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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

Item 10: Peaceful Settlement of Disputes
Overlapping Jurisdiction of International Courts and Tribunals

Non-paper submitted by
the Delegation of the United Kingdom

A. Introduction

1. The Delegation of Portugal has raised in CAHDI an important issue facing the international legal system: namely, the issue of proliferation, fragmentation and the lack of co-ordination of international courts and tribunals.

2. In Document No CAHDI (2006) 5 Addendum, Portugal raised three questions:
   - 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 jurisdiction and competition?
   - If so, can these principles and rules help to build an international judicial system? Should the ICJ have a special role to play in it?

3. The United Kingdom is pleased to contribute this non-paper in order to address these questions and stimulate further discussion.

B. The Development of Different Judicial Principles

4. While the problem should not be exaggerated, the United Kingdom recognises that a potentially problematic feature of the multitude of international courts and tribunals is the emergence of divergent jurisprudence. There have been several instances where it is arguable that international courts have rendered inconsistent decisions, which have given rise to concerns.
   - The most well-known of these is the ICTY Appeals Chamber's judgment in *Prosecutor v Tadic* (Case IT-94-1-A, Judgment of 15 July 1999, paras 115-145), where it departed from ICJ jurisprudence on the attribution of responsibility for the acts and omissions of paramilitary units, as articulated in the *Nicaragua* case (Judgment of 27 June 1986, para 115). The ICTY Appeals Chamber's approach was recently not followed by the ICJ in *Application of the Genocide Convention* (Judgment of 26 February 2007, paras 396-407).
   - A further example can be found in the attitude of international tribunals to the permissibility of reservations to the jurisdiction of international courts, where divergent jurisprudence can be identified in decisions of the PCIJ, the ICJ and the ECHR: see, eg, *Phosphates in Morocco (Italy v France)*, PCIJ Rep Ser A/B, (No 74), 23-24; *Reservations to the Genocide Convention* [1951] ICJ Rep 15, 29-30, cf *Belilos*

v Switzerland (1988) ECHR Rep Ser A, (No 132); *Loizidou v Turkey* (1995) 20 EHRR 99, paras 83-85.

5. Inconsistent decisions can also be found concerning not only the articulation of legal principles, but also with regard to the application of those principles to similar (and even identical) sets of facts.
   - An illustration is provided by the arbitral awards in *Lauder v Czech Republic* (Final Award of 3 September 2001), and *CME (Czech Republic) BV v Czech Republic* (Partial Award of 13 September 2001 and Final Award of 14 March 2003), where two differently composed UNCITRAL Tribunals arrived at different conclusions in claims brought in respect of the same set of facts.
   - A further example can be found in the different application of the customary international law defence of necessity in the context of the Argentine financial crisis: see *CMS Gas Transmission Company v Argentina* (ICSID Case No ARB/01/8, Award of 12 May 2005), paras 315-331, 353-382; cf *LG&E Energy Corporation v Argentina* (ICSID Case No ARB/02/1, Award of 3 October 2006), paras 226-266.

6. Some international scholars have concluded that the emergence of inconsistent judicial decisions does not pose a significant threat to the coherence of public international law. But in light of the increasing number of international tribunals, and the rise in resort to international dispute settlement by adjudication, it is possible that inconsistent decisions may, in future, create significant difficulties. Indeed, were the WTO panel and the ITLOS both to proceed to hear the *Swordfish* case (which was referred to in Portugal's Document No CAHDI (2006) 5), and were they to render conflicting decisions, the ultimate resolution of that dispute could be made quite problematic.

C. Common Principles to Solve Problems of Overlapping Jurisdiction

7. In general, international law does not provide for jurisdiction-regulating rules that apply to resolve the problem of competing jurisdictions of international courts and tribunals. There are general principles of law that may apply in some circumstances, such as *res judicata* and *lis alibi pendens*, although these may be of only limited assistance when the nature of the claim or the identity of the parties in competing proceedings are not the same.

8. Nevertheless, certain treaty regimes do make some provision to regulate jurisdictional competition. Some of these rules might be described as exclusive jurisdiction clauses, whilst others are more flexible.

9. Examples of exclusive jurisdiction clauses include the following:
   - Article 292 of the *EC Treaty*, which provides that: 'Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.'
   - Article 23(1) of the WTO's *Dispute Settlement Understanding*, which states that: 'When members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules of procedure of this Understanding.'

