement.[692] The *Martins v Spain case*[693] illustrates the virtual identity test to support the argument that 'only the same parties involved in the first set of proceedings,' in a situation of multiple claims count.[694] This could be subsequent or parallel claims. However, privies and subsidiaries of holding companies in mixed proceedings can present some difficulties in determining whether they are identical or closely related entities with legal personality for applying regulatory rules.[695] Related parties like subsidiaries or those constituting different personalities of the same entities are prohibited, going by the virtual identity that involves only 'the very same parties' in multiple proceedings.[696]

Meanwhile, the issue of natural persons acting on behalf of a legal entity is considered inseparable with the example of trade union activists acting on behalf of a trade union as the same parties.[697] However, international or multilateral corporations often have a complex structure involving BITs, potentially creating jurisdictional conflicts and parallel proceedings. Commentators have observed different standards of assessing identity in 'modern foreign investment'.[698] For example, the International Chamber of Commerce and ICSID follow an 'economic reality approach' to disregard corporate distinctions when determining jurisdiction involving the identity of parties.[699] Even though the economic reality approach is broad and

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692 Ibid 55.
693 ECHR, *Cereceda Martin v Spain*, Case 16358/90, 12 October 1992, DR Vol. 73, 120 *et seq*.
694 Shany (n 5) 24.
695 Reinisch (n 681) 55.
696 Shany (n 5) 24.
697 Ibid.
698 Reinisch (n 681) 57.
699 Ibid; In *Dow Chemical France et al. v. Isover Saint Gobain,* ICC Case No. 4131 (1982), 9 Yearbook of Commercial Arbitration (1984) 131, at 136 the ICC followed an economic reality approach in determining its jurisdiction; the ICSID has also encountered instances where it had determined its jurisdiction upon the question of identity between a parent company and its subsidiary as was the case with *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports, 389; *Klockner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports, 9 also witnessed a situation of identity of shareholders with respect to arbitration agreements in determining jurisdiction; There is a fully developed practice in terms of identity of parties in establishing jurisdiction particularly in international investment law, which has the tendency of disregarding the corporate veil, taking into

encompassing, it is limited to judicial bodies determining their jurisdictions and either accepting or rejecting a case or possibly referring to another forum as in *forum non-conveniens*. It often requires the discretion of the court or tribunal to decide as it is beyond the consent of the parties.[700]

In terms of parallel jurisdiction conflicts, Reinisch argues that if such a standard is accepted for jurisdictional purposes, the same standard should apply for *lis pendens* and *res judicata*.[701] This approach could help individual companies of a corporate group to avoid the same dispute being re-litigated endlessly under the disguise of separate legal identities.[702] An example of corporate group identity occurred in The *CME v Czech Republic* involving other subsidiaries of the CME like CNTS were treated under the CME corporate identity. However, because a BIT can lift the corporate veil, Mr Lauder was able to seek restitution of licence for CNTS through himself in London and through CME in Stockholm.[703] These issues are examined in greater detail in the case analysis of the *Lauder/CME v Czech Republic* parallel proceedings is available in the next chapter.

Within the international human rights regime, the Human Rights Committee (HRC) in *the Casariego v. Uruguay case,*[704] contended that the *lis pendens rule* does not preclude victims of alleged rights abuse from filing a claim pending before another forum so long as the claimants are unrelated.[705] In *AGVR v. the Netherlands,*[706] it was determined that a complaint by one party before one tribunal could not bar an identical complaint by another party to the same tribunal'.[707] Precluding parties just because another party is litigating the same issues is not permissible, not least because a decision might set a non-binding precedent.[708] However, such a dispute hinges on substantial conflicts, not on contested jurisdiction, though equally important to clarify the discussion of party identity.

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consideration economic realities which the ICSID tends to follow; The ECJ has also developed the "single economic entity" doctrine as seen in the *Dyestuffs case,* cf case 48/68/69 *ICI* v. *Commission* (*Dyestuffs Case) [1972] ECR 619, para. 133, and Case 52/69 Geigy v Commission [1972] ECR 787, para. 44*, in which it noted that "the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company." However, in terms of the parallel jurisdictional case, the practice is not as well developed as regulatory rules actually stand in the way.

[700] Wittich (n 612).

[701] Reisnisch (n 681) 59.

[702] Ibid.

[703] UNCITRAL, *CME Czech Republic BV v The Czech Republic*, Final Award, 14 March 2003, para 210.

[704] *Comm. R.13/56, Casariego v. Uruaguay UN GAOR, 37th Sess., Supp. 40, at 185, 187 (Report of HRC, 1981).*

[705] Shany (n 5) 25.

[706] *AGVR v. Netherlands App. 20060/92, Decision of the European Human Rights Commission of 10 Apr.1995*

[707] Ibid cf. No. 11603/85, Dec. 20.1.87, D.R. 50 p. 228.

[708] Article 59 of the Statute of the ICJ does not bind non-parties to a dispute.

Meanwhile, the ECJ in the *Drouot Assurances SA v. Consolidated Metallurgical Industries case,*[709] rejected the view that two parties whose litigation interests diverge could not be considered as the same parties to apply the *lis pendens* rule.[710] The same standard will apply if the situation involves all the other regulatory rules. Regardless of whether the issues are the same, the divergence of interests, in other words, object or relief, changes the nature of the jurisdictional conflict fundamentally. Before getting into the same relief discussion, what constitutes the same or similar issues must first be examined.

4.4.2 Cause of Action: Similar (Grounds or Merits) – *Causa Petendi*

Cause of action is the legal foundation upon which the parties rely to build or support their claim, which is the first of the two sub-categories of the same issue condition. When the same rights or legal arguments are relied on in different sets of proceedings, then the identity of cause or *causa petendi* is achieved.[711]

The position in IL is that, where new rights are asserted, a new case should not be barred by a previous decision even if the parties and relief should be the same.[712] On the other hand, where a new issue gives rise to a different relief, which is fundamentally different, a new case emerges and is not precluded by any previous action or decision between the same parties.[713] The difference must be fundamental. Otherwise, preclusion could still be achieved if the parties should have known about the cause of action at the time of the first proceedings or cause of action.[714] For purposes of *res judicata* and *lis pendens*, proceedings based on a fundamental difference in legal grounds constitute a separate cause of action. As a result, *res judicata* and *lis pendens* would not be applicable.[715] However, there is no established test to determine what constitute a fundamental difference in the cause of action or grounds except contested during proceedings as in the case of *Della Bank v Bank Mellat* in which Lord Hobhouse J stated that*:*

> The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of

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[709] *Case C-351/96, Drouot Assurances SA v. Consolidated Metallurgical Industries (CMI Industrial Sites) [1998] ECR I-3075.*
[710] Shany (n 5) 25.
[711] Reinisch (n 681) 62.
[712] Cheng (n 609) 345.
[713] In the *CME v Czech Republic Case*, the Arbitral Tribunal had to consider an earlier award rendered in the *Lauder v the Czech Republic Case* that gave rise to *res judicata* and the possibility of precluding the *CME* proceedings.
[714] Scobbie (n 614).
[715] Reinisch (n 681).

> the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[716]

Otherwise, it should be observed *prima facie* to be different regardless of whether or not the parties should have known during the earlier proceedings.

The *causa petendi* requirement risks creating parallel proceedings if strictly applied in situations where claimants seeking the same relief on the same grounds from the same respondent under different legal instruments are considered as substantially not identical.[717] This scenario presents a risk of duplication of proceedings. In this situation, Reinisch recommends examining the specific rules relied on and how far they are substantially identical for the identity of cause to be admitted.[718] The legal rule is examined to see if it is reflected in the different legal instruments. If it does, then the identity of cause should be admitted.[719] As such, the relevant regulatory rule is applied to stop the proceedings.

The *Southern Bluefin Tuna case* illustrates this scenario, as an UNCLOS tribunal had to determine whether to settle the issue of Japanese fishing practices under the CCSBT or the UNCLOS before declining jurisdiction in favour of the CCSBT.[720] The tribunal noted that the dispute between the two instruments was artificial as the parties were 'grappling not with two separate disputes' but with 'a single dispute arising under both Conventions,' and trying to find a distinction, and concluded there was only one dispute.[721] The tribunal acknowledged that even though the UNCLOS and CCSBT were fairly different, they emanated from and addressed the same factual grounds.[722] In assessing the parallel proceedings, the same legal grounds and arguments must be applied in both parallel proceedings.[723] However, supposed the legal grounds are varied between parallel proceedings, *lis pendens* will be inoperable because this will change the cause of action and grounds for the claim. Thus, removing the identity of cause. The *Southern Bluefin Tuna* situation seems to have been a less strict interpretation of less related instruments to find and fulfil the identity of cause condition.

Meanwhile, other international tribunals have followed a stricter approach, as witnessed in the *MOX Plant Case* between the United Kingdom and Ireland. The ITLOS was faced with interpreting treaties or similar provisions of different treaties.[724] The tribunal held that

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716 *Dallal v Bank Mellat* [1985] 75 ILR 151; see Scobbie (n 614).
717 Reinisch (n 681) 64.
718 Ibid.
719 Ibid.
720 *Southern Bluefin Tuna C*ase (*Australia and New Zealand v Japan)*, Award on Jurisdiction and Admissibility.
721 Ibid para 54.
722 Reinisch (n 681) 66
723 Ibid.
724 The *MOX Plant Case* (n 54) para 51.

'having regard to…differences in respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*,' the application of international rules to interpret identical or similar treaty provisions may not yield the same results.[725] To this end, a lack of identity will restrict the application of *lis pendens* and the other regulatory rules. The *MOX Plant Case* is examined further in greater detail in the next chapter.

It should be noted that whether assessing the identity of cause or object in the parallel proceedings, to apply the regulatory rules, assessing the identity of facts is inevitable. The identity of facts is at the crossroads between *causa petendi* and *petitum*. The next section shall examine the identity of object.

4.4.3 Same Object/Relief of the Claim – *Petitum*

Even though the principle *ne bis in idem,*[726] applies to the entire triple identity test, it is more pronounced in the identity of object or relief because of its impact of damages, relief or awards on the parties. So, the object's identity requirement refers to the remedies award or relief requested in parallel to subsequent proceedings. This must be barred in subsequent proceedings by *res judicata* or by any of the regulatory rules in parallel proceedings if the respondent suffered twice for the same wrong committed. As seen in the *Southern Pacific Properties Limited v Egypt*[727] *Case*, many grounds for triggering the regulatory rules were relitigated based on the award or relief. So, for the identity of object or relief requirement, the same type of relief must be sought in the parallel or subsequent proceedings.[728]

The object identity standard has been tested in the *Tatry v Maciej Rata Case,* in which the ECJ held that for the results to be essentially the same, the actions must be seen to have the same object.[729] So, the same relief must be requested in both competing proceedings for the strict application of the identity of object test. The ILA also recognises this in determining object identity.[730]The ILA cautions against 'claim splitting' such as by way of first seeking *restitutio in integrum* and later seeking monetary compensation in a separate

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[725] *Ibid*

[726] Literally translates as 'not twice about the same' and prohibits double jeopardy by the injuring party according to Robin Geib, '*Ne bis in idem*,' [2013] MPEPIL.

[727] *Southern Pacific Properties (Middle East) Limited, Southern Pacific Properties Limited v The Arab Republic of Egypt*, Decision on Jurisdiction of November 27, 1985, ICSID Case No. *ARB/84/3, hereinafter SPP v Egypt.*

[728] Reinisch (n 681) 62

[729] *ECJ, Tatry v Maciej Rataj, Case C-406/92, 6 December 1994, ECR 1994, p. I-05439.*

[730] Filip de Ly and Audley Sheppard, ILA Final Report on *Res Judicata* and Arbitration [2009] 25 (1) *Arbitration International* 20.

proceeding.[731] With the range of remedy or relief options available to an injured party, a restitution claim may be initiated or abandoned for damages instead.[732]

However, a party cannot claim both remedies as different objects in a single or parallel proceeding. For example, in the *Machado Cases*[733] involving a claim for damages arising from the recovery of a house, a second claim involving the restoration of the house as well as rent and damages was dismissed on the *res judicata.*[734] The umpire argued that the items included in both cases didn't matter. Instead, it was the foundation of the claim that was based on the same injury and concluded that both claims were identical.[735] Meanwhile, in the *Delgado Case*,[736] even though the umpire noted that the two claims were based on different grounds, he still dismissed the second claim based on *res judicata. I*t was apparent the claimant could have requested indemnity for the property's value in the first claim in which damages were sought.[737]

The *Machado Case* took a much broader approach than the *Delgado Case* but ended up with the same object identity to apply *res judicata.* Meanwhile, in the *Delgado Case*, the umpire recognised both claims were related to different grounds but still applied *res judicata*, which illustrated no definitive standard in finding object identity.

Generally speaking, ICTs are not too restrictive or strict on identical relief or object because parties could modify grounds in parallel proceedings to evade the precluding effect of the regulatory rules.[738] However, with the contrast observed in the *Machado* and *Delgada cases*, a much safer approach will be to stick with the principle of *ne bis in idem*, which will preclude the respondent from paying twice for the same action. On this count, the regulatory rules should apply *prima facie* once it is clear that the identity of the object, relief or result is essentially the same.[739] However, this must be closely linked to the identity of facts, as factual background determines the relief and legal arguments made by parties to satisfy the

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731 Ibid.
732 *Factory of Chorzow, PCIJ Ser. A, No.17, 1928, at 70 (Merits) (Judge Finlay, dissenting)*
733 *Machado Case* (1880), reported in Bassett Moore, John, History and Digest of the International Arbitrations to Which the United States Has Been a Party, Vol. 3, Washington 1898, pp. 1293 *et seq.*
734 Legal Opinion of Christopher Schreuer and August Reinisch in UNCITRAL Arbitration Quantum Proceedings *CME Czech Republic BV (The Netherlands) v The Czech Republic para* 45.
735 ibid
736 *Delgado Case* (1881), reported in Bassett Moore, John, History and Digest of the International Arbitrations to Which the United States Has Been a Party, Vol. 3
737 Schreuer and Reinisch (n 734).
738 Ibid para 48.
739 *Tatry,* C-406/92. Ibid.

traditional elements of *persona*, *causa petendi* and *petitum* as determined in the *Chorzow Factory case* and the *Trail Smelter* decision.[740]

To conclude this section on the regulatory rules and the triple identity requirements, it is worth commenting on estoppel and other non-legal factor factors which ICTs also use to evade the regulatory rules. For example, when Poland challenged the Court's jurisdiction in the *Chorzow Factory case* based on *lis pendens*, and in the Certain German Citizens case, the Court applied the principle of estoppel by conduct to avoid invoking *lis pendens.*[741] So, the Court would invoke other related factors to evade using the regulatory rules. Estoppel has also featured in the more recent cases like the *Apotex v USA* ICSID Tribunal referred to in *Grynberg v Grenada*,[742] which did not meet the triple identity criteria. Yet, the claims did not proceed on the principle of estoppel.[743] So, it is not only the Court and its predecessor from the perspective of general litigation that does not have an appetite towards regulatory rules on the guise of estoppel. Arbitration tribunals are not equally consistent with the rules and the identity requirements. Nevertheless, the Court's reluctance to apply the regulatory rules and disregard other ICTs is based on superiority complex or a corollary of seniority having been around just after World War I and believes its judges are 'inherently better or wiser'.[744]

Meanwhile, ICTs take a more comprehensive approach and apply discretion to support the outcomes they produce, often compromising at the detriment of relationships that develop from a strict application of the regulatory rules. However, the ILA Committee has recommended that tribunals should take a cautious approach to avoid procedural unfairness or abuse by giving the parties –

> a wide discretion in terms of cost, psychological influences, relational elements, cross-cultural considerations, persuasiveness, political constraints and other aspects that may be responsible for not instituting certain claims or for not raising causes of action or issues of fact or law, and caution is I order to avoid res judication amounting to a patronising review of what parties and counsel ought to have done in managing their case.[745]

Some tribunals have applied non-legal factors like the 'economic reality approach'[746] to determine their jurisdiction instead of the regulatory rules as seen in the International

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740 Reinisch (n 681).
741 See Shany (n 5) 240.
742 *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Order and Judgment of the United States District Court for the Southern District of New York, 29 April 2011, para.
743 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 7.19
744 See Romano (n 7).
745 ILA Report on *Lis Pendens* (n 552) para 60.
746 Reinisch (n 681).

Chamber of Commerce as seen in the *Dow Chemical France et al. v Isover Saint Gobain case.*[747] So, the use of non-legal factors and discretion is not an unusual occurrence, which is where comity comes on board. However, instead of completely replacing the regulatory rules, comity works alongside the regulatory rules as seen in the *MOX Plant case* in which the Annex VII tribunal exercised comity and suspended proceedings in favour of the ECJ.[748]

Reinisch and Schreuer have warned that taking a restrictive, formalistic or strict approach based on the same legal arguments, object and ground, the doctrine of res judicata [and by extension all the other regulatory rules] would rarely apply. [Emphasis added]. Against this risk, this study mitigates with comity as a second step, with the first being the formalistic or strict application of the rules. The above analysis shows that the rules fail, giving rise to an indeterminate or disorderly situation that comity is involved in fixing after being deconstructed into distinct jurisdictions.

4.6 Comity as a Jurisdictional Conflict Regulator – Post Binary Opposition Deconstruction

As conceptualised in chapter one, the role of comity is to settle the jurisdictional conflict that was left unsettled following the application of the regulatory rules and the deconstruction of the binary jurisdictions to keep them distinct. Comity is stage three of the methodological steps involved in this study and involves different comity based activities involving binary opposing jurisdictions that work together to resolve the dispute. This includes delegating roles between judges and arbitrators involved in the parallel proceedings, moving judges between jurisdictions, and inter-jurisdictional communication. Before applying these different approaches after the case studies, it is worth examining what comity entails.

It would not be an exaggeration to state that of every single case of overlapping and conflicting or parallel proceedings, comity could have resolved the dispute independently or in association with the relevant regulatory rule that was disputed at the time of the jurisdictional dispute. Comity could have resolved the very early cases of the PCIJ like the *Mavrommatis forum selection case,*[749] *the Chorzow Factor Case*[750] and *the Certain German cases*[751] if the Court had exercised it and given the special procedure a chance. Even more complex cases like the Swordfish cases between the WTO and ITLOS that lasted a decade would have been quickly resolved if one of the comity-based approaches was engaged. It assisted in the *MOX*

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747 *Dow Chemical France et al. v. Isover Saint Gobain,* ICC Case No. 4131 (1982), 9 Yearbook of Commercial Arbitration (1984) 131, at 136
748 *MOX Plant case* (n 54).
749 *Mavrommatis case (n 677).*
750 *Chorzow Factory Case (n 595).*
751 *Certain German Cases (n 64).*

plant cases when Judge Treves raised *obiter dicta.*[752] So, this section shall examine the suitability of comity for its role in this study. It examines the nature and legal status of comity. It also looks at whether comity is a tool in the hands of judges who can exercise their discretion arbitrarily that may lead to abuse. Suppose that should be the case, then it will not be suitable because trying to engage comity is a process of undermining the threat to the integrity and authority of the system caused by the non-formalistic application of the rules to achieve false preclusion. If judges and arbitrators were to be doing the same thing, there would be no need to engage comity to maintain the cycle of compromise and undermining of the integrity and authority of IL.

4.6.1 The Nature of Comity

Comity is commonly known as a legal doctrine or principle under which courts recognise and enforce judgments from other jurisdictions as a matter of courtesy and mutual respect and defer considering cases on the same issues in other jurisdictions.[753] Accordingly, courts in one jurisdiction respect with a certain degree of deference to another jurisdiction's laws and judicial decisions even when there are no judgment recognition agreements in place. This is the case between inter-state courts. Even so, not all states(and domestic courts) tend to accept the decisions of others without a judgment recognition agreement or having signed up to the *New York Convention on the Recognition and Enforcement of Foreign Awards*.[754] Comity is based on discretion rather than agreement, even though discretion sometimes undermines some of the doctrine's basic elements like reciprocity and courtesy.[755] This is also due to its vague definition, which risks creating controversy and more jurisdictional conflicts while resolving existing ones.[756]So, whether controversy, uncertainty or indeterminacy of any kind, judges and arbitrators tend to exercise their discretion, a gift of comity to situations where the law is indeterminate, and judges are faced with exercising their subjective understanding of the law.[757]

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752 MOX Plant Case (n 54)

753 John P Grant and J Craig Barker, Parry & Grant Encyclopaedic Dictionary of International Law (3rd edn, OUP, Oxford 2009) 108

754 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). Available on < https://www.newyorkconvention.org/english > Accessed 18 April 2019.

755 See Donald Earl Childress III, 'Comity as Conflict: Resituating International Comity as Conflict of Laws' [2010] 44 (11) University of California Davies.

756 Ibid.

757 Shlomo C. Pill, 'Leveraging Legal Indeterminacy, A Judeo-Islamic View of the Indeterminacy Problem and the Rule of Law' [2018] 6 JLRS 147 -194.

Even though comity is discretionary and applied out of courtesy and without obligation, reciprocity cannot be ignored as it plays out in domestic practice.[758] In *AG v Jonathan Cape*, Lord Widgery noted that judicial comity compels a judge to respect and follow the courts' decisions of the same level in the judicial hierarchy out of deference and respect, to give effect to laws and judicial decisions of another.[759] If comity is discretional, then the notion of 'compelling' creates obligations with reciprocity in consideration. Obligation, reciprocity and courtesy all in one bowl is confusing and contradictory, for jurisdictions cannot be compelled or forced to reciprocate. The concept of legal comity is introduced to contrast judicial comity, which Elisa D'Alterio, in her paper—*From Judicial Comity to Legal Comity*[760] argues is produced from judicial comity to mitigate the disorder that characterises the global legal space.

To D'Alterio, the lack of adequate parameters to regulate these relations call for judicial comity to adopt a set of techniques to regulate the system. She identifies some of these techniques, which include, amongst others, the traditional regulatory rules. However, this study argues that the regulatory rule technique often fails when applied formalistically. Thus, leading to disorder and indeterminacy, differentiated by deconstruction to maintain jurisdictional distinctions. This is legal comity in three stages, including the deconstruction of binaries to ensure distinct jurisdictions. Thus, paving the way for ordering and harmonisation, which is tantamount to legal comity.[761] So, this clarifies differentiating between comity as a problem, which is the maze within judicial comity with considerations of reciprocity on the one hand and the mitigating effect of legal comity and its discretionary use on the other. D'Alterio does not identify this middle ground which is innovative and original, by this research. Instead of applying comity directly to resolve jurisdictional conflicts, a second step - deconstruction is inserted to mitigate any disorder before getting to comity, which D'Alterio prefers to label legal comity.

While comity is flexible and can be applied relatively discretionary, there has to be some caution when engaging it to ensure that its scope is not stretched too wide. It should not be applied in a manner that will completely wipe out the judiciary function of one jurisdiction in the spirit of comity in favour of another. Doing so might lead to a backlash. For example, it is not expected that the Court in *the Mavrommatis, the Chorzow factory* or *the Certain German cases* would have ceded its general jurisdiction in favour of the special mechanisms to deal with the

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[758] See Shany (n 5) 261.
[759] *AG v Jonathan Cape* [1976] QB 753, 769 F-G (Lord Widgery CJ).
[760] D'Alterio E, 'From Judicial Comity to Legal comity: A Judicial Solution to Global Disorder?' [2011] 9 (2) OUP 394
[761] Ibid.

indemnities head of the claims. Such a broad scope decline would have meant a dereliction of the Court's duty because the special procedures did not have the competence to deal with the other heads of the claims like diplomatic protection.[762] For example, diplomatic protection and state party individual rights - *Greece v Great Britain* in *the Mavrommatis case, and Germany v Poland in the Certain German Interests and Chorzow Factory cases.*[763] So, no matter how low the threshold of exercising comity is, it would not be advisable for the Court to fully exercise any of the three effects of the regulatory rules (decline, stay or terminate) proceedings in association with comity. The most would be to delegate or assign and coordinate the special tribunals with the specific task of determining the facts of the indemnities head of claim and allowing the Court to pronounce the final judgment.

As mentioned earlier, comity provides an interface to resolve difficult inter-regime or inter-jurisdictional disputes making its role quite central in this study. It is quite dynamic and capable of moving across jurisdictions to mitigate the effect of the strict overlapping and conflicting jurisdictions.[764] Shany sums up the application of comity as follows, 'when the strict conditions for the application of *res judicata* are not met, there is some evidence of implicit recognition of comity…'[765] As such, comity finds the balance between the different factors that legitimise the discretionary application of the rules. This includes the non-legal factors due to its ability to 'function outside of the categories of law as a bridge'.[766]

Comity acts as a positive device in promoting jurisdictional relationships and encourages the application of laws, decisions, and legal concepts from other jurisdictions. It breeds jurisdictional cooperation, cross-fertilisation and harmony within the system.[767] With the international judiciary system lacking a centralised coordinating structure, one of the benefits comity provides is to fill the gap with some form of coordination and harmonisation. When jurisdictional interaction results from a combination of the regulatory rules and comity, then whatever outcome the parallel jurisdictions come up with, the suspended jurisdiction is most likely to accept such an outcome. For example, in the *MOX Plant case*, the Annex VII tribunal suspended its jurisdiction in the spirit of comity in favour of the ECJ. This was equivalent to

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[762] See *Factory at Chorzow (Germany v Poland)* (Jurisdiction) 1927 PCIJ (ser A) No 9.
[763] See *Mavrommatis case*, *Certain German Interests case* and *Chorzow Factory Case* in (n 64)
[764] See related comment on newly independent sovereign state by Thomas Schultz and Niccolo Ridi, 'Comity and International Courts and Tribunals' [2017] 50 (3) CILJ <https://scholarship.law.cornell.edu/cilj/vol50/iss3/5> accessed 20 October 2018.
[765] Ricardo Letelier, 'Review work(s): The Computing Jurisdictions of International Courts and Tribunals by Yuval Shany' [2005] 38 125–133 JSTOR<http//:www.jstor.org/stable/41391835> accessed 20 December 2019).
[766] See Joel R. Paul, 'Comity in International Law' [1991] 32 (1) Harv. Int'l L.J. Available at: http://repository.uchastings.edu/faculty_scholarship/625 accessed 20 October 2018.
[767] See Yuval Shany, Regulating Jurisdictional Relations Between National and International Courts (2007) Online OUP available<DOI: 10.1093/acprof:oso/9780199211791.001.0001> accessed 20 May 2019.

a delegation of duty between the jurisdictions facilitated by comity. For the Annex VII tribunal to have delegated its competence to the competing or parallel jurisdiction, by implication, it accepted to be bound by the decision of the parallel jurisdiction to the extent of *lis pendens* and any other regulatory rules affected by the suspension. This supersedes any form of judgment recognition agreements sometimes needed to accept and enforce extra-jurisdictional decisions. So, comity plays such a positive role that it can oversee the need for jurisdictional agreements. In normal circumstances, a judgment recognition agreement is required to recognise and enforce extra-jurisdictional decisions. Comity negates all of this, and where extra-jurisdiction decisions are relevant, recognition and enforcement can be applied straight away without an enforcement order or jurisdictional clash.

Due to its highly flexible character, comity can be applied tactically to manage the conduct and timing of proceedings in light of regulatory rules. In the *British Caribbean Bank Case,*[768] the respondent invoked comity with respect to *lis pendens* as parallel proceedings were pending, noting that a tribunal may exercise or stay its discretion 'as a matter of comity' with respect to timing and conduct.[769] This approach flows from precedent derived from the *Southern Pacific Properties Case,* which noted *that*:

> when the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of the international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.[770]

Unlike domestic jurisdictions, where judgment recognition agreements can interfere with reciprocity, the international system has more room for discretion. ICTs experience more flexibility with no expectations of reciprocity from the competing or parallel jurisdictions. Through courtesy, one jurisdiction tends to recognise the comity based decisions of the other, usually without pronouncement or expectation from the parallel jurisdiction. For example, in cases like the *SPP v Egypt* or the *MOX Pant* where comity was triggered, there was no expectation of reciprocity, nor any other judgment recognition agreements whose terms needed to be respected. As such, genuine jurisdictional relationships tend to emerge from 'inter-forum courtesy, […] improved coordination and cooperation, and the enriching

[768] PCA, *British Caribbean Bank Limited v. The Government of Belize* - Award, 19 December 2014, PCA Case No 2010-18 para. 187.
[769] Thomas Schultz and Niccolo Ridi, 'Comity and International Courts and Tribunals' [2017] 50 (3) CILJ <https://scholarship.law.cornell.edu/cilj/vol50/iss3/5> accessed 20 October 2018.
[770] R. Rayfuse and E. Lauterpacht, ICSID Reports: Report of Cases decided under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965. (Vol 3 CUP, Cambridge 1995) 129.

and educational potential of normative cross-fertilisation…'[771] Without expectation of reciprocity, courtesy based comity decisions come with stability and harmonise the entire system. It increases inter-jurisdictional dialogue, trust and confidence, increasing the quality and legitimacy of judicial decisions.[772] If the process is well managed, at a more practical level, it can lead to inter-judicial communication at a wider scale, which is one of the aims of comity in this study.

4.6.2 The Legal Basis and Status of Comity

In terms of its legal status, comity is widely recognised and accepted as a general principle of IL under Article 38(1)(c) of the Statute of the Court. However, reciprocity and the reluctance of some domestic jurisdictions in implementing comity based decisions without judgment recognition agreements raise questions about whether comity is a legitimate acquisition from other legal systems.[773] That notwithstanding, the majority of the world's legal systems recognise and apply the doctrine of comity, which justifies its entry into the international judicial order through Article 38(1)(c) of the Statute of the Court. While considerations of reciprocity and judgment recognition agreements may be valid, it doesn't fit the discretionary character of comity. If comity is discretional, then non-recognition of comity-based decisions without reciprocity or a judgment recognition agreement should be irrelevance.

In terms of its status under custom, even though there is an identified practice of the use of comity in addressing jurisdiction, conflicts across different international jurisdictions from which a customary practice can be derived, the legal basis of comity under customary IL remains unclear.[774] However, conclusion 9(3) of the *Draft Conclusions on the Identification of Customary International Law* highlights comity as one of the extra-legal motives distinguished from motives accepted as law.[775] In other words, comity does not count as part of customary international law.

