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ITEM 11: PEACEFUL SETTLEMENT OF DISPUTES

OVERLAPPING JURISDICTION OF INTERNATIONAL COURTS AND TRIBUNALS

Document submitted by the Delegation of Portugal

Secretariat Memorandum
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In September 2005, Portugal introduced in the CAHDI agenda this item in order to allow for an open discussion in the issue of overlapping jurisdiction of international courts and tribunals.

Last March, we presented our paper to CAHDI (Document CAHDI (2006) 5) and were asked to limit the number of questions put to CAHDI.

Without it being necessary for this purpose to qualifying this phenomenon as good or bad, but that at least problematic, and still working on unchartered territory, we feel that it is useful to start out by taking some stock of the emerging case-law on this issue, which is far from providing a complete and overall picture, but indeed shows that judges are paying attention to this issue and trying to find solutions.

Court decisions issued during the year of 2005 and 2006 from European courts like the Strasburg Court (European Court of Human Rights) and the Luxemburg court (European Court of Justice) may have identified some principles that can be used in order to avoid conflict with other tribunals and, if repeated, may be conducive to an emerging trend.

In the *Bosphorus* case (Bosphorous Airways v. Ireland, ECHR, 30 June 2005), the European Court of Human Rights held unanimously that there had been no violation of Article 1 of Protocol no. 1 of the European Convention on Human Rights (protection of property). The Court found that the protection of fundamental rights by EC law could have been considered to be, and to have been at the relevant time, “equivalent” to that of the Convention system. Consequently, a presumption arose that Ireland did not depart from the requirements of the Convention when it implemented its legal obligations flowing from its membership of the EC. Such a presumption could be rebutted if, in a particular case, it was considered that the protection of Convention rights was manifestly deficient.

In the *Mox Plant* case (Commission of the European Communities v. Ireland, European Court of Justice, 30 May 2006), the European Court of Justice declared that, by instituting dispute-settlement proceedings against the UK under UNCLOS concerning the Mox Plant located in the UK, Ireland has failed to fulfill its obligations under Articles 10 EC and 292 EC and under Articles 192 EA and 193 EA. The ECJ considered thus that it has exclusive jurisdiction (a jurisdictional monopoly) to deal with issue arising from Community law between its Member States, even in a case of mixed agreements, at least when a significant part of the dispute relates to the interpretation or application of Community law. The Court also said that in these types of cases, the duty of cooperation also imposes a duty to first inform and consult the Community competent institutions.

At this juncture, together with other issues that CAHDI members may propose, we would deem useful to discuss possible insight this two decisions may offer, as a starting point on the issue of overlapping of jurisdictions.
Being so, given that the “proliferation” and “non-coordination” and “fragmentation” could give raise to numerous problems, we believe that, from the list of questions presented in Document CAHDI (2006) 5, the most pressing issues are:

- How to cope with the possibility of different judicial principles being formulated by different courts and tribunals?
- Is it possible to find common principles and rules to solve problems of overlapping and competition?
- If so, can these principles and rules help to build an international judicial system? Should the ICJ have a special place role to play in it?