CHAPTER 5

Invocation of Extrinsic Judgments and Decisions

5.1 Introduction

The argument has been made that a judicial dialogue between international courts would curtail fragmentation, and would decrease the risk of conflicting judgments.1 While there is no stare decisis2 in international law, judicial decisions could still be regarded as soft law,3 and in practice, most international tribunals do give considerable weight to the views of other judicial bodies, at least when the reasoning is perceived as being on point.4

However, it is another matter to establish when and to which degree such reasoning is in fact perceived as being on point in a context where dispute settlement engages in ever more specialized fields of law. This chapter will thus be devoted to an examination of references as between courts—not to rules of other normative systems, but to the judgments emanating from courts operating within other legal orders. In the following, I will first address the relationship of special jurisdiction courts to general ones, such as the ICJ. Thereafter, I will proceed to consider examples of references to other courts in the case law of, primarily, WTO and EU judicial bodies. Towards the end of the chapter, I provide analysis as to what the treatment of such judgments are given indicates about the advent of ‘authority fragmentation’ and the relationship between international courts.


5.2 References to General International Courts

Arguably, the interplay between special courts and findings of the ICJ is a very different type of interaction compared to references between special jurisdiction courts. The discussion in Chapter 3 should have established that some fundamental rules and concepts of general public international law are relevant in all contexts where states engage in relations and consequently in dispute settlement. Against this background, it is not surprising that special courts look to the ICJ for interpretations on such core concepts such as statehood or the creation of custom. The same may be said about instances where references to jurisprudence of other international tribunals relate to judicial practices. The lion part of this chapter will instead be devoted to more challenging types of references, such as when the findings of another body embedded within a different regime that gives effect to other political or organizational choices is invoked to influence the interpretation of intrinsic rules or to challenge their validity. For the sake of exhaustiveness, some examples of references to general international law jurisprudence will however be mentioned.

The views of the ICJ are given considerable weight by many other courts and tribunals, in particular when dealing with general international law.  

5 Cf. the argument made with regard to ‘infrastructural rules’ in Chapter 3.
7 This contrasts with the authority of more specialized tribunals, which appears to be effectively constrained to their respective treaty regimes. Perhaps for this reason, and for safeguarding its pedigree as the arguably most esteemed court for public international law in its traditional sense, the ICJ is not in the habit of referring to the judgment of any other courts, Charney, “Is International Law Threatened,” 130. Cf. Charney, “Growth of International Courts and Tribunals,” 703, 705–706, suggesting that the ICJ should cultivate this, and attempt to counter centrifugal forces resulting from proliferation by maintaining ‘intellectual leadership’, by openly encouraging and tackling dialogue with other courts, by formulating its judgments in a way that mimics a ‘Supreme International Court’, and by making clear when it found good reason to either endorse or reject the approaches of other courts. Endorsement would reinforce the position adopted in the other court, which would then be prone to continue on that line. Rejection, by contrast, would make it difficult for other courts of special jurisdiction to maintain their stance, at least if on an issue of general international law, ibid. 707. Cf. the strategy adopted by the ICJ in the Bosnia Genocide case, involving a ‘dialogue’ between the ICJ and the ICTY, cf. on this case Rosalyn Higgins, “A Babel of Judicial Voices?