That notwithstanding, scholars like Anne-Marie Slaughter have expounded the influential role of comity to the effect that comity may also have the backing of Article 38(1)(d). She argues it influences many legal decisions and acts as a subsidiary means for identifying the

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[771] Shany, Culled from Richard A Falk, *The Role of Domestic Courts in the International Legal Order* (1964) 106.
[772] Yuval Shany, Regulating Jurisdictional Relations Between National and International Courts (2007) Online OUP available<DOI: 10.1093/acprof:oso/9780199211791.001.0001> accessed 20 May 2019.
[773] Shany The Competing Jurisdictions (n8) 261.
[774] See Shany Regulating (n 772)
[775] ILC *Draft Conclusions on the Identification of Customary International Law* available https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf accessed 18 May 2020.

rules of IL.[776] Indeed, suppose comity based decisions are accepted as a matter of courtesy and applied as part of precedents across international jurisdictions, comity-based decisions might find backing under Article 38(1)(d). There is not enough currency on this argument within international legal circles, even though captured by Shany in *Regulating Jurisdictional Relations Between National and International Courts*.[777] It might be better suited to manage inter-state jurisdictional conflicts with comity.

Meanwhile, no judgment recognition treaties or agreements have been identified between ICTs, as is the case with some domestic jurisdictions, requiring the exercise of discretion to dismiss or decline jurisdiction in favour of parallel jurisdictions. However, forms of comity in resolving jurisdictional conflicts have been identified in Article 22 of the Brussels Convention, which allows for manifestations of courtesy towards foreign judicial bodies engaged in adjudicating issues also pending before domestic courts.[778] This has been invoked in cases of multiple proceedings to justify restraint in exercising jurisdiction.[779] Meanwhile, GATT Anti-dumping Code allows GATT/WTO panels to accord deference to determinations issued by national administrative agencies, where such measures conform with one of the permissible interpretations of the Code.[780] Others are inferred from the constituted instruments accorded dispute settlement bodies inherent powers and general powers provisions such as the ICSID Rules of Procedure under Article 19, which states that 'the Centre shall enjoy in the territories of each Contracting State the immunities and privileges…'[781]

While this puts an ICSID tribunal at the receiving end of comity, it does seem the ICSID Tribunal decision to exercise comity towards the *French Cour de Cassation* in the *SPP v Egypt case* reciprocates this expectation. Also, within the law of the sea jurisdiction, Annex VII Article 5 of the Arbitration Rules allows arbitral tribunals some degree of competence-competence to determine their procedures.[782] In the trade division, the DSU, Article 12.1 also performs a similar function, giving arbitrators discretion to decide on procedural matters not

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776 Anne-Marie Slaughter, 'A Global Community of Courts'[2003] 44(191) *Harv Int'l LJ* 206–10
777 Shany, Regulating Jurisdictional Relations… (n 772).
778 Shany The Competing Jurisdictions…(n 5).
779 Ibid.
780 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 15 Apr. 1994, Art. 17(6)(i), available on <https://www.wto.org/english/tratop_e/adp_e/antidum2_e.htm> accessed 20 June 2020
781 ICSID Rules of Procedure for Arbitration Proceedings (amended 2003), art 19, available on <https://icsid.worldbank.org/sites/default/files/ICSID_Conv%20Reg%20Rules_EN_2003.pdf> accessed 20 June 2020
782 UNCLOS Annex VII Arbitration Rules Article 5 available <https://www.un.org/depts/los/convention_agreements/texts/unclos/annex7.htm> accessed 20 June 2020

regulated in the DSU following due process.[783] 'Not regulated by the DSU' makes it broad enough to include parallel jurisdictions as they are also third parties whose rights and relationships are not regulated under the DSU. However, since Article 23 of the DSU makes trade-related issues exclusive to the WTO, this could have been an excellent solution to the *Swordfish case*[784] for the WTO to engage the ITLOS in the spirit of comity.

Meanwhile, Article 16 of the UNCITRAL Model Law allows an arbitral tribunal to rule on its own jurisdiction, which is equivalent to competence-competence and purely discretional.[785] This provision projects a situation where *lis pendens* or other regulatory rules may be triggered. Thus, giving the tribunal the power to exercise competence-competence. And where a tribunal is accorded the power to decide its jurisdiction, there is the possibility of declining, staying or terminating parallel proceedings in the spirit of comity. Should the arbitrators in the *Lauder v Czech Republic* tribunal have applied this to engage comity, the parallel proceedings of the *CME v Czech Republic* tribunal would have enjoyed comity, thereby avoiding two controversial decisions.

So, based on the above analysis, it can be safely concluded that there is a wide range of direct and indirect legal basis for the exercise of discretion to engage comity to resolve overlapping jurisdictional conflicts. However, with the wide margin of discretion that some instruments accord ICTs, several factors influence how judges and arbitrators exercise discretion to engage comity. The following section shall examine how politics influence comity based decisions.

4.6.3 Possible Risks and Mitigation of Risks from the Discretional Application of Comity

The question of whether comity poses a risk of abuse at the hands of judges, given the close relationship between IL and international politics, is a question not to be ignored. Generally speaking, several factors influence decision making, amongst which are political considerations. Inter-state dispute settlement bodies like the ICJ, WTO and ITLOS may become vulnerable to politics. This may lead to abuse as it can be tricky for judges and arbitrators to keep away political sensitivities when making determinations. Bearing in mind that the Court, as the principal judicial organ of the United Nations, is often faced with political questions referred by its political organs under the Charter and Statute of the Court. The line between politics and law of the United Nations is very thin, putting the Court

783 WTO ANALYTICAL INDEX DSU – Article 12/Appendix 3 (Jurisprudence)
784 Chile – Measures Affecting the Transit and Importation of Swordfish, WT/DS193/1 G/L/367 26 April 2000
785 UNCITRAL Model Law on International Commercial Arbitration, UN doc. A/40/17, Annex 1 and A/61/17, Annex I.

squarely amidst international politics. Thus, posing a threat to the integrity and authority of IL.

In the recent *Chagos Archipelago* advisory opinion, Judge Donoghue asserted in his dissenting opinion that the Court had the discretion to decline jurisdiction to 'protect the integrity of the Court's judicial function…' and not to render an advisory opinion.[786] He argued that the distinction between the UN Charter and the Statute of the Court, even though the Charter gives the Court the function of settling disputes, must be respected.[787] This was equivalent to maintaining the distinctions between the political and judicial organs even though the judicial organs would instruct for an advisory opinion. Judge Donoghue argued that the Court would have provided legal guidance to the General Assembly on how to frame the question before the Court in light of the self-determination of the Chagos people. He then concluded that the advisory opinion failed to preserve the integrity of the Court nor the UN General Assembly. Instead, it established that the advisory opinion procedure was available as a fall-back mechanism to overcome the absence of consent from parties in contentious cases. The United Kingdom had not consented to the bilateral dispute settlement process against Mauritius.[788] However, the Court argued, citing its precedent in the *Kosovo advisory opinion. It highlights* that only 'compelling reason' will lead the Court to decline jurisdiction and concluded that there were no compelling reasons in the *Chagos case.* As such, it refused to decline jurisdiction.[789] Even though this was not a case of parallel proceedings, it is important to highlight the importance of keeping overlapping or binary opposing jurisdictions distinct to uphold the integrity and authority of IL.

Besides the General Assembly requesting an advisory opinion, the Security Council have a say in how judges of the ICJ are appointed, which increases judges sensitivities, and the risk of a trade-off as judges may lose their independence while feeling obliged towards their political appointors. The Court has been criticised in several cases for exercising comity towards political organs of the UN. For example, in the South West Africa Advisory Opinion, the Court was criticised for binding itself with the Security Council characterisation of the situation, notwithstanding Security Council Resolution 276, which condemned South Africa's continued occupation of Namibia.[790] However, the judges disagreed on several substantive issues, with Judge Gros and Judge Fitzmaurice dissenting. Judge Gros chastised

[786] *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)*, Dissenting Opinion of Judge Donoghue, 25 February 2019, para. 1-2.
[787] Ibid para 23.
[788] Ibid paras 22 -23
[789] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, 22 July 2010, para. 48
[790] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971 para 1

the Court for not being the guardian of its judicial integrity, as earlier stated in ICJ Reports of 1963.[791]

While the UN Security Council or political organs are not courts or quasi-judicial bodies, domestic courts have made light of ICJ decisions even though the Court did not reciprocate through comity. For example, the US Supreme Court, in its review of the comity-inspired decision of the ICJ Consular Notification cases in *Breard v Greene,*[792] suggests that there was no deference exercised towards the Court by the US Supreme.[793] Similarly, the Israel Supreme Court in the *Mara'abe v Prime Minister of Israel*[794] suggesting that national courts make no real effort to harmonise domestic decisions with the Court's. However, while there is no expectation that domestic courts must reciprocate comity based decisions of ICTs, the attitude of the US and Israel Supreme Courts in these cases tend to undermine the authority and integrity of ICTs in general, and not least the Court's.

With the wide margin of discretion and flexibility of comity at the hands of judges, there is also the risk that international judges and arbitrators could abuse their authority, or lose their judicial independence, particularly given the political nature of their work. In the *South West Africa Advisory Opinion,* two dissenting opinions and six separate opinions, all expressing different views on the matter. This illustrates that despite extra-legal factors and a wide margin of discretion that may influence the nature of decision-making, judges can still maintain their independence and uphold the integrity and authority of IL. Besides, international minimum standards of fairness are expected from ILs and their judges. So, given a wide margin of discretion to engage, comity should not be an opportunity to abuse authority or use it for a trade-off in political cases.

4.7 Conclusion

This chapter has examined the regulatory rules and the triple identity standard for their suitability in resolving jurisdictional conflicts. Aware that preclusion has often been achieved only when the rules have been applied non-formalistically, it was vital to study the nature and legal status of the rules to ensure that they are capable of being applied formalistically. With this rationalisation, the rules are safely applied in the case studies in the next chapter. Similarly, comity has also been assessed in the same light to ensure that it is not a political tool in the hands of judges that are abused when judges exercise their discretion. From the above analysis, the study is satisfied that the rules can be applied formalistically and comity-

[791] Ibid, Dissenting Opinion of Judge Gros para 2.
[792] *Breard v Greene*, 523 US 371, 375 (1998)
[793] Shany, Regulating Jurisdictional Relations (n 772)
[794] HCJ 7957/04 *Mara'abe v Prime Minister of Israel*, Judgment of 15 Sept 2005.

based approaches engaged in resolving the jurisdictional conflicts completely. This is done while maintaining the integrity and authority of IL and keeping the binary opposing jurisdictions distinct, following the differentiation of the binary opposing jurisdictions through deconstruction. The next chapter shall conduct a full case study analysis of four case studies carefully selected to ensure that they are representative of institutional fragmentation and real overlapping and conflicting jurisdictions.

Chapter 5

Formalistic Application of the Regulatory Rules in Case Analysis

5.1 Introduction

This chapter showcases the methodological approach employed in this study. It strictly applies the regulatory rules with strict adherence to the triple identity criteria to carefully selected cases of overlapping jurisdictions. It has already been established that a strict application of the regulatory rules fails to preclude, fails to keep the binary opposing jurisdictions distinct and fails to resolve the jurisdictional conflict. Instead, it leaves a disorderly and indeterminate situation that is less distinct and undermines the integrity and authority of the international legal order. The selected cases for this case study are *the Swordfish dispute,*[795] *the MOX Plant dispute,*[796] *the CME/Lauder*[797] *v Czech Republic dispute* and *the Achmea BV dispute.*[798]

Before delving into the case analysis, it is worth rationalising the choice of cases for the case study analysis and eliminating cases that are sometimes mischaracterised as cases of overlapping jurisdiction based on the non-formalistic interpretation of the concept of overlapping jurisdictions.

5.2 Rationalising the Case Selection and Scope of Case Analysis

Before delving into the case analysis, it is worth rationalising the case choices. This is done by eliminating some cases that could be mischaracterised as overlapping jurisdiction disputes based on the non-formalistic interpretation of the concept of overlapping jurisdictions. As the methodology involves formalistic interpretation and application, it is worth eliminating some of these cases that do not meet the methodological standard for the research.

The selected cases have been identified from a thorough review of a vast amount of commentary and jurisprudence on overlapping and conflicting jurisdictions, resulting in controversial outcomes between two or more jurisdictions.

It is also worth recalling that the study focuses ideally on ICTs though recognising that the jurisprudence of some ICTs involving parallel proceedings does recognise domestic proceedings. For example, the *British Caribbean Bank Limited v The Government of Belize*

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795 *Swordfish case* (n 784).
796 *MOX Plant* (n 54).
797 *CME/Lauder cases: Ronald S. Lauder v. The Czech Republic*, Final Award of 3 Sept. 2001, reprinted in 14 World Trade and Arbitration Materials (2002) 35; *CME Czech Republic BV v. The Czech Republic*, Partial Award of 13 September 2001
798 *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

tribunal recognised domestic proceedings in parallel with the international proceedings.[799] Even though some were merely enforcement proceedings, overlaps, conflicts, and competition were inevitable.

Some BITs tend to involve higher courts in the seat of the arbitration tribunals. For example, *the Southern Pacific Properties(ME) Ltd v Egypt Case,*[800] involving the *French Cour de Cassation*, is not included in the case study despite its popularity in *lis pendens* and comity discussions as seen above. The ICSID arbitral tribunal did not exercise jurisdiction in the parallel proceedings until the International Chamber of Commerce award previously rendered was annulled. In doing so, the ICSID tribunal had to formally stay its proceedings awaiting the eventual annulment of the International Chamber of Commerce award by a French court.[801] To this end, the ICSID tribunal exercised its discretion and, in the spirit of comity, applied *lis pendens* and potential *res judicata* in favour of the domestic court.[802] However, the overlap was between a domestic court and an international tribunal. As such, the case is not part of the case study analysis.

Meanwhile, in the *Mexico—Soft Drinks dispute,*[803] which is more of a case of forum selection despite overlaps and conflicts between NAFTA and the WTO, is also left out. There were no actual parallel proceedings between NAFTA and the WTO since the NAFTA panel did not convene because the US rejected it. So, it did not progress to determine the market access dispute Mexico was pursuing.[804] So, the cases under review show the struggle for admissibility of a dispute in one jurisdiction while expecting a parallel jurisdiction to decline jurisdiction or exercise comity and refer as expected in *Mexico—Soft Drinks dispute* between the NAFTA and the WTO.[805] To this end, the selected cases have the potential of consolidation, waivers, rejection or suspension of proceedings in one jurisdiction in favour of proceedings in a parallel or competing jurisdiction when the regulatory rules are triggered. Alternatively, requests to stay, suspend or waive in favour of one jurisdiction was not possible even though scholars like Lavranos still categorise these cases under 'competing jurisdictions'.[806]

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799 PCA, *British Caribbean Bank Limited v. The Government of Belize - Award*, 19 December 2014, PCA Case No 2010-18 para. 187

800 *SPP v Egypt* (n 589) ICC Award.

801 *SPP v Egypt* (France, *Cour d'appel)* Judgment of 12 July 1984 in Shany (n 5) 51.

802 Reinisch (n 681) 37.

803 *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel, WT/DS308/R (October 7, 2005), 4.185 – 4.187

804 See William J. Davey and Andre Sapir, 'The *Soft Drinks Case*: The WTO and Regional Agreements' [2009] 8 (1) World Trade Review 5 – 23.

805 Lim and Gao (n 52) 295.

806 Lavranos (n 130).

Another example of *de facto* competition is the *SGS v Pakistan Case*[807] and *SGS v Philippines*[808] case in the investment regime treated as competing jurisdictions which are not related though similar with the identical subject-matter. Even so, there is no basis of consolidation, stay or suspension of one proceeding in favour of the other as it is expected with real competing jurisdictions. Meanwhile, the mischaracterised *Tadic,*[809] *Nicaragua* and *the ICJ Genocide cases,*[810] already discussed and eliminated as jurisprudential overlaps need no further emphasis for before elimination. They do not meet the selection criteria for the case studies.

In light of the above factors, the case analysis settles with four cases from real jurisdictional overlapping and conflicting jurisdictions. For a reminder, these are the *Swordfish cases*, *the CME/Lauder v Czech Republic cases*, *the MOX Plant cases* and *the Achmea BV cases*. These disputes will be analysed against the strict application of the regulatory rules—*lis pendens*, *res judicata*, *electa una via*, *lex specialis,* and *lex posterior* applied with strict adherence to the triple identity test. As already mentioned, the aim is to achieve preclusion between the binary opposing jurisdictions. However, with the strict application of the rules against the identity criteria, preclusion fails, giving rise to disorder, uncertainty and indeterminacy. Thus, creating the need for deconstruction to keep the jurisdictions distinct before engaging comity.

5.3. The *Swordfish* Dispute

The *Swordfish dispute*[811]between Chile and the European Union (EU formerly the European Community (EC))[812] started when Chile took domestic measures following the Chilean Fishery Law[813] as a coastal state and under Article 61 of the UNCLOS on the regulation of the catching of swordfish within Chile's Exclusive Economic Zone (EEZ).[814] According to the EU, these measures violated substantive provisions of the General Agreement on Tariffs

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807 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13.

808 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6).

809ICTY Appeals Chamber, *Tadic* judgment, 15 July 1999 http://www.un.org/icty/tadic/appeal/judgment/tad-aj990715e.pdf accessed 3 March 2018.

810 *Genocide Judgment* (n 309).

811 Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, *Chile v European Community*, Procedural Order, ITLOS Case No 7, Order 2000/3, ICGJ 340, 20 December 2000.

812 Case reports refer to European Committee (EC) until 2009, with the coming into force of the Lisbon Treaty that the references changed to EU. For convenience sake, indirect references in this case study use EU in place of EC.

813 Chilean Decree No 598 Chilean National Fishery Law (Ley General de Pesca y Acuicultura) article 165, as consolidated by the Supreme Decree 430 of 28 September 1991 and extended by the Decree 598 of 15 October 1999.

814 The *Swordfish ITLOS Case* (n 811).

and Trade (GATT) 1994.[815] As a result, the EU requested consultation under Article 4.4 of the DSU and GATT Article III, asserting that Chile made transit through its ports impossible for *swordfish* and that the measures were inconsistent with the rules.[816] After several futile consultations, a WTO panel was constituted in December 2000.[817]

Chile, on her part, argued that the issue at stake was not commercial but was for the need for conservation measures that would ensure sustainable *Swordfish* fisheries and so invited the EU for a formal dispute settlement under Part XV of the UNCLOS.[818] Clearly, a jurisdictional conflict had ensued at the point when both the WTO and ITLOS had been seized, heading to parallel proceedings with potential contradictory decisions from both independent jurisdictions.[819]

After about ten years of wrangling, an agreement to set up a Special Chamber under the ITLOS was reached in 2009.[820] A year later, they reached another agreement to discontinue the dispute. However, before the discontinuance, the WTO suspended proceedings favouring the ITLOS Special Chamber.[821] Most commentators view the termination based on the agreement between the parties as a political solution as it does not fit squarely within any of the mechanisms under Article 287 of UNCLOS.[822] However, for the purposes of this study, this was comity, albeit between the parties and not between the parallel dispute settlement bodies. Nevertheless, because the parties had different interests, and with the possibility of a potential arbitral tribunal for the special agreement, Article 287(1)(d) would have accommodated the Special Chamber.[823] This would have also required experts, making Article 287 (1)(d) more accommodating for a special agreement between the parties under Annex VIII of UNCLOS.

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815 WTO WT/DS193/1; *Chile – Measures Affecting the Transit and Importation of Swordfish*, Request for Consultations by the European Communities; 26 April 2000, <http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm>accessed 20 August 2017.

816 The *Swordfish ITLOS Case* (n 781).

817 Peter-Tobia Stoll and Silja Voneky, 'The *Swordfish* Case: Law of the Sea v. Trade, 2002, MPEPIL <http://www.zaoerv.de> accessed on 11 September 2017.

818 The *Swordfish ITLOS Case* (n 781).

819 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] 6 (1) ASIL

820 *Chile ─ Measures Affecting* (n 815).

821 ibid

822 See Stoll and Voneky (n 817).

823 Article 287 of UNCLOS on Choice of procedures under Section 2 of the Compulsory Procedures Entailing Binding Decisions states that '[…] a State shall be free to choose […] a special arbitral tribunal constituted in accordance with Annex VIII for the categories of disputes specified therein.'

Accordingly, Article 3(g) under Annex VIII allows for the appointment of experts where the parties have separate interests.[824] This does not exclude trade-related interests and experts as the WTO case was circumstantially based on trade, resulting from Chile's measures. It unavoidably impacted other areas of international law. Even though the WTO did not expressly acknowledge comity during the suspension of its proceedings, there was a practical show of deference. In addition, the Joint Communique was published by the WTO alongside the Statement setting up the ITLOS Special Chamber to handle the dispute in 2009 before the agreement to discontinue.[825] However, below is the analysis based on the different regulatory rules.

5.3.1 *Lis pendens*

With both jurisdictions seised simultaneously, a situation of *lis pendens* had emerged even though the substantive arguments were based on different subject-matters. This posed a challenge for either of the two jurisdictions to suspend proceedings because, even though the 'same parties' test was satisfied, the 'same issues' test failed. So, it was difficult to consolidate, suspend, decline, terminate or defer to the other jurisdiction by either jurisdiction as the parallel cases were substantially different.

The WTO, on its part, entertained the EU case against measures affecting the transmission and importation of the *Swordfish* Stocks as a particular trade issue within its exclusive jurisdiction.[826] In contrast, the ITLOS conservation-related matters were purely law of the sea matters.[827] Hence, *lis pendens* could not remedy the situation between the two exclusive jurisdictions of international trade law and the law of the sea, respectively. However, had the identity criteria been satisfied to allow the application of *lis pendens*, the preclusion would have occurred, blocking potential relationships.

While this was not the case, upon triggering *lis pendens*, the dormant binary opposing and competing jurisdictions are expected in theory to become active in a disorderly manner due to the failure of the rules. There is also the expectation that the opposite effect(interactions)

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[824] Annex VIII. Special Arbitration under the UNCLOS.

[825] *Chile – Measures* (n 779). By Order dated 16 December 2009, pursuant to Article 105, paragraph 2, of the Rules of the Tribunal; It should be noted that these parallel proceedings had begun though suspended during the time the International Law Commission (ILC) Study Group on Fragmentation completed its work. But none of its draft conclusions nor techniques could offer any solutions to the *Swordfish* proceedings; See ILC Report (n 35). Note that there are still no codified rules to deal with situations of parallel proceedings of this nature;

[826] Measures Affecting the Transmission and Importing of *Swordfish*, *(European Communities v. Chile),* WT/DS193/2, Request for the Establishment of a Panel by the European Communities, 7 November 200 (WTO proceedings).

[827] John Shamsey, 'ITLOS vs Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the *Chile – EU Swordfish* Dispute' [2002] 12 Trans Natl L & Contmp. Probs 513, 528.

would happen with the failure of the preclusion meant to prevent interactions. However, in this case, the jurisdictions are already binarily opposing. So, the opposite effect is that of disorder and uncertainty. Thus, a state of indeterminacy occurs, which is differentiated through deconstruction to maintain jurisdictional distinctions. Comity could have also applied directly without attempting to preclude with *lis pendens*. However, directly engaging comity would not have kept the binary opposing jurisdictions of the UNCLOS and the WTO distinct to maintain the integrity and authority of their individual judicial or dispute settlement functions. And consequent, the international legal order in general.

With the theoretical step differentiating and keeping the binary opposing WTO and ITLOS jurisdictions distinct, comity comes in with practical solutions to resolve the jurisdiction dispute and form interdependence between the two jurisdictions. In this case, the best comity-based solution would have been to separate the different heads off claims and allow both jurisdictions to run them separately. The WTO runs the trade head of the claim and the ITLOS the law of the sea and environmental aspects of the case. And then finally agreeing on which jurisdiction declares a joint final decision in a single report. In this case, it would have been the ITLOS as the Special Chamber that was agreed was under the UNCLOS before the dispute was finally discontinued.[828]Further analysis of this theoretical relationship is conducted in the following sub-section as *res judicata* and *lis pendens* are closely related.[829]

5.3.2 *Res Judicata*

With *res judicata* and *lis pendens* observed as being closely related, with the test of *lis pendens* on the identity of the parties not satisfied, a similar outcome is expected of *res judicata*. However, *res judicata* could quickly be ruled out since there had not been any prior judgments by either the WTO or the ITLOS on the matter. So, there was no basis to invoke *res judicata* by the EU at the time Chile initiated ITLOS proceedings because, first of all, the WTO proceedings had not been completed. As seen in the *lis pendens* situation, the WTO and the ITLOS cases were different subject-matters. They did not attain the cause identity as the same rights, or legal arguments could not be relied on to satisfy *causa petendi*.[830]

Res judicata makes a judgment or award binding upon the parties, implemented with finality.[831] o, with the failure of *res judicata*, finality fails. There was no judgment, decision, or award to enforce. There is no order but disorder, no determinacy, but indeterminacy binding the parties. Like *lis pendens*, as *res judicata* fails to preclude, suspend or stop the competition, a

[828] Orellana (n 829).
[829] Ibid.
[830] See Reinisch (n 681).
[831] Williams S Dodge, '*Res Judicata'* [2006] MPEPIL.

similar occurrence through the theoretical phase of deconstruction to maintain the jurisdictional distinctions occurs. With jurisdictions kept distinct, comity-based approaches are engaged.

5.3.3 *Electa Una Via*

With the conditions of *lis pendens* and *res judicata* unmet, the same applies for *electa una via*. From the WTO perspective, the subject-matter(s) of the WTO case was exclusive to the WTO without contemplation of another jurisdiction. The EU did not choose the ITLOS or another forum, having first chosen the WTO for its case, clearly established based on a violation of the WTO provisions according to the WTO. So, there was no basis for the EU invoking *electa una via* in relation to the ITLOS or another jurisdiction and vice versa.[832] There was also arbitration based on agreements ratified by both parties. That created a 'fork in the road' situation that either party could have invoked. For example, the UN Fishstock Agreement[833] could have introduced an alternative court or tribunal that could have resulted in arbitration under Article 27 of the Agreement, which was not pursued.

Similarly, the Galapagos Agreement – the Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific was not in force. This could have also given effect to arbitration and alternative courts or tribunals (giving grounds for *electa una via*) within Article 14 of the Agreement.[834] Thus, the dynamic would have shifted to *lex specialis* and *lex posterior,* discussed further ahead. However, the WTO initially acted like the PCIJ in the *Mavrommatis case* before agreeing to the ITLOS Special Chamber, which was later suspended. So, as both parties limited the dispute to the parallel jurisdictions of the WTO and the ITLOS, there was no direct interaction between the two jurisdictions except for the theoretical interactions similar to the ones observed with *lis pendens* and *res judicata* upon the strict application of the regulatory rules that need deconstructing. Basically, as *electa una* via fails to preclude, suspend or stop the competition and conflict, the dormant binary oppositions become active and create disorder and indeterminacy requiring deconstruction. This occurs exactly in the same way as it does with the other regulatory rules as seen in the case of *lis pendens* and *res judicata* above.

5.3.4 *Lex Specialis* and *Lex posterior*

832 Lim and Gao (n 52) 308.

833 The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001) (UN Fishstock Agreement).

834 Framework Agreement for the Conservation of Living Marine Resources on the High Sea of the South Pacific, 14 August 2000.

It is worth recalling that even though the *lex specialis* and *lex posterior* are not traditional regulatory rules, their self-contained and exclusive nature accord them *lex specialis* status. Also, since both regimes cannot fall within the same legal order as a requirement for preclusion, their substantive and normative issues are similar to those under the *lex specialis* and *lex posterior* analyses by the ILC Study group.[835] However, both cases did not meet the requirement of the same legal order.[836] As such, the failure of the identity test for the traditional regulatory rules has the same effect on *lex specialis* and *lex posterior*. Chile asserted the ITLOS the status of *lex specialis* to challenge the competence of the WTO with regards to the substantive and procedural rules.[837] Nevertheless, the WTO eventually suspended, allowing the ITLOS Special Chamber before the parties finally agreed to discontinue the dispute. With the regulatory rules failing, binary oppositions formed and, like the traditional rules, disorder, indeterminacy, and the need to deconstruct.

Lex posterior resolves conflicts between two *lex specialis*. However, lex posterior was irrelevant as WTO-DSU, a much later lex specialis could not have possibly resolved the ITLOS claim, nor was it equipped to interpret the UNCLOS. So, the same applied for *lex posterior*, which could not be applied directly under the WTO-DSU and the ITLOS rules to suspend or terminate as per Article 59 of VCLT.[838] Suppose the same legal order requirement applied, the same subject-matter required could have led to a preference for one mechanism over the other under their respective dispute settlement mechanisms.[839] This was one of the hurdles to overcome alongside the triple identity test. So, the dispute was indeterminate as none of the regulatory rules could stop either of the parallel jurisdictions until a Special Chamber under the auspices of the ITLOS was set up.[840] The WTO's consent to this Special Chamber was an act of comity. Even though the proceedings were later discontinued, the role of comity would have been very effective had the proceedings continued.

However, as *lex specialis* and *lex posterior* fail to achieve preclusion, the theoretical phase of disorderly interactions, indeterminacy and deconstruction occur similarly completed by comity as with the regulatory rules above.

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835 See ILC Report (n 35).
836 See Reinisch (n 681) 37-77.
837 Stoll and Voneky (n 817).
838 Article 59 of the VCLT on the Termination or suspension of the operations of a treaty implied by conclusion of a later treaty, which regulates the substitution of one treaty by another.
839 Oellers-Frahm (n 66).
840 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] 6 (1) ASIL <https://www.asil.org/insights/volume/6/issue/1/eu-and-chile-suspend-swordfish-case-proceedings-wto-and-international>accessed 20 December 2019.

5.4 *The MOX Plant (Ireland v United Kingdom) Dispute*

The MOX Plant dispute is a jurisdictional conflict involving multiple proceedings, starting with Ireland raising a complaint about radioactive wastes discharged from a Mixed Oxide Plant (MOX Plant) nuclear facility at Sellafield, UK Cumbrian Coast facing the Irish Sea.[841] The dispute fell within the jurisdiction of the UNCLOS, the European (Economic) Community treaty,[842] the European Atomic Energy Community (Euratom Treaty)[843] and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR).[844] With separate dispute settlement mechanisms, there was the potential of four parallel proceedings emerging, which was the case with cases at the OSPAR Tribunal, the ITLOS, the Annex VII Tribunal and the ECJ.