10. Examples of more flexible jurisdiction-regulating provisions are the following:
    - Article 55 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which states that: 'The High Contracting Parties agree that except by special agreement, they shall not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of

petition, a dispute arising out of the application of this Convention to a means of settlement other than those provided for in this Convention.'

- Article 26 of the *ICSID Convention*, which provides in part that: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.'

11. Some states have contemplated the possibility of competing jurisdictions in their unilateral declarations accepting the jurisdiction of international courts.
    - For instance, the United Kingdom's optional clause declaration under Article 36(2) of the ICJ Statute provides that it accepts 'as compulsory *ipso facto* and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice … over all disputes... other than: (i) any dispute which the United Kingdom has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement'.

12. However, the constitutive instruments of most international tribunals do not contain any jurisdiction-regulating provisions. This has given rise to situations where a dispute might be referred to more than one international court. Examples include the *Swordfish* dispute between Chile and the EC; the *Southern Bluefin Tuna* case between Australia/New Zealand and Japan, and the *MOX Plant* cases between Ireland and the United Kingdom, as referred to by Portugal in Document No CAHDI (2006) 5.

13. Faced with the situation where an international court is seised of a dispute which is also pending before another international tribunal, it appears that an international court might adopt one of two approaches. First, the international court can consider that it is a self-contained regime, and proceed on the basis that any litigation before another international court has no bearing on the dispute of which it is seised. Second, the international court may take the view that related litigation before another international court may have an impact on its own proceedings.

14. International tribunals which have adopted the second approach have sought to deal with the absence of jurisdiction-regulating rules by having regard, where possible, to the general principles of *res judicata* and *lis alibi pendens*, as mentioned above. They have also increasingly relied on the concept of 'judicial comity', and have decided to suspend their proceedings pending the outcome of litigation before another international court.
    - In *SPP v Egypt*, an ICSID Tribunal suspended the proceedings before it, as the claimant in that case, SPP, had previously commenced an ICC arbitration, and the ICC award was the subject of proceedings in the French national courts. The ICSID Tribunal held that although it was competent to proceed, one of the issues in dispute was under consideration by the French Cour de cassation. In deciding to suspend its proceedings, the Tribunal held that in such situations, 'in the interests of judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide the stay the exercise of its jurisdiction pending a decision by the other tribunal': *SPP v Egypt*, 3 ICSID Rep 112, 129-30 (1985).
    - The UNCLOS Tribunal in the *MOX Plant* case adopted the same approach. In that case, it was apparent that the resolution of issues arising under EC law could impact on the jurisdiction of the UNCLOS Tribunal. In light of the possibility of proceedings before the ECJ which would consider these issues, the UNCLOS Tribunal held that it would be 'inappropriate for it to proceed further with hearing the Parties on the merits of the dispute': *MOX Plant* (Procedural Order No 3) (2003) 42 ILM 1187, 1191.

D. The Existence of an International Judicial System and the Role of the ICJ

15. The International Law Commission has concluded in its Study on Fragmentation of International Law, that international law does constitute a 'system': *Report of the International Law Commission*, *Fifty-eighth Session*, UN Doc No A/61/10, para 251.

16. Whether the various international courts and tribunals can be said to constitute an 'international judicial system' is another matter. International courts have no institutional links, and there is no formal hierarchy, except within some specific sub-systems. Examples of these are the ICTY and ICTR and the possibility of appeal to the Appeals Chamber of those bodies; the system of appeals from WTO panels to the WTO Appellate Body; and also the possibility of referring a case from a Chamber of the ECHR to the Grand Chamber. There is, however, no 'Supreme Court' of the international legal order to which parties can appeal, or to which reference can be made by other international courts in order to eliminate normative inconsistency in international jurisprudence.

17. It does not seem practical to expect the ICJ to fulfil this role. There are many reasons for the establishment of regional and specialised international courts and tribunals, as these may be concerned with a specific subject matter (eg, international human rights courts); work on the basis of shorter time periods than the ICJ (eg, the WTO dispute settlement system); or be primarily concerned with regional economic issues (eg, the ECJ).

18. The United Kingdom would welcome the views of other Delegations.

E. References

- Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des cours* 101
- Jonathan Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 *New York University Journal of International Law and Politics* 697
- Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191
- Vaughan Lowe, '*Res Judicata* and the Rule of Law in International Arbitration' (1996) 8 *African Journal of International and Comparative Law* 38
- August Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 *Law and Practice of International Courts and Tribunals* 37
- Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003)