Ireland raised the first case to the OSPAR Tribunal concerning access to information on environmental matters under Article 9 and Article 32 of the OSPAR Convention on referral for arbitration.[845] At the ITLOS, Ireland requested interim measures under Article 290 of the UNCLOS to force the production and transportation operations at the plant pending the constitution of the Annex VII Tribunal.[846] During the ITLOS proceedings, the UK rejected the jurisdictions of Annex VII in favour of the OSPAR Tribunal and the ECJ.[847] The UK argued that the main elements of the dispute were covered by the compulsory dispute settlement procedures of the OSPAR Convention, the European (Economic) Community treaty and the European Atomic Energy Community treaty.[848] However, the ITLOS rejected the UK's argument and found that *prima facie*, the Annex VII Tribunal had jurisdiction and that the elements covered by the OSPAR and the EU treaties dispute mechanisms were aspects under those treaties.[849] The ITLOS also argued that the issue before the Annex VII Tribunal was solely concerning the interpretation of the UNCLOS and only suitable for an UNCLOS mechanism and no other agreement.[850]

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841 Robin E Churchill, '*MOX Plant* Arbitration and Cases' [2018] MPEPIL <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e176> 20 July 2019.
842 Treaty establishing the European Community (as amended by the Treaty of Amsterdam and the Treaty of Nice) (European Union [EU]) [2002] OJ C325/33, 298 UNTS 11
843 Treaty establishing the European Atomic Energy Community, 25 March 1957
844 Convention for the Protection of the Marine Environment of the North-East Atlantic 2354 UNTS 67, UKTS 14 (1999), Cm 4278
845 *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, (Ireland* v. *United Kingdom)*, PCA, OSPAR Tribunal Final Award of 2 July 2003, 126 ILR 334).
846 The *MOX Plant Case* (n 41) para 2.
847 Ibid para 28.
848 Ibid para 43.
849 Ibid para 81.
850 Churchill (n 841).

The European Commission also raised a complaint under Article 292 of the EC Treaty for breach of the Treaty establishing the European Community, requiring Member states to only submit European Community law to the ECJ.[851] Secondly, the ECJ had to rule on the Commissions complaints against Ireland for violating Articles 192 and 193 of the Euratom treaty to ask the Annex VII Tribunal to apply provisions of EU law as part of Article 293 of UNCLOS.[852] This adoption of provisions of EU Law under the UNCLOS and other questions of similarity and identity of provisions fit directly into the triple identity requirements for the regulatory rules.

However, what role did the regulatory rules perform during the entire proceedings? In the strictest or formalistic sense, neither *lis pendens, res judicata, nor electa una* directly affected the multiple proceedings. The triple identity test could not be fully satisfied on separate subject-matters. Instead, binary oppositions became effective, creating disorder and indeterminacy that needed deconstructing. Meanwhile, the opportunity arises for comity to resolve the practical problem, which was the case with the Annex VII Tribunal, suspended in favour of the ECJ. However, with regards to creating preclusions to keep jurisdictions distinct to maintain the integrity and authority of each jurisdiction and IL in general.

5.4.1 *Lis Pendens*

The OSPAR Tribunal convened in October 2001 concurrently with the ITLOS right up to December 2001 when the ITLOS issued its decision on provisional measures and the question of the Annex VII jurisdiction.[853] Similarly, the OSPAR tribunal ran concurrently with the Annex VII Tribunal between February 2002 when the Annex VII Tribunal was convened and July 2003 when the OSPAR tribunal issued its decision.[854] Even so, *lis pendens* could not apply as the cases differed in their subject-matters except for the ECJ cases, which eclipse the entire Annex VII subject-matter causing Annex VII to suspend proceedings.

From the ITLOS perspective, Ireland wanted provisional measures pending the Annex VII tribunal decision was declined as there was no urgency of what the UK could do (produce and transport MOX radioactive material) that could be of immediate danger.[855] These facts were not tried at any of the parallel or subsequent proceedings, and as such, *lis pendens* could

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851 Treaty establishing the European Community (as amended by the Treaty of Amsterdam and the Treaty of Nice) (European Union [EU]) [2002] OJ C325/33, 298 UNTS 11, Part 6 General and Final Provisions, Art.292.

852 *The MOX Plant Case*, *Commission of the European Communities v Ireland*, Judgment, action for failure to fulfil obligations, Case C-459/03, [2006] ECR I-4635, ECLI:EU:C:2006:345

853 Churchill (n 841).

854 The *MOX Plant Case* (n 41) para 89.

855 The *MOX Plant* Case (n 41) para 81.

not apply to stop the parallel jurisdictions or assist Ireland's case. In addition, the ITLOS was not too concerned with the strict identity test in relation to the parallel proceedings.[856] The ITLOS held that 'regard must be given to[…], inter alia, differences in the respective contexts, objects and purpose, subsequent practice of parties and travaux *préparatoires*'.[857] Such differences will not apply when there is a complete eclipse of one jurisdiction by another, as was the case of the ECJ over the ITLOS and Annex VII Tribunal.

The OSPAR tribunal convened in October 2001 and had to determine the application of Article 9 of the OSPAR Convention on the availability and disclosure of information, alongside Ireland's request for the tribunal to broaden its scope based on Article 32 of the Convention.[858] The tribunal rejected both requests under Article 9 and particularly under Article 32 that Ireland wanted the OSPAR to have 'unqualified comprehensive jurisdiction' overall substantive matters.[859] However, while the OSPAR proceedings were underway, the ITLOS jurisdiction had been convened to determine the Annexe VII Tribunal's jurisdiction and decide on provisional measures requested by Ireland as both parties had not agreed to a forum under UNCLOS Article 287.[860] The UK wanted the ITLOS to exclude the Annex VII Tribunals as per Article 282 of UNCLOS in favour of the OSPAR.[861]

According to the UK, the main elements of the OSPAR, the European Community, and the Euratom treaties were dealt with by the OSPAR tribunal. As the OSPAR tribunal was still running, this implied staying or not commencing the Annex VII procedure favouring the OSPAR Tribunal, which entailed *lis pendens*. However, the ITLOS rejected the UK's argument, stating that 'even if those treaties contained rights or obligations similar to or identical with the rights and obligations under the UNCLOS, the rights and obligations under those agreements have a separate existence from those under the UNCLOS'.[862] This was an apparent response to the triple identity question. Had the UK seised the ECJ and substituted the ECJ in its request instead of the OSPAR, the Annex VII tribunal would have complied with *lis pendens* as it eventually happened when the European Commission initiated proceedings against Ireland.

The ECJ was seised by the European Commission, which exercised complete jurisdiction over the dispute, which meant that the triple identity test was satisfied, leading to Annex VII

856 *The MOX Plant Case (*n 41) para. 51.
857 Ibid.
858 Ted McDorman, 'Access to Information under Article 9 of the OSPAR *Convention (Ireland v the United Kingdom)'* [2004] 98 (2) AJIL 330.
859 OSPAR Tribunal Final Award (n 845) para. 85.
860 Churchill (n 841).
861 *The MOX Plant Case* (n 41) para. 38.
862 Ibid para 50.

Tribunal suspending its proceedings to allow the ECJ to reach its judgment.[863] The ECJ found that Ireland breached Article 292 of the EC treaty, which led to Ireland withdrawing its case in parallel proceedings at the Annex VII tribunal.[864]

As the triple identity test could not be satisfied due to the differences in substantive issues or *causa petendi*, *lis pendens* failed when it was triggered. As illustrated in the previous case analysis, this resulted in disorder and indeterminacy. However, in this situation, there was already comity in light of the Annex VII tribunal suspending 'in the spirit of comity,' favouring the ECJ. However, like *lis pendens* in the previous case study, preclusion in maintaining jurisdictional distinctions fails, paving the way for deconstruction to keep the jurisdictions distinct. This maintains the integrity and authority of each jurisdiction's judicial function and IL in general while maintaining the integrity and authority of IL.

5.4.2 *Res Judicata*

The first decision on the case was the ITLOS provisional measures decision which rejected the UK's challenge of the Annex VII Tribunal jurisdiction and declined to grant interim or provisional measures.[865] Could this have provided grounds for *res judicata* relative to the other ongoing parallel and subsequent proceedings? It should be that the ITLOS did not discuss any of the substantive matters that were at issue and could not provide closure or finality to any of the substantive issues to give rise to *res judicata* or any preclusion moving forward.

The OSPAR Tribunal issued the next decision in July 2003 for disclosure under Article 9 of OSPAR on access to information as the UK was not disclosing under Article 32 of the applicable law.[866] Unlike the ITLOS decision, which never precluded any parallel or subsequent proceedings or jurisdiction, the OSPAR Tribunal dealt with substantive issues that the UK wanted OSPAR Tribunal to handle. With the OSPAR decision in place, the issues that the ITLOS had recognised within the OSPAR jurisdiction were somewhat protected against the UNCLOS and were of separate identity. By implication, an OSPAR tribunal decision would preclude the Annex VII Tribunal over the same issues. The ITLOS ruled that the 'rights and obligations of other agreements have a separate existence from those under the Convention'.[867] The ITLOS also stated that, because 'the dispute before the tribunal concerns the interpretation or application of the Convention and no other

863 Churchill (n 841).
864 The *MOX Plant Case, Commission v Ireland* (n 819), ILEC 047 (CJEU 2006), [2006] 2 CMLR 59, [2006] All ER (EC) 1013, 30 May 2006, [CJEU]; ECJ (Grand Chamber).
865 The *MOX Plant Case* (n 41) para 50.
866 *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom) (Final Award)* PCA (2 July 2003). 23 RIAA 59.
867 The *MOX plant Case* (n 41) para 50.

agreement, only the dispute settlement procedures under the Convention are relevant to that dispute.'[868]

These points were reiterated in Judge Wolfrum's separate opinion of the ITLOS decision. He stated that 'it is well known in IL and practice that more than one treaty may bear upon a particular dispute'.[869] He continued, '…a dispute under one agreement does not become a dispute under the Convention on the Law of the Sea by the mere fact that both instruments cover the issue'.[870] This, by implication, removed any possibility of relying on the OSPAR decision based on *res judicata*. Thus, the issues could not simply 'melt into one pot' to satisfy the triple identity requirement for the OSPAR decision to give *res judicata* effect to subsequent proceedings either within the same jurisdiction or in parallel jurisdictions.

As the Annex VII proceedings were continuing, questions of *res judicata* from the perspective of how its decision might affect other instruments in the future were raised. The tribunal wanted to know using Article 213 of UNCLOS concerning enforcement of provisions of the UNCLOS. Whether in relation to other instruments like the OSPAR and Annex VII provision would have *res judicata* effect on some future international tribunal under OSPAR to resolve a dispute on interpretation.[871] At the time, the OSPAR proceedings had not yet concluded, and the ECJ had not yet commenced. But the Annex VII Tribunal had rightly contemplated the ECJ jurisdiction following EU law objections raised by the UK.[872] In responding to the question, Prof Phillippe Sands, Counsel for Ireland, noted that as a rule of public international law, *res judicata* could not be excluded, provided that the conditions of the identity of the parties, the identity of the issue and the identity of the facts were fulfilled.[873]

However, the OSPAR Tribunal decided when the Annex VII Tribunal proceedings were still ongoing until the ECJ case was lodged by the Commission against Ireland in October 2003.[874] As a result, the Annex VII Tribunal suspended its proceedings as a matter of comity and not on the grounds of *lis pendens*.[875] The ECJ approach to consider the whole dispute as the Commission aimed at protecting EU exclusive jurisdiction over matters involving member states meant the OSPAR Tribunal decision did not give *res judicata* or any preclusive

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868 Ibid.
869 Ibid; Stoll and Voneky (n 817).
870 Ibid.
871 The *MOX Plant Case, Ireland v United Kingdom,* Order No 3: Suspension of proceedings on jurisdiction and merits, and request for further provisional measures, Case No 2002-01, ICGJ 366 (PCA 2003), (2003) 126 ILR 310, (2003) 42 ILM 1187, 24 June 2003, Lines 1 – 7 of the Record of Proceedings of 13 June. 2003.
872 Ibid.
873 Ibid Lines 23 – 25 Transcript of Proceedings 13 June 2003.
874 The *MOX Plant Case, Commission v Ireland* (n 819), ILEC 047 (CJEU 2006), [2006] 2 CMLR 59, [2006] All ER (EC) 1013, 30 May 2006, [CJEU]; ECJ (Grand Chamber).
875 The *MOX Plant Case* (n 873) Transcript of Proceedings, Statement of the President, Para 11.

effect on the ECJ case. Thus, failure to achieve preclusion gave rise to disorderly binary opposing jurisdictions that need to be differentiated through deconstruction to maintain jurisdictional distinctions to safeguard the integrity and authority of IL.

5.4.3 *Electa Una Via*

Application of the triple identity conditions for *res judicata* and *lis pendens* is slightly different in the case of *electa una via in this case*. It could only be tested against Ireland if it abandoned any earlier seised jurisdictions to engage a new one. As such, the identity of the parties, issues and objects would fall between the OSPAR and ITLOS and the newly seised jurisdictions.

For example, if Ireland had tried to abandon the ITLOS and the OSPAR where it first initiated proceedings against the UK, to seise a different forum, maybe due to the urgency of time as in the case of provisional measures before the ITLOS, then *electa una via* would have applied.[876] Or maybe anticipating the rejection of its Article 32 request regarding the applicable law and forum shopping a different forum. If that were to happen, then *electa una via* would have precluded such action as the triple identity test would have applied in such cases of direct forum shopping to seise another forum for the same subject-matter. The ECJ would have accepted. However, the ECJ relitigated the entire dispute regardless of the OSPAR Tribunal and the Annex VII proceedings, evidence that Ireland abandoned the OSPAR proceedings and seised the ECJ. This action rendered *electa una via* worthless in the process as it did not affect the binary oppositions that emerged to form jurisdictional relationships.

But how would have *lex specialis* and *lex posterior* handle the situation involving many specialised elements of the substantive conflict and specialised governing instruments and jurisdictions?

5.4.4 *Lex Specialis* and *Lex Posterior*

The OSPAR tribunal noted that the OSPAR Convention does not incorporate any *lex specialis* reference that was not part of general IL during its proceedings. The parties could have requested its application if it was not inconsistent with *jus cogen*.[877] To the Tribunal, there must be a provision within the convention granting the *lex specialis* status, or it must be customary international law.[878] To this, in the dissenting opinion of Gavan Griffith QC, 'interpreting Article 9 is to apply the OSPAR Convention as a *lex specialis* between the

[876] The *MOX Plant Case* (n 871).
[877] The *MOX Plant* (n 833) OSPAR Tribunal, *Dispute Concerning Access to Information* para 100.
[878] Ibid.

parties consistent with international law…' and within the general context of other rules and general rules of IL.[879]

This study shares this dissenting view. By definition of *lex specialis*, the whole OSPAR Convention governs a specific subject-matter: its object and purpose. As Griffith QC notes, 'its drafters plainly perceived the OSPAR Convention as an integral part of a matrix of international instruments directed to environmental protection'.[880] However, the question for this study is whether the OSPAR decision could have provided a preclusive effect against the Annex VII Tribunal and the ECJ proceedings.[881] The answer is in the affirmative. Bearing in mind that during the ITLOS proceedings, it was highlighted that the OSPAR and the Euratom treaty were of 'separate existence,' compared with other instruments.[882] This is tantamount to 'specific subject-matter' and therefore *lex specialis*. However, in this situation with the OSPAR and the Euratom Treaty, the *lex posterior* doctrine, which requires that the later in time rule takes precedence, would have given preference to the OSPAR 1999 Convention over the Euratom 1996 treaty.

Regarding the relationship between the Annex VII Tribunal and the ECJ from a *lex specialis,* the Euratom Treaty and the TFEU accords the ECJ exclusivity, which meant preclusion could not occur to prevent inter-jurisdictional relationships. Nevertheless, these instruments are of different legal orders or regimes. As the rules did not achieve the aim of preclusion, disorderly binary opposing jurisdictions emerged. However, comity was in place to help the Annex VII Tribunal suspend proceedings favouring the ECJ, allowing inter-jurisdictional interactions to continue. Nevertheless, the disorder and indeterminacy still needed differentiation and restructuring through deconstruction, similar to the other cases where preclusion fails, requiring deconstruction of the binary opposing jurisdictions to keep them distinct and maintain the integrity of their judicial function of IL.

5.5 *The* Lauder/CME v Czech Republic *Cases*

The *Lauder Case* and the *CME Case* are two of a series of cases that emanated from measures taken by the Czech Republic through its Media Council in line with reforms of its media sector.[883] The measures breached the legal protection for investments under two bilateral investment treaties, under which the claimant initiated two separate proceedings. First, in his capacity as Mr Lauder for breach of the protection under the United States and the Czech and Slovak Federal Republic treaty, also known as the United States—Czech Republic

[879] Ibid OSPAR Tribunal Final Award, Dissenting Opinion of Gavan Graffith QC para 4 -5.
[880] Ibid.
[881] Churchill (n 841).
[882] The *MOX Plant Case* (n 41) para 50.
[883] *Ronald S. Lauder v. the Czech Republic*, Award, 3 September 2001 para 10.

Bilateral Investment Treaty (BIT).[884] Then later, in his corporate identity as CME for breaching the legal protections under the Netherlands and the Czech and Slovak Federal Republic treaty, also known as the Netherlands – Czech Republic BIT.[885] This is *prima facie* a problem of party identity in ascertaining the triple identity test to apply the regulatory rules to prevent jurisdictional conflicts and contradictory outcomes.

Actually, in both cases, the Claimants alleged that the Czech Republic, through the Media Council, violated the independent obligations under the treaties to not expropriate investments without paying compensation. To accord investments fair and equitable treatment, provide investments full protection and security, treat the investments according to IL and refrain from impairing investments through arbitrary and discriminatory measures.[886]

While the Czech Republic denied all the claims in each of the proceedings, it also raised a jurisdictional defence, arguing that the tribunals lacked the power to hear the claims because the separate tribunals were improperly constituted, amounting to an abuse of process.[887] The Czech Republic also sought to dismiss the claims because the claimant had attempted to pursue the same relief from the separate tribunals.[888]

Under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the main tribunals rejected the Czech Republic's jurisdictional argument that the claims were inadmissible.[889] The *Lauder* Tribunal rejected all of the claimant's requests for relief.[890] Meanwhile, the *CME* Tribunal decided in favour of CME on each of the causes of action and awarded damages.[891] Overall, there were about twenty different proceedings in this dispute. Involving both domestic and international levels, including an appeal of the CME Tribunal decision at the Svea Court of Appeal in Sweden.[892] Other third-party claims like the Zelezny and CME at the International Chamber of Commerce in which

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884 Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, entered into force on 22 October 1991.
885 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic was executed on 29 April 1991.
886 see *Lauder* (n 850) para 193.
887 Ibid para 43.
888 *CME Czech Republic B.V. v The Czech Republic*, Partial Award, 13 September 2001 para 29
889 Ibid para 37.
890 *Lauder v Czech Republic* (n 883) para 319.
891 *CME v Czech Republic* (n 888) Final Award, 14 March 2003 para 650.
892 August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation v The Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration' in Isabelle Buffard, James Crawford, Gerhard Hafner, Alain Allan Pellet, International Law between Universalism and Fragmentation (Martinus Nijhoff Publishers, Leiden 2008) 116.

neither Lauder nor the Czech Republic was a party.[893] It was expressly stated in the Lauder proceedings that neither claimant nor respondent in the *Lauder/CME* proceedings was a party to the numerous domestic proceedings before the Czech Courts.[894] However, there was a disparity regarding party identity between the Lauder Tribunal, which considered the Lauder and CME to be different entities.[895] The CME tribunal considered them to be the same.[896] So, this study's concern is the London Lauder tribunal proceedings constituted under UNCITRAL rules resulting in no award,[897] in parallel to the CME Tribunal constituted under UNCITRAL rules held in Stockholm that granted a partial award.[898]

Having established the identities of the parties, causes and objects or reliefs presented to both tribunals, which returned controversial decisions, the following sections examine how the regulatory rules produce binary opposition relationships.

5.5.1 *Lis Pendens*

The London *Lauder v Czech Republic* tribunal requested arbitration on 19 August 1999, constituted on 05 November 1999 and rendered its decision on 3 September 2001.[899] Meanwhile, the *CME v Czech Republic* Tribunal request for arbitration was submitted on 22 February 2000, constituted on 21 July 2000 and rendered a partial award on 13 September 2001.[900] To this end, the Lauder proceedings ran concurrently between July 2000, when the CME Tribunal constituted, and September 2001, when the Lauder Tribunal rendered its decision. These were cases for applying *lis pendens* to stop or temporarily suspend one proceeding favouring another from these timeframes.

The question of *lis pendens* was directly linked to the request for consolidation that was turned down by the Czech Republic, arguing that it was not 'appropriate that claims brought by different claimants under separate treaties should be consolidated.'[901]

At the level of the *Lauder* tribunal, the Czech Republic argued that the claimant had created a situation of disorder that the principle of '*lis alibi pendens* was designed to avert'.[902] The tribunal did not buy this argument. The Czech Republic emphasized that it was not relying

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[893] Mariel Dimsey, The Resolution of International Investment Disputes: Challenges and Solutions (Eleven International Publishing, Utrecht, 2008) 93.
[894] *Lauder v Czech Republic* (n 883).
[895] *Lauder v Czech Republic* (n 883) para 171.
[896] *CME v Czech Republic* (n 888) para 620 - 621.
[897] *Lauder v Czech Republic* (n 883) para. 319.
[898] *CME v Czech Republic* (n 888) para. 624.
[899] *Lauder v Czech Republic* (n 883) paras 11 - 13; Note, it is unclear when the tribunal was constituted. So, the date of the first procedural order is assumed as the date of the constitution.
[900] *CME v The Czech Republic* (n 888) paras 30 - 31.
[901] Ibid para 302.
[902] *Lauder v Czech Republic* (n 883) para. 168.

on the principle of *lis pendens* or *res judicata* but on 'a new important issue not previously tested in court or arbitral proceedings' involving a multiplicity of proceedings. [903] This was tantamount to an abuse of process. The Czech Republic was expected to consolidate as it was in its interest should the doctrine of *non bis in idem* not apply. Still, ironically the offer was turned down, considering the promptness with which the matter needed to be dealt with.[904]

In addition, the *Lauder* tribunal considered *lis pendens* relating to the other courts and tribunals. It concluded that there was no possibility of any other courts or arbitral tribunals rendering a decision similar to or inconsistent with its own based on the specific treaty.[905] That no other court or tribunal would have to determine whether the Czech Republic 'breached or did not breach the treaty, and is or not liable for damages to Mr Lauder'.[906] Even though the relief sought was generally observed as similar to some extent and the identity of the parties following reconcilable precedents.[907] Because of the different grounds, the *Lauder* tribunal was very assertive of the non-preclusive effect of *lis pendens* to its jurisdiction.[908]

Similarly, the *CME v Czech Republic* Tribunal rejected the Czech Republic's request to decline jurisdiction because it was inappropriate for Mr Lauder, who controlled the CME, to bring arbitration under the US—Czech Republic BIT with identical allegations to seek identical relief.[909] *The CME Tribunal* also stated that Mr Lauder did not abuse the treaty regimes in bringing virtually identical claims under two separate treaties […] derived from the same facts and circumstances'.[910] The tribunal noted that 'should two different tribunals grant remedies to the respective claimants…from the same facts and circumstances, it did not deprive one of the claimants if jurisdiction is granted 'under the respective treaty'.[911] As such, the tribunal was not deprived of jurisdiction. This was because the legal instruments upon which the claims were based did not satisfy the triple identity test for *lis pendens*. This applies similarly to *res judicata* and *electa una via.*

While both tribunals did not find grounds for *lis pendens*, even though they agreed that the claims were virtually identical, consolidation requested by the Claimants during both

[903] *CME v Czech Republic* (n 888 para 434.
[904] *CME v Czech Republic* (n 888) para. 113.
[905] *Lauder v Czech Republic* (n 883) para. 171.
[906] Ibid.
[907] See *Dow Chemical France et al. v. Isover Saint Gobain,* ICC Case No. 4131 (1982); *Amco v Indonesia*, Decision on Jurisdiction; *Klockner v. Cameroon. These cases* have illustrated how the economic approach, the corporate veil and shareholder identity have been used to determine jurisdiction based on party identity.
[908] *Lauder v Czech Republic* (n 883) para. 170 – 175.
[909] *CME v Czech Republic* (n 888) para. 412.
[910] Ibid.
[911] Ibid.

proceedings was rejected by the Czech Republic despite acknowledging the same facts and circumstances.[912] In dismissing the consolidation request, the Czech Republic highlighted the need to determine the proceedings independently and promptly.[913] The Czech Republic was concerned about time-wasting as consolidation takes typically time to obtain consent from both parties. However, this was supposed to be *a de facto* consolidation.[914]

The idea of *de facto* consolidation though not expressly defined, would have mitigated any time loss in agreeing on the terms of the consolidation. Even so, the Czech Republic was indifferent to the idea of consolidation even though the Lauder Tribunal acknowledged that the Claimants were different in its offer of d*e facto* consolidation. Another difficulty was that the 1985 UNCITRAL Rules did not regulate consolidation.[915] However, this study argues that the consolidation of international parallel proceedings destroys each tribunal's independence and ability to form relationships and interdependence.

To conclude, even though different elements of the triple identity test were satisfied, there was no preclusive effect to prevent interaction between the two parallel independent tribunals. As such, binary opposing jurisdictions interacted disorderly, requiring deconstruction to differentiate and keep them distinct to maintain the integrity of the international investment system. Two tribunals under the UNCITRAL rules system are similar to two organs of the UN System overlapping over a particular dispute and undermining the integrity and authority of the UN system has been highlighted in the problem identification phase of this study. With the help of comity, this would have been better realised, most probably by terminating one of the proceedings in the spirit of comity since consolidation was not desirable and there were no separate heads of the claims in the dispute. However, comity was not considered as each tribunal asserted its independence throughout the parallel proceedings.

5.5.2 *Res Judicata*

Having failed to trigger *lis pendens* to suspend, terminate or stay proceedings in favour of another, or even consolidate the parallel proceedings, the chance of applying *res judicata* and the other regulatory rules became very remote as the Czech Republic disregarded both

912 Ibid.
913 Ibid para 302 and 412.
914 *Lauder v Czech Republic* (n 850) para 173.
915 The UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments adopted in 2006 still mentions consolidation as an exception to the rules. It could not provide a model to be followed by the parallel tribunals.

principles.[916] The *Lauder* Tribunal rendered its award on 03 September 2001, which would have been the basis of *res judicata* on the *CME* Tribunal.

However, it was clear that both Tribunals were working concurrently. So there was no basis for the *Lauder* Tribunal to preclude the *CME* Tribunal, which rendered its partial award on the 13 September, that's barely ten days after the *Lauder* Tribunals award. That notwithstanding, both tribunals could only accord the *res judicata* effect to the claims emanating from the independent BITs provided the triple identity test was satisfied.

Similar to the effects of *lis pendens*, the failure of *res judicata* to preclude also results in disorderly binary opposing jurisdictions that need deconstructing to retain jurisdictional distinctions and retain the integrity and authority of the international investment system.

5.5.3 *Electa Una Via*

Like the other regulatory rules that failed to satisfy the triple identity test, the application of *electa una via* was equally not possible because both tribunals asserted their independence regarding jurisdiction and did not have a common position on party identity. While the Lauder Tribunal was first seised, it did not have any basis to consider *electa una via*. Meanwhile, the later CME tribunal did accept that the claimants were the same entity, which formed a basis for *electa una via*.[917] However, both tribunals having asserted jurisdiction over their independent claims, any attempts to trigger *electa una via* were thwarted. Therefore, there was no preclusion from *electa una via*, allowing the parallel jurisdictions to become binary opposing, accompanied by disorder and indeterminacy. Like the other rules, the need for deconstruction to keep the binary opposing parallel proceedings distinct was necessary to uphold the integrity of the ICSID system.

5.5.4 *Lex Specialis and Lex Posterior*

There was no contested substantive jurisdiction determining special status between the Lauder and CME proceedings. Even if there were, having asserted their independence, there was no doubt regarding the jurisdictional positions of parallel proceedings. So, there were no grounds to invoke *lex specialis* or *lex posterior*. On this basis, similar to the other regulatory rules, there was no preclusion based on *lex specialis* and *lex posterior*. In other words, none of the parallel proceedings acquired *lex specialis* characters that needed to be kept distinct to maintain the integrity of the ICSID system. Without *lex specialis*, there was no need for preclusion, leading to disorder, indeterminacy and deconstruction.

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[916] *Lauder v Czech Republic* (n 883) para 169.
[917] *CME v Czech Republic* (n 888) para. 620 – 621.

5.6 The *Achmea BV v Slovak* Republic Jurisdictional and Arbitrability Dispute

This dispute involves both international and domestic jurisdictions. However, the analysis in this section will only include the ICT, the arbitration tribunal and the ECJ. The domestic German Regional and Federal Courts are not part of the main focus of the analysis. However, it should be noted that the hybrid ad hoc arbitration tribunal is also subject to German Law and not purely an international tribunal.[918]

5.6.1 Brief Background of the Dispute

The *Achmea BV (formerly known as Eureko) v Slovak Republic case* involves the breach of the 1992 Agreement on the Encouragement and Reciprocal Protection of Investments under the Netherlands and the Czech and Slovak Republic BIT.[919] The breach resulted from legislative measures introduced by the Slovak Republic, first in 2004 liberalising the health insurance market, which prompted Achmea to invest in the sector.[920] Then later, in 2006, reversed the law, which prohibited the free transfer of profits and dividends, which Achmea considered was in breach of several provisions of the BIT.[921]

5.6.2 The Arbitral Tribunal

Consequently, Achmea initiated proceedings against the Slovak Republic in October 2008, under Article 8 of the BIT, following Article 3 of the UNCITRAL arbitration rules.[922] Proceedings were administered by the PCA seated in Frankfurt, Germany, with reservations for hearings in other locations considered appropriate.[923]

The Slovak Republic denied the claims and argued that the claimant, Achmea, did not present sufficient facts to establish either *ratione personae* or *ratione materiae*. Alongside, there was a jurisdictional objection based on the Slovak Republic's EU membership, which precluded the tribunal of jurisdiction.[924] According to the Slovak Republic, the EC treaty governs the same subject-matter, thus giving the dispute intra-EU character, which rendered it subject to the exclusive jurisdiction of the ECJ and should be considered terminated and,

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[918] *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 para 224.
[919] Ibid para 6.
[920] Ibid.
[921] Unlawful and indirect expropriation of its investment in Union Healthcare under Article 5; violation of the BIT's standards of protection contained in its provisions on fair and equitable treatment including non-discrimination under Article 3(1); full protection and security under Article 3(2); free transfer of profits and dividends under Article 4.
[922] *Achmea v Slovak Republic* (n 918) para 10.
[923] Ibid para 16.
[924] Ibid para 19.

or inapplicable, according to Article 59 and 30 of the VCLT.[925] The respondent insisted the arbitration clauses in the BIT were incompatible with EU law, as the ECJ has exclusive jurisdiction over Achmea's claims.[926] Furthermore, the respondent stated that the clauses such as Article 4 relating to the 'free transfer of capital have been held by the ECJ to be incompatible with EU law, which is supreme'.[927]

The tribunal asserted its jurisdiction over the case on the award of jurisdiction, arbitrability and suspension. Meanwhile, recognising its relationship with the ECJ or European Institutions under Article 8(6) of the BIT.[928] This provision allowed the tribunal to consider the law in force of the Contracting party, other relevant agreements, special agreements relating to the investment and general principles of international law.[929] To this end, the European Commission is noted to have also submitted written observations on the case in July 2010 and tried to distinguish extra-EU BITs and intra-EU BITs. It iterated that with the coming into force of the Lisbon Treaty, the EU has exclusive competence over Intra-EU BITs.[930]

However, the Commission also noted a proposal for new EU Regulation for the terms, procedures and treaty-making competence and incompatibility of Extra-EU BITs with EU law relating to investments.[931] The Commission clarified that 'unlike intra-EU BITs, it [was] important to clarify that the European Commission [did] not take issue with third party arbitration mechanisms set out in… BITS entered into with non-EU countries'.[932] Specifically relating to the ECJ, the tribunal considered the importance of mutual respect and comity between judicial institutions but did not suspend its proceedings in favour of the Commissions case in light of the ECJ.[933] In its final judgment upon adjudicating the case's merits, the tribunal found that the Slovak Republic violated the BIT, dismissed the jurisdictional objections and ordered the Slovak Republic to pay damages.[934]

As a result of the decision, the Slovak Republic applied to the German Regional Court for a set-aside, arguing that the Arbitral Tribunal lacked jurisdiction because the arbitration clause in the BIT was incompatible with EU law—specifically Article 18, 267 and 344 of the

925 Ibid.
926 Ibid.
927 Ibid.
928 Ibid para 286.
929 Ibid para 287.
930 Ibid para 176.
931 Ibid.
932 Ibid.
933 Ibid para 292.
934 *Achmea B.V. (formerly Eureko B.V.) v The Slovak Republic,* (I), PCA Case No.2008-13, E-SR Final Award, 7 December 2012 para 352.

TFEU.[935] In response, the Higher Regional Court rejected the Slovaks argument and found that the BIT provisions were not incompatible with the provisions as mentioned earlier of the TFEU.[936] In a further appeal to the Federal Court of Germany, the matter was referred to the ECJ to make a preliminary ruling on the compatibility of the BIT's arbitration clause with EU law.[937]

5.6.3 The ECJ Judgment

The ECJ decided to go against the decision of the German Regional Court and the arbitral tribunal, stating that the arbitration clauses contained in Article 8 of the Netherlands – Slovak Republic BIT were incompatible with EU law.[938] The ECJ ruling stated that 'Articles 267 and 344 must be interpreted as precluding a provision in an international agreement concluded between member states, such as Article 8 of the Agreement…'[939] So, the case before the ECJ was delineated around the operations of Article 8 of the BIT. The BIT was signed in 1991 between the Netherlands and the Slovak Republic. Meanwhile, Articles 267 and 344 of the EC Treaty were signed in 1958. By all means, the ECJ retained its jurisdiction.

However, the BIT should have been terminated when the Slovak Republic joined the European Union in 2004 for the TFEU taking precedence over the inter-state dispute mechanism known as the Intra-EU jurisdiction objection.[940] Such a termination would have affected the investor-state dispute resolution element within the BIT, which the TFEU could not offer any investor like Achmea BV under the BIT. Consequently, this created an overlap between the BIT and the TFEU, the arbitration tribunal and the ECJ.[941] As such, VCLT Article 59, which requires *lex posterior*, would have mitigated between the BIT and TFEU.[942] However, this does not seem to be the case, which provides a gap for applying the regulatory rules.

5.6.4 Application of the Regulatory Rules

The sections below will apply the regulatory rules to address this jurisdictional conflict between the arbitral tribunal and the ECJ. Like the other cases, the triple identity standard applies as strictly as possible. Except for the object identity (compensation or the relief), as

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935 Oberlandesgericht Frankfurt, the decision of 18 December 2014-Case 26 Sch 3/13
936 Ibid.
937 Bundesgerichtshof, the decision of 3 March 2016 – Case I ZB 2/15.
938 *Slovak Republic v Achmea B.V. (Case C-284/16)*, Judgment of the Grand Chamber of the European Court of Justice, 6 March 2018, para 60.
939 Ibid.
940 *Achmea v Slovak Republic* (n 918) para 9.
941 Ibid para 156.
942 Article 59 VCLT (n 838).

the TFEU does not accord such powers within the meaning of Article 4(3) to the ECJ, the triple identity test would have been satisfied.[943] It should also be noted that, during the different proceedings, references of mutual respect and comity relative to the other judicial institutions were made or implied.[944] These are all examined alongside the regulatory rules in the following sections.

5.6.4.1 *Lis pendens*

Proceedings on the jurisdiction, arbitrability and suspension commenced in October 2008. The award was rendered in October 2010. Meanwhile, as a quasi-judicial body or proxy for the ECJ, the European Commission submitted its Intra-EU jurisdictional observations on 7 July 2010. There was, therefore, a basis for the application of *lis pendens* as the arbitral tribunal and the European Commission/ECJ co-existed in parallel deliberations.

However, the arbitral tribunal rejected the Commission's suspension request because it was set up by consent of the parties and as German law under the principle of *lex loci arbitri*.[945] Nevertheless, the tribunal noted that 'should it become evident at a later stage that the relationship between the two sets of proceedings is so close as to be a cause of procedural unfairness or serious inefficiency, the tribunal will reconsider the question of suspension'.[946]

So, *lis pendens* does not provide any preclusive effect on the parallel proceedings on many levels, including the fact that the triple identity test could not be satisfied as the ECJ did not address the question of the original award.[947] However, coming out of the failure of rules, there is a need for deconstruction to differentiate and maintain jurisdictional distinctions. So, the parallel jurisdictions became binary opposing. There was connectivity between the independent judicial bodies and, in this case, the ad hoc arbitration tribunal and the ECJ.

5.6.4.2 *Res Judicata*

Res judicata would have taken effect upon concluding the Arbitral Tribunal award on jurisdiction, arbitrability and suspension to preclude the European Commission/ECJ proceedings in October 2010. Instead, the Tribunal recognised that the European

943 *Slovak Republic v Achmea (*n 938) para 17.
944 *Achmea v Slovak Republic* (n 934) paras 195 - 196, 211, 292.
945 Ibid paras 224 – 225.
946 Ibid para 292.
947 *Achmea v Slovak Republic* (n 934) Judgment of the Grand Chamber of the ECJ 6 March 2018, para 62.

Commission continued its determinations and assisted the Commission with the documents requested.[948]

While the question presented to the ECJ for a preliminary ruling explicitly clarified the interpretation of Articles 18, 267 and 344 of the TFEU,[949] this was not a question within the arbitral tribunal's competence. *Prima facie*, the subject-matter before the ECJ did not fulfil the identity of cause, in addition to the fact that the ECJ could not entertain the identity of object or relief. The arbitral tribunal also considered the question of *res judicata* in light of the overlap and incompatibility of the legal relationships. This was between the subject-matters and the identity of the cause regarding termination under Article 59 of the VCLT.[950] As already stated, their subject-matter was different and as such, *res judicata* could not preclude the ECJ proceedings.

With the failure to preclude from a *res judicata* perspective, the pattern observed with the other regular rules is repeated. Binary opposing jurisdictions emerge amidst disorder and indeterminacy, requiring deconstructed to keep the parallel jurisdictions distinct before engaging comity.

5.6.4.3 *Electa Una Via*

Achmea BV did not initiate the ECJ proceedings. As such, suspension or termination of the ECJ based on *electa una via* could not be triggered favouring the earlier arbitral tribunal proceedings started by the Achmea tribunal. Like the other rules, the pattern of disorderly binary opposing jurisdictions leading to indeterminacy and deconstruction into distinct jurisdictions and engaging comity through the different comity-based methods emerges to maintain the system's integrity.

5.6.4.4 *Lex Specialis* and *Lex Posterior*

The question of *lex specialis* and *lex posterior* would have had a significant role in the proceedings in helping to resolve the dispute as both the BIT and the TFEU are of *lex specialis* character in their own right, with the ECJ recognising the legal context of the BIT.[951] However, they did not belong to the same legal order and were not framed to resolve the same jurisdictional conflict. As such, neither *lex specialis* nor *lex posterior* provided any preclusive effect of stopping interaction between the binary opposing jurisdictions of the arbitral tribunal and the ECJ. As a result, binary opposing jurisdictions emerge.

[948] *Achmea v Slovak Republic* (n 934) paras 31 – 33.
[949] *Slovak Republic v Achmea* (n 938) para 1.
[950] *Achmea v Slovak Republic* (n 934) para 258.
[951] *Achmea v Slovak Republic* (n 934) para 4.

Deconstruction to remove disorder and indeterminacy due to the failure to preclude follows. This maintains jurisdictional distinctions and upholds the integrity and authority of the different judiciary bodies before engaging comity-based approaches. The best approach is to separate the issues according to heads of claims and one jurisdiction coordinating and making the final determination to resolve the conflict.

5.7 Conclusion

This chapter has illustrated how binary opposing jurisdictions react when subjected through the regulatory rules formalistically with a strict application of the triple identity standard. Even though the rules could not satisfy the triple identity standard, some suspension was observed in the *Swordfish* and *MOX Plant cases*. It was clear, particularly in the *MOX plant case*, that the suspension was in the spirit of comity rather than under the identity standard. This means the preclusion was amidst disorder and indeterminacy. Therefore, deconstruction of the binary opposing jurisdictions was still required to keep the jurisdictions distinct to maintain the integrity and authority of each competing jurisdiction's judicial function and the integrity and authority of IL. Meanwhile, similar requests in the spirit of comity in the *Lauder/CME* and *Achmea cases* were rejected.

Overall, the binary opposing jurisdictions were not precluded by the regulatory rules leading to disorder and indeterminacy. Deconstruction differentiated the binary opposing jurisdictions, keeping them distinct to perform its judicial function and independently engage with a competing jurisdiction through one of the following comity-based approaches. It should be clarified that applying the regulatory rules, preclusion failure, the emergence of disorder and indeterminacy and deconstruction are theoretical steps that are not easily measured. Meanwhile, the comity-based approaches are practical approaches that prove the theoretical steps. For example, moving judges between cases and transferring different subject heads across the different competing jurisdictions is evidence that each jurisdiction has been successfully kept distinct and maintains its judicial function, integrity and authority, and consequently, the integrity and authority of IL in general. The next chapter shall discuss the different comity-based solutions applied to measure the success of the methodological device.

Chapter 6

Post Case Study Analysis and Application of Comity-Based Approaches

6.1 Introduction

This chapter examines some of the limitations encountered during the case studies and some of the potential problems that can be encountered in similarly circumstances. The chapter also analyses comity-based approaches that finally resolve the conflict when jurisdictional distinctions are retained and maintain their jurisdictional integrity and authority. The chapter is also a measure of the extent to which the theoretical steps of the methodological process are successful. While the theoretical steps are not practically manifested, their success depends on the comity-based approaches' successful implementation. Successful implementation of the comity driven approaches illustrates that the deconstruction successfully differentiated and kept the binary opposing jurisdictions distinct. Keeping jurisdiction distinctions entails maintaining their integrity and authority and allowing free independent interactions between the jurisdictions, forming interdependence with their competitors. These approaches are extra-jurisdictional bifurcation, aggregation and relocation of expert judges and arbitrators and subject-matter allocation, using expert judges in hybrid proceedings and moving subject-matters across competing jurisdictions together with experts. Before delving into the comity-based approaches, it is worth examining some of the practical problems encountered during the case studies. These are the non-applicability of *forum non-conveniens* and referrals, the issue of uneven exclusivity of jurisdiction, the absence of precedent, the problem of consent, the lack of extra-jurisdictional consolidation mechanisms, unwillingness and unable to act *propio motu* extra jurisdictionally.

6.2 Practical Problems Encountered during the Case Studies

It is important to analyse some of the limitations encountered during the case studies and some potential problems that can be addressed by the comity based approaches. Together with all the other conflict issues, these issues have remedies in the comity-based remedies discussed in this chapter. These problems include the inapplicability of positive rules like *forum non-conveniens*, uneven exclusivity of jurisdiction, lack of precedent, lack of willingness to act proprio motor, lack of consent and mechanisms for extra-jurisdictional consolidation. The following sections shall examine these problems in tum.

6.2.1 Non-Applicability of Forum Non-Conveniens and Referrals

F*orum non-conveniens* entails that a jurisdiction exercises its discretion and determines its competence over a dispute and decline jurisdiction, particularly when there is a more

convenient forum to which the matter is referred.[952] Like most regulatory rules, *forum non-conveniens* is also adopted from other judicial systems of the world under Article 38(1)(c) of the Statute of the Court. It is a more positive rule because it tries to connect other jurisdictions, which is the reverse of traditional preclusive rules, which is considered negative in relationship building with binary opposing jurisdictions.

Forum non-conveniens in their own right was capable of resolving most of the jurisdictional conflicts in the case studies, regardless of whether or not the identity criteria was satisfied. It is a solution to the failure to meet the identity criteria. For example, in the *Swordfish cases*, the WTO would have declined and referred the law of the sea matters to the ITLOS and vice versa if there was enough wriggle room to exercise such discretion towards the opposite jurisdiction. However, a stalemate ensued because both the WTO and the ITLOS ascertained their right over their specific head of the claim. While it may be argued that the disputing parties already referred the dispute – Chile to the ITLOS and the EU to the WTO, there was still room for referring what was not within each jurisdiction's competence.

Like the *Swordfish cases*, the *MOX Plant Cases* involved different subject-matters that *forum non-conveniens* could have helped separate and referred to the appropriate and most convenient forum. However, through the exercise of comity, which saw the Annex VII tribunal suspended its proceedings in favour of the ECJ. This was not a referral according to forum non-convenient, but a temporary suspension which meant that the matter could revert to the Annex VII tribunal. It showed the opportunity and potential for applying more positive rules to engage the parallel proceedings and refer to the appropriate jurisdictions in conflicting situations. However, because of the general reluctance by the parties and arbitral bodies to trigger more positive regulatory rules to suspend the parallel proceedings in favour of the binary opposing jurisdictions.

Meanwhile, it is not expected that competing jurisdictions, which are more protective than accommodating of parallel jurisdictions because of exclusivity clauses, parties do not expressly trigger *forum non-conveniens* to request the courts and tribunals to refer to parallel jurisdictions. It would be naïve to expect courts and tribunals in a competitive environment to voluntarily assess a case *proprio motu* and refer to a competing jurisdiction following the doctrine of *forum non-conveniens*. The parties in the *MOX Plant cases* had no express or direct call to refer disputes to jurisdictions of their choice. Such a call could only be inferred from situations, like the UK requesting the ITLOS to decline jurisdiction favouring the OSPAR and the Euratom proceeding. In other words, it was an indirect request for the ITLOS to

[952] See Fellmeth and Horwitz (n 546) 112.

refer to these jurisdictions in the spirit of *forum non-conveniens*.[953] But the ITLOS chose to exercise comity and suspended instead of referring to the parallel jurisdictions.

A similar pattern was observed in the *Achmea BV v Slovak Republic* dispute, even though it involved only a single subject-matter and not multiple issues involving different specialised jurisdictions. Parallel proceedings arose because of the EU as a third party with substantive interest, which sought to protect the EU's integrity through the EU Commission, which sought to preserve the jurisdiction of the ECJ. While the ECJ did not directly request a referral, the *Achmea BV* tribunal decided to exercise comity and suspended proceedings favouring the ECJ. The *Lauder/CME* cases were similar, and there was no basis for *forum non-conveniens* as both parallel tribunals had the competence to deal with the subject-matter.

So, while the *Swordfish Cases* and *the MOX Plant cases* were suitable for *forum non-conveniens*, the *Lauder/CME* tribunal and Achmea tribunals did not have any basis for *forum non-conveniens*. In any case, even though some comity led to the temporary suspension of proceedings in the *MOX Plant* and *Achmea BV* tribunals while allowing the ECJ to deliberate on the EU related aspects of the claim, this temporary measure did not amount to a referral. The EU jurisdiction related aspects of the claim were not substantive enough and only emerged in the proceedings and not that the Slovak republic seized the ECJ, creating an expectation for the *Achmea BV* tribunal to refer to the ECJ as the most appropriate forum while declining jurisdiction. So, the jurisdictions were very protective, implicitly claiming exclusivity even though there was some exercise of comity and temporary suspension and not decline and referral that completely transfers the matter to the binary opposing jurisdiction or a third jurisdiction.

6.2.2 The Problem of Uneven Exclusivity of Jurisdiction

From the case study analysis, some jurisdictions are more protective as they claim exclusivity, while others are more amenable and accommodating. Particularly in multiple proceedings, it is challenging to find a common platform for interaction. For example, in the *MOX Plant Cases,* within the law of the sea jurisdiction, according to UNCLOS Article 287,[954] the ITLOS was more encompassing of the Annex VII Tribunal and the ECJ. However, However, it disregarded the OSPAR tribunal even though it acknowledged the compulsory jurisdictions as invoked by the United Kingdom.[955] The United Kingdom requested, according to UNCLOS Article 282, which regarded the OSPAR Treaty and the Euratom Treaty to be of

[953] *The MOX Plant Case* (n 41) para 44.
[954] United Nations Convention on the Law of the Sea, adopted on 10 December 1982, Article 287(1).
[955] *The MOX Plant Case* (n 41) para. 43.

the same status as regional or bilateral treaties, which the ITLOS acknowledged their invocation by any party in place of the ITLOS.[956]

That notwithstanding, the OSPAR Tribunal was disregarded as exclusive of matters under the OSPAR Convention and had no competence to interpret matters under the UNCLOS.[957] The ITLOS proceeded to recognise the exclusive jurisdiction of the Euratom Treaty and the EC treaty, even though neither the EC Treaty nor the Euratom Convention (already ruled out by the ITLOS alongside the OSPAR Convention) had the competence.[958] The situation was indeterminate, leaving the ITLOS the discretion to decide, which is the realm of comity. It was clear that the ITLOS yielded to the jurisdiction of the EC Treaty Article 292 in making its decision in recognising the ECJ exclusive jurisdiction. Was it an administrative decision under Article 36 of the rules of the ITLOS influenced by the suspicion of the EU Commission instituting proceedings before the ECJ?[959] Or, was it simply in the spirit of cooperation or mutual respect and comity? The Annex VII Tribunal's suspension of its proceedings favouring the ECJ. Whatever the situation, there was a disparity in the way the OSPAR Tribunal exclusive jurisdiction and the ECJ exclusivity jurisdiction were treated, which leaves a gap for the discretionary application of comity of the theoretical framework to resolve the conflict.

Also, the *Lauder* proceedings ascertained exclusivity when it stated that there was no possibility of any other court and tribunal rendering a decision similar to, or inconsistent with the award issued by the *Lauder* Tribunal.[960]

The *Achmea v Slovak Republic* case also witnessed the ECJ ascertaining exclusivity under Article 292 of the EC treaty, claiming the Intra-EU jurisdiction between the Netherlands and the Slovak Republic was under EU jurisdiction. According to the EU Commission, the intra-EU BIT should have become inoperative in 2004 when the Slovak Republic acceded to the EU.[961] So, exclusivity is quite common with ECJ cases, as seen in the *MOX Pant cases* and the *Achmea BV cases* with the ECJ insulated with the blessings of Article 292 of the EC Treaty. At the expense of other jurisdictions, this is often triggered in disputes involving EU member states.[962] However, this has not provided any established practice that can be relied on as a pattern to deal with jurisdictional conflicts as dispute settlement mechanisms continue to be protective of their jurisdictions.

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956 Ibid para 38.
957 *The MOX Plant Case* (n 41) para. 45.
958 Ibid.
959 Churchill (n 841).
960 *Lauder v Czech Republic* (n 883) para 171.
961 *Achmea v Slovak Republic* (n 885) para 9.
962 Lavranos (n 130).

6.2.3 The Lack of Precedent

While the decisions of ICTs are generally not binding except on the parties to the particular dispute according to the ICJ Article 59 in litigated matters, this practice has created wider gaps in arbitration than in litigation.[963] As already seen in the *MOX Plant* and the *Lauder/CME cases,* most dispute settlement agreements are very protective of their regimes. Exclusive jurisdictional clauses are either expressly stated as in Article 23 of the WTO-DSU or implied from the conduct or manner in which jurisdiction is retained in the cause of proceedings.[964]

However, since there is no consistent practice of how previous decisions guide future cases, not least because of the absence of *stare decisis* within the international legal system, disparities between parties and ICTs make room for discretion with the help of comity. There is no pattern for applying exclusivity clauses, which often involves flexibility though largely inflexible. This makes it challenging to identify a clear pattern that can act as a precedent. In the case studies, Article 292 of the EC Treaty was relatively inflexible in the *MOX Plant* dispute, providing a precedent in the *Achmea BV cases*. Still, within the case studies, it becomes clearer why there was a stalemate in the *Swordfish* dispute because Article 23 of the WTO-DSU has a similar inflexible character. Thus, prohibiting the referral of cases as the language of Article 23 suggests 'only the DSU' should resolve disputes between members as a general obligation.[965] Meanwhile, Article 292 of the EC-Treaty seems more influential. Due to its absolute nature, it has a preclusive effect on parallel proceedings involving Intra-EU jurisdictional disputes. Article 23 of the WTO-DSU, even though also inflexible, did not have the same effect on the *Swordfish Cases*, probably due to the less absolute nature of the wording of the clause, which is subject to different interpretations.[966] This diversity makes it challenging to identify a common pattern.

While the stalemate in the *Swordfish cases* was ongoing, the ITLOS had already made determinations on the jurisdiction in the *MOX Plant cases* regarding the OSPAR Tribunal proceedings.[967]However, this could not apply as precedent in the *Swordfish* parallel cases because the ITLOS and WTO ascertained exclusivity without any window of discretion or flexibility regarding jurisdictional claims. In addition, many commentators mostly regarded fragmentation as a curse to the unity of the international legal system rather than a

963 Statute of the ICJ (n 85) Article 59.
964 WTO-DSU Article 23 (n).
965 John Jackson, The World Trading System: Law and Policy of International Economic Relations (2nd edn Mit Press, Cambridge 1997).
966 Shany (n 5)183.
967 *The MOX Plant Case* (n 41) para. 41 - 43

differentiation that allowed restructuring for better interdependence and cooperation. While rules of judicial discretion declining and referring have been developed and tested to an extent within international mechanisms, this did not seem to help in the *WTO/ITLOS Swordfish* dispute.

For example, the IL Association, through its Committee work on '*International Civil and Commercial Litigation, Declining and Referring Jurisdiction in International Litigation: Third Interim Report…*'[968] Meanwhile, there are indications that some international courts are willing to accommodate flexibility within lesser degrees of similarity. Such as 'connexity, which authorises courts to join related claims'. However, this 'has never been incorporated into general international law'[969] This has been the case since observed in the Dissenting Opinion of Judge Weiss in the *SS Lotus (France v. Turkey) Case.*[970] To this end, while the regulatory rules failed, as seen in the previous chapter, this approach would have assisted, which did not occur as there is no reliance on precedent relating to connexity.

Nevertheless, one interpretation of Article 23 of the WTO-DSU 'indicates a strict exclusive jurisdiction regime, barring referral of cases arising under the GATT/WTO legal system to any outside judicial forum.[971] Understandably, the ITLOS could not exercise the same approach it took in the *MOX Plant* to reject the OSPAR Tribunal because there was no express request similar to the UK requesting the ITLOS to the OSPAR. Like the OSPAR, which could not deal with the law of the sea matters, the WTO could not equally make determinations on the law of the sea matters and the ITLOS, trade matters. Even though there were no express requests, implicitly, unconscious exclusivity prevented any attempts at bringing the jurisdiction together.

While it may be argued that there was no request for either the WTO to cede jurisdiction to the ITLOS or the ITLOS to cede jurisdiction to the WTO in the Swordfish dispute, other situations have witnessed the WTO protecting its jurisdiction under DSU Article 23 when requested.[972] For example, in *the Mexico - Soft Drinks dispute*, when the USA refused to constitute a NAFTA panel and went ahead with a WTO panel, Mexico requested the WTO to suspend proceedings and refer to a NAFTA Panel.[973]

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968 Third Interim Report Submitted to the International Law Association London Conference (2000) 7; McLachlan (n 557) 440.
969 Shany (n 5) 26.
970 *SS Lotus (France v. Turkey) 1927 PCIJ (Ser. A),* No. 10, at 48 (Dissenting Opinion of Judge Weiss).
971 Shany (n 5)183.
972 WTO Pursuant to Article 23 of the DSU.
973 William J. Davey and Andre Sapir, 'The *Soft Drinks Case*: The WTO and Regional Agreements' [2009] 8 (1) World Trade Review 5 – 23.

In rejecting the request, the panel argued that the DSU did not allow the panel to refuse exercising jurisdiction in a case properly constituted before it. To further protect its authority, the panel used DSU Article 3.10 as an injunction to reject any possibility of linking the WTO Panel and a NAFTA Panel. It argued that Mexico's argument was not persuasive enough for the panel to exercise discretion.[974] However, the panel's mention of the possibility of exercising discretion shows there is a chance of moving away from the rigidities of Articles 23 and 3.10 stance. But since there is no consistent practice of using precedent, Mexico failed to apply the ILA guidance on referrals and rules of discretion. Drawing a parallel with the *Swordfish Cases*, the *Mexico – Soft Drinks dispute* exemplifies how protected the WTO is of its jurisdiction and how states respond, which provides a gap for the theoretical framework postulated in this study.

6.2.4 The Problem of Consent and confidentiality

Without a jurisdictional conflict agreement that may direct ICTs on dealing with parallel proceedings, some ICTs, particularly arbitration tribunals, tend to restrict arbitrators based on confidentiality.[975] For example, Article 6 of Appendix I and Article 1 of Appendix II of the International Chamber of Commerce impose a duty of confidentiality on arbitrators.[976] Meanwhile, ICSID and UNCITRAL Rules do not have confidentiality rules.[977] However, in the absence of such rules, it does not mean arbitrators are free to communicate or discuss with parallel forums or a competing jurisdiction on the same matter. Nevertheless, there are ways that arbitrators may get around the issue. For example, the doctrine of competence-competence, which allows tribunals to determine their jurisdiction over a particular matter, could be applied in *non-liquet* situations presented by ICSID and UNCITRAL tribunals due to the lack of confidentiality rules. This means that arbitrators can discuss their competence over a dispute with a parallel proceeding without fear of breaching any rules of confidentiality. However, Kreindler supports this view, arguing that where the New York Convention and the UNCITRAL Model Law do not offer protection, parallel actions in arbitration or litigation should proceed due to competence-competence.[978]

Nevertheless, the common practice is that dispute resolution has always required further consent from parties at different stages of proceedings which tends to be an encumbrance

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[974] DSU Article 3.10 notes in part that, '[...] that complaints and counter-complaints regarding distinct matters should not be linked'.
[975] See Melon Meza-Salas, 'Confidentiality in International Commercial Arbitration: Truth or Fiction? [2018] via <arbitrationblog.kluwerarbitration.com> accessed 18 October 2020.
[976] International Chamber of Commerce Appendix I and Appendix II of the Internal Rules of the International Court of Arbitration 2014; now modified and effective as of 01 January 2021.
[977] Meza-Salas (n 975)
[978] Kreindler (n 193).

rather than facilitating procedural matters. Thus, creating a stalemate when parties cannot agree whenever required. For example, when the regulatory rules failed to resolve the competing *jurisdictions in the Swordfish dispute, an additional agreement was needed, culminating in the* Special Chamber.[979] The time and cost wasted to obtain this additional agreement could have been avoided with a discretional clause for comity within existing arrangements. Such an agreement would bind parties when signing up to the governing text of the relevant instruments. However, this is mainly limited to the powers of these institutes to adjudicate disputes arising under the governing documents. Where these instruments fall short, a stalemate ensues as the scope of consent under these instruments is often limited. Neither the WTO-DSU nor the UNCLOS had foreseen the type of competition that presented itself in the *Swordfish Cases*. The dispute was beyond the regulatory rules, which as general principles, even though they could not remedy the situation, are customarily considered binding and do not need the consent of the parties.[980]

Similarly, in the *Lauder/CME* arbitrations, the procedural hearing in the *Lauder* tribunal noted the absence of agreement between the parties for consolidation because the parties had not consented to consolidation.[981] While the different BITs provided for arbitration, there was a gap regarding consolidation, which the Czech Republic turned down when requested by the claimant.[982] To this end, it is worth considering whether BITs and other mechanisms do go far enough to allow parallel arbitration tribunals to exercise discretion and comity over binary opposing jurisdictions. The UNCITRAL rules applied by the parallel tribunals do not provide clear guidance on consolidation, and so, the parties would have to consent for any consolidation to be effective. Consenting also requires satisfying the triple identity test. However, suppose the parties agree to waive the identity requirements, consolidating without deconstruction to ensure that each jurisdiction is distinct and independent. In that case, the threat to the integrity and authority will remain.

6.2.5 Lack of Extra-Jurisdictional Consolidation Mechanisms

This study does not recommend outright consolidation unless the theoretical phase is complete and the binary opposing or parallel jurisdictions have been kept distinct and their integrity and authority maintained. As such, consolidation will be based on the identical heads of claims. As mentioned earlier, one of the possible solutions to

[979] Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union), Order of 16 December 2009, (ITLOS Reports 2008-2010) 13
[980] J L Brierly, The law of nations: An introduction to the international law of peace (Clarendon Press, Oxford 1955) 55.
[981] *Lauder* (n 839) para 16.
[982] Ibid para 173.

the *Lauder/CME* proceedings was consolidation, to which the Czech Republic did not consent. However, consolidation problems are many, ranging from missing consolidation clauses in the international agreements or limited presence in arbitration rules such as UNCITRAL, ICSID, International Chamber of Commerce and the ILA rules that are often relied upon in resolving arbitration disputes.

However, consolidation is not desirable in this study because it may inadvertently lead to cross-fertilisation, which undermines jurisdictional distinctions or binary oppositions that must be protected to achieve jurisdictional interdependence. This is not exclusive of permanent dispute resolution mechanisms like the ICJ, WTO Appellate body and ITLOS. It includes ad hoc arbitration tribunals based on international agreements. For example, the *CME v Czech Republic Case* based on the Czech and Slovak Republic BIT was a good case for consolidation based on the separate BITs between the Czech Republic and the United States and the Netherlands and the Czech and Slovak Republic. Article 8.5 of the later BIT allows an ad hoc tribunal based on UNCITRAL arbitration rules.[983] Even in cases like *SPP(ME) v Egypt* where there is no direct BIT between the investor and state, ICSID and the International Chamber of Commerce rules were recognised under Egyptian domestic law as rules governing any potential dispute.[984] It limits consent or agreement of the parties, which was a significant limitation to consolidation in the *Lauder/CME Cases,* illustrating the difficulty in consolidating the *Lauder/CME Cases* under the 1976 rules.[985] It is worth noting that The 2010 revised UNCITRAL Rules did not consider revising consolidation. So, the problem persists and is open for *de facto* consolidation. However, it is still subject to party agreement should arbitration tribunals encounter similar circumstances in the *Lauder/CME Cases*.

The problem of consolidation is not limited to ad hoc arbitral tribunals. Institutional mechanisms also have challenges even though some, like the ITLOS under the UNCLOS, do have a straightforward process of accommodating extra-jurisdictional overlaps as they accommodate other jurisdictions more. Even so, the ITLOS could not consolidate the *Swordfish Cases*. Others like the WTO and the ICJ do not have extra-jurisdictional connecting processes, making multiple proceedings between jurisdictions, particularly involving ad hoc processes that are difficult to manage.

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983 Article 8 (5) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and the Slovak Federal Republic, adopted on 29 April 1991.
984 Article 10, International Chamber of Commerce Arbitration Rules, 1 March 2017.
985 *Lauder* (n 850) para 11.

Meanwhile, Article 9 of the DSU attempts to accommodate multiple complaints within the WTO jurisdiction and allows a single panel to examine complaints whenever feasible.[986] From a textualist perspective, stating that the panel 'may be established' upon members agreeing entails a dispute settlement body does not have the complete latitude to exercise discretion to consolidate. So, even if the dispute is within the trade regime involving different competing proceedings, a dispute settlement body does not have the full discretionary powers to consolidate without consent or an agreement between the parties.

Consolidating parallel proceedings is not an issue. The problem arises when parallel jurisdictions are concerned, which means time, waste and costs involved in obtaining an agreement as observed in the *Soft Wood Lumber Cases.*[987] Even though the consolidation proceedings terminated prematurely, litigation costs could not be avoided, resulting in cost order.[988] Meanwhile, the 'complex structures of NAFTA' with three dispute mechanisms are seen as capable of dealing with the *Softwood Lumber—IV Cases* that allow 'interplay' between NAFTA mechanisms as reflected in Article 2004.[989]

However, the process remains unclear regarding extra-jurisdictional competition between the WTO and other regional mechanisms that have witnessed potential jurisdictional competition against the WTO. Many commentators have contemplated empowering the WTO panels and Appellate Body to apply Regional Trade Agreement mechanisms to resolve jurisdictional disputes between the WTO and RTAs.[990] This was a possibility between the NAFTA XIX mechanism and the WTO in the Softwood Lumber – IV Cases.[991]

Many of these problems identified leading to this suggestion revolve around the regulatory rules and interpretive approaches already discussed in this study.[992]Though still very relevant, they fall short of taking advantage of the interdependences within these approaches. However, all these mechanisms suffocate under the exclusive nature of the WTO-DSB provided for in Article 23 of the DSU that overrides the ability of parallel proceedings' ability to maintain their independence to consolidate interdependently.

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[986] WTO Analytical Index DSU – Article 9 (Jurisprudence).
[987] Joint Order on the Costs of Arbitration and for the Termination of Certain Arbitral Proceedings before the Arbitral Tribunal established under NAFTA art 1126 in *Canfor Corporation v United States of America*; *Tembec et al. v United States of America; and Terminal Forest Products Ltd. v United States of America.*, dated 19 July 2007 (JOC) paras 78–82.
[988] Leonila Guglya, 'The Interplay of International Dispute Resolution Mechanisms: the Softwood Lumber Controversy' [2011] 2 (1) JIDS <https://doi.org/10.1093/jnlids/idq020> accessed 20 September 2019.
[989] Ibid.
[990] Lim and Gao (n 52) 285.
[991] *US — Softwood Lumber IV United States* — Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada (IV) WT/DS257
[992] Ibid.

Interdependent consolidating is challenging as each jurisdiction maintains its independence. It would only be possible if each jurisdiction bifurcates the aspects of the dispute that can be removed from its proceedings to the competing proceeding and vice versa. Otherwise, consolidating parallel proceedings could lead to cross-fertilization, which undermines the independence of each jurisdiction. Without independence, there is no interdependence.

6.2.6 Lack of the Power and Unwillingness to Act *Proprio Motu* Extra Jurisdictionally

Without too much diversion, even though the Court was not directly involved in the case study analysis, a look at how the Court exercises powers *proprio motu* is relevant to provide a base for this discussion. Also, the Court's unlimited subject-matter jurisdiction faces potential competition from other courts and tribunals. In this light, the *Guinea-Bissau v Senegal*[993] arbitral dispute was unilaterally referred to the Court by Guinea-Bissau, even though the Court, upon assessment, declined to exercise its jurisdiction.[994]

The above notwithstanding, it is noted that the Court's powers to act *proprio motu* are not expressly stated within the Statute.[995] However, the Court's ability to act *proprio motu* with respect to its jurisdiction is implied under Article 31(5) of its statute.[996] However, there is no latitude to act *proprio motu* in light of other jurisdictions.

Internally, Article 31(5) allows a bit more latitude to the Court regarding different parties with the 'same interest' to 'be reckoned as one party only'.[997] In the case of overlaps, the Court's jurisprudence, as observed in the *North Sea Continental Shelf Cases.*[998] Meanwhile, Article 30 of the Court's Statute gives the Court the power to set its procedure, even though the Court is reluctant to do so when faced with overlaps.[999]

Other cases in which the Court could have without competition acted *proprio motu* to consolidate the same interest case, even though there was no jurisdictional competition as seen in the *South West Africa Cases*.[1000] In 1962 and 1966, Ethiopia and Liberia brought an action against South Africa for the continuous occupation of South West Africa, and the

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993 Arbitral Award of 31 July 1989 *(Guinea-Bissau v Senegal)* 1991 ICJ 53.
994 Shany (n 5) 31.
995 R.C. Lawson, 'The Problem of the Compulsory Jurisdiction of the World Court' [1952] 46 AJIL 234 - 238, and 219, 224 and 227.
996 Allows the Court to act without the request of a party, but of its own volition implied under Article 31(5) of the Court.
997 Kolb (n 9) 129.
998 *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*) ICJ Reports 1969 7.
999 Statute of the ICJ (n 58) Article 30(1).
1000 *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa); Second Phase*, ICJ 18 July 1966.

Court allowed them time to agree on nominating a single judge ad hoc, even though Article 31(5) allowed the Court to nominate *proprio motu*.[1001]

Even though the Court's cases were not directly featured amongst the cases studied, these discussions highlight similarities with other institutional mechanisms like the ITLOS, that have such powers under UNCLOS Article 294 and Article 96(1)(3)(5) of the rules.[1002] Albeit internally, this highlights the limitations of courts and tribunals in dealing with issues out of their jurisdictional boundaries. So, despite these powers to act *proprio moto*, the practice is limited to internal conflicts involving different parties with the same interest against a common defendant. Extra-jurisdictionally gaps need addressing with the theoretical framework of binary oppositions postulated in this study. Meanwhile, the following section summarises the deconstruction of the binary opposing jurisdictions to understand more of the disorder and why it was essential to deconstruct and retain jurisdictional distinctions and maintain integrity and authority before setting up together through comity.

6.3 The Effect of Not Deconstructing the Binary Opposing Jurisdictions

In chapter three, binary oppositions and deconstruction were discussed as subfields of structuralism, constituting the theoretical phase of the methodological steps. It is important to recall how these are employed to complete the theoretical phase of the study before fully engaging comity to complete the practical phase to resolve the conflict. As discussed in the previous chapter, by default, overlapping, competing, or conflicting jurisdictions are binary opposing in nature. They remain dormant until the regulatory rules are triggered against them with strict application of the triple identity criteria. If the rules successfully resolve the conflict, the other is retained as preclusion is achieved, and the binary opposing jurisdictions are prevented from interacting. Consequently, no relationships get formed.

However, when the rules fail to preclude, the parallel jurisdictions tend to interact and form disorderly relationships. Of course, when rules meant to maintain order fail, disorder and indeterminacy occur and must be fixed. Disorder and indeterminacy affect the integrity and authority of IL as jurisdictional distinctions get undermined. In this situation, deconstruction steps in to restructure and differentiate the competing jurisdictions into their distinct state, which comes with jurisdictional independence. With distinct and independent jurisdictions, interdependent interactions and relationships are formed with the discretionary use of comity.

[1001] Kolb (n 9) 129.

[1002] Article 294 of UNCLOS and Article 96(1)(3)(5) of its Rules allow the court to act *Proprio Motu* with respect to its jurisdiction See -Rules of the Tribunals Adopted on 28 October 1997 (amended on 15 March and 21 September 2001, on 17 March 2009, on 25 September 2018 and on 25 September 2020)

Without deconstructing, the competing binary opposing jurisdictions will lose their distinctive character, and the entire system will suffer, as it is often said, differentiate or die in market competition.[1003] Borrowing from Jack Trout's and Steve Rivkin's concept of 'differentiate or die' illustrates the importance of making competing market products stand out within a competitive market environment or die.[1004] This idea is not limited to market competition. For the sake of emphasis, 'differentiate or die' is applicable in all fields where there is competition, be it in science or the arts. Even in disciplines like Biology, 'differentiate or die' has been used to illustrate the importance of separate disorderly blood cells without which fatalities might occur.[1005] Meanwhile, differentiation was applied by the ILC Study Group to distinguish between two types of special law or jurisdictions.[1006][with added emphasis]. There is a need to differentiate the jurisdictions and keep them distinct. Otherwise, the disorder that ensues when the regulatory rules fail to preclude harms the integrity and authority of their judicial function and that of the entire international legal order.

So, without differentiating to deconstruct binary opposing and competing jurisdictions, the jurisdictions suffer and cold lose their judicial function and become extinct, reflective of 'differentiate or die'. Since the start of the international system, from the days of the PCIJ, several ICTs have become extinct by losing their judicial function and through competition.[1007] For example, the Upper Silesia Arbitral Tribunal that became extinct in 1937 faced a lot of competition against the PCIJ, as observed *Chorzow factor case* and the *Certain German cases*.[1008] As also observed in this research, the tribunal struggled against the PCIJ, which was very reluctant in allowing the tribunal the opportunity to decide issues within its competence, overlapping with the Court. The tribunal finally became extinct. While many other factors could have contributed to the Upper Silesia Tribunal's extinction, it certainly would not have survived the clashes with the PCIJ that continuously undermined its integrity and authority. Its judicial function could not be kept distinction or precluded from the PCIJ, which continuously undermined it. The tribunal became extinct in 1937.

1003 See Jack Trout and Steve Rivkin, 'Differentiate or Die: Survival in Our Era of Killer Competition', in Rhiema Acosta [2002] Vol 9 (4) Quality Management Journal, 75-76.
1004 Ibid.
1005 Toshiaki Kawakami, 'Differentiate or die!' Nature Immunology [2016] Vol 17 (9) News and Views, 1007 -1008.
1006 See ILC Report (n 35) para 55
1007 See Cesare PR Romano, 'The International Judiciary in Context: A Synoptic Chart' 2014 via http://cesareromano.com/wp-content/uploads/2015/06/synop_c4.pdf last accessed 5 May 2021.
1008 *Certain German Interests in Polish Upper Silesia (Preliminary Objections)*, PCIJ Series A. No 6, Judgment, 25 August 1925, page 7.

So, to complete the theoretical phase, deconstruction reverses the disorderly and indeterminate binary opposing jurisdictions to more orderly, determinate, and distinct jurisdictions. This completes the theoretical phase and the structure of interdependence. With the theoretical phase complete, the practical phase re-engages with comity to resolve the jurisdictional conflicts completely.

6.4 Comity Driven Remedies to Complete the Structural Framework

Comity by its characteristics is not an isolated, independent or stand-alone remedy to jurisdictional relationship problems. It engages other tools like the regulatory rules - *lis pendens, res judicata* and *electa una via.*[1009] Hence, an indirect remedy that inspires other regulatory mechanisms.[1010] For example, 'in the spirit of comity' *lis pendens* achieved suspension in the *MOX Plant*[1011] and the *SPP v Egypt cases.*[1012] Meanwhile, those accessed directly, amongst others - exclusivity through jurisdiction clauses like Article 23 of the WTO-DSU, Article 344 of the TFEU, which constraints access to other jurisdictions.[1013] Another example is the preferential jurisdiction clause, which prescribes a specific forum in the event of a jurisdictional dispute.[1014] Such as Article 189(4)(c) of the EU – Chile Free Trade Agreement.[1015] Another example is a preferential jurisdiction clause seen in Articles 2005(3) and 4 of NAFTA, allowing parties to exclude other jurisdictions and request exclusivity of NAFTA jurisdiction.[1016] Also, subsidiarity or subsidiary jurisdiction such as Article 17 of the Rome Statute of the ICC. It precludes the ICC at first instance unless the state is unwilling or unable to investigate and prosecute, which is commonly known as complementarity.[1017] Salles describes these approaches as models of jurisdictional relationships.[1018] Some of these models collaborate like comity, similar to what Salles describes as aggregation.[1019]

Like comity, the aggregation techniques collaborate with some direct models like bifurcation, solidarity, preference or exclusivity.[1020] However, comity follows a three-step approach, whereas aggregation follows a two-pronged path regardless of jurisdictional distinctions. Hence the comity based approaches are developed in light of distinct jurisdictions,

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[1009] See Luiz Edwardo Salles, 'Jurisdiction' in Research Handbook on International Courts and Tribunals (Edward Edgar 2017) 262 - 271.
[1010] Ibid 271
[1011] *The MOX Plant Case (n 54)* para 5.
[1012] *SPP V Egypt* (n 70) para 84.
[1013] Salles (n 1009) 265.
[1014] Ibid.
[1015] Ibid; EU – Chile Comprehensive Free Trade Agreement, 30 December 2002.
[1016] Salles (n 1012) 265.
[1017] Ibid 266; Articles 280 -282 of the United Nations Convention on the Law of the Sea gives preference to other jurisdictions and comes in as a last resort, similar to complementarity.
[1018] Salles (n 1009) 262.
[1019] Ibid 268.
[1020] Ibid.

deconstructed from overlapping binary opposing jurisdictions. As such, the following section shall examine the need to subject-matters between distinct jurisdictions and the use of judges arbitrators as experts. This is done alongside reassigning subject-matters into categories of heads of claims so that judges and arbitrators can be easily assigned across competing jurisdictions as a form of delegating or sharing responsibilities. This two approaches would address all the issues identified from the case studies above and the original problems identified in problem analysis phasis of this study in chapter.

6.4.1 Delegation of and Categorisation of Subject-Matters between ICTs

The notion of delegation, like any other comity-driven approach, to finally resolve jurisdictional conflicts, the idea of delegation goes a little further than merely apportioning the different heads of claims into various jurisdictions. It requires some form of categorisation of disputed subject matters or heads of claims under different headings. Karen Alter has analysed the delegation between domestic courts and ICTs, categorising the different ICTs domestic courts can delegate.[1021] Before delving into this study's delegation structure, it suffices to make a few remarks about Alter's delegation structure.

Even though Alter's relationship structure of delegation is unidirectional - from domestic to ICTs only, her idea of categorisation of 'impressionistic classifications' of the relevant ICTs is a significant take home. She categorises ICTs into the different political roles ICTs play in the political system. While Albeit skirted around at the time and describing her categorisation as 'impressionistic classifications', she identified four categories under which states can delegate. In the first category, she places the ECJ, ECHR, IACHR, ICJ and ITLOS under International Constitutional Courts.[1022] ECJ/ECFI, ITLOS, ITLOS(Sea Bed Authority), and NAFTA Chapter 19) under the second category as International Administrative Courts.[1023] WTO, ECJ, ITLOS, EFTA, OAPEC, NAFTA, EFTA, PCA, CACJ, ICJ under the third Category as International Dispute Resolution Bodies. And finally, the ICC, ITFY and ITFR under the fourth category as International Criminal Courts.[1024] This categorisation has been maintained in her recent work, *The New Terrain of International Law* has not changed,[1025] , which suggests that her earlier delegation structure was not mere 'impressionistic'. This has now crystalised into a delegation structure, enhancing the fact that categorisation is relevant to delegation. It is worthy to note that there could be many other categories depending on

[1021] Karen Alter, 'Delegation to International Courts: Self-Binding vs. Other-Binding Delegation' [2008] 71(1) Northwestern University Journal of Law and Contemporary Problems 37 -76.
[1022] Ibid.
[1023] Ibid.
[1024] Ibid.
[1025] Karen J Alter, The New Terrain of International Law, Courts, Politics, Rights (PUP, Princeton 2014) 246

the purpose of delegation. With regards to heads of claims, it is unlike that parallel proceedings would be faced with an inexhaustive lift of issues constituting different heads of claims, making categorisation unnecessarily complex.

However, Alter's delegation structure looks like an extended version of complementarity where the domestic systems are unable or unwilling to exercise their judiciary function fully. Therefore, referring to ICTs because domestic political structures cannot control them. While self-contained regimes and exclusivity and its risk of fragmenting the international system appear as 'set on stone', delegating between competing ICTs seems unthinkable, which could justify why Alter decided to skirt around and was careful not to overstate her work. Nevertheless, this form of delegation is not of great help to this study, even though the idea of categorisation and delegation remains plausible.

Alter's idea of delegating is influential in this study. It can be restructured to be driven by comity if it flows mutually between different ICTs and is categorised under different heads of claims. Delegating between ICTs under an administrative structure similar to ICSID and PCA would maintain jurisdictional distinctions and create an interface for disputes with multiple heads of claims to be mapped into the different categories that can best examine the issues. ICTs are already talking amongst themselves, and doing this under a formally categorised structure can manage overlapping jurisdictional conflicts without compromising the integrity and authority of IL. Through a formalised structure, judges and experts can also be factored in to deal with overlapping and conflicting jurisdictions issues. Nevertheless, the approach is not oblivious to issues of parties consent which are dealt with in the next section under flexibility of the ICTs ability to act *proprio motu*.

6.4.2 The Use of Judges as Experts in Hybrid Proceedings

The exchange of judges and arbitrators across binary opposing jurisdictions is a form of trans-jurisdictional communication and inter-judicial dialogue amongst judges and arbitrators. It requires one court or tribunal in parallel proceedings to be moved to a competing jurisdiction when preclusion has failed to resolve the jurisdictional conflict. Using judges across jurisdictions is not a new phenomenon in international legal discourse. Cesare P.R Romano had observed a 'series of *modi vivindi* - informal and non-codified interactions between judges' since 2007.[1026] Together with Daniel Terries and Leigh Swigart, they observed what he described as 'professional international judges' who move from

[1026] Casare PR Romano (n 7).

'international court to international court'.[1027] Their research which culminated in the publication of *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* involves a series of interviews with international judges shows appetite in moving and hearing cases across different jurisdictions.

Despite this flexibility and ability to act *proprio motu*, some courts and tribunals still rely on parties consenting and do not readily exercise discretion to act in the interest of justice in different situations, including the calling or appointment of experts during proceedings. Article 48 of the Statute of the Court and Rules of Court Article 62(2) allow wide powers to act *proprio motu* to collect evidence.[1028] It makes very minimal use of these powers.[1029] These are vast powers, including calling experts as per Articles 44(5), 50 and 51 of the Statute of the Court.[1030] However, it should be noted that other judges and arbitrators would certainly not find it appealing to be brought under the same category as ordinary experts. Particularly in a case in which they started deliberating proceedings parallel with proceedings in a competing jurisdiction.

However, the idea was to highlight the wide powers of the Court, which do not exclude communicating with other courts and tribunals and using arbitrators and judges as experts for which the Court has a minimal appetite. Despite this wide power to act *proprio motu,* to call experts beyond Articles 44(5), 50 and 51, the Court has only ever appointed experts in the *Corfu Channel case*[1031] and the *Gulf of Maine Case*[1032] based on the Special Agreement between the parties.[1033] Meanwhile, parties have consistently called on the Court to appoint independent experts, which has consistently declined. Thus, facing criticism as was observed in the *Pulp Mills case,*[1034] several judges criticised the Court's refusal 'and called for greater focus in fact-finding'.[1035] There has been a recurrent trend of criticism in many cases, particularly when requested by the parties, which the Court has declined.[1036] This suggests a

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1027 Ibid; See Daniel Terris, et al., The International Judge: An Introduction to the Men and Women Who Decide the World's Cases (OUP Oxford 2007).
1028 Statute of the ICJ (n 85) Article 48 and Article 62(2) Rules of the Court.
1029 Anna Riddell, 'Evidence, Fact-Finding, and Experts' in Cesare PR Romano, Karen Alter, Yuval Shany, The Oxford Handbook of International Adjudication (OUP, Oxford 2014) 855.
1030 Articles 44(5) and 51 ICJ Statute.
1031 *Corfu Channel (United Kingdom v. Albania)* (Compensation) [1949] ICJ. Rep. 244.
1032 *Delimitation of the Maritime Boundary in the Gulf of Main Area (Canada/United States of America) (Appointment of Expert, Order of March 30, 1984*) [19844] ICJ Reports 165.
1033 Riddell (n 988) 857.
1034 *Case concerning Pulp Mills on the River Uruguay,* Dissenting Opinion of ad hoc Judge Vinuesa note 11, para. 95.
1035 Riddell (n 988) 857.
1036 Ibid; See *Temple of Preach Vihear (Cambodia v Thailand*) (dissenting Opinion of Judge Wellington Koo) [1962] ICJ Rep 100; Case Concerning Kasikili/Sedudu Island (Botswana/Namibia) (Separate Opinion of Judge Oda) [1999] ICJ Rep 1118-19, at para. 6; *Military and Paramilitary Activities in and*

gap and high probability that putting forward judges and arbitrators as experts through aggregation will address cross-jurisdiction competition as a practical application of the theoretical framework.

For the UNCLOS and ITLOS related tribunals, Article 289 allows the appointment of experts to sit with the tribunal.[1037]On the part of ad hoc tribunals, Article 29 of the UNCITRAL Arbitral Rules makes provision for the appointment of one or more independent experts upon consultation with the parties.[1038] On the part of the WTO, panels and AB are also allowed to seek information and technical advice from individuals or a body deemed appropriate in Article 13(1) of the DSU.[1039]

While Article 22 of the ICSID Convention also allows for expert witnesses[1040], it has been observed that the UNCITRAL and ICSID Arbitration Rules are lacking in detail. As a result, arbitrators always turn to the International Bar Association (IBA) Rules.[1041] According to Khodykin Mulcahy, 'the role of an expert witness (or simply an "expert") is to opine on specialist matters beyond the expertise of the tribunal'.[1042] This emphasises the type of expert knowledge, whether legal, technical/scientific or valuation/quantum, as applied in the *CMC v Mozambique arbitration*.[1043] So, this exposes a gap that is fillable with the use of the theoretical framework of moving judges and arbitrators across jurisdictions as submitted in this study.

Generally speaking, the idea of using judges and arbitrators as experts is not expected to overwhelm judges or cause any concerns in terms of losing credibility and legitimacy having to act as experts in other jurisdictions in areas of their competence. Terris et al. and Romona have proven in their 2007 and 2013 studies, as stated above, that judges are pretty flexible in this regard.[1044] There is no expectation that the trend of professional international judges identified in 2007 is losing morale, personality or status or any form of anti-climax in the trend. With the continuous proliferation of ITC and fragmentation of international law, the trend is continuing. Being able to function in two jurisdictions as experts should boost the

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Against Nicaragua (Nicaragua v. United States of America) (Dissenting Opinion of Judge Schwebel) [1984] ICJ Rep 323, at para. 134 courtesy of Riddell (n 988) 857.

[1037] Article 289 of UNCLOS.

[1038] Riddle (n 988) 856.

[1039] Article 31(1) of the DSU, Annex 2 of the WTO Agreement, 1994.

[1040] Article 22 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted on 18 March 1965.

[1041] Roman Khodykin and Carol Mulcahy, *'Article 5: Party-Appointed Experts' in Nichalas Fletcher,* A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, 2019, para 8.70 < https://jusmundi.com/en/document/wiki/en-expert-witness> accessed 10 October 2020.

[1042] Ibid.

[1043] *CMC Africa Austral, LDA, CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., and CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa v. Republic of Mozambique* ICSID Case No. ARB/17/23

[1044] Terris et al. (n) and Romano (n 7).

professional standing of judges and arbitrators. It should be a welcome approach that can help showcase the work of judges besides deciding cases. Many judges and arbitrators do academic publications, which brings them under the umbrella of Article 38(1)(d) of the Statute of the Court, making them a source of international law. Article 38(1)(d) talks of '[…] the teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of the rules of law'.[1045] If this is read in its broadest sense, judges and arbitrators will fall within this category of experts. It will not be unusual having to act as experts in another court or tribunal on a specific subject-matter in jurisdictional conflicts.

Renowned publicists like Ian Brownlie QC, who was lead counsel for Nicaragua in the *Nicaragua* v *US* case,[1046] later became one of the arbitrators in the *CME v Czech Republic* proceedings.[1047] Meanwhile, Professor W. Michael Reisman was an arbitrator in the OSPAR arbitral proceedings.[1048] This is a common practice as judges are also very involved in academic writing, contributing to Article 38(1)(d) of the Statute of the Court as renowned publicists.[1049] Dean Spielmann, in *Human Rights Case Law in Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities,* provide examples of judges of one jurisdiction performing in other jurisdictions.[1050] The case of Lord McNair, a judge of the ICJ and the ECHR Prof. Georges Abi-Saab served as ad hoc ICJ judge and an ICTY judge, and later as a member of the WTO Appellate Body. Mohamed Shahabuddeen served as an ICJ judge and later as a member of the ICTY/ICTR Appellate Chamber, while Thomas Buergenthal served on the IACHR and the Court The case of Lord McNair, a judge of the ICJ and the ECHR Prof. Georges Abi-Saab served as ad hoc ICJ judge and an ICTY judge, and later as a member of the WTO Appellate Body. Mohamed Shahabuddeen served as an ICJ judge and later as a member of the ICTY/ICTR Appellate Chamber, while Thomas Buergenthal served on the IACHR and the Court.[1051] Although political influences might raise conflict of interest concerns, the fact that this is working suggests that the overall value of using judges as

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[1045] Lawrence R Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supra-national Adjudication' [1997] 107 YILJ 273, 372-3.

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[1047] *CME v Czech Republic* (n 855) Separate Opinion of Ian Brownlie, C.B.E., Q.C. on the Issues at Quantum.

[1048] *Ireland v. United Kingdom* (OSPAR Arbitration) PCA Case No. 2001-03.

[1049] Statute of the ICJ (n 85)

[1050] Dean Spielmann 'Human Rights Case Law in Strasbourg and Luxembourg Courts: Conflicts, inconsistencies and complementarities' in Philip Alston, The EU and Human Rights (OUP, Oxford 1999) 757 - 780.

[1051] Shany (n 5) 280.

experts, following stated guidelines override any of such concerns.[1052] After all, IL and international politics are inseparable and often complement each other.

Even though some of these cases were not overlapping or conflicting jurisdictions, the examples show that there is a practice of using judges and arbitrators as experts. It is also worthy to note that the notion of permanency of an ICT refers to whether judges are sitting permanently and deciding all cases as the ICJ or are appointed *ad hoc* on a case by case basis as it applies to arbitration tribunals.[1053] Permanency is nothing to do with the name of the court or tribunal but applies to those sitting on the bench.[1054] This illustrates dynamism in how judges function, which is very useful in international adjudication. So, moving judges around to find a reasonable resolution in parallel proceedings when suspending one proceeding would not be an impracticable suggestion. This also shows that if judges of a suspended parallel proceeding were to refuse such roles, other judges with competence on the subject-matter from a broader spectrum could still fill in. However, the judges and arbitrators of the suspended proceedings should be given 'the right of first refusal' wherein they have to refuse to act as experts. Unless they refuse, other experts agreed by both parties should not be consulted.

The process of using judges and arbitrators as experts may raise questions under *The Burgh House Principles on The Independence of The International Judiciary*,[1055] In particular, principle 9 states that 'judges shall not serve as agents, counsel, adviser, advocate, expert, or any other capacity for one of the parties. Or, as a member of a national or international court or other dispute settlement body which has considered the subject-matter of the dispute'.[1056] It goes further in principle 9.2 to state that 'judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality'.[1057] However, it must be stated that this will only apply in the case where parallel proceedings have begun and gone through the regulatory rules with the application of the triple identity test.

[1052] See Article 1, IBA Rules on the Taking of Evidence in International Arbitration adopted by a resolution of the IBA Council on 29 May 2010.
[1053] Cesare P.R. Romano, 'Taxonomy of International Rule of Law Institutions' [2011] 2 (1) Journal of Int'l Dispute Settlement 241 – 277.
[1054] Ibid
[1055] Philippe Sands, Campbell McLachlan and Ruth Mackenzie, The Burgh House Principles on The Independence of The International Judiciary [2005] 4 LPICT 247 - 260. The ILA designed the Burgh House Principles on the practice and procedure of ICTs. This is in association with the Project on International Courts and Tribunals are incorporated into the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors Practitioners Guide No.1, Published by the Intl. Com. of Juries, Geneva, 2007.
[1056] Intl. Com. of Juries Principle 9.1.
[1057] Ibid Principle 9.2.

6.4.3 Moving Subject-Matter across Competing Jurisdictions Together with Experts

The idea of moving subject-matter is basically about ensuring that the actual dispute or merits of the parallel proceedings are not left behind when the judges are moved across jurisdictions. Otherwise, it will be pointless moving judges across jurisdictions when there are no cases to determine with such a remedy to resolve the jurisdictional conflict. In other words, it would be a question of putting the cart before the horse. Salles has noted that many aspects of the parallel jurisdictions integrated or configured into a single or partial proceeding constitute aggregation.[1058] So, allocating subject-matter across jurisdictions squarely 'fits the frame.'

So, this gives rise to a hybrid case of different subject-matters with judges and arbitrators acting as experts on a specific subject-matter and switching to judges and arbitrators when their specific expert area is not the subject of proceedings. It is done without moving the disputes and the judges as experts together. Each process will appear as a newly constituted process with new judges who may need to start afresh with the risk of being treated as a consolidated process. But as part of an aggregated process, time and resource waste will be mitigated.

Moving subject-matter across jurisdictions is a form of allocation advocated by Lim and Gao, who focus on the WTO and RTAs jurisdictional conflicts. They allow the application of rules of one jurisdiction by another.[1059] They also highlight that the integration of norm and authority connects issues and the institution with conceptual interdependence between the two.[1060] In this type of interdependence, they advocate a model where norms from one institution are used by the other institution and vice versa, with the WTO and NAFTA being the case.[1061] While the idea is to allocate rules of one jurisdiction at the disposal of another, this study fears there is a risk of a merger or some cross-fertilization that could undermine the independence of each jurisdiction. As such, rather than allocating the rules of one jurisdiction to the other, the subject-matter moves in a situation of conflicting jurisdiction. With the examples of WTO to apply the RTA Rules like those with NAFTA and MERCUSOR, the subject-matter or dispute itself, the issues might go missing as more attention gets paid to the rules.

So, the subject-matter is allocated along with the judge or arbitrator to another jurisdiction by aggregation. However, this is a much simpler form of allocation and is preferred for this

[1058] Salles (n 69) 284.
[1059] Lim and Gao (n 52) 284 - 285.
[1060] Ibid 285.
[1061] Ibid.

study. The subject-matter moves with the experts as they get allocated across jurisdictions and not moved independently. There is the risk of the expert not having work to do if moved across separately without the issues to resolve and vice versa. Without the expert to deal with that subject-matter in the hybrid proceeding, the subject-matter may become unattended or cross-fertilised, which is an undesired outcome. Despite the suspension of proceedings in one jurisdiction favouring another, jurisdictional distinctions are maintained following the deconstruction. Without jurisdictional distinction, interdependence gets compromised alongside the integrity and authority of international law.

6.5 Considerations for Reform in a Number of Key Areas

While the above analyses portray comity as a meta-principle – a solution in its own right on the one hand and a driver of the solutions on the other more still needs to be done to reform and facilitate how overlapping jurisdictional conflicts are addressed. That is, from a general IL perspective. The following sections discuss and recommend measures, which are non-exhaustive of the reforms needed in this area, but more in line with the issues in this study. So, reforming how consent is obtained from parties, retained and applied needs re-examination. Finally, the case is made for the ILC to reconsider institutional fragmentation involving ICTs, side-lined by the Study Group in 2006.

6.5.1 Reforming the Over Reliance on Party Consent

Arguably the latitude in international instruments, as seen in Article 31(5) of the Statute of the Court, grant power to decide in case of doubt in situations of 'same interest' between several parties.[1062] ICTs do not follow the precedent, which tested the operative function of Article 31(5) in the *North Sea Continental Shelf case*[1063] against Germany, where Denmark and the Netherlands were found to have the same interest and were joined.[1064]Similarly, in the *South West Africa cases*[1065] against South Africa, Ethiopia and Liberia were found to have the same interest, and the cases were also joined.[1066]

Therefore, these situations can be replicated by other ICTs in competing parallel proceedings beginning with dispute resolution clauses making provisions for doubtful situations. 'Doubt' under Article 31 can be read quite broadly in anticipation of one party resisting and pursuing a parallel proceeding, which will create doubt, and a gap for ICTs acting *proprio motu* rather than requesting consent from the parties in all circumstances. However, some FTAs have

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[1062] Statute of the ICJ (n) Article 31(5).
[1063] *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, Judgment, 20 February 1969.
[1064] Kolb (n 9) 129.
[1065] *South West Africa Cases (Ethiopia v. Union of South Africa; Liberia v. Union of South Africa*), Order of 20 May 1961: I.C. J. Reports 1961, p. 13.
[1066] Kolb (n) 129.

started including dispute resolution clauses to deal with competition like the EU-Vietnam FTA[1067] and EU-South Korea FTA[1068]can also help raise a presumption of doubt. Particularly where an FTA is silent, court or ICT to make a presumption of doubt and act *propio motu*. However, where two ICTs agree, it would be easier to resolve competing or parallel proceedings.

Nevertheless, the question to answer in this section is reforming how consent is obtained or avoided when dealing with competing jurisdictions. BITs and FTAs can replicate these examples in anticipation of such situations. Meanwhile, the ILC can extend its competence towards the progressive development of the law in this area. Recalling that the work of the Study Group on Fragmentation ignored the question of competition and institutional fragmentation, with many commentators questioning whether Koskenniemi betrayed his scholarship,[1069] there is still an appetite for this sort of reform. Suppose the ILC were to take up work in this area, avenues would be created where other ICTs could act confidently without party consent in cases of conflicting and competing jurisdictions. If codified, it will reduce the level of reluctance on the part of ICTs acting *proprio motu*. Alternatively, it would be plausible to codify some of the non-codified and informal *modi vivendi* that international judges have applied to regulate relations with other ICTs, such as strategic cooperation.[1070] However, even though not tested or contested, one obstacle causing reluctance could be the fear of ICT going against Article 95 of the Charter, allowing states the freedom to forum shop. Article 95 states:

> Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future. [1071]

So, the ILC is a bit restricted in this regard, mainly if it takes some form of negative *modus vivendi*. However, Article 95 of the Charter does not stand on the path of the ILC if it wants to codify institutional fragmentation to provide an interface between ICTs. This adds to the general reluctance within the ICJ regime to acknowledge and deal with jurisdictional competition or conflict cases involving other ICTs.[1072]

However, mechanisms for ad hoc tribunals, particularly the ICSID and UNCITRAL Rules, have been revising and reforming through which the issue can be slotted for consideration.

[1067] EU-Vietnam FTA (n 159).
[1068] EU-South Korea FTA (n 161).
[1069] See Sean D. Murphy, 'Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project' [2013] Temple International & Comparative Law Journal.
[1070] See Romano (7).
[1071] UN Charter (n 84).
[1072] Shany (n 5) 31.

The UNCITRAL Rules on Arbitration were revised in 2010, while the ICSID Rules were last revised in 2018 and still have the potential for further revision. This shows that these mechanisms are quite accommodating when it comes to reform and could include providing ad hoc tribunal arbitrators with the opportunity to communicate with competing for parallel proceedings. With such powers in the ICSID and UNCITRAL Rules, arbitrators acting *proprio motu* could aggregate without being impeded by lack of party consent to interact beyond jurisdictional boundaries.

Reform could make provisions for a clause that gives arbitrators in parallel proceedings the power to communicate with binary opposing and conflicting jurisdictions once a conflict emerges. Such consent could be obtained when agreements embedded with conflict clauses or provisions are finalised, rather than seeking consent only when conflict arises. This would have resolved cases like the *Swordfish* dispute between WTO and ITLOS had the DSU and UNCLOS, respectively, allowed. Therefore, it would utilise the above methods to resolve the dispute, saving cost and resources from wasting like the protracted S*wordfish* dispute for over a decade.

Regarding institutional mechanisms or provisions for jurisdictional protection, the WTO needs to recognise that with its exclusive powers under DSU Article 23, a similar *Swordfish* scenario against the ITLOS could emerge against other regimes. For example, human rights, crime, environment or any other specialist area will require expert advice beyond its jurisdiction. Without addressing the problem and making provision for extra-jurisdictional communication, such a problem is likely to re-occur, leading to the kind of stalemate witnessed in the *Swordfish* dispute. So, because the judicial bodies were unable to communicate since there was no contingency arrangement beyond the parties not consenting, there was no progress. As already stated, the ITLOS is very accommodating and prioritises other institutions, as seen in cases like the *MOX Plant* with the help of comity, which made it feasible.

The need for expressly written jurisdictional clauses has been around since the days of the PCIJ involving cases like the *Factory of Chorzow case* in which the Court resisted declining jurisdiction. There was concern about the presumption of a negative conflict of jurisdiction and considered an [expressly written clause] an exception to its declining jurisdiction.[1073] According to Salles, without such a clause, jurisdictions cannot guarantee that a parallel jurisdiction would effectively match its decision as judiciary bodies would not readily give up their competence.[1074] Hence, when overlaps, conflict or parallel proceedings occur,

[1073] Salles (n 199) 268.
[1074] Ibid.

jurisdictions do not often decline proceedings or allow their competences to give way. unless by way of a clause 'sufficiently clear to prevent the possibility of a negative conflict of jurisdiction'.[1075]

However, conflict clauses do not expressly state how jurisdictions communicate with external jurisdictions when subject-matters do not allow regulatory rules to decline jurisdiction. Reforms do not need to specify what is included in international agreements such as BITs or any agreements that can provide the basis of arbitration. For the vast number of existing conventions, treaties or dispute settlement mechanisms with exclusive jurisdiction clauses, all that is needed is more latitude for jurisdictions to communicate without hindrances. Particularly when parallel proceedings have commenced and the competing jurisdictions are fully aware of the binary opposing jurisdiction, the real risk of controversial decisions is imminent.

Consideration is given to inter-court communication accorded in Principle 5.2 of the ILA 'Principles on Declining and Referring Jurisdiction in Civil and Commercial Litigation'.[1076] This prescribes a means of breaking down barriers between adjudicators faced with the same dispute in their independent jurisdictions and will be a straightforward means of mitigating overlapping jurisdictions.[1077] However, it is insufficient to deal with conflicts that do not fulfil the triple identity test to enable suspension and referral based on the regulatory rules. It also prioritises party choice of forum according to Principle 3 on jurisdictional clauses, provided there are no exclusivity clauses, which pave the way for the regulatory rules. Meanwhile, Principle 4 on declining jurisdiction based on *lis pendens* and referrals cannot be applied.[1078] The ILA rules are based on declining and referring to *lis pendens*, which is insufficient to deal with parallel proceedings as seen in the case studies where the regulatory rules could not apply.

As guidance to be recommended, consideration has also been given to the influence the ILA Principles have on the Hague Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments.[1079]However, the Convention, even though mainly applicable to domestic and private IL jurisdictions, could also impact public IL jurisdictions so, because there have been situations dating back to the *Mavrommatis case* where states have taken over

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[1075] *Chorzow Case* (n 511).
[1076] See McLachlan (n 557) 440 for "The Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Litigation", Res. 1/2000, (2000) 69 ILA Rep. Conf. 13; Report (2000), 69 ILA Rep, Conf. 137
[1077] McLachlan (n 557) 449.
[1078] Ibid 411 - 412.
[1079] Hague Conference on Private International Law, 'Enforcement of Judgment, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters' (Nygh and Pocar, Rapporteurs), Prel. Doc. No. 11, 2000, 89 in McLachLan (730) 451.

private IL disputes.[1080]This Convention would help regulate the connecting factors even though the relationship between private and public IL has always been controversial because of the source of private IL rules being domestic courts.[1081]That notwithstanding, such rules have often applied as general principles, and so would the Convention.

6.5.2 ILC Re-commissioning a Study on Institutional Fragmentation and Comity

Based on the findings in this study, the ILC may have to re-examine the question of fragmentation with interest in the role of comity and the relationship between ICTs. This work may lead the Commission's reconsider its position regarding comity. The Commission denied comity status in its 2017 Study on the identification of customary international law from its draft conclusions.[1082] The case for comity is simple. If an authoritative body like the ILC endorses it rather than discards it as its 2016 study, then the academic language will change. Like the 2006 work, it will restore the credibility, integrity and authority of international law at the expense of the regulatory rules.

To support this argument, in a recent judicial review case involving the UK government with potential parallel proceedings in the courts in the devolved jurisdictions, the court of appeal emphasised the need for comity between the three jurisdictions of the UK in public law cases. Without a high Court in IL to play a similar raw as the UK Court of Appeal or Supreme Court, the ILC can mimic the role of a superior body and can draft a framework for comity's use. For the ILC to take up work of this nature, other treaty bodies responsible for making rules to manage international judicial mechanisms like the UNCITRAL, ICSID will take the queue. Others like the ILA and International Chamber of Commerce will also follow. Taking advantage of the theoretical framework and trying to formalise some of the practical steps in this study to overcome the challenges of overlapping jurisdictions will set the stage for new ways of looking at fragmentation.

The three-step approach inserts a theoretical step between the failure to preclude and comity as an innovative approach. It brings to light what happens in the background of structuralist studies with binary oppositions and deconstruction. This follows the formalistic interpretation of overlapping jurisdictions and strict application of jurisdictional regulatory rules. Thus, giving rise to disorder and indeterminacy. Instead of juxtaposing jurisdictional

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[1080] See *Mavrommatis* (n 677).

[1081] See Alex Mills, 'Connecting Public and Private International Law' in V Ruiz Abou-Nigm, K McCall-Smith and D French, Linkages and Boundaries in Private and Public International Law [Hart 2018] SSRN <https://ssrn.com/abstract=3133078> accessed 8 June 2019

[1082] Commentary 9 to Draft Conclusion 9 in the Draft conclusion on identification of customary international law, with commentaries 2018, *Yearbook of the International Law Commission, 2018, vol. II, Part Two.*

and jurisprudential overlaps for fear an overly narrow interpretation will render the regulatory rules obsolete, more studies need to be conducted based on the formalistic approach. As this study has revealed, trying to protect the usefulness of the regulatory rules by delineating overlapping jurisdictions across a vast scope is counter-productive. It diminishes the judicial function of each jurisdiction that must be kept distinct from upholding the integrity and authority of international law. Such an expansive interpretation creates blind spots that overshadow positive interactions and interdependence between international judicial bodies.

Needless to emphasise the authority of the ILC in this study. Without a doubt, if it recommends comity as a solution to overlapping or conflicting parallel proceedings, it will strengthen the use of comity to curb the risk of parallel proceedings that threaten the integrity and authority of international law. It will also provide an opportunity for the ILC to reconsider its disregard of comity in its 2016 work on the identification of customary IL. This study shows that more focus needs to be placed on the relationships that form when regulatory rules trigger binary opposing jurisdictions. Relationships were not the focus of the ILC Study Group on Fragmentation.

So, now is time to reconsider the debate on fragmentation with specific attention on comity and relationships between ICTs because it forms the backbone of interdependence. As mentioned earlier, Hefner's abandoned work should provide a starting point from where the Commission decided to change its syllabus because the method and outcome of the work on the topic did not fall within its codification standard.[1083]However, the Commission acknowledged that the work was within its competence and according to its Statute. However, the argument that the work on institutional fragmentation is not strictly within its 'normal form of codification' is *de minimus*.[1084]It should not be deprived of a study on institutional fragmentation, particularly now that new knowledge is emerging. It is evidenced in this study with reasonable grounds for reconsideration because there is a real risk to the integrity and authority of IL. This is due to the failure of the regulatory rules to preclude jurisdictional conflicts properly.

The chapter has also analysed judiciary institutions' use of experts and the reluctance of judicial institution particularly the ICJ, towards using experts. With this analysis and exposure of this gap, there is a need to develop this aspect further. It will facilitate the application of the theoretical framework, which is done in line with the recommendations in this study for

[1083] See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 731
[1084] Fragmentation of International Law: difficulties arising from the diversification and expansion of international law, Summaries of the Work of the International Law Commission July 2015 via https://legal.un.org/ilc/summaries/1_9.shtml accessed 04 April 2021.

policymakers to consider. Doing this will enhance an appetite for the use of expert witnesses, particularly when judicial institutions are faced with parallel proceedings.

6.6 Conclusion

This chapter has successfully merged theory with practice from the formalistic interpretation of the theoretical framework through observation of practical parallel proceedings, the application of the regulatory rules and the deconstruction of binary opposing jurisdictions to keep them distinct. Thus, allowing each jurisdiction to maintain the integrity of their judicial function for better inter-jurisdictional relationships. Better inter-connectedness leads to inter-jurisdictional communication between independent jurisdictions in which parallel jurisdictions have occurred, allowing judges, arbitrators, and subject-matters to move across jurisdictions. This is through aggregation, allocation and delegation while maintaining the independence of each jurisdiction and making sure proceedings are not crossed-fertilised. Otherwise, there will be no interdependence.

Chapter 7

Review and Final Conclusion

7.1 Introduction

This chapter reviews the entire research process and makes its final conclusions on the main research questions the study set out to address. At the outset, the study undertook a mild revisionist view of the work of the ILC Study Group on fragmentation. The study revealed that the ILC conclusion that fragmentation did not pose a 'serious danger' to the international legal order was inaccurate. The ILC conclusion was based on a narrow syllabus of fragmentation that excluded institutional fragmentation. In any case, there is a danger, which still exists, though the ILC did not seem to think it was severe enough. Overlapping and conflicting binary opposing jurisdictions, requiring the use of regulatory rules, the non-formalistic application of which undermines the integrity and authority of IL result from institutional fragmentation. Against this backdrop, the study engaged the formalistic application of the rules to restore the integrity and authority of IL.

It begins with the presumption that overlapping and conflicting jurisdictions resulting from the fragmentation of IL are dormant binary opposing jurisdictions, activated by the formalistic application of the regulatory rules. Thus, a three-step hybrid methodological approach involving theory and practice emerges. Differentiating the binary opposing jurisdictions through deconstruction constitutes the theoretical phase, which highlights what prevails in structuralist studies though not always stated by scholars. Deconstructing while maintaining jurisdictional distinctions paves the way for comity. Comity completely resolves the jurisdictional conflict practically while maintaining the integrity and authority of IL. This approach is a shift from the practice of compromise with non-formalistic application of the rules. The study has revealed that jurisdictional boundaries disappear when rules are triggered non-formalistically to achieve false preclusion.

However, the formalistic application results in disorder and indeterminacy when the rules fail to preclude jurisdictional conflicts to keep their jurisdictional functions distinct. This is the first methodological step, which does not lead to any type of relationships between binary opposing jurisdictions. With indeterminacy between the binary opposing jurisdictions, engaging deconstruction reverts the jurisdictions into their distinct and independent character. Thus, upholding their integrity and authority completes the second methodological step. With jurisdictional distinctions retained, comity is safely engaged to resolve the jurisdictional conflicts and the third and final methodological step. This approach is a shift from the practice of compromise because of the fear of rendering the rules obsolete.

It is worth clarifying that a reference to methodological steps does not reflect the different chapters through which the research process unfolds. Instead, the three-step methodological approach is embedded in the research process across the various chapters. The most significant manifestation is in chapters five and six, which directly involve the case studies. When the regulatory rules fail to preclude and give rise to indeterminate binary opposing jurisdictions, deconstruction differentiates and maintains jurisdictional distinctions. Thus, paving the way for comity to resolve the conflict between two independent jurisdictions, which results in the structure of interdependence. However, below is a chapter by chapter recap of the research process.

7.2 Recapping the Entire Study and Appreciation of the Defined Objectives

The main task in chapter one was to introduce the entire research project beginning with a general overview and identification of the central problem of undermining jurisdictional distinctions and the threat to the integrity and authority of ICTs. This, as the study revealed, is due to the non-formalistic application of jurisdictional regulatory rules that achieve false preclusion, which undermine the integrity and authority of IL. This results from the non-formalistic application of the regulatory rules. The formalist approach was used, resulting in the theoretical problem dealt with through deconstruction. Meanwhile, the practical problem of finding an interface between overlapping and conflicting jurisdictions was briefly examined, which allowed a complete analysis of the research questions that guided the research process.

The chapter started by examining the evolution of fragmentation, overlapping jurisdictions, and parallel proceedings. The theoretical and practical problems formed the basis of the conceptualisation of the key terms. With the critical terms conceptualised and research methodology defined, constituting theoretical and practical steps alongside comity-based approaches, the study gained the confidence to claim originality as laid down in section 1.1 above. Originality is seen in the methodological step involving deconstruction. Contrarily to Derrida's view, as explained in section 1.2.3 that deconstruction cannot be used as a methodological device, the analysis justified why it can.[1085] The statement of original contribution to research showcases all the innovative ideas from this research that add to scholarship on international legal scholarship.

Chapter two conducted a critical analysis of situations or issues that lead to the non-formalistic application of the regulatory rules and reverting to the formalistic application of overlapping jurisdictions. This is one of the core issues in this research, which leads to

[1085] See Turner (n 32).

compromises that blur jurisdictional distinctions and undermine the integrity and authority of IL. The chapter focused on parallel proceedings as the basis for competition binary opposing jurisdictions and the non-formalistic application of the regulatory rules. This was through a general situation analysis of parallel proceedings, through which most competition between ICTs is manifested. The chapter began by examining the meaning of overlapping jurisdictions and some of the mischaracterisations of the concept by scholars to justify the fear of rendering the regulatory rules obsolete. Thus, justifying the non-formalistic interpretation of the concept. The chapter also analysed the lack of IL's jurisdictional regulatory rules, which explains the reliance on Article 38(1)(c).

The chapter also provided insights into the different approaches international legal scholars have used to address fragmentation and threat to the unity of the international system. In this light, constitutionalisation and systemisation were briefly analysed and concluded as not having any significant contribution to institutional fragmentation. However, categorisation and deductions from Raz, Hart and Kelsen's evaluation of the system question were relevant in understanding IL as a system. A system capable of accommodating new categorisations and new theoretical structures. The principle of systemic integration postulated by the ILC as its toolbox for addressing all fragmentation problems was analysed and concluded as relevant but limited to jurisprudential overlaps. However, other approaches such as inter-judicial dialogue and communication proved relevant and applicable to jurisdictional and jurisprudential overlaps. Dialogue and communication between judges and arbitrators are important for judges being used as experts, as discussed in sections 6.4.2 and 6.4.3 above. Overall, the chapter successfully highlighted the different manifestations and justified the methodological approach engaged in this study.

Chapter Three examined the theoretical foundations of the structure of interdependence by examining structuralism and its subfields - binary oppositions and deconstruction. It also examined indeterminacy, following the failure to preclude after the formalistic application of the rules. Deconstruction projected the idea of differentiation into distinct binary opposing jurisdictions while trying to address the disorder created by the regulatory rules' failure to preclude and retain the integrity and authority of IL. It was also observed that critical legal scholars like Martti Koskenniemi, David Kennedy and others implicitly apply binary oppositions and deconstruction. However, they do not always expressly state this as their theoretical basis. This could be seen in works like *From Apology to Utopia,* The *Structure of International Law*. These significant works facilitate the understanding of binary oppositions as the theoretical basis of the project even without mentioning the words binary opposition and deconstruction. The umbrella term- structure, as in structuralism, is often used. Similar to the

critical analysis in chapter two, this chapter is not one of the methodological steps the research process has unfolded. However, it presents a detailed critical analysis to justify the theoretical positions adopted in this study.

Similarly, chapter four witnessed a critical analysis of the regulatory rules – *lis pendens, res judicata, electa una via* alongside *lex specialis* and *lex posterior*, their nature and legal status. In the absence of IL's jurisdictional regulatory rules, it was essential to carefully assess rules acquired externally under Article 38(1)(c) of the Statute of the Court. The chapter also critically analysed the concept of comity, its nature, characteristics, and legal status. This analysis justified why comity is the right tool to pick up where the regulatory rules fail and produce disorder and indeterminacy rather than preclusion. One significant challenge with comity at the outset was determining whether comity was a political tool at the disposition of judges with the risk of abuse. If this were the case, then comity would not have been a suitable tool to deal with the situation because it will lead back to the status quo. Upon the analysis, the study concluded that even though comity is discretionary and applied flexibly, it is not a political tool in the hands of judges to be abused. This provided security and guaranteed that comity was a safe tool to resolve the conflict where the regulatory rules failed.

In chapter five, the case studies tested the three-step methodological approach against carefully selected overlapping and conflicting jurisdiction cases. There was the strict or formalistic application of the regulatory rules, which did not achieve preclusion. According to the theoretical underpinnings of this study, the failure to preclude triggered the dormant binary opposing jurisdictions into interactive disorder, uncertainty and indeterminacy. This paved the way for deconstruction. In ideal circumstances and current practice, would make compromises to achieve preclusion. However, this study argues that this is false preclusion to keep the binary opposing jurisdictions distinct. Real preclusion maintains the rules' strict application and deconstructs the binary opposing and indeterminate relationships to retain jurisdictional distinctions. These theoretical steps are not visible and assumed as accomplished following the adherence to the regulatory rules and the transition to the application of comity.

As the penultimate chapter, chapter six reviewed the case studies in chapter five, highlighting the problems encountered during the analysis. These additional problems were necessary to measure the strength of the comity-based approaches engaged in precluding and ultimately resolving the jurisdictional conflicts following the failure of the regulatory rules. The discretionary and flexible nature of comity should influence, 'in the spirit of comity' any measures taken in conjunction with comity to resolve associated jurisdictional problems.

Meanwhile, other indirect problems like the problem of parties' consent inhibiting ICTs was dealt with in section 6.5.1. However, comity can always play an assistive or influential role in all of these situations, including consent.

Above all, the three main comity-based approaches – delegating and categorising *ratione materiae* under heads of claim and moving between ICTs, using judges as experts in hybrid proceedings and moving subject-matters across competing jurisdictions with experts. These approaches have been analysed satisfactorily to show their credibility and reliability in dealing with jurisdictional conflicts. That is when regulatory rules apply formalistically. This means achieving real preclusion with each parallel or binary opposing jurisdiction, keeping their judicial function distinct, maintaining its integrity and authority, and resolving real jurisdictional conflicts through comity.

7.3 Final Conclusion

The study concludes that it has designed and presented the first interdependence structure to the international legal community. The study followed a hybrid approach combining theory and practice, which is part of the original contribution. This methodological approach analysed overlapping jurisdictions formalistically to separate it from jurisprudential overlap. Also, the traditional jurisdictional regulatory rules and specialis rules were applied strictly using the triple identity standard. Meanwhile, binary oppositions and deconstruction constituted the theoretical elements of the hybrid. The study has also introduced 'binary opposing jurisdiction' as a synonym for overlapping jurisdictions and parallel proceedings. Attaining the status of binary opposing jurisdictions occurs when two exclusive jurisdictions are simultaneously seised to adjudicate a jurisdictional conflict. In this case, it provides the basis for deconstruction. As the study has successfully argued, when this happens, the binary opposing jurisdiction remains dormant until the regulatory rules are triggered and set into action.

Having illustrated that triggering the rules non-formalistically leads to false preclusion, the study engaged the formalistic application of the rules through binary opposition, deconstruction and comity while maintaining the integrity and authority of the international legal system. This emerges into the interdependence structure that can remedy and interface between 'complex cases' like the *swordfish cases* as it was at the time. This structure contains 'expert judges', delegation and re-categorisation of subject matters or heads of claims, delegation and inter-judicial dialogue between judges and arbitrators.

The theoretical analysis also resolved the issue of why the subfields of structuralism – binary oppositions and deconstruction, are rarely mentioned in international legal structuralist

scholarship. The study concludes that these subfields are manifested in international legal structuralist writings though not often stated expressly. The difficulty is that they do not apply as part of a methodological device, which is how their presence is noticeable, as seen in this present study. It gives this study its originality, combining regulatory rules with binary oppositions, deconstruction and comity to produce the theoretical framework for interdependence.

Bibliography

List of Cases

1. *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010

2. *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, 179, (Jan. 9, 2003).

3. *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (ICJ), 28 May 1951

4. *AG v Jonathan Cape* [1976] QB 753, 769 F-G (Lord Widgery CJ).

5. *AGIP S.p.A. v. People's Republic of the Congo*, ICSID Case No. ARB/77/1.

6. *Aguas del Tunari S.A. v. Bolivia*, ICSID Case no. ARB/02/3, Decision on Jurisdiction of 21 Oct. 2005.

7. *AGVR v. Netherlands App. 20060/92, Decision of the European Human Rights Commission of 10 Apr.1995*

8. *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation Owed by the Democratic Republic of the Congo to the Republic of Guinea) (ICJ, 19 June 2012).

9. *Aldeguer Tomás v. Spain*, no. 35214/09, 14/06/16, Third Section.

10. *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports, 389

11. *Ambatielos (Greece v UK)*, Judgment, 15 June 1939 ICJ Reports (1953) 10

12. *Apotex Holdings Inc. v United States of America case* [2013] (ICSID Case No. ARB(AF)/12/1).

13. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)* (application by Croatia, 2 July 1999)< http://www.icj-cij.org/icjwww/idocket/icry/icry_orders/icry_iapplication_19990702.PDF> accessed 02 March 2018.

14. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Serbia and Montenegro)* ICJ judgment of 26 February 2007. http://www.icj-cij.org/docket/files/91/13685.pdf accessed

15. Application for Revision of the Judgment of 11 Sept. 1992 in the *Case Concerning the Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) (El Salvador v. Honduras),* Judgment of 18 Dec. 2003 [2003] ICJ Rep 392.

16. Arbitral Award of 31 July 1989 *(Guinea-Bissau v Senegal)* 1991 ICJ 53.

17. *Argentina – Definitive Anti-dumping Duties on Poultry from Brazil*, Report of the Panel, WT/DS 241/R 22 (April 22, 2003), Panel 2.10.

18. *Asylum Case (Columbia v Peru) (Judgment) [1950] ICJ Rep 266, Dissenting Opinion of Alvarez J 290.*

19. *Avena and Other Mexican Nationals (Mexico v. United States of America),* Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p. 89, para. 48.

20. *Arbitral Award of 1906 Case*, Reports 1960 p 197 – 199, 205, 210.

21. Barcelona Traction, Light and Power Company Ltd (Belgium v. Spain) (Judgment) [1970] ICJ Rep 3.

22. Bosphorus Hava Turizm v Ireland, application 45036/98, 42 E.H.R.R.1, judgment of 30.06.05.

23. *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999: III, p. 1221.

24. *British Caribbean Bank Limited v. The Government of Belize* - Award, 19 December 2014, PCA Case No 2010-18.

25. *Burmilla Trust and others v Lesotho PCA, Procedural Order No. 1 (Suspension, Bifurcation and Procedural Timing) PCA Case No. 2016-21* para 43.

26. Camouco (Panama v. France) 39 ILM (2000) 666, 678,

27. Canfor Corporation v United States of America; *Tembec et al. v United States of America; and Terminal Forest*

28. Certain German Interests in Polish Upper Silesia (Preliminary Objections), PCIJ Series A. No 6, Judgment, 25 August 1925.

29. *Case Concerning Legality of Use of Force (Yugoslavia v. Spain),* Provisional Measures, Order of 2 June 1999.

30. *Case Concerning Legality of Use of Force (Yugoslavia v. United States of America),* Provisional Measures, Order of 2 June 1999.

31. *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) 2006.*

32. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986.

33. Case *Concerning Kasikili/Sedudu Island (Botswana/Namibia)* (Separate Opinion of Judge Oda) [1999] ICJ Rep 1118-19.

34. Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, *Chile v European Community*, Procedural Order, ITLOS Case No 7, Order 2000/3, ICGJ 340, 20 December 2000.

35. Case C-459/03 *Commission of the European Communities v Ireland*, ECLI:EU:C:2006:345, [2006] The *MOX Plant Case*, Action for Failure to Fulfil Obligations, ECR I-4635

36. *Case of Al Adsani v. the United Kingdom*, Application no. 35763/97, ECHR, Judgment of 21 November 2001.

37. Case of *Atala Riffo and Daughters v Chile,* IACHR Judgment on Merits, Reparations and Cost, 24 Feb 2012.

38. *Cereceda Martin v Spain*, Case 16358/90, ECHR 12 October 1992, DR Vol. 73, 120 *et seq*.

39. *Certain German Interests in Polish Upper Silesia (Germany v. Poland*) 1925 PCIJ (Ser. A) No. 6, at 19-20 (Jurisdiction)

40. *Chile – Measures Affecting the Transit and Importation of Swordfish*, Request for Consultations by the European Communities; WTO WT/DS193/1; 26 April 2000,

41. *CMC Africa Austral, LDA, CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., and CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa v. Republic of Mozambique* ICSID Case No. ARB/17/23

42. *CME Czech Republic B.V. v The Czech Republic*, Partial Award, 13 September 2001

43. *Commissioner v Sunnen*, 333 US 591, 597 (1948).

44. Conservation and Sustainable Exploitation of *Swordfish* Stocks in the South-Eastern Pacific Ocean, *Chile v European Community*, Procedural Order, ITLOS Case No 7, Order 2000/3, ICGJ 340 20th December 2000.

45. *Corfu Channel (United Kingdom v. Albania)* (Compensation) [1949] ICJ. Rep. 244.

46. *Dallal v Bank Mellat* [1985] 75 ILR 151.

47. *Delimitation of the Maritime Boundary in the Gulf of Main Area (Canada/United States of America) (Appointment of Expert, Order of March 30, 1984*) [19844] ICJ Reports 165.

48. *Delgado Case* (1881), reported in Bassett Moore, John, History and Digest of the International Arbitrations to Which the United States Has Been a Party, Vol. 3

49. *Desgranges v. ILO*, (1953) ILR 20, 523, 530; J. Stone, '*Non-Liquet* and the Function of Law in the International Community', [1959] 35 B.Y.I.L. 124.

50. *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, (Ireland* v. *United Kingdom)*, PCA, OSPAR Tribunal Final Award of 2 July 2003, 126 ILR 334.

51. Dispute Regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*) ICJ, Judgment of 13 July 2009.

52. *Dow Chemical France et al. v. Isover Saint Gobain,* ICC Case No. 4131 (1982), 9 Yearbook of Commercial Arbitration (1984) 131

53. Drier v. Germany 8 RIAA 127, 157-8 (1935); Leigh Valley 8 RIAA at 188; Trial Smelter 3 RIAA, at 1957.

54. *Drouot Assurances SA v. Consolidated Metallurgical Industries (CMI Industrial Sites) [1998] ECR I-3075 Case C-351/96*

55. *Duque v. Colombia* ((Preliminary Exceptions, Merits, Reparations and Costs), judgment of 26 February 2016, Series C No. 310).

56. *Dyestuffs case,* cf case 48/68/69 *ICI* v. *Commission* (*Dyestuffs Case) [1972] ECR 619, para. 133, and Case 52/69 Geigy v Commission [1972] ECR 787, para. 44*,

57. *EC – Approval and Marketing of Biotech Products,* para. 7.67 (citing Appellate Body Report*,*

58. *EC – Measures Affecting the Approval and Marketing of Biotech Products,* (United States of America, Canada & Argentina v. European Communities), Panel Report adopted on 21 November 2006, WTO, WT/DS291R, WT/DS292R, WT/DS293R, paras. 4.163 *et seq*.

59. *EC – Measures Concerning Meat and Meat Products (Hormones)* 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 123-125.

60. ECJ, Tatry v Maciej Rataj, Case C-406/92, 6 December 1994, ECR 1994, p. I-05439.

61. Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic, ICSID Case No. ARB/01/3, Award May 22, 2007.

62. *Eritrea v Yemen*, PCA Award October 9, 1998, 153, 40 ILM. 900(2001).

63. Factory of Chorzow, PCIJ Ser. A, No.17, 1928, at 70 (Merits) (Judge Finlay, dissenting Opinion)

64. Factory at Chorzow (Germany v Poland) (Jurisdiction) 1927 PCIJ (ser A) No 9.

65. Fornieles v Spain App. 17512/90, 73 Eur. Comm'n. HR Decz. & Rep. 214, 223 – 4 (1992)

66. *Guinea-Bissau v Senegal* 31 July 1989 [1991] 53 Arbitral Award.

67. HCJ 7957/04 *Mara'abe v Prime Minister of Israel*, Judgment of 15 Sept 2005.

68. *Honduras v Nicaragua* 1960 ICJ 192 Arbitral Award.

69. *International Company for Railway Systems (ICRS) v Jordan, ICSID Case no ARB/09/13*

70. ICTY Appeals Chamber, *Tadic* judgment, 15 July 1999 http://www.un.org/icty/tadic/appeal/judgment/tad-aj990715e.pdf accessed 3 March 2018.

71. *Ireland v. United Kingdom* (OSPAR Arbitration) PCA Case No. 2001-03.

72. *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996: I, p. 97

73. *Jadhav (India v. Pakistan),* Provisional Measures, Order of 18 May 2017, ICJ Reports 2017 23

74. *Klockner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports, 9

75. *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the ad hoc Committee (Unofficial English translation from the French original), 3 May 1985.

76. Kaing Guek Eav (alias `Duch'), Appeal Judgment, Case File/Dossier No. 001/18-07-2007-ECCC/SC, 2012, 97

77. *LaGrand (Germany v. United States of America),* Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I), p. 15, para. 25.

78. *Laker Airways Ltd v Sabena Belgian World Airlines* 731 F. 2d 909 (DC Cir., 1984).

79. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004

80. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)*, Dissenting Opinion of Judge Donoghue, 25 February 2019

81. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971

82. *Leigh Valley Railroad Co. v. Germany* 8 RIAA 160, 19- (1933).

83. *LG & E Energy Corp., LG & E Capital Corp. and LG & E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), 46 ILM 40 (2007), para 257.

84. Lilian Celiberti de *Casariego v. Uruguay UN GAOR, 37th Sess., Supp. 40, at 185, 187 Comm. R.13/56, (Report of HRC, 1981).*

85. *Machado Case* (1880), reported in Bassett Moore, John, History and Digest of the International Arbitrations to Which the United States Has Been a Party, Vol. 3, Washington 1898, pp. 1293 *et seq*.

86. *Maritime Dispute (Peru v. Chile),* Judgment, I.C.J. Reports 2014, 3*;*

87. *Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 2 (Aug. 30).*

88. Measures Affecting the Transmitting and Importing of *Swordfish*, *(European Communities v. Chile),* WT/DS193/2, Request for the Establishment of a Panel by the European Communities, 7 November 200 (WTO proceedings).

89. *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Appellate Body, 6 March 2006, WT/DS308/AB/R, para. 54.

90. *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308, Report of the Panel, 7 October 2005

91. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* [1984] ICJ Rep 323

92. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*) ICJ Reports 1969 7.

93. *Nuclear Tests (Australia v France),* ICJ Reports 1974 p 253; *Nuclear Tests (New Zealand v France),* ICJ Reports 1974 p 457.

94. Oil Platforms (Iran v US) Preliminary Objectives, ICJ Reports 1996 80

95. *Products Ltd. v United States of America.*, dated 19 July 2007 (JOC) paras 78–82.

96. *Prosecutor v Issa Hassan Sesay*, Morris Kallon, Augustine Gbao, Judgment, Case No SCSL-04-15-T, 2009, 295.

97. *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [1995] ICTY – 98 -30/1) [2001].

98. *Prosecutor v Kvcka and others* (Decision on the Defence 'Motion Regarding Concurrent Proceedings before the ICTY and ICJ on the Same Questions') IT-98-30/1, T Ch I (5 December 2000).

99. *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, Case No ICC-01/04-01/06, 2012, 603 in Borda (n 248).

100. *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, (aka `Vlado')*, Judgment, Case No IT-95-16-T, 2000, 540.

101. *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Order and Judgment of the United States District Court for the Southern District of New York, 29 April 2011

102. *RFP v Canada PCA,* Procedural Order No. 4 Decision on Bifurcation*, 18 November 2016*

103. *Rights of Minorities Case* 1928 PCIJ (Ser. A) No. 12, at 23 in Ibid.

104. *Ronald S. Lauder v. The Czech Republic*, Final Award of 3 Sept. 2001, reprinted in 14 World Trade and Arbitration Materials (2002) 35.

105. *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept.28, 2007).

106. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13.

107. SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6).

108. *Slovak Republic v Achmea B.V. (Case C-284/16)*, Judgment of the Grand Chamber of the European Court of Justice, 6 March 2018, para 60.

100. *Societe Commerciale de Belgique (Belgium v. France) 1939, PCIJ (Ser. A/B) No.78.*

101. *Southern Bluefin Tuna case (Australia v New Zealand/Japan*) Award of 4 August 2000 (Jurisdiction and admissibility) UNRIAA vol...II (2004) 1-57.

102. *Southern Pacific Properties (Middle East) Limited, v The Arab Republic of Egypt(The Pyramids Case),* Decision on Jurisdiction of 27 November, 1985, ICSID Case No ARB/84/3.

103. *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (the Pyramids Case)(Award on the Merits)* (1995) 3 ICSID case No.*ARB/84/3* Rep 45.

104. *South West Africa* Advisory Opinion [1950] ICJ Rep 128.

105. *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* Second Phase, ICJ Reports 966 3.

106. *South West Africa Case,* Reports 1962 335 – 337 et seq, Namibia Case, Reports 1971 28 – 30 (45 - 51).

107.*SPP v Egypt* (France, Cour d'appel) Judgement of 12 July 1984

108. *SS Lotus (France v. Turkey) 1927 PCIJ (Ser. A),* No. 10

109. *Stoll v Switzerland,* Reference Application No 69698/01. European Court of Human Rights. Judge Grand Chamber. Date of Judgement 10 Dec 2007.

110. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010

111 *Transglobal v Panama, Procedural Order No. 2 (Bifurcation)* 21 January 2016

112 *Temple Case, Reports* 1962 p 16 – 20. *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (ICJ), 28 May 1951

113 *Temple of Preach Vihear (Cambodia v Thailand)* Preliminary Objections, ICJ Reports 1961 p17; Request for Interpretation of the Judgement of 15 June 1962.

114 *Terminal Forest Products Ltd. v United States of America.* Order of the Consolidation Tribunal*,* 7 September 2005 para 133.

115 *Tembec et al. v United States of America*

116 *Thailand – Cigarettes (Philippines*) para. 7.1051.

117 *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*, ITLOS Case No. 10, Order - Provisional measures, 3 December 2001.

118 The *MOX Plant Case, Ireland v United Kingdom,* Order No 3: Suspension of proceedings on jurisdiction and merits, and request for further provisional measures, Case No 2002-01, ICGJ 366 (PCA 2003), (2003) 126 ILR 310, (2003) 42 ILM 1187

119 *The MOX Plant Case*, *Commission of the European Communities v Ireland*, Judgment, action for failure to fulfil obligations, Case C-459/03, [2006] ECR I-4635, ECLI:EU:C:2006:345

120 *The MOX Plant Case, Commission v Ireland*, ILEC 047 (CJEU 2006), [2006] 2 CMLR 59, [2006] All ER (EC) 1013, 30 May 2006, [CJEU]; ECJ (Grand Chamber).

121 *The Pious Fund of the Californias (The United States of America v. The United Mexican States)*, PCA Case No. 1902-01, Award, 14 October 1902

122 *Toledo District v Belize*, *Case* 12,053, Report No 40/04(2004) at para 149; *The Ecuador-Colombia Border: Historical Links, Current Events, and Future Possibilities*, May 2008.

123 *Trail Smelter (United States v. Canada)* 3 R.I.A.A 1907 (1941).

124 *United States Diplomatic and Consular Staff in Tehran case* [1980] ICJ Rep 3 4

125 *United States - Import Prohibition of Certain Shrimp and Shrimp Products* - AB-1998-4 - Report of the Appellate Body WTO WT/DS58/AB/R 12 October 1998 (98- 3899).

126 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling), WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report, WT/DS285/AB/R.*

127 *United States – Safeguard Measures on Import of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT, Panel Report adopted on 16 May 2001, WTO, WT/DS177/R & WT/DS178/R, para. 7.21

128 *United States — Softwood Lumber IV United States* — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada (IV) WT/DS257

129 *United States — Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.

International Legal Instruments

1. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, adopted on 29 April 1991.

2. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic executed on April 29, 1991

3. Agreement Establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, 30.12.2002

4. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 15 Apr. 1994

5. Charter of the United Nations 24 October 1945, 1 UNTS XVI.

6. Convention for the Protection of the Marine Environment of the North-East Atlantic 2354 UNTS 67, UKTS 14 (1999), Cm 4278

7. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) signed 10 June 1958, entered into force 7 June 1959), 3300 UNTS 38

8. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted on 18 March 1965

9. Council Regulation (EC) No. 44/2001 of 22 December 2001 on Jurisdiction and Regulation and Enforcement of Judgments in Civil and Commercial Matters 16 January 2001

10. Draft Articles on State Responsibility, Commentary on Article 55, para 2 in Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/56/10) 356.

11. EU – Canada Comprehensive Economic and Trade Agreement (CETA), 30 October 2016.

12. EU – Chile Comprehensive Free Trade Agreement, 30 December 2002.

13. EU – South Korea Free Trade Agreement (EU-South Korea FTA), 1 July 2011.

14. EU – Vietnam Free Trade Agreement (EU–Vietnam FTA), 2 December 2015.

15. European FTA – Singapore FTA (June 26, 2002), Article 56

16. Framework Agreement for the Conservation of Living Marine Resources on the High Sea of the South Pacific, 14 August 2000.

17. IBA Rules on the Taking of Evidence in International Arbitration adopted by a resolution of the IBA Council on 29 May 2010.

18. ICSID Convention (1965) Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

19. ILC *Draft Conclusions on the Identification of Customary International Law* available https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf accessed 18 May 2020.

20. ILC Report on Fragmentation (2006) Finalised by Martti Koskenniemi [UN Doc (A/61/10, para. 251). The Year Book of the International law commission, 2006, vol. II, Part Two.A/CN.4/L.682, UN Doc A/61/10, 400]

21. ICSID Rules of Procedure for Arbitration Proceedings (amended 2003), art 19, available on <https://icsid.worldbank.org/sites/default/files/ICSID_Conv%20Reg%20Rules_EN_2003.pdf> accessed 20 June 2020.

22. International Chamber of Commerce Arbitration Rules 1998 -2011

23. International Chamber of Commerce Arbitration Rules, 1 March 2017.

24. International Chamber of Commerce Appendix I and Appendix II of the Internal Rules of the International Court of Arbitration 2014; now modified and effective as of 01 January 2021.

25. International Court of Justice, Rules of the Court (1978) Adopted on 14 April 1978 and entered into Force on 1 July 1978.

26. Model Law on International Commercial Arbitration 1985 [UNCITRAL]) UN Doc A/40/17.

27. Non-Proliferation of Nuclear Weapons Treaty, 1 July 1968, 729 UNTS 161 (NPT).

28. North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994.

29. Statute of the International Criminal Tribunal for the Former Yugoslavia, Security Council Resolution 827(1993), 25 May 1993.

30. The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001) (UN Fishstock Agreement).

31. The Protocol of Olivos for the Settlement of Disputes in Mercosur (February 18, 2002)

32. The Protocol of Brasilia for the Solution of Controversies, 17 December 1991.

33. The United Nations Commission on International Trade Law Arbitration Rules (1976)

34. The UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as adopted in 2006 still mentions consolidation as exception to the rules and so could not provide a model to be followed by the parallel tribunals.

35. Third Interim Report Submitted to the International Law Association London Conference (2000)

36. Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, entered into force on 22 October 1991.

37. Treaty Establishing the European Atomic Energy Community, 25 March 1957

38. Treaty Establishing the European Community (as amended by the Treaty of Amsterdam and the Treaty of Nice) (European Union [EU]) [2002] OJ C325/33, 298 UNTS 11, Part 6 General and Final Provisions, Art.292.

39. UNCITRAL Model Law on International Commercial Arbitration, UN doc. A/40/17, Annex 1 and A/61/17, Annex I.

40. UNCLOS Annex VII Arbitration Rules Article 5 available <https://www.un.org/depts/los/convention_agreements/texts/unclos/annex7.htm> accessed 20 June 2020

41. United Nations Charter, adopted on 26 June 1945, Article 95

42. United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, General Assembly Resolution 31/98 Adopted 15 December 1975.

43. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

44. United Nations, Statute of the International Court of Justice, 18 April 1946

45. UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982

46. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, here after VCLT. 2

47. UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, 277.

48. WTO-DSU Dispute Settlement Understanding: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

Books

1. Alter K J, The New Terrain of International Law, Courts, Politics, Rights (PUP, Princeton 2013)

2. Alvesson M and Deetz S, 'Critical Theory and Postmodernism: Approaches to Organisational Studies' in Stewart R Clegg & Cynthia Hardy, Studying Organisations: Theory and Method (Sage Publications, London 1999)

3. Andrews N, The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England (Springer, Cambridge 2012)

4. Austin J, The Province of Determined (1832) Wilfred E. Rumble (ed) (CUP, Cambridge 1995)

5. Barnett P, *Res Judicata*, *Estoppe*l and Foreign Judgments (OUP, Oxford 2001)

6. Bianchi A, Peat D and Windsor M, Interpretation of International law (1st edn, OUP, Oxford 2015)

7. Boyle A and Chinkin C, The Making of International Law (OUP, Oxford 2007)

8. Brierly J L, The law of nations: An introduction to the international law of peace (Clarendon Press, Oxford 1955)

9. Blackburn S, Oxford Dictionary of Philosophy (2nd edn OUP, Oxford 2005)

10. Black C and Falk R, The Future of the International Legal Order: Conflict Management (PUP, Princeton 1971)

11. Black H C, Black's Law Dictionary (7th ed., West Group Austin Texas 1999)

12. Blokker N, International Regulation of World Trade in Textiles: Lessons for Practice (Martin Nijhoff Publishers 1989)

13. Bortz F, Laws of Motion and Isaac Newton (The Rosen Publishing Group, New York 2013)

14. Brooks R L, Structures of Judicial Decision Making from Legal Formalism to Critical Theory, (2nd edn, Carolina Academic Press, Durham 2005)

15. Bulloch P A and Raz J, The Concept of Law H. L. A Hart. (2nd end. Clarendon Press, Oxford 1997)

16. Buckley C, Donald A and Leach P, Towards Convergence in International Human Rights Law: Approaches of Regional and International system (Brill Nijhoff, Leiden 2017)

17. Cheeseman C, 'Harmonising the of Regional and International Human Rights Bodies: A Literature Review in the collection' in Carla Buckley, Alice Donald and Philip Leach, Towards Convergence in International Human Rights Law: Approaches of Regional and International system (Brill Nijhoff, Leiden 2017)

18. Cheng B, General Principles of Law as Applied by International Courts and Tribunals (Stevens, London 1953)

19. Collins H, Collins English Dictionary & Thesaurus (4th edn Harper Collins Publishers, Glasgow 2006)

20. Combacau J, *Le Droit International: Bric-a-Brac ou systeme?' 31 Archives de Philosophie du Droit* (1996) 85, 86.

21. Commission J and Moloo R, *The Splitting of Issues for Separate Determination (Bifurcation/Trifurcation),* Procedural Issues in International Investment Arbitration (OUP, Oxford 2018)

22. Coward R and Ellis J, Language and Materialism: Developments in Semiology and the Theory of the Subject. (London RKP 1977) 12

23. Crawford J R, Brownlie's Principles of Public International Law (8th edn OUP, Oxford 2012)

24. d'Aspremont J,'Martti Koskenniemi, the Mainstream, and Self-Reflectivity', (2016) 29 LJIL 625-39.

25. d'Aspremont J and Sahid Singh S, Concepts for International aw: Contributions to Disciplinary Thought (Edward Elgar, Cheltenham 2019)

26. de Saussure F, Course in General Linguistics (New York Philosophical Library, New York 1959)

27. Derrida J, 'Positions' Translated and Annotated by Alan Bass (University of Chicago Press, Chicago 1982)

28. Derrida J and Bass A, Freud and the Scene of Writing, Writing and Difference (New edn. Routledge, London 2001)

29. Dimsey M, The Resolution of International Investment Disputes: Challenges and Solutions (Eleven International Publishing, Utrecht, 2008)

30. Dorr O and Schmalenbach K, Vienna Convention on the Law of treaties: A Commentary (Springer, Osnabruck 2018)

31. Dworkin R, 'Indeterminacy and Law' in Positivism Today, (Dartmouth Publishing 1996)

32. Endicott T, 'The Generality of Law' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti, Reading HLA Hart's Concept of Law (Hart Publishing, Oxford 2013)

33. Fawcett J J, Declining Jurisdiction in Private International Law, Report to the XIVth Congress of the International Academy of Comparative Law 1994 (OUP, Oxford 1995)

34. Fellmeth A X and Horwitz M, Guide to Latin in International Law (OUP, Oxford 2009)

35. Foucault M, Power/Knowledge: Selected Interviews and Other Writings 1972–1977 (Harvester Press, London 1980)

36. Foucault M, 'Of Other Spaces: Utopias and Heterotopias' in Neil Leach, Rethinking Architecture: A Reader in Cultural Theory (NYC Routledge, London 1997)

37. Franck T M, Fairness in International Law and Institutions (Clarendon Press, Oxford 1995)

38. Gallagher N, 'Parallel Proceedings, *Res Judicata* and *Lis Pendens*: Problems and Possible Solutions' in Loukas A. Mistelis and Julian D.M. Lew QC, Pervasive Problems in International Arbitration (Kluwer Law International, Alphen aan den Rijn 2006)

39. Gasche R, Introduction to Deconstruction and Philosophy: The Texts of Jacques Derrida (The University of Chicago Press, Chicago 1987)

40. Grant J P and Barker J C, Parry & Grant Encyclopaedic Dictionary of International Law (3rd edn, OUP, Oxford 2009)

41. Greenwood C, 'Unity and Diversity in International Law' in Mads Andenas and Eirik Bjorge (eds), A Farewell to Fragmentation: Reassertion and Convergence in International Law (CUP 2015)

42. Halpin A, Reasoning with Law, (Hart Publishing, Oxford 2001)

43. Hart H L A, The Concept of Law (2nd edn, Claredon Press, Oxford 1994)

44. Jackson J, The World Trading System: Law and Policy of International Economic Relations (2nd edn Mit Press, Cambridge 1997)

45. Jennings R and Watts A, 'Oppenheim's International Law' (9th edn. Longman, London 1992)

46. Kennedy D, International Legal Structures (Nomos Verlagsgesellschaft, Baden-Baden 1987)

47. Kelsen H, Introduction to the Problems of Legal Theory (1934)55; Joseph Raz, A Concept of a Legal System (2nd edn., 1980) (1990 reprint)

48. Kolb R, The International Court of Justice, (Hart Publishing, Oxford 2013)

49. Koskenniemi M, From Apology to Utopia: The Structure of International Legal Argument (Finnish Lawyers Publishing Company, Helsinki 1989).

50. Koskenniemi M, 'Theory: Implications for the Practitioner' in Philip Alott and others, Theory and International Law: An Introduction (Published by The British Institute of International and Comparative Law, London 1991)

51. Koskenniemi M, *From Apology to Utopia: The Structure of International Legal Argument, Reissue with New Epilogue.* (CUP, Cambridge 2005 [1989])

52. Koskenniemi M, *From Apology to Utopia. The Structure of International Legal Argument* (CUP, Cambridge 2005)

53. Koskenniemi M, *From* Apology to Utopia: The Structure of International Legal Argument (2nd edn, CUP, Cambridge 2006)

54. Koskenniemi M, 'What is Critical Research in International Law: Celebrating Structuralism' (2016) 29 LJIL 727

55. Lim C L and Gao H, 'The Politics of Competing Jurisdictional Claims in WTO and RTA Disputes: The Role of Private International Law Analogies' in Tomer Broude, Marc L. Busch and Amelia Porges, The Politics of International Economic Law (CUP, Cambridge 2011)

56. Litowitz D E, Postmodern Philosophy & Law (University Press of Kansas, Lawrence 1997)

57. Luhmann N, Law as a Social System (OUP 2004).

58. Matsushita M, Schoenbaum T J and Mavroidis P C, The World Trade Organization: Law, Practice and Policy (2nd edn OUP, Oxford 2006)

59. McLachlan C, *Lis Pendens* in International Litigation, AIL Pocket Books, (Hague Academy of International Law 2009)

60. Miles C A, 'Indeterminacy' in Jean d'Aspremont and Sahid Singh, Concepts for International law: Contributions to Disciplinary Thought (Edward Elgar Publishing 2019)

61. Nolte G, Treaties and Subsequent Practice, (OUP, Oxford 2013)

62. Onuf N, 'International Theory, Essays and Engagements, 1966 – 2006'(London Routledge-Cavendish London) 266.

63. Pauwelyn J, Conflict of Norms in Public International Law: How WTO Law Relates to Other (CUP, Cambridge 2003)

64. Pauwelyn J, 'Legal Avenues to Multilateralizing Regionalism: Beyond Article XXIV,' in Richard Baldwin and Patrick Low, Multilateralizing Regionalism: Challenges for the Global Trading System (CUP, Cambridge 2009)

65. Pettit P, The Concept of Structuralism: A Critical Analysis (University of California Press 1977)

66. Popa L, Patterns of Treaty Interpretation as Anti-Fragmentation Tools (Springer, Cham 2018)

67. Prost M, The Concept of Unity in Public International Law (Hart Publishing, Oxford 2012)

68. Rayfuse R and Lauuterpacht E, ICSID Reports: Report of Cases decided under the Convention on the Settlement of Investmnet Disputes between States and Nationals of Other States, 1965. (Vol 3 CUP, Cambridge 1995)

69. Reed M, 'Organisational Theorising: Historical Contested Terrain' in Stewart R Clegg & Cynthia Hardy, Studying Organisations: Theory and Method (Sage Publications, London 1999)

70. Reinisch A, 'International Courts and Tribunals, Multiple Jurisdiction', in Max Planck Encyclopedia of Public International Law (Reiger Wolfrum ed., 2006), assessed via www.mpepil.com/ on 10 June 2020.

71. Reinisch A, 'The Proliferation of international Dispute Settlement Mechanisms: The Threat of Fragmentation vs. The Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration' in Isabelle Buffard, James Crawford, Gerhard Hafner, Alain Allan Pellet, International Law between Universalism and Fragmentation (Martinus Nijhoff Publishers, Leiden 2008)

72. Reinisch A, 'The Issues Raised by Parallel Proceedings and Possible Solutions', in Michael Waibel, Asha Kaushal, et al. (eds), The Backlash against Investment Arbitration (Kluwer Law International 2010)

73. Reitz K R, The Traditional indeterminate Sentencing Model in The Oxford Handbook of Sentencing Model (OUP, 2012)

74. Riddell A, 'Evidence, Fact-Finding, and Experts' in Cesare PR Romano, Karen Alter, Yuval Shany, The Oxford Handbook of international Adjudication (OUP, Oxford 2014)

75. Romano S, L'Ordre Jurisddique (2nd edn) translated by L. Francois and P. Gotho 1975 (Paris Dalloz 2002).

76. Roucounas E, A Landscape of Contemporary Theories of International Law, (Brill, Leiden 2019)

77. Salles L E, Forum Shopping in International Adjudication: The Role of the Preliminary Objections (CUP, Cambridge 2014)

78. Salles L E, 'Jurisdiction' in William A. Schabas and Shannonbrooke Murphy, Research Handbook on International Courts and Tribunals (Edward Edgar Publishing, Cheltenham 2017)

79. Sallis J, Deconstruction and Philosophy: The Texts of Jacques Derrida (Paperback edn. University of Chicago Press, Chicago 1988)

80. Schauer F, Thinking like a Lawyer: A New Introduction to Legal Reasoning (Harvard University Press, London 2009)

81. Schwarzenberger G, International Law (Stevens, London 1945)

82. Schwarzenberger G, The Frontiers of International Law (Stevens London 1962)

83. Scobbie I, 'Legal Theory as a Source: Institutional Facts and the Identification of International Law' in Samantha Besson and Jean d'Aspremont, the Oxford Handbook on the Sources of International Law (Oxford Handbook on Sources of International Law (OUP, Oxford 2018)

84. Scobbie I, '*Res Judicata*, Precedent and the International Court: A Preliminary Sketch' [1999] 20 AU YB Int'l Law 299

85. Scobbie I, 'Thinking About International Law' in Malcolm D Evans, International Law (4th edn OUP, Oxford 2014)

86. Scobbie I, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism' [1991] 61 1 BYBIL 339 - 362

87. Shany Y, The Competing Jurisdictions of International Courts and Tribunals, (OUP, Oxford 2003)

88. Shany Y, Regulating Jurisdictional Relations Between National and International Courts (OUP 2007) Online available<DOI: 10.1093/acprof:oso/9780199211791.001.0001> accessed 20 May 2019.

89. Slaughter A, A New World Order (PUP, Princeton 2004)

90. Spielmann D, Human Rights Case Law in Strasbourg and Luxembourg Courts: Conflicts, inconsistencies and complementarities' in Philip Alston, The EU and Human Rights (OUP, Oxford 1999)

91. Stablein R, 'Data in Organisation Studies' in Stewart R Clegg & Cynthia Hardy, Studying Organisations: Theory and Method (Sage Publications, London 1999)

92. Tams C J, 'The ICJ as a Law-Formative Agency: Summary and Synthesis', in Christian Tams and James Sloan, The Development of International Law by the International Court of Justice (OUP, Oxford 2014)

93. Terris D, Romano C P R and Swigart L, The International Judge: An Introduction to the Men and Women Who Decide the World's Cases (OUP, Oxford 2007)

94. Trachtman J P, *The Future of International Law: Global Government* (CUP Cambridge 2013)

95. Vauchez A, Communities of International Litigators, The Handbook of International Adjudication (OUP 2014)

96. Webb P, International Judicial Integration and Fragmentation (OUP, Oxford 2013)

97. Weick K, 'The Social Psychology of Organising. Reading, MA: Addison-Wesley' in Stewart R Clegg & Cynthia Hardy, Studying Organisations: Theory and Method (Sage Publications, London 1999)

98. William J, Understanding Post Structuralism (Taylor and Francis 2014) 33.

List of Journal Articles

1. Acosta R, 'Differentiate or Die: Survival in Our Era of Killer Competition', [2002] Vol 9 (4) Quality Management Journal, 75-76.

2. Alter K, 'Delegation to International Courts: Self-Binding vs. Other-Binding Delegation' [2008] 71 (1) Northwestern University Journal of Law and Contemporary Problems.

3. Andenas M and Leiss J R, 'The Systemic Relevance of Judicial Decisions in Article 38 of the ICJ Statute' [2017] 9 Heidelberg JIL 907

4. Banaszewska D M, '*Lex Specialis*', [2015] MPEPIL.

5. Boisson de Chazournes L, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' [2017] Vol. 28 No. EJIL 1

6. Borda A Z, 'Precedent in International Criminal Courts and Tribunals' [2013] 2 CJICL 287

7. Brand R A, 'Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and Path Ahead' [2020] 67 NILR 3

8. Brekoulakis S, 'The Effect of an Arbitral Award and Third Parties in International Arbitration: *Res Judicata* Revisited' [2005] 16 Am. Rev. Int. Arb. 177

9. Bruns G L, 'Review: Structuralism, Deconstruction and Hermeneutics, Reviewed Work: On Deconstruction: Theory and Criticism after Structuralism by Jonathan Culler, [1984] Vol. 14, No. 1

10. Burke-White W, 'Community of Courts: Towards a System of International Criminal Law Enforcement' [2002] 24 (1) Mich. J. INT'L. L 2

11. Cali B, 'On Interpretivism and International Law' [2009] 20 (3) EJIL 805

12. Charney J, 'Is International Law Threatened by Multiple International Tribunals?' [1998] Hague Academy of INT'L L. 101

13. Charney J, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' [1999] 31 NYU J of Int'l Law & Politics 697

14. D'Alterio E, 'From Judicial Comity to Legal comity: A Judicial Solution to Global Disorder?' [2011] 9 (2) OUP 394

15. Davey J W, 'The *Soft Drinks Case*: The WTO and Regional Agreements' [2009] 8 (1) World Trade Review 5 – 23

16. Desautels-Stein J, 'International Legal Structuralism' [2016] A Primer, 8 IT 201

17. Dodge W S, '*Res Judicata'* [2006] MPEPIL

18. Dunoff J, 'A New Approach to Regime Interaction,' in Regime Interaction in International Law: Facing Fragmentation', ed. Margaret Young [2012] CUP, 136–74.

19. Falk R A, '*The Role of Domestic Courts in the International Legal Order'* [1964] 39 Indiana Law Journal 429.

20. Finke J, 'Sovereign Immunity: Rule, Comity or Something Else?' [2010] 21 (4) *EJIL* 853

21. Fitzmaurice M, 'Dynamic (Evolutive) Interpretation of Treaties: Part I' [2008] Hague Y.B. Intl. L 21

22. Fitzmaurice M, 'Dynamic (Evolutive) Interpretation of Treaties: Part II' [2009] Hague Y.B. Intl. L 22

23. Geib R, '*Ne bis in idem*,' [2013] MPEPIL.

24. Guillaume G, 'The Use of Precedent by International Judges and Arbitrators' [2011] 2 (1) Journal of Int'l Dispute Settlement 5

25. Hafner G, 'Pros and Cons Ensuing from Fragmentation of International Law' [2004] 25 MICH. J. INT'L L. 849

26. Hafner G, 'The Risk Ensuing from Fragmentation of International Law', in Report of the International Law Commission on its 52nd session, U.N. Gaor, 55th Sess., Suppl. 10, at 321-39, U.N. Doc. No. ILC(LII)/WG/LT/INFORMAL/2 (2000).

27. Haskell J, 'From Apology to Utopia's Conditions of Possibility', (2016) 29 LJIL 667-76.

28. Helfer L R and Anne-Marie Slaughter, 'Towards a Theory of Effective Supra-national Adjudication' [1997] 107 YILJ 273

29. Henckels C, 'Overcoming Jurisdictional Isolationism at the WTO– FTA Nexus: A Potential Approach for the WTO' [2008] 19 (3) EJIL

30. Jennings R, 'The Role of the International Court of Justice in the Development of International Environmental Protection Law' [1992] 1 (3) *RECIEL 240*

31. Kennedy D, 'Form and Substance in Private Law Adjudication' [1976] Harvard Law Review 89:1685

32. Kennedy D, 'The Structure of Blackstone's Commentaries' [1979] Buffalo Law Review 28:205.

33. Keohane R O and Nye J S, 'Power and Interdependence in the Information Age' [1998] 77 (5) Foreign Affairs 81

34. Kreindler R, 'Parallel Proceedings: A Practitioner's Perspective' in Michael Waibel (ed.), The Backlash against Investment Arbitration: Perceptions and Reality (2010) 127

35. Lanyi P A and Steinbach A, 'Limiting Jurisdictional Fragmentation in International Trade Disputes' [2014] 5 (2) Journal of Int'l Dispute Settlement 372

36. Lawlor L, 'Jacques Derrida'[2019] in Zalta, Edward N. (ed.), Metaphysics Research Lab, Stanford University

37. Lawson R C, 'The Problem of the Compulsory Jurisdiction of the World Court' [1952] 46 AJIL 234

38. Llamzon A P, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' [2007] 18 (5) *EJIL* 815

39. Lowe V, 'Overlapping Jurisdiction in International Tribunals' [1999] 20 Australian Year Book of International Law 191

40. Mahiou A, 'the Notion of Interdependence, Max Planck Encyclopaedia of Public International' [2011] MPEPIL

41. Martineau A, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' [2009] 22 (1) Leiden Journal of Int'l Law 1

42. McCrudden C, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' [2000)] 20 (2) Oxford Journal of Legal Studies 499

43. McDorman T, 'Access to Information under Article 9 of the OSPAR *Convention (Ireland v United Kingdom)'* [2004] 98 (2) AJIL 330

44. McLachlan C, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' [2005] 54 (2) Int'l and Comp. Law Quarterly 279

45. Miller J H, 'Deconstruction and Criticism *Stevens' Rock and Criticism as Cure'* [1976] II, 30 Georgia Review 5.

46. Mosler H, 'Chapter XIV. 'The International Court of Justice,' in B. Simma (ed.) Charter of the United Nations, A Commentary [1994] 973

47. Mosler H, 'General Principles of Law', in R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. II (1997), 511, 522.

48. Murphy S D, 'Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project' [2013] Temple Int'l & Comp. L.J

49. Neuman G L, 'The External Reception of Inter-American Human Rights Law' [2011] (Special Edition) Quebec Journal of Int'l Law 100

50. Nigel P, 'Critical Legal Studies in Public International Law'[1991] Harvard Journal of International Law 32:81.

51. Nucup N B, 'Infallible or Final? Revisiting the Legitimacy of the International Court of Justice as the "Invisible" International Supreme Court' [2019] L A P E Brill Nijhoff 145

52. Kawakami T, 'Differentiate or die!' Nature Immunology [2016] Vol 17 (9) News and Views, 1007 - 1008.

53. Kennedy D, 'Critical Theory, Structuralism and Contemporary Legal Scholarship' [1985] 21 New Eng. L. Rev. 209

54. Kennedy D, 'Tom Franck and the Manhattan School' [2004] 35 NYU Journal of International Law & Policy 397

55. Kirgis L J F, 'Custom on a Sliding Scale' [1987] 81 AJIL 146

56. Koskenniemi M, 'A Response' [2006] 7 (12) *German Law Journal* 1103

57. Koskenniemi M, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' 1 [2007] 1 Eur. J. Legal Study 1

58. Koskenniemi M, 'Theory: Implications for the Practitioner' in Philip Alott and others, Theory and International Law: An Introduction (Published by The British Institute of International and Comparative Law, London 1991) 25.

59. Kulick A, 'Article 60 ICJ Statute, Interpretation Proceedings and the Competing Concepts of *Res Judicata'* [2015] 28 (1) Leiden J Int'l L 73

60. Lasswell H D, 'The Interrelations of World Organization and Society' [1946] 55 YALE L.J. 889

61. Lavranos N, 'Regulating Competing Jurisdictions among International Courts and Tribunals' [2008] 68 MPIPIL 575

62. Linton S and Tiba F K, 'The International Judge in an Age of Multiple International Courts and Tribunals and Tribunals' [2009] 9 (2) Chicago Journal of Int'l L 407

63. Odermatt J, 'A Farewell to Fragmentation: Reassertion and Convergence in International Law' [2016] 14 (3) CUP Int'l J Constitutional Law 776

64. Oellers-Frahm K, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdictions-Problems and Possible Solutions' [2001] 5 Max Planck UNYB 68

65. Orellana M A, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' [2002] 71 Nordic Journal of International Law 55

66. Paul J R, 'Comity in International Law' [1991] 32 (1) Harv. Int'l L.J.

67. Pauwelyn J, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands' [2004] 24 (903) Mich J. Int'l L 903

68. Pauwelyn J, 'The Role of Public International Law in WTO: How Far Can we GO?' [2001] 95(3) Am.J. Int'l L. 535

69. Pauwelyn J, 'Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law' [2012] 22 Duke J. Comp. & Int'I L 349

70. Pauwelyn J and Salles L E, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions.' [2009] 42 CILJ

71. Peters A, 'Fragmentation and Constitutionalisation' in Anne Orford and Florian Hoffmann[2016] The Oxford Handbook of the Theory of International Law, (OUP 2016) Available online on DOI: 10.1093/law/9780198701958.003.0049. Accessed 19 August 2021

72. Peters A, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' [2017] 15 (3) International Journal of Constitutional Law 671

73. Pill S C, 'Leveraging Legal Indeterminacy, A Judeo-Islamic View of the Indeterminacy Problem and the Rule of Law' [2018] 6 JLRS 147 -194

74. Radulov A, 'From Apology to Utopia and The Inner Life of International Law', (2016) 29 LJIL 641-66.

75. Ramsey M D, 'Escaping International Comity' [1999] 83 IOWALR 893

76. Reinisch A, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' [2004] 3 (1) LPICT 37

77. Roberts A E, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' [2001] 95 (4) AJIL 757 – 791

78. Romano C P R, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' [1999] 31 NYU J Int'L & Pol 709

79. Romano C P R, 'This Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent' [2006] 39 N.Y.U.J Int'l L. & Pol. 791

80. Romano CP R, 'Deciphering the Grammar of the International Jurisprudential Dialogue' [2009] 41 (755) International Law and Politics 755

81. Romano C P R, 'Taxonomy of International Rule of Law Institutions' [2011] 2 (1) Journal of Int'l Dispute Settlement 241

82. Sanders G, 'Rethinking Arbitral Preclusion' Law and Policy in International Business [1992 -1993] Vol. 24 pp 101.

83. Schauer F, 'Do Cases Make Bad Law?' [2006] 73 (3) Chicago Law Review, 73U 883

84. Schmitt C, 'The Changing Structure of International law' [2016] 20 (3) Journal for Cultural Research 310

85. Schultz T, 'Arbitral Decision-Making: Legal Realism and Law & Economics' [2015] 6 Journal of International Dispute Settlement 231

86. Shamsey J, 'ITLOS vs Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the *Chile – EU Swordfish* Dispute' [2002] 12 Trans Natl L & Contemp Probs 513

87. Shell R G, '*Res judicata* and collateral estoppel effects of commercial arbitration' [1988] 35 UCLALR 623

88. Shih W, 'Conflicting Jurisdictions Over Disputes Arising from the Application of Trade-Related Environmental Measures' [2009] Rich. J. Global L. & Bus. 351

89. Slaughter A, 'A Typology of Trans-Judicial Communication' [1994] 29(1) URLR 99

90. Slaughter A, 'A Global Community of Courts' [2003] 44(1) Harvard ILJ 191

91. Smith G, 'Binary opposition and sexual power in Paradise Lost' [1996] 27 (4) Midwest Quarterly 383

92. Starke S J G, 'International Law, Butterworth-Heinemann' in Sarder Ma, Waqar Khan Arif, Judicial Precedent and its authority under international Law [2017] 3 (6) IJL 75

93. Stone J, '*Non Liquet* and the Function of Law in the International Community' [1959] 35 BYBIL 123

94. Szewczyk, 'Lawfulness of Kosovo's Declaration of Independence' [2010] 14(26) ASIL

95. Treves T, 'Conflict between the International Tribunal for the Law of the Sea and the International Court of Justice' [1998 -1999] 31 N.Y.U. J. Int'l L. & Pol. 809

96. Troop T, 'Why Legal Formalism Is Not a Stupid Thing' [2008] 31 (4) Ratio Juris 428

97. Trout J and Rivkin S, 'Differentiate or Die: Survival in Our Era of Killer Competition', in Rhiema Acosta [2002] Vol 9 (4) Quality Management Journal, 75-76.

98. Tunkin G, 'Report on the Law of Treaties' [1964] 1 YILC (A/CN.4/SR.769) 310

99. Turley J, 'Introduction: Hitchhiker's Guide to CLS, Unger, and Deep Thought' [1987] 81 Northwestern University Law Review 594

100. Vanhonnaeker L, 'International Res Judicata as a Solution to Parallel Proceedings Arising from Shareholders' Claims for Reflective Loss in International Investment Law' in Shareholders' Claims for Reflective Loss in International Investment Law (Cambridge University Press 2020) 265.

101. Verhoeven J, 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law' [2002] 33 Netherlands Yearbook of International Law 2

102. Verdirame G, 'A Normative Theory of Sovereignty Transfers' [2013] 49 Stanford Journal of Int'l L 371

103. Voeten E, 'Borrowing and Nonborrowing among International Courts' [2010] 39 (2) The Journal of Legal Studies 547

104. Wehland H, 'The Regulation of Parallel Proceedings in Investor-State Disputes' [2016] 31 (3) ICSID Review 740

105. Wilkins D B, 'Legal Realism for Lawyers' [1990]104 Harv L. Rev 469

106. Wistrich A J, Rachlinski J J and Guthrie C, 'Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?' [2015] 93 (4) Texas Law Review 855

107. Wittich S, 'Permissible Derogation from Mandatory Rules/The Problem of Party Status in the Genocide Case' [2007] 18 (4) EJIL 591

108. Yang S, 'The Solution for Jurisdictional Conflicts Between the WTO and RTAs: The Forum Choice Clause' [2014] 23(1) Mich. State Int'l Law Review 108

Internet Sources

1. Alexandrov S A, 'The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?' [2006] 5 (1) CJIL < https://doi.org/10.1093/chinesejil/jml008> accessed 10 October 2020

2. Bennouna M, 'How to Cope with the Proliferation of International Courts and Coordinate Their Action' Oxford Scholarship Online <10.1093/acprof:oso/9780199691661.003.0023> accessed 17 May 20 2017

3. Bitti G, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC' [2008] The Emerging Practice of the International Criminal Court [2008] 48 Brill Nijhoff 281 - 304 < https://doi.org/10.1163/ej.9789004166554.i-774.91> accessed 11 April 2020

4. Cali B, 'On Interpretivism and International Law' [2009] 20 (3), 805-822 EJIL <https://ssrn.com/abstract=1950522> accessed 20 April 2019

5. Charnock, 'Hart as Contextualist? Theories of Interpretation in Language and the Law' in Michael Freeman and Fiona Smith in Law and Language: Current Legal Issues (Vol 15, OUP, Oxford Scholarship Online 2013)129. <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199673667.001.0001/acprof-9780199673667-chapter-9> accessed 20 February 2020

6. Childress III D E, 'Comity as Conflict: Resituating International Comity as Conflict of Laws' [2010] 44 UC Davis Law Review <https://ssrn.com/abstract=1576633> accessed 20 July 2020

7. Churchill R E, '*MOX Plant* Arbitration and Cases' [2018] MPEPIL <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e176> 20 July 2019

8. Cowen T and Sutter D, 'Conflict, Cooperation and Competition in Anarchy'[2005] 18 (1) The Review of Austrian Economics 109 – 115 <https://link.springer.com/content/pdf/10.1007/s11138-005-5595-1.pdf> accessed 20 June 2018

9. Critchley S, 'Derrida: The Reader' [2005] 27(2) CLR <http://www.abdelmagidzarrouki.com/2013-05-06-14-45-36/finish/604-critchley-simon/17991-derrida-the-reader/0> accessed 23 March 2018

10. Dawkins P, 'Essay Two for Course 'International Relations in the 20th Century' <https://www.academia.edu/13904094/Interdependence_> accessed 20 November 2019

11. Desautels-Stein J, 'International Legal Structuralism: A Primer' [2016] 8 (2) CUP Online 201-235 <https://doi.org/10.1017/S175297191500024X> accessed 20 April 2019

12. Draft conclusions on identification of customary international law, with commentaries 2018, *Yearbook of the International Law Commission, 2018, vol. II, Part Two.*

13. Falk R, 'The Adequacy of Contemporary Theories of International Law-Gaps in Legal Thinking' [1964] 50 VA. L. Rev. 231< https://heinonline.org/HOL/LandingPage?handle=hein.journals/valr50&div=25> accessed 23 March 2019

14. Fogarty S, "Binary Oppositions". *The Literary Encyclopedia*. First published 15 February 2005 [https://www.litencyc.com/php/stopics.php?rec=true&UID=122, accessed 07 July 2021.

15. Green M S, 'Legal Realism as Theory of Law' (2005) 46 Wm. & Mary L. Rev. 1915 <https://scholarship.law.wm.edu/wmlr/vol46/iss6/2> accessed on 30 November 2019

16. Guglya L, 'The Interplay of International Dispute Resolution Mechanisms: the Softwood Lumber Controversy' [2011] 2 (1) JIDS <https://doi.org/10.1093/jnlids/idq020> accessed 20 September 2019

17. Gutteridge HC, 'The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice' in Transactions of the Grotius Society for the Year 1952 [1952] 38 CUP on behalf of the BIICL <https://www.jstor.org/stable/743162> accessed 10 October 2020

18. Jiminez M R, 'Considerations of NAFTA Chapter 11' [2001] 2 (1) CHI. J. INT'L < https://chicagounbound.uchicago.edu/cjil/vol2/iss1/17/> accessed 20 June 2019

19. Kirchner , 'Relative Normativity and the Constitutional Dimension of International Law; A Place for values in the International Legal Systems?,' 5 German L. J, (2004) <http://www.germanlawjournal.com/article.php?id=361#_edn1> accessed 20 March 2019

20. Khodykin R and Mulcahy C, *'Article 5: Party-Appointed Experts' in Nichalas Fletcher,* A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, 2019, para 8.70 < https://jusmundi.com/en/document/wiki/en-expert-witness> accessed 10 October 2020

21. Kotzur M, '*Ex Aequo et Bono'* [2009] MPEPIL <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1402#law-9780199231690-e1402-div1-7> accessed 5 January 2020

22. KrishanD 'Judicial Precedent in the International Court of Justice', [2005] BIICL <https://www.biicl.org/files/918_devashish_krishan,_vinson_&_elkins_-_precedent.pdf> accessed 02 July 2018

23. Letelier R, 'Review work(s): The Computing Jurisdictions of International Courts and Tribunals by Yuval Shany' [2005] 38 125–133 JSTOR<http//:www.jstor.org/stable/41391835> accessed 20 December 2019

24. Leiter B, 'American Legal Realism' [2002] Public Law and Legal Research Paper No. 042 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=339562 accessed 20 July 2020

25. Leiter B, 'Legal Formalism and Legal Realism: What Is the Issue?' (2010) Legal Theory, 16(02), 111–133 <http://doi.org/10.1017/S1352325210000121> accessed 20 June 2019

26. Ly D F and Sheppard A, 'ILA Interim Report on *Res Judicata* and Arbitration' *AI* [2009] 25 (1) 35 in [2014] AI <https://doi.org/10.1093/arbitration/25.1.35> accessed 20 May 2019

27. Ly D F and Sheppard A, 'ILA Final Report on *Lis Pendens* and Arbitration', Arbitration International [2009]25 (1) 3–34) para. 1.2.

28. Ly D F and Sheppard A, 'ILA Final Report on *Res Judicata* and Arbitration' *AI [2009] 25 (1) 67 in [2014] AI* <https://doi.org/10.1093/arbitration/25.1.67> accessed 20 May 2019

29. Ly D F and Sheppard A, 'ILA Commercial Arbitration Report on *Lis Pendens and Res Judicata',* [2009] 25 (1) Arbitration AI<https://doi.org/10.1093/arbitration/25.1.67>accessed on 23 March 2019

30. Madalena C, 'Parallel Proceedings in International Arbitration' [2008] 24 (4) 507 – 540 <https://doi.org/10.1093/arbitration/24.4.507> accessed 9 June 2019

31. Martinez-Fraga P J and Samra H J, '*The Role of Precedent in Defining Res Judicata in Investor–State Arbitration'*, [2012] 32. 419 Nw. J. Int'l L. & Bus http://scholarlycommons.law.northwestern.edu/njilb/vol32/iss3/1 accessed 03 January 2019

32. McDougal M S and Reisman S W, 'The Changing Structure of International Law: Unchanging Structure for Inquiry' [1965] Faculty Scholarship Series. 677. <https://digitalcommons.law.yale.edu/fss_papers/677> accessed 23 March 2019

33. Kotzur M, '*Ex Aequo et Bono'* [2009] MPEPIL < https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1402> accessed 20 June 219

34. Meza-Salas M, 'Confidentiality in International Commercial Arbitration: Truth or Fiction? [2018] via <arbitrationblog.kluwerarbitration.com> accessed 18 October 2020.

35. Mills A, 'Connecting Public and Private International Law' in V Ruiz Abou-Nigm, K McCall-Smith and D French, Linkages and Boundaries in Private and Public International Law [Hart 2018] SSRN <https://ssrn.com/abstract=3133078> accessed 8 June 2019

36. Nguyen S T, 'The applicability of *Res Judicata* and *Lis Pendens* in World Trade Organisation Dispute Settlement' [2013] 25 (10) BLR <http://epublications.bond.edu.au/blr> accessed 03 August 2017

37. Orellana M, 'The EU and Chile Suspend the *Swordfish Case* Proceedings at the WTO and the International Tribunal of the Law of the Sea' [2001] 6 (1) ASIL <https://www.asil.org/insights/volume/6/issue/1/eu-and-chile-suspend-swordfish-case-proceedings-wto-and-international>accessed 20 December 2019

38. Peters A, 'The Refinement of International Law: From Fragmentation to Regime Interaction' [2017] 15 (3) OUP a http://ssrn.com/abstract=2823512 accessed 19 August 2019

39. Posner R, 'How Judges Think' (Harvard University Press 2008) 41 < https://www.hup.harvard.edu/catalog.php?isbn=9780674048065> accessed 11 July 2019

40. Reinisch R, 'The Use and Limits of *Res Judicata and Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' [2004] 3 (1) TLPICT 37-77 <https://doi.org/10.1163/15718030177373262 7> accessed 20 September 2020

41. Reis F D and Kessler O, 'Legality and Interdisciplinary Research' in Nikolas M. Rajkovic, Tanja E. Aaiberts and Thomas Gammeltoft-Hanse, The Power of Legality: Practices of International Law and Their Politics (CUP, Cambridge 2016)

42. Romano C P R, 'The Project on International Courts and Tribunals, International Judiciary in Context' via <http://www.pict-pcti.org> 01 November 2018

43. Romano C PR, 'The International Judiciary in Context: A Synoptic Chart' 2014 via http://cesareromano.com/wp-content/uploads/2015/06/synop_c4.pdf last accessed 5 May 2021.

44. Sacerdoti G, 'WTO Law and the "Fragmentation" of International Law Specificity, Integrity, Conflicts,' <https://www.biicl.org/files/4352_wto_law_and_fragmentation_2007_ny_final_pdf.pdf > accessed 24 January 2018

45. Schaffstein S, 'The Doctrine of *Res Judicata* Before International Arbitral Tribunals PhD Thesis' [2012] QMUL <http://qmro.qmul.ac.uk/xmlui/handle/123456789/8665> accessed 20 October 2018

46. Scheeck L 'Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks' IEP de Paris CERI and Institut d'Etudes Européennes – Université Libre de Bruxelles <https://www.ucd.ie/t4cms/06_wish_paper_laurent_scheeck.pdf> accessed 2 December 2019

47. Schultz T and Ridi N, 'Comity and International Courts and Tribunals' [2017] 50 (3) Cornell Int'l Law J https://scholarship.law.cornell.edu/cilj/vol50/iss3/5 accessed 20 October 2018

48. Scobbie I, '*Res Judicata*, Precedent and the International Court: A Preliminary Sketch' [1999] 20 AU YB Int'l Law 299 <http://www5.austlii.edu.au/au/journals/AUYrBkIntLaw/1999/16.html> accessed 20 July 2020

49. Stoll P and Voneky S, 'The *Swordfish* Case: Law of the Sea v. Trade, 2002, MPEPIL <http://www.zaoerv.de> accessed on 11 September 2017

50. Telman J, 'International Legal Positivism and Legal Realism' (University Legal Studies Research Paper 2013) No 13-9 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2292694 accessed 4 May 2019

51. Thibault J, 'Martti Koskenniemi: Indeterminacy' [2017] Critical Legal Thinking, Law and the Political <http://criticallegalthinking.com/2017/12/08/martti-koskenniemi-indeterminacy/> accessed on 17 January 2019

52. Turner C, 'Jacques Derrida: Deconstruction', Critical Legal Thinking, Law and Politics <https://criticallegalthinking.com/2016/05/27/jacques-derrida-deconstruction/> accessed on 18 May 2019

53. Voyiakis E, 'Estoppel', Oxford Bibliography, <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0058.xml> accessed 10 September 2017

Other Sources

1. ACPHR, 'European Court of Human Rights and African Court Start Week-Long Joint Workshop to Exchange Judicial Experiences in Arusha June 20016' < https://en.african-court.org/index.php/news/press-releases/item/83-european-court-of-human-rights-and-african-court-start-week-long-joint-workshop-to-exchange-judicial-experiences-in-arusha> accessed 17 May 2019

2. Baldick C, 'The Concise Oxford Dictionary of Literary Terms' 2004 <http://www.highbeam.com/doc/1056-binaryopposition.html> accessed 28 December 2018

3. Bennouna M, 'How to Cope with the Proliferation of International Courts and Coordinate Their Action' Oxford Scholarship Online <10.1093/acprof:oso/9780199691661.003.0023> accessed 17 May 20 2017

4. Burchill S and Linklater A, 'Introduction' in Theories of International Relations by Scott Burchill et al., (Eds), (New York: Pelgrave Macmillan 2005) 1. <https://digitalcommons.law.yale.edu/fss_papers/677> accessed 23 March 2019

5. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M 1027.

6. Crawford J and Nevill P, 'Relations between International Courts and Tribunals: The Regime Problem' [2012] CUP <https://doi.org/10.1017/CBO9780511862403.012> accessed 02 July 2019

7. Declaration of San José, Joint Declaration of the Presidents of the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, on the occasion of the 40th Anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights, Signed in San José, Costa Rica on the 18th of July 2018 <https://echr.coe.int/Documents/San_Jose_Declaration_2018_ENG.pdf> accessed 17 May 2019

8. Chilean Decree No 598 Chilean National Fishery Law (Ley General de Pesca y Acuicultura) article 165, as consolidated by the Supreme Decree 430 of 28 September 1991 and extended by the Decree 598 of 15 October 1999

9. 'Deconstructionist Theory' Standard Presidential Lectures and Symposia on Humanities and Arts. [1995] 8 From Formalism to Poststructuralism CUP<http://prelectur.stanford.edu/lecturers/derrida/rorty.html> accessed 20 December 2018

10. ECtHR, 'Research Report: References to the Inter-American Court of Human Rights in the Case-Law of the European Court of Human Rights', 2012, at 1 – 20

11. ECHR, 'Joint Public Seminar of the European Court Of Human Rights and Inter-American Court of Human Rights: Optimization Of A Methodology In Adjudicating Large-Scale Human Rights Violations Friday 9 November 2018' <https://echr.coe.int/Documents/Seminar_Inter_American_Court_20181109_ENG.pdf> accessed 17 May 2019

12. ECHR Useful Links to Regional Human Rights Courts <https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/regionalcourts&c=> accessed 17 December 2019

13. Guglya L, 'The Interplay of International Dispute Resolution Mechanisms: the Softwood Lumber Controversy' [2011] 2 (1) JIDS <https://doi.org/10.1093/jnlids/idq020> accessed 20 September 2019.

14. Hague Conference on Private International Law, 'Enforcement of Judgement, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters' (Nygh and Pocar, Rapporteurs), Prel. Doc. No. 11, 2000, 89

15. Interpretation of Judgements Nos. 7 & 8 Concerning the *Case of the Factory of Chorzow*, 1927 PCIJ (Ser.A) No. 11, at 23(dissenting opinion of Judge Anzilotti) < http://www.worldcourts.com/pcij/eng/decisions/1927.12.16_judgments7and8.htm > accessed 10 October 2020

16. International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors Practitioners Guide No.1, Published by the Intl. Com. of Juries, Geneva, 2007.

17. Kampala Declaration, The African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, at the First International Human Rights Forum 28 to 29 October 2019 < https://www.corteidh.or.cr/docs/declaraciones/Kampala_declaration_29_October_2019_En.pdf> accessed 17 December 2019

18. Merkouris P, 'Article 31(3)(c) of the VCLT and the Principle of Systemic Integration' (PhD thesis, Queen Mary University of London 2010)

19. Overlapping Jurisdiction, 'Law and Legal Definition' [2020] <https://definitions.uslegal.com/o/overlapping-jurisdiction/> accessed 4 April 2018

20. Oxman B, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals' The Oxford Handbook of the Law of the Sea, (OUP 2015) available on <https://www-oxfordhandbookscom.manchester.idm.oclc.org/view/10.1093/law/9780198715481.001.0001/law-97> accessed on 20 July 2021.

21. Pika M and Gambarini C, '*Res Judica*ta accessed via *Res Judicata* (jusmundi.com accessed on 01 February 2022.

22. Research Report on References to the Inter-American Court of Human Rights and Inter-American instruments in the case-law of the European Court of Human Rights 1 November 2016 <https://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf> accessed 13 December 2019

23. Statement of the President of the ICJ to the United Nations General Assembly of 30 October 2000 <http://unis.unvienna.org/unis/en/pressrels/2001/ga9941.html> accessed 20 May 2017

24. The Burgh House Principles on The Independence of The International Judiciary [2005] 4 LPICT 247 – 260.

25. The Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Litigation", Res. 1/2000, (2000) 69 ILA Rep. Conf. 13; Report (2000), 69 ILA Rep, Conf. 137

26. The Palestine Mandate, 'The Avalon Project Documents in Law, History and Diplomacy' [2008] YLSL <https://avalon.law.yale.edu/20th_century/palmanda.asp#art26> accessed 18 February 2018

27. United Nations Information Service, 'General Assembly Is Told Proliferation Of Tribunals May Be Risk To Unity Of International Law' Press Release GA/9941 31 October 2001<http://unis.unvienna.org/unis/en/pressrels/2001/ga9941.html> accessed 30 September 2018

28. Williams R, 'Structure' in Key Words [1976] London Fontana pp. 253-59 in Robert Seiler 'Semiology and semiotics, accessed via <https://people.ucalgary.ca/~rseiler/semiolog.htm>1 May 2020.

29. WTO Analytical Index DSU Article 3 Jurisprudence < <https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art3_jur.pdf> accessed 15 June 2018

30. Yannaca-Small K, 'Parallel Proceedings' by Peter Muchlinski, Federico Ortino and Christopher Schreuer (eds) [2012], The Oxford Handbook of International Investment Law via <http://oxfordhandbooks.com> accessed 3 June 2